

THE
BURMA LAW TIMES.

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JAN.-FEB., 1918.

[No. 1 and 2.

NOTES

BY SENEN.

When the present Chief Court building was finished it was discovered by the Bar and the public that there was one great defect in it—it had no lift. A building that is three storied, and rather more, and the highest storey of which is in daily use by judges, advocates, litigants, witnesses and others ought to have a lift for the convenience of those who have to go up to its highest floors. When it was discovered that the usefulness of the present Chief Court was in danger of being seriously diminished by reason of the fact that it had no lift the Bar sent a representation to the Chief Judge with the request that one might soon be constructed. The reply to that representation was that if the Bar wished to have a lift they could have one constructed at their own expense. Considering that a lift in the Chief Court building would be a convenience to every one using the building the suggestion that the bar should, if they wished to have a lift, pay the costs of all parties was manifestly not a fair order as to costs, and the bar naturally and properly decided not to accept it in a hurry. Since then a lot of water has passed under the bridge. Many changes have taken place in the personnel of the courts in the Chief Court buildings. Some of the judges have gone over to the majority, others have gone home, but the Bar like the poor is always with us. The advocates who were practising at the time have grown of course wiser, but also older, and feel the inconvenience of mounting to the topmost floor even more acutely—if that is possible—than ten years ago. Will the present judges of the court not turn their attention to the question of remedying this defect in the Chief Court building? The remedy is in their hands, and is simple, and comparatively inexpensive. Will they not add this one to their many claims

to the gratitude of the public and of the bar? For it is not the Bar alone that want a list.

The District Court of Hanthawaddy is now and has for some years been a court of considerable importance. Its business has greatly increased; its revenues, derived mainly if not entirely from court-fee stamps have also increased. The number of legal practitioners now seen and heard conducting cases there is far larger than it was a few years ago. And yet the court has not a printed cause list—daily or weekly when the Small Causes Courts of Rangoon which decide much less important cases have daily cause lists. Why should this be so, and why should it not commence to have a cause list as soon as possible? I doubt whether if called upon to do so, it could show good or sufficient cause—to use a common judicial phrase in this country—for this omission. May I then hope to see one issued from the commencement of the next judicial year? The extra cost to the Bar will be a trifle. The benefit to them and the public will be enormous.

DIGEST OF CIVIL RULINGS OF BURMA.

We have received a copy of the second edition of Mr. Hallkar's Digest of Civil Rulings of Burma from 1872-1917. It professes to include the Civil Rulings reported in Agabeg's Burma Law Reports, Burma Law Times and also all the civil cases of Burma reported in the 42 Volumes of the Indian Cases. It contains a useful appendix of some of the important cases judicially noticed. The book is well bound, and is a very useful reference book. We have great pleasure in recommending the book to the Bench and the Bar.

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VOL. XI.] MARCH-APRIL, 1918. [No. 3 and 4.

CROSS-EXAMINING TO CREDIT.

Judge Graham, K. C., of Bow Country Court, asked the Bar Council to lay down some general rules for the guidance of Counsel as to under what circumstances they would be justified in putting questions to witnesses in cross-examination suggesting imputations on their character. The Bar Council has accordingly laid down the following rules basing them chiefly on the Indian Evidence Act for the guidance of the Bar. The extract below is taken from the last report of the Bar Council and it will surely afford guidance to members of the legal profession in this country as well:—

The Council have been asked by a Country Court Judge to consider the possibility of framing some general rules for the guidance of Counsel who are instructed to put questions in cross-examination suggesting imputations upon the character or conduct of a witness.

By the Rules of the Supreme Court (O. XXXVI, R. 38) it is provided that "a Judge may disallow any question which may appear to him to be vexatious and not relevant to the matters which are being inquired into." It is common knowledge that this power is very seldom exercised, no doubt because of the difficulty of distinguishing between legitimate cross-examination to credit and "vexatious" questions. The subject, however, was more fully dealt with by Sir James Stephen in the Indian Evidence Act, 1872 (sections 148, 149, 152), and the substance of those sections re-arranged and adapted, is expressed in the following rules. The Council are of opinion that they correctly state the general principles by which counsel should be guided in such matters, and that greater particularity is unattainable.

1. Questions which affect the credibility of a witness by attacking his character but are not otherwise relevant to the actual inquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is wellfounded or true.

2. A barrister who is instructed by a solicitor that in his opinion the imputation is wellfounded or true, and is not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking, and to put the questions accordingly.

3. A barrister should not accept as conclusive the statement of any person other than the solicitor instructing him that the imputation is wellfounded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement.

4. Such questions, whether or not the imputations they convey are wellfounded, should only be put if in the opinion of the cross-examiner the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect or would not materially affect the credibility of the witness, the question should not be put.

5. In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions suggested to him.

This seems to be in accordance with the rule as to the privilege of counsel as laid down by Erle, C. J., in *Kennedy vs. Brown* 32, L. J. C. P. 137 at pp. 146-47 where he held that "the law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty. . . . The law also trusts him with a power of insisting on answers to the most painful questioning, and this power again is in practice only controlled by his own view of the interests of truth." Again in *Munster vs. Lamb* 11, Q. B. D. 588, p. 603 Brett Master of the Rolls said "of the three classes—judge, witness and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not

called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. Far more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. . . . To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is that a counsel, who is not malicious and who is acting bona fide may not be in danger of having actions brought against him. If the rule of law were otherwise the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.' Reference may also be made in this connection to the cases of *Upendra Nath vs. Emperor* (36 C. 375; S. C. 13, C. W. N. 340) and *Sullivan vs. Norton* (10 M. 28) which are the leading cases on the subject in the Indian High Courts.

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VOL. XI.] JULY-AUGUST, 1918. [Nos. 7 and 8.

CONSTITUTIONAL REFORMS IN INDIA.

OFFICIAL SUMMARY.

The report in which the Viceroy and the Secretary of State have embodied their recommendations on constitutional reforms in India will rank with the historic document in which Lord Durham laid the foundations of the constitution of Canada. This report first narrates the events which led up to the present position; it describes the growth of the administrative system and the legislative councils; it examines the working of the Morley-Minto councils and the conditions of the problem, including the Congress League scheme; and it then formulates proposals. It is to these proposals that everybody will first turn, though to understand them it is necessary to study the argument, and an opportunity to do this will be afforded by the issue of the report in book-form.

The policy of the Imperial Government towards India, defined by the Secretary of State on August 20th, 1917, is the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India, as an integral part of the British Empire; and that substantial steps in this direction should be taken as soon as possible. This policy is radically different from, and infinitely greater than that which Lords Minto and Morley approached in 1908-09; Lord Morley emphatically repudiated the idea that those measures were in any sense a step towards parliamentary government. No mere development of the system established in 1909 will meet the existing situation. That demands an immediate measure of responsible government and provision for its expansion. The first step

is to establish substantial provincial autonomy; the provincial Budget will be entirely separated from that of the Government of India and a fixed contribution to the Imperial Revenues will supersede the present divided heads. Subject to this contribution, each provincial Government will control its own finances with certain powers of borrowing and taxation. This will be accompanied by a real measure of administrative and legislative devolution. The system of government proposed for all provinces is that of Governor in Council. At the head of the executive will be the Governor with an executive council of two members one an Englishman, the other an Indian, both nominated by the Governor. Associated with the Executive Council as part of the Government will be one or more Ministers, nominated by the Governor from amongst the elected members of the legislative council and holding office for the life of the Council. The administration will be divided into two parts—reserved subjects in charge of the Governor and the members of the Executive Council, and transferred subjects controlled by the Governor and his Ministers. The division of subjects between reserved and transferred will naturally vary from province to province and will be determined by a committee composed of a chairman from outside India and two members, one English official and one non official Indian. The departments naturally lending themselves to classification as transferred subjects are taxation for provincial purpose; local self-government; education; public works; agriculture; excise; and local industries.

The Legislature to which the Government will, in this important degree, be responsible will contain a substantial elected majority chosen by direct election on as broad a franchise as possible. Communal election for Muhammadans will be preserved, but other minorities except the Sikhs in the Punjab will be represented by nomination. The details of the franchise and the composition of each council will be worked out by a representative committee. The council will elect from amongst its own members a Standing Committee for each department, or group of departments, which will be associated with the Member or Minister in charge; it will have subject to the sanction of the Governor, power to modify the rules of business; all members will have the right of asking supplementary questions. The council will influence the conduct of all reserved subjects and effectively control the policy in all transferred subjects; and subject to careful provisions to secure the enactment of measures which the Governor certifies are “es-

prison, without more, the responsibility is one which cannot be fairly shifted on to the public. They are to be treated as people of 'hostile origin or association,' although there is no such allegation against them in the Order under which they have been arrested, nor any proof of it in the Government statement. Their offence, if 'offence' it can be called—their accusers are chary of using the word—is not that, but that, in the terms of the special Regulation which has been made to deal with the Irish difficulty, they are persons 'suspected of acting, or having acted, or being about to act, in a manner prejudicial to the public safety.' Under those terms, of course, any one could be arrested and kept in durance for an indefinite period without trial and without appeal. It is the system of *lettres de cachet* installed in our midst in its crudest form, and it is not confined to Ireland but applies to any part of the Kingdom where the Executive chooses to proclaim it. The public have a right to know that, and the nature of the 'statement,' which has been issued to justify the treatment of the Irish suspects, if it serves no other purpose, may at least awaken them to the danger. If there is no protest because life is not threatened, but only liberty, it would be well to bear in mind Blackstone's warning that the tests are the same for both, and that, though the violations of the sanctity of life by denial of trial to the subject would convey the alarm of tyranny throughout the whole kingdom, 'a confinement of the person by secretly carrying him to goal, where his sufferings are unknown or forgotten is a less public, a less striking, and therefore a more dangerous form of arbitrary government.' The safeguards of liberty have been thrown down. Unless the right of trial, at least, is restored, even life itself may not be safe.

essential to the discharge of his responsibility for the peace and tranquillity of the Province" or for "the discharge of his responsibility for the reserved subjects," it will decide the form of legislation. As to finance, the Budget will be framed by the Executive Government as a whole; the first charge will be the contribution to the Government of India; after that provincial needs will be satisfied; and if the revenue is insufficient, the question of additional taxation will be decided by the Governor and the Ministers. The Budget will then be laid before the council which will discuss it and vote by resolution on the allotments. These resolutions will be made binding on all save the reserved subjects, where if the council rejects or modifies the proposed allotment, the final decision will rest with the Governor, with the important safeguard that he must certify that the allotments are necessary for peace and order or good government.

The effect of these proposals is to establish real provincial autonomy, financial, administrative and legislative; to increase, through legislative councils with substantial elected majorities, the influence of the electorate on all branches of the administration and to establish immediate popular control over all those questions which most intimately concern the growth of India; the aim of the proposals is to give complete responsibility as soon as conditions permit, and to secure their automatic advance it is proposed that the list of reserved and transferred subjects may be revised by the Government of India at the end of five years and the whole constitutional position be reconsidered by a parliamentary commission after the expiry of ten years, with a view to its development. Periodic commissions at intervals of twelve years are recommended for the purpose of advising on further advance.

The problem as it affects the constitution of the Government of India is more complex, because, until complete responsible government is established in the Provinces, the Government of India must remain responsible to Parliament and because it must preserve indisputable authority on matters which it considers to be essential for the preservation of peace, order and good government. Whilst therefore a single Chamber is proposed for the province, two Chambers are proposed for the Government of India. The executive will consist, as now, of a Governor General in Council, with the difference that there will be two Indian Members of Council instead of one, and the existing restrictions on the

choice of Members of Council will be removed. There will be a Legislative Assembly of one hundred members, of which two thirds will be elected and one-third nominated, communal election being retained for Muhammadans and established for Sikhs in the Punjab. The second Chamber, called the Council of State, will consist of fifty members, twenty-one elected (fifteen by provincial legislative councils) and twenty-nine nominated, of whom not more than twenty-five shall be officials. In regard to official legislation, Bills will ordinarily be introduced in the Legislative Assembly, then pass to the Council of State; in the event of difference between the two Chambers, a joint session will be held; the same procedure will govern private Bills, which will however first be submitted to whichever Chamber the proposer belongs. But the King's Government must be carried on; in the event of the Legislative Assembly rejecting a provision accepted by the Council of State which the Governor General in Council regards as essential to peace and order or good government, then on his certificate this provision will stand. In the same way, if the Legislative Assembly refuses leave for the introduction of, or at any stage rejects, what the Governor General in Council regards as an essential Bill, then on a similar certificate the Bill can be introduced in the Council of State, and if accepted by that body will become law. The Budget will be introduced in the Legislative Assembly and will be discussed there; but resolutions thereon will be advisory and not binding. The object sought here is to make assent by both Chambers the normal condition of legislation but to establish that on measures essential to peace and order or good government, the decision of the Council of State should prevail. As in the case of the Provinces, Standing Committees will be appointed to co-operate with the Executive, and the working of the system will be examined at the end of ten years by the same parliamentary commission, which enquires into the working of the system in the provinces. In addition, it is proposed to establish a Privy Council for India, composed of men of distinction drawn from all classes, whose function it will be to advise the Governor General when he desires to consult it.

For the smooth working of this system there must be a material relaxation of the close control now exercised by the Secretary of State and the India Office over the Government of India. It is therefore proposed that the control of Parliament and of the Secretary of State be modified, and that a committee be immediately appointed to report on the present constitution of the

Council of India and on the India Office establishment. But as the responsibility of Parliament will remain, the salary of the Secretary of State for India should be put on the Home Estimates and the House of Commons be asked to appoint a permanent Select Committee, which will advise it on Indian affairs, ensuring the constant presence in Parliament of a group of members who have made a special study of Indian polity.

The proposals here made affect only British India; one-third of the area of India and one-fifth of its population are embraced in the Native States. These cannot remain unaffected by the changes in British India, and there is an increasing community of interest between the two parts. It is therefore proposed that the Chiefs' Conference shall become a permanent Council of Princes, which will ordinarily meet once a year, and that the Council shall appoint a small standing committee to deal with such questions as custom and usage. Disputes between States, or between States and the Government of India, will be referred to a Commission consisting of an official of not less status than a High Court Judge and a nominee of either party, which will advise the Viceroy. Cases of misconduct by Ruling Chiefs will also be investigated by a Commission of five, including a High Court Judge and two Ruling Princes which will advise the Viceroy. All important States will be placed in direct communication with the Government of India, and provision is made for joint deliberation between the Council of State and the Council of Princes on matters of common interest.

In the forefront of the declaration which formulated the policy of the Imperial Government towards India is "the increasing association of Indians in every branch of the administration." Whatever the form of the Constitution, the actual work of administration must be carried out by a body of trained officials. The report therefore proposes the abolition of all racial bars; a fixed and progressive percentage of recruitment in India for all public services; (that for the Civil Service being thirty-three per cent., increasing by one and a half per cent. annually for ten years when the subject will be re-examined); a readjustment of the rates of pay and pension; and the granting of a considerable number of Commissions in the Army to Indians.

The recommendations of the Viceroy and of the Secretary of State therefore propose to place Indian education progressively under Indian control, and to train people in affairs through the

popular control of local bodies; and thus to prepare the ground for complete self-government. They recommend the immediate establishment of provincial autonomy, with popular control over several departments of the administration, and increased popular influence over the others. They suggest a central government increasingly representative of and responsible to the people of the land. They urge the removal of all racial bars in the personnel of the administration, and the increasing admission of Indians into the services through recruitment in India. And they suggest machinery which will provide for the continuous progress of the constitutional system to full responsible government. The recommendations, in accordance with promises given, are now submitted for discussion.

It is obviously impossible to summarise with precision all the proposals of this important Report, but we have endeavoured to set out the salient features in broad outline. We recommend to our readers to study the Report in the handy volume which has been issued at the price of Re. 1. There is at the end an excellent summary to which references are attached indicating the paragraphs which deal in detail with the specific proposals.

IMPRISONMENT OF SUSPECTS WITHOUT TRIAL.

(Taken from the Law Journal of 1st June, 1918).

The hope which has been generally entertained that the public conscience, stirred as it had been by the wholesale arrests of Irish suspects and their imprisonment under Executive Order, would be satisfied by the promised publication of evidence of intrigues with the enemy on which the government proceeded, has, it must be confessed, been disappointed by the partial 'statement' issued to the Press. Except in the one case of the Sinn Fein leader, De Valera, there is nothing that can properly be called evidence, and so far as the statement goes, the rest of the prisoners might as well have been deported openly for the political opinions they hold as for any offence they are supposed to have committed against the security or defence of the Realm. No overt act by any of them is alleged, nor any proofs submitted to the tribunal of public opinion to which the 'statement' is addressed. It is not possible for that tribunal, nor any other, to pass judgement on the accused on such materials; and if they are to be kept in

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NOV.-DEC., 1918.

[Nos. 9 and 10.

DEFENCE OF POOR PRISONERS.

CIRCULAR No. 23 OF 1918.

JUDICIAL DEPARTMENT.

Rangoon, the 30th October, 1918.

In the period which has elapsed since the issue of Judicial Department Circular No. 35 of 1916, the Local Government has observed cases in which the procedure prescribed for securing the provision of legal assistance on behalf of paupers accused of the offence of murder, has been disregarded. The Government of India have also drawn attention to cases in which such persons have not been professionally defended, although the circumstances appeared to be such that the grant of legal assistance was advisable for the ends of justice. It is considered that the omissions noticed have occurred because of the latitude permitted in the selection of cases in which such assistance is given to the accused. Under the existing procedure if the accused has no pleader the Committing Magistrate, the District Magistrate and the Sessions Judge must consider, first whether the case is of such a nature that it is expedient that the accused should have legal assistance in the Sessions Court, and secondly whether he and his friends are too poor to pay for such assistance. It is now directed that whatever may be the nature of the case, every person charged with committing an offence punishable with death, except in the cases subsequently specified, should have legal assistance in the Sessions Court, and if it cannot be provided by himself or his family, it should be provided by Government. In future, therefore, in cases in which the accused is charged with an offence punishable with death and has no pleader, the only

question which will engage the attention of the Committing Magistrate, the District Magistrate and the Sessions Judge in this respect, is whether the accused and his friends are too poor to pay for legal assistance. In consequence of the changes herewith effected, the following procedure is prescribed in supersession of that contained in Judicial Department Circular No. 35 of 1916.

2. In any case in which a person is accused of an offence punishable with death the Committing Magistrate, before forwarding the committal record to the District Magistrate, will record in the diary-sheet whether the accused was represented by counsel in the proceedings before him. He will also record his opinion whether the accused or his family can afford to engage legal assistance for his trial in the Sessions Court, giving the reasons for his opinion. The District Magistrate, on receipt of the report of the Committing Magistrate, unless he considers that the accused or his family can afford to engage counsel, will proceed to engage a pleader or advocate to appear in the Sessions Court, offering a fee at the rate of remuneration prescribed in paragraph 5 of this circular. The District Magistrate, before forwarding the record to the Sessions Judge, will note in the diary-sheet therein whether or not he has engaged a pleader or advocate, stating the reasons for his action. The Sessions Judge may, if he thinks fit, even when the Magistrate has found that the accused and his friends have means enough, himself request the District Magistrate to engage counsel for the trial, noting the reasons for his action in his diary-sheet.

3. Counsel in all cases should be engaged in time to be able to receive instructions and to study the necessary documents. As soon as orders for the engagement of counsel have been passed, a copy of the Committing Magistrate's proceedings will be prepared in order that it may be supplied free of cost to the pleader or advocate as soon as possible after he is selected.

4. The Honourable Judges of the Chief Court of Lower Burma, and the Judicial Commissioner, Upper Burma, are authorized in like circumstances to engage a pleader or advocate at Government expense, at the rates prescribed in paragraph 5, on behalf of a person accused of an offence punishable with death in an application for enhancement of sentence preferred by the Local Government. It will not be necessary for these courts to engage counsel for a person accused of a capital offence when the

Local Government appeals against his acquittal by a Court of Session, as in such a case the Local Government will arrange for his defence. Counsel will not ordinarily be engaged by Government in an appeal against a conviction, but if for any special reason it is considered necessary to engage counsel in such an appeal, application should be made for the sanction of the Local Government to such a course.

5. The following rates of fees are authorized for pleaders and advocates engaged under the preceding paragraphs:—

- (1) *Chief Court, Rangoon, and Court of the Judicial Commissioner, Upper Burma*—Rs. 75 the first day and Rs. 50 for each succeeding day.
- (2) *Hanthawaddy Sessions Court, Rangoon*—Rs. 50 the first day and Rs. 25 for each succeeding day.
- (3) *Other Sessions Courts*—Rs. 25 the first day and Rs. 20 for each succeeding day.

Daily rates are not to be paid for appearances merely to hear judgment.

It is not an obligation of the Crown to provide for the defence of accused persons at public expense. In providing for payment of fees on the above scale, the Local Government appeals to the tradition of the Bar that the defence of poor prisoners is an act of merit on the part of advocates, and trusts that the scale may receive ready acceptance, even though the fees may be less than those which would be paid by wealthy clients charged with grave offences.

6. A report of all cases in which legal assistance has been provided under these orders during the financial year ending on the 31st March will be prepared annually by the District Magistrate, the Registrar, Chief Court, Lower Burma, and the Judicial Commissioner, Upper Burma, as the case may be, and sent to the Secretary to the Local Government, on or before the 1st June of each year.

The report should show—

- (i) the number of cases;
- (ii) the total number of appearances in these cases;
- (iii) the total fees paid.

The expenditure will be debitable to the head "19A—Law and Justice—Courts of Law—Criminal Courts—Supplies and Services—Fees to Pleaders to defend indigent persons accused of murder."

7. These orders do not contemplate the engagement of counsel to appear in a Sessions Court in remote stations where there are no pleaders or advocates in residence, nor the engagement of counsel to appear in any cases on behalf of accused persons in the preliminary enquiry held by the committing court.

By order,

C. M. WEBB,

Secretary to the Government of Burma.

THE RETIREMENT OF MR. P. C. SEN.

At the time of going to press we hear that Mr. P. C. Sen the official assignee and administrator-general for Burma has sent in his resignation to the Chief Judge. His retirement from the post which he has held continuously since 1890 removes a familiar figure from the judicial life of the province, and his kindly face will be greatly missed by those members of the Rangoon bar and the commercial public who had such frequent dealings with him in insolvency cases.

Soon after his call to the bar Mr. Sen came over to Rangoon a little over forty years ago when Rangoon was a city of very little importance. After a few years' practice at the bar he was appointed Assistant Government Advocate and later on he became judge of Moulmein at a time when that city was at the zenith of its now vanishing prosperity. His work at Moulmein brought him under the special notice of Mr.—afterwards Sir John—Jardine whom Mr. Sen assisted in the preparation of his Notes on Buddhist Law. In 1890 Mr. Sen was appointed Official Assignee of Rangoon. With small intervals Mr. Sen filled that post continuously till September, 1916, when he took two years' leave. During his twenty-six years' work in insolvency Mr. Sen has seen Rangoon in the making with its land and oil and various other booms, and while in retirement he may perhaps utilise his well-earned leisure to the edification of young Rangoon by writing on the vicissitudes through which the youngest of Indian cities has passed in its brief but eventful life. During his absence on leave since 1916 Mr. S. N. Sen has held the offices of official assignee and administrator-general of Burma, and has given

complete satisfaction to the bar and the public by his efficient discharge of his duties. We are glad to learn that pending the appointment of a permanent incumbent the Chief Judge has provisionally appointed Mr. S. N. Sen to fill the vacancy created by the retirement of Mr. P. C. Sen.

CHIEF COURT NOTIFICATION.

Rangoon, the 26th November, 1918.

No. 24 (APPOINTMENT).—With the approval of the Local Government the following list of days to be observed in the year 1919 as holidays in the Chief Court and the Civil Courts subordinate thereto, is published for general information under section 38 (1) of the Lower Burma Courts Act, 1900:—

List of General Holidays to be observed by the Chief Court and all Civil Courts in Lower Burma subordinate thereto during the year 1919.

Name of Holidays.	Date on which they fall.	Number of days excluding Sundays.
(1)	(2)	(3)
New Year	1st January	1
Chinese New Year	1st February	1
Full Moon of Tabaung	14th and 15th March	2
Laster and Burmese New Year	14th April to 3rd May	18
Full Moon of Kason	13th May	1
King-Emperor's Birthday	*	1
Beginning of Buddhist Lent	11th and 12th July	2
Bak-rid	6th September †	1
End of Buddhist Lent	6th to 17th October	11
End of Buddhist Lent	6th to 25th October	†
Diwali	23rd October	1
Tazaungdaing	5th and 6th November	2
Christmas Vacation	23rd to 31st December	8
	Total	49

* The day which may be fixed for the celebration of the King-Emperor's Birthday will be notified separately in due course.

† If, however, the moon be not visible on the 27th August, the festival will fall on Sunday the 7th September.

‡ Eighteen days for the Small Cause Court, Rangoon.

Every Sunday in the year and any other day not included above which may be declared to be a holiday under the Negotiable Instruments Act shall be observed as holidays.

The Long Vacation of the Chief Court will commence on 15th September and end on 15th November, both days inclusive.

J. HORMASJI,
Registrar.

CRIMINAL SESSIONS OF THE CHIEF COURT.

For the year 1919.

First Sessions will commence on 20th January.

Second Sessions will commence on 17th March.

Third Sessions will commence on 19th May.

Fourth Sessions will commence on 7th July.

Fifth Sessions will commence on 18th August.

Sixth Sessions will commence on 17th November.

THE BURMA LAW TIMES.

Vol. XI.] JANUARY-FEBRUARY, 1918. [No. 1 and 2.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 40 OF 1916.

BICHAY SUKUL APPELLANT.

vs.

BEHARI SUKUL RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. J. R. Das.

For respondent—Mr. Doctor.

15th March, 1917.

*Negotiable Instruments Act (XXVI of 1881) s. 87. Material alteration—
Point taken by court in appeal.*

The mere fact that a document appears to be written in two different inks is not per se any proof of material alteration such as would render it void under section 87 of the Negotiable Instruments Act.

It is an error of law for a court to dispose of a case on a point taken on appeal by itself without giving the parties affected an opportunity of meeting the point.

JUDGMENT.

MAUNG KIN, J.—The suit was by the appellant for the recovery of Rs. 1720|- principal and interest alleged to be due on a promissory note for Rs. 1,000|-, dated the 26th of June, 1914. The respondent replied that the promissory note sued on was a forgery and that on that date he borrowed, not Rs. 1,000, but only Rs. 100|- for which he executed a promissory note and that he had paid off what was due on the same. He produced what he alleged to be the promissory note for Rs. 100|-. The trial court dismissed the suit on the ground that it was not satisfied that the plaintiff had proved his claim. The plaintiff appealed to the divisional court which confirmed the decree of the trial court.

There is on the record much evidence on both sides. But the learned divisional judge apparently found it unnecessary to consider it, as he had seized on what he apparently considered to be a matter which helped to dispose of the suit without calling for further evidence or explanation. It was a matter which he himself discovered and from it he drew his own inferences without giving the party against whom he drew the inferences an opportunity of explaining the matter. I will now quote the learned judge to show how he made the discovery: "while the case was being argued in this court, I noticed that the last figure in the number 1,000 and the dash at the end of the number had the appearance of being in a different ink from the other figure of that number, so I sent for a glass and examined it carefully. On examination through my glass, it is seen beyond doubt that the last "0" and the dash have been added, and that the note as originally written was one for Rs. 100/- and not Rs. 1,000/-." The learned judge then proceeds to hold that the part of the defendant's story where he said he borrowed only Rs. 100/- is true but the note he produced was a forgery and that the note he executed was the note sued on, which, however, the plaintiff had forged by altering the figure "100" to the figure "1,000." He further held that it followed that the defence that the defendant repaid the loan must also be false. Both sides were, guilty of perjury but the plaintiff could not get a decree even for the amount held to have been borrowed by the defendant, as he had materially altered his pro-note.

Now the learned judge has worked out all this upon the basis of the plaintiff having made the alteration in question. What he held may be put in a few words: the plaintiff altered his note therefore, he is guilty of forgery; the alteration is material, therefore the note becomes void by reason of that. It is apparent that his views are based upon assumptions which had not been put down in black and white. But I may say in passing that it is satisfactory to note that he has not done so, for I am going to remand the case for further evidence. In my judgment it is absolutely wrong to say that because a man alters a figure in a document, he thereby forged the document, or because there is something in a different ink to the rest of the document, there must be a material alteration. It is obvious that it is not fair to resort to this train of reasoning without giving the party affected thereby a reasonable opportunity of meeting it. What appears at first sight to be suspicious may be capable of a satisfactory explanation and, to use a homely saying, circumstances often alter cases.

For the above reasons I will order that the case be remanded to the trial court upon the following issue:—

How did it happen that the last figure "0" in the number 1,000 and the dash at the end of the number have the appearance of being in a different ink from the other figures of that number?

The trial court will record such evidence as is offered by the parties on the issue and return the proceedings together with its findings

through the divisional court, which will make any remarks it may think proper upon the findings of the trial court.

This order is justified by the case of *Kristamma Naidu vs. Chapa Naidu* (1), where it was expressly held by Collins, C. J., that a judge who disposed of a suit on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, was wrong in law. The question immediately before the Full Bench in that case was whether such an error was a ground for revision under section 622 of the Civil Procedure Code, which is section 115 in the present code. The other judges went upon the assumption that the error was one of law without expressly saying so and discussed the applicability of section 622 to the case.

IN THE COURT OF THE FINANCIAL COMMISSIONER
OF BURMA.

REVENUE REVISION No. 2 OF 1918.

BURMA OIL COMPANY APPLICANTS.

vs.

BAIJ NATH SINGH and another RESPONDENTS.

Before the Hon'ble H. Thompson, F. C.

For appellants—Mr. Lentaigne.

For respondents—Mr. Halkar and Mr. Willes.

15th February, 1918.

Upper Burma Land and Revenue Regulation (III of 1889) section 12 (1) Rules 5 and 10. Powers of revenue officers in execution of decrees and orders relating to moveable property—Civil Procedure Code (Act V of 1908) s. 144—Power to order restitution.

Under section 12 of the Upper Burma Land and Revenue Regulation and under Rules 5 and 10 under the regulation, revenue officers have been given the powers of civil courts in the trial of suits and are empowered to enforce orders of ejection and delivery of possession of immoveable property in manner prescribed in the civil procedure code for the execution of decrees.

The words "any power exercised by a civil court in the trial of suits" in section 12 (1) of the Regulation include the power to execute decrees and orders relating to moveable property.

An order for resumption of deeds of grant of land can be executed in the manner provided by the civil procedure code for execution of a decree or order relating to moveable property viz by a notice to the person in possession of the deeds to hold them at the disposal of the person in whose favour the order is passed.

(1) 17 M. 410.

Under section 144 of the civil procedure code all courts have an inherent power where a decree is reversed or varied in appeal to order restitution so as to put the parties in the position which they would have occupied but for such reversal or variation.

JUDGMENT.

THOMPSON, F. C.—This application for revision is made to me in somewhat peculiar circumstances. In my order in Revenue Revision No. 4 of 1916 I found that the deeds of grant of certain well-sites in the Yenangyaung oil-field had been wrongly made over by the Burma Oil Company, Limited, the present applicants, to Baij Nath Singh, one of the present respondents, under the orders of the Assistant Collector, Yenangyaung, and I held that the assistant collector should direct on application by the company that the grants be resumed and be restored to the company.

The Burma Oil Company applied to the assistant collector for restoration of the grants and the assistant collector issued notice to the respondents to appear before him and produce the deeds of grant. The respondents failed to comply with this notice and eventually the assistant collector in an order dated the 23rd October, 1916, held that with reference to Rule 10 of the Rules under the Upper Burma Land and Revenue Regulation the deeds of grant of the well-sites were immoveable property and directed that notice be issued to Baij Nath Singh to show cause why he should not be committed to the civil prison. He also directed that the well-sites in question should be attached and that notice of attachment should be sent to Messrs. Wightman and Company, managing agents of the Nath Singh Oil Company who had already been directed to withhold any money payable by them to Baij Nath Singh.

The respondents appealed to the collector, Magwe, against the order of the assistant collector, and the collector in his order in Revenue Appeal No. 8 of 1916-17 held that the deeds of grant were not immoveable property and also that there was no way in which the Revenue Court could enforce the orders which I had passed in the revenue revision. The collector set aside therefore the orders of the assistant collector.

I need hardly point out that whilst it was open to the collector on appeal to modify or reverse any action which was being taken by the assistant collector which was not in accordance with the Land and Revenue Regulation and the Rules thereunder, it was not within his province to hold that the order which I had passed could not be enforced and thereby practically to nullify the order. The orders of the collector are therefore without jurisdiction and are null and void, and it is for this reason that I have decided to deal with his orders in revision rather than to refer the applicants to the Commissioner, Magwe Division, as I should ordinarily have done where an appeal

As the assistant collector and collector have found difficulty in giving effect to my orders I have heard counsel for both parties on lay to the commissioner from the orders of the collector.

the points raised by these officers and issue now the following further instructions as to the manner in which compliance is to be given with my previous orders in revision.

In the first place every court or Revenue Officer exercising powers of a judicial nature has the power so far as may be to restore a party to the position which he would have occupied but for a decree or order which has been reversed in appeal or revision. This power is definitely expressed in section 144 of the Code of Civil Procedure and is an inherent power with all courts. Moreover, it is the duty as within the power of the court or officer to take such measures as are possible to restore the aggrieved party to his original position, and whilst it is open to such party to state to the officer in what manner he desires that restitution should be made, it is incumbent on the officer on application by the party to take such measures as appear to the officer to be needed for restitution. I mention this point as it has been argued by counsel for the respondents that the assistant collector could not proceed to resume the grants and restore them to the Burma Oil Company until the company had set out the manner in which they desired resumption to be made.

I proceed to examine the provisions of the Upper Burma Land and Revenue Regulation and Rules thereunder by which effect can be given to my orders. In accordance with clause (1) section 12 of the Regulation the local government may confer by rule upon any revenue officer any power exercised by a civil court in the trial of suits, and clause (2) of the section declares that the Rules may provide among other matters for the mode of enforcing ejectment from and delivery of possession of immoveable property. By Rule 5 framed under section 12 of the Regulation revenue officers in dealing with all cases of a judicial nature have been given the powers conferred upon civil courts with reference to the institution and trial of suits. In Rule 10 framed under the same section, it is declared that orders of ejectment from and delivery of possession of immoveable property shall be enforced in the manner prescribed in the civil procedure code for the execution of a decree. There is no express provision in the Regulation and Rules for the enforcement of a decree or order relating to moveable property, although it is clear from Rule 5 (2) (b) which provides that a claim to establish any lien upon or other interest in the rents, profits or produce of State land shall be deemed to be a case of a judicial nature, that the legislature contemplate that revenue officers should be given power to pass decrees or orders in regard to moveable property in a class of cases which may be of frequent occurrence and should be given powers to enforce such decrees or orders. It must therefore be accepted, in my opinion, that the words "any power exercised by a civil court in the trial of suits" as used in section 12 (1) of the Regulation, and as conferred upon revenue officers by Rule 5, are intended to include the power to execute a decree or order, and that clause (2) of section 12 of the Regulation and Rule 10 thereunder which contains special provision for the enforcement of orders relating to immoveable property, are not intended to restrict the more general power contained in clause (1)

of section 12, and in Rule 5. In accordance with this finding action for the resumption of the deeds of grant of the well-sites should be taken in conformity with the provisions of the Code of Civil Procedure for execution of a decree relating to moveable property.

Counsel for the respondents state that the deeds in question have recently been filed by the respondents as exhibits in a suit which is now pending between the parties in the Court of the District Judge, Magwe. I now direct that the assistant collector, Yenangyaung, forward to the district court a copy of my orders in Revenue Revision No. 4 of 1916, and that he give notice to the court that the deeds in question are to be held at the disposal of the Burma Oil Company, Limited, and not at the disposal of the party or parties by whom the deeds were produced before the court.

There has been considerable delay on the part of the applicants in taking steps to set aside the order of the collector and to secure the enforcement of my orders in revision, and in setting aside both the orders of the collector and the assistant collector I direct that the parties shall bear their own costs in all courts.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 21 OF 1916.

ESOOF MAHOMED BHAROOCHA APPELLANT.

vs.

HAYATOONNISA RESPONDENT.

Before Mr. Justice Rigg.

For appellant—Mr. J. Robertson.

For respondent—Mr. J. R. Das.

19th December, 1916.

Mahomedan Law—Gift—Mushaa.

The doctrine of mushaa does not apply where possession has been taken by the donor under the gift.

The doctrine is not suited to a progressive state of society, and is not applicable to gifts amongst Mahomedans in Burma.

Muhammad Mumtaz *vs.* Zubaida Jan. 16. I. A. 205 referred to.

JUDGMENT.

RIGG, J.—The parties in this case were divorced after a few months of married life. The divorce was followed by arbitration over the property, but the diamond earrings and necklace in dispute in this case were not included in the reference. Hayat-oonnisa sued for these

things, on the ground that they were given her at the time of the marriage by the bridegroom's father and the bridegroom respectively. The claim to the necklace was dismissed. The trial judge decreed her the earrings but on appeal the divisional judge allowed her only half a pair of earrings. Her husband again appeals.

In the first plaint filed, the earrings were alleged to be part of the dower, but in an amended plaint it was stated that they were a gift to her from her father-in-law. When examined in court, Hayat-oonnisa said that they were a joint gift at the time of the marriage to her husband and herself. Esoof pleaded that the earrings were a gift to himself and were intended to be a family heirloom. When he gave evidence, he said that he had told his father that he did not want money, but preferred earrings. The father admits that he went to buy the earrings with the father of the bride. The evidence leaves no room for doubt that these earrings were mentioned in an *awebasa* as amongst the wedding gifts and were made over to the newly married couple. They were worn by the bride on the marriage day and on subsequent occasions. The parties are Muhammadans resident in Burma, and I think that in making the gift, Esoof's father was under the influence of Burmese customs. I agree with the courts below that the earrings were a gift, and with the finding of the divisional court that they were a joint gift. The point, however, chiefly argued at the bar is whether this gift is invalid in law on the ground that the doctrine of *mushaa* applies to the case. In *Ameeroonnisa Khatoon vs. Abeddonnissa Khatoon* (1) their Lordships of the Privy Council say:—"That a rule of this kind does exist in Muhammadan Law with regard to some subjects of gift is plain. The *Hedayya* gives the two reasons on which it is founded:—first, that complete *seisin* being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and secondly, because it would throw a burden on the donor he had not engaged for, viz, to make a division. Instances are given by text-writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state and confusion might thus be created between donor and donee which the law will not allow." In the later case of *Muhammad Mumtaz Ahmad vs. Zubaide Jan* (2) their Lordships remarked: "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." The latest case I have been able to find on the subject of gifts of *mushaa* is *Abdul Aziz vs. Fateh Mahomed Hazi* (3), where a bench of the Calcutta High Court declined to apply the doctrine on the ground that the possession had been given. In this case, a gift was made by A to B of a four annas share in a *kaimi raiyati* holding, and after the gift donor and donee jointly enjoyed

(1) 2 I. A. 87 at p. 105.

(2) 11 A. 460; 16 I. A. 205.

(3) 38 C. 518. 15 C. W. N. 541.

the land. Mr. Abdul Rahim in his Muhammadan Jurisprudence, page 298, points out that even according to the strict Hanafi Law, a gift of an undivided share in a thing that is not capable of division without impairing its utility is valid, provided such possession is given as the nature of the property admits of. In the present suit it is not the donor that is challenging the gift but one of the joint donees. Possession has been given and in my opinion, it does not lie with him to say that the gift is altogether invalid. Even if the validity of the gift had been disputed by the donor, I should not have applied the doctrine of mushaa where possession has been given. Such a doctrine is in my opinion unsuitable to Muhammadans who have resided for years in Burma and have become imbued with Burmese ideas. The doctrine was not ever pleaded in the written statement. The appeal is dismissed with costs.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL APPEAL No. 273 OF 1916.

H. E. MANDARI APPELLANT.

vs.

R. MISSER RESPONDENT.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Lutter.

For respondent—Mr. Pillay.

14th December, 1916.

Upper Burma Civil Courts Regulation (I of 1896) ss. 12 and 13.—Civil Procedure Code (Act V of 1908) O. XLIII.

Appeals under O. XLIII from the district court lie to the divisional court and not to the court of the Judicial Commissioner whatever the valuation of the subject matter may be.

JUDGMENT.

McCOLL, A. J. C.—The respondent in execution of a decree for over Rs. 56,000—against the appellant had two oil wells sold. The appellant applied under Order XXI, rule 90, to have the sale set aside on the ground of material irregularity. The district court set aside the sale of one well but confirmed the sale of the other. Against that order the appellant has appealed to this court.

I think it is clear that the appeal lies to the divisional court.

Section 12 (1), Upper Burma Civil Courts Regulation, runs:—"An appeal from a decree of a district court shall, when the value of the

suit in such court is Rs. 10,000|- or upwards, lie to the court of the Judicial Commissioner and in any other case to the divisional court."

Thus it is only appeals against decrees that lie to this court. The order appealed against, though it relates to the execution of a decree in a matter arising between the parties, is not a decree because an appeal lies against it as an appeal against an order (section 2 (2), Civil Procedure Code) under Order XLIII, rule (1) (j). The appeal therefore, lies to the divisional court.

Reliance is placed on Civil Appeal No. 74 of 1916 between the same parties which related to the execution of the same decree, which was entertained by the learned Judicial Commissioner, but in that case the order appealed against was passed under Order XXI, rule 83, and an appeal did not lie as an appeal against an order and, therefore, the order was a decree. The memorandum of appeal, is returned for presentation to the divisional court. The appellant will pay the respondent's costs in this suit.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 56 OF 1915.

K. K. JANOO & CO. PLAINTIFFS.

vs.

JOSEPH HEAP & SONS, LTD. DEFENDANTS.

Before Mr. Justice Young.

For plaintiffs—Mr. B. Cowasji.

For defendants—Mr. Connell and Mr. Banerji.

31st May, 1917.

Contract Act (IX of 1872) section 38 illustration—offer of performance—Proper time and place.—Illustrations to statutes.

To be binding on the promisee an offer of performance of a contract by the promisor must be at the proper time and place, and when the contract specifically provides a place of performance, the offer must be to perform it at the place named in the contract.

Under the illustration to section 38 of the Contract Act the vendor of goods must bring the goods to the place named in the contract and give the purchaser an opportunity of satisfying himself that the goods offered are of the quality contracted for. An intimation that the goods are at the vendor's place and will be forwarded to the place agreed for performance after examination and approval by the purchaser is not a proper offer.

Illustrations appended to sections of a statute should be accepted as being of relevance and value in the construction of the text.

Mahomed Syedol *vs.* Yeoh Ooi 1916 2 App. Cas. 575 referred to.

JUDGMENT.

YOUNG, J.—In this suit Messrs. Karim Kassim Janoo & Co. sue Messrs. Joseph Heap & Sons, Ltd. for breach of contract dated 14th July, 1914, under which they undertook to buy from the plaintiffs 50,000 baskets of rail and boat paddy at the price of Rs. 121|- per 100 baskets of 45 lbs. each and for Rs. 10,721|- damages made up as follows Rs. 10,500|- the difference between the contract price and the market rate, survey fees Rs. 192|- and Rs. 29|- certain railway and godown charges in respect of certain paddy tendered but not accepted.

The sole stipulations in the contract were that the paddy was to be "free from yellows" and was to be delivered into Messrs. Heaps' cargo boats at their Pazundaung siding within July and August (vide Exhibit P the bought note).

On the 27th July the plaintiffs tendered seven wagon loads of paddy to the defendants which were not accepted. According to the defendants they contained new unripe grain which plaintiffs agreed to replace as they were able to sell it at a profit vide defendants' letter of 5th August, 1914—(exhibit C). The plaintiffs, though it is admitted that they sold the paddy in question at a profit took exception to the defendants' act and wrote to them on July 30th saying that the paddy had been rejected on the ground that it was new paddy and alleging that they had a perfect right to tender new paddy provided it was free from yellows and asking if they were going to reject all new paddy as they only intended to deliver such, and if they intended to reject it it was no use going to the expense of formally tendering it. They also asked if it was rejected on any other ground.

On the 5th August having received no reply they again wrote and asked whether the defendants claimed that under the contract they were entitled to get old paddy and would refuse to take new paddy of the quality last tendered. On the same day the defendants wrote to them the letter already mentioned in which they replied that their contract had always been for ripe sound grain of 1913-14 and not of new 1914 crop, but that the question of non-acceptance had never arisen. This last sentence was an allusion to their contention that the tender had been withdrawn so to speak by consent, as the plaintiffs were able to dispose of it elsewhere to better advantage. It may however be remarked that this contention was given up in the written statement in which the defendants admitted that they had rejected the paddy as not being of contract quality. The defendants also stated that the plaintiffs had agreed to replace the paddy with good sound paddy. On the 7th August the plaintiffs replied denying that they had promised to replace the paddy with paddy of any other quality and asking the defendants to state definitely whether they would take paddy of the quality which had been tendered and rejected. The defendants replied the following day reiterating their assertion that the question of acceptance or non-acceptance had never arisen and stating that until paddy was tendered, they were not in a position either to accept or reject it.

At this stage of the dispute there were two courses open to the plaintiff which were either to treat the defendants' conduct as tantamount to a wrongful putting an end to the contract and sue him for the breach, or to continue the contract. The plaintiffs elected to adopt the latter course and tendered three more wagon loads which were again rejected whereupon the plaintiffs again wrote on August 20th, exhibit F. to the defendants asking for the reasons of such rejection. The defendants replied on the 22nd August that they had rejected it because it again consisted of new crop grain and was damaged, and on the 29th August the plaintiffs wrote as follows "Referring to previous correspondence we have to point out that you have twice rejected paddy tendered to you on grounds which our clients consider untenable. We are now instructed to tender 14,300 bags of paddy now lying at Moola Dawood's Dawbong mill. We have to request you to examine this paddy and say whether you will accept it. If you will our client will cause it to be brought to your mill at once." The defendants replied the same day declining to accept tender except at their own mill in the customary manner and the plaintiffs then wrote on August 31st, to the defendants stating that it was apparent that they did not intend to take the paddy under any circumstances and adding as follows:—"We hereby give you notice that as you have refused to take delivery of paddy of the quality mentioned in the contract our client hereby cancels the contract."

From these words it is quite clear, and the plaintiffs do not contend to the contrary, that whether the defendants' previous conduct might or might not have justified the plaintiffs in putting an end to the contract, they had not done so, but had elected to keep it alive until the defendants' refusal to inspect and state whether they would accept the 14,300 bags of paddy lying at Moola Dawood's Dawbong mill.

Up to this stage they kept the contract alive and as pointed out in *Frost vs. Knight* (1) kept it alive for the benefit of the defendants as well as their own and enabled the defendants to take advantage of any supervening circumstance which would justify them in declining to complete it.

The defendants claim that this request that they should examine these 14,300 bags at Moola Dawood's Dawbong mill was such a supervening circumstance, in as much as it was no tender or offer of performance within the meaning of the law and that therefore the present suit must be dismissed. They rely upon sections 37 and 38 of the Contract Act. Section 37 provides that the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under any law. Whatever rights the defendants' former rejections might have conferred upon the plaintiffs with regard to cancelling the contract, had been admittedly waived by the plaintiffs and unless their letter of 29th August, constituted a valid offer of performance, they cannot in my opinion be said either to have performed or to have offered to perform their

(1) L. R. 7 Exch. 111.

promise or to be entitled to say that the defendants had wrongfully omitted to perform in turn their own promise. Whether it was a rightful offer of performance depends upon the construction of section 38 which provides inter alia that an offer to perform must be unconditional and made at a proper place and time.

Here the contract was to deliver paddy within July or August. It was offered within this period and there is therefore no objection as to time, but the contract also provided that it was to be delivered into buyers' cargo boat at the Pazundaung siding, and plaintiffs' offer was not to deliver there, but to give inspection at Moola Dawood's Dawbong mill and then deliver at defendants' mill if defendants agreed to accept it. Can this be said to be an offer to perform at a proper place? What is meant by a proper place is not explained in section 38 presumably because it is in each case a question of fact whether the place is or is not proper except that as we see from the illustration when a place for performance has been mentioned in the contract that place is the proper place also for the offer to perform. The illustration runs as follows "A contracts to deliver to B at his warehouse on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section A must bring the cotton to B's warehouse on the appointed day."

Words could hardly be more emphatic or plain than the words "in order to make an offer of performance with the effect stated" and in *Mahomed Syedol vs. Yeoh Ooi Gark* (2) the Privy Council laid down "that it is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text, and that they should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal." This was laid down in an appeal not from India but from the Strait Settlements but the law laid down is clearly of general application and was moreover enunciated with regard to a section reproduced from the Indian Evidence Act, as the judgment in question elsewhere states. The illustration is therefore both of relevance and value, and where as here it so emphatically states "that in order to make an offer of performance with the effect stated in this section" certain things are essential, it seems to follow that if these essentials are not complied with, the offer of performance cannot have the effect stated in the section. In the case of *Mahomed Syedol vs. Yeoh Ooi* (2) the Court of Appeal of the Strait Settlements had held it safer to construe the section and illustrations on English lines, and their Lordships reprobated this, but in the present case if we turn to English Law we find that the law of tender is exactly the same in this respect as that laid down in the illustration. I can see no difference between a tender and an offer of performance. In *Lake on Contracts** 4th Edn. p. 583, we find the two words used indiscriminately for the same act. He writes as follows:—"When a contract

* 5th edition p. 584. Editor B. L. T.

(2) 1916. 2 App. Cas. 575.

"is due it may be discharged by performance according to the terms. "A promise may be capable of performance independently of any act or concurrence on the part of the promisee or it may be incapable of complete performance without some act or concurrence upon his part. Where the performance is dependent upon the concurrence of the promisee the promisor discharges his liability by a *tender or offer of performance, so far as it can be completed on his part.*"¹ A promise to deliver goods is clearly a promise that cannot be completely performed without the concurrence of the promisee *Startup vs. Macdonald* (3). But unless the offer is made at the place specified in the contract, the offer cannot be said to be as complete as it was possible for the promisor to make it. Again in Anson's Law of Contracts† 12th Edn. p. 313 we read that "tender is an attempt to perform frustrated by the act of the other party" and again that "Where in a contract for the sale of goods the vendor satisfies *all the requirements* of the contract as to delivery and the purchaser nevertheless refuses to accept the goods, the vendor is discharged and may either maintain or defend successfully an action for the breach of the contract." Again it follows that unless the vendor has offered to perform at the place specified in the contract he has not satisfied all the requirements of the contract as to delivery. Parke Baron in the same case of *Startup vs. Macdonald* (3) at p. 624 stated as follows "where the thing to be done is to be performed at a certain place the tender "must be to the other party at that place."

This particular case turned on the question of time rather than of place, but the authorities are quite sufficient to establish the proposition that English law is fully as strict as the illustration. Section 47 lays down in India the law as regards time and place for performance and I have no doubt that the offer to perform to be valid offer must follow the same rule, as laid down in the illustration to section 38 and that as Parke Baron stated at p. 623, the law has fixed the rule and it is not to be left to a jury to be determined as a question of practical convenience or reasonableness in each case.

In my opinion therefore for an offer of performance to be valid, it must be complete and must satisfy all the requirements of the contract as to delivery: it must, where the contract requires delivery at a particular place be an attempt to deliver at that place. In their letter of 29th August the promisees seem to have waived delivery at their Pazundaung siding and consented to take it at their own Dawbong mill; they were of course entitled to do this but I think they were fully within their rights in declining to inspect at Moola Dawood's mill or to accept tender of paddy at any place other than that mentioned in the contract or agreed to by both parties. The two mills seem to have been at most only about half a mile apart; but this seems to me immaterial. *In England the rules are so strict that a tender of a large sum of money accompanied by a demand for change is invalid: the tender or offer to perform must be in accordance with the

(3) 6 M. and G. 593 at p. 610.

† 14th edition p. 342-43. Editor B. L. T. *

contract. This was not such an offer. The plaintiffs themselves recognised this, for they said that if the defendants would pass the paddy at Mulla Dawood's mill they would then deliver it at the defendants' mill. There was no such term in the contract, and they could not import it. I must therefore hold that there was no valid offer of performance and that plaintiff's suit must be dismissed so far as the two first and main items are concerned. As regards the small claim of Rs. 29|- it was practically disregarded by counsel. It arose out of the second tender of three wagon loads; the defendants had a claim against the plaintiffs for certain gunny bags, and claimed a lien on this paddy for the payment, and detained it for some days. I do not see that they were entitled to any lien and I think they are entitled to be reimbursed this amount. The result is that the suit must be dismissed with costs on Rs. 10,721|- less Rs. 29|- or Rs. 10,692|- and the defendants must pay the plaintiffs or deduct from their costs the sum of Rs. 29|-.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL SECOND APPEAL No. 96 OF 1916.

MA PYU PLAINTIFF. APPELLANT.

vs.

MAUNG PO CHET and others .. DEFENDANTS. RESPONDENTS.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Pillay.

For respondents—Mr. Lutter.

23rd October, 1916.

Evidence Act (I of 1872) s. 115. Estoppel—Thing—Promise—Transfer of Property Act (IV of 1882) ss. 51, 63 and 108 (h)—Right to accissions.

The word thing in section 115 of the Evidence Act means a fact in existence or past. A promise to do something in future is not a thing, and cannot create an estoppel.

The maxim quicquid plantatur solo, solo cedit is not applicable to India. Sections 51, 63 and 108 (h) of the Transfer of Property Act have taken its place, and the rule contained in these sections should be followed unless there is an estoppel.

JUDGMENT.

McCOLL, A. J. C.—The first defendant-respondent is* the grandson of the plaintiff-appellant. The second defendant-respondent is the first defendant-respondent's wife and the third defendant-respondent is his mother-in-law.

The plaintiff-appellant sued for possession of a house and ground alleging that the ground was hers, and that she had built the house on it, the first defendant-respondent being entrusted with the superintendence of its construction, that the house had cost Rs. 1,500 of which she had furnished Rs. 1,050 and the first defendant-respondent Rs. 450|-, that after the house had been built she had permitted the defendants respondents to live in it with her; and that now disagreements had arisen and they had refused to quit.

The defence was that the ground had been given to first defendant-respondent by the plaintiff-appellant out of natural love and affection, that he had built the house with his own money and that he had permitted the plaintiff-appellant to live with him.

The subdivisional judge found that the house belonged to plaintiff-appellant, but that the first defendant-respondent had furnished more than Rs. 450|- for its construction, and gave the plaintiff appellant a decree for possession on payment of Rs. 1,100.

On appeal the lower appellate court held that it was for the plaintiff-appellant to prove that she had furnished Rs. 1,050|- for the construction of the house, that she had failed to prove this and that there was accordingly no difficulty in believing the story of the gift of the land, but that the question of the gift was not essential to a determination of the suit. It reversed the decree of the first court and dismissed the suit.

One of the grounds of this appeal is that the lower appellate court erred in holding that the question whether the land on which the building was erected was given or not by the plaintiff-appellant to the first defendant-respondent was not essential, and that the only issue to be determined was whether the plaintiff-appellant had contributed Rs. 1,050 towards the building.

The land admittedly had belonged to the plaintiff-appellant and she was in joint possession of the house and paid the taxes. If she had stated nothing further the burden of proof would have been on the defendants-respondents, but she stated that the first defendant-respondent had built the house for her as her agent and had expended money of his own on its construction. He was, therefore entitled to remain in joint possession until reimbursed what he had expended under section 221, Contract Act. She thus admitted that she had not an unconditional right to turn the first defendant-respondent out of the house, and she, therefore had to prove on what terms she was entitled to sole possession.

No doubt she was not in a position to prove the exact amount expended by the first defendant-respondent, but she was bound to make out a *prima facie* case, and this she could have done by proving the approximate value of the building and that she had contributed Rs. 1,050. The payment of this sum, therefore, was part of her case, but it does not follow that her suit was bound to fail entirely if she failed to prove it. Unless there was a gift she remains owner of the land.

For the defendants-respondents it is urged that the maxim *quicquid plantatur solo, solo cedit*, which means that anything affixed to land with the object of improving the inheritance becomes part of the realty and the property of the owner, whether it be affixed by him or by some one else, is not applicable. This rule is not part of the law of India, sections 51, 63 and 108 (h), Transfer of Property Act, have taken its place. The two latter sections do not apply because first defendant-respondent is neither a mortgagee nor a tenant. Section 51 does not apply either. If first defendant-respondent be a transferee, i. e., if there were a gift of the land, then the land is his, he is not a transferee with an imperfect title. But assuming that plaintiff-appellant failed to prove that the defendant-respondent was her agent and that she contributed Rs. 1,050 she certainly could not lose her land unless she be estopped, and I think the equitable rule contained in section 51, Transfer of Property Act should be followed.

Now it is plain that there was no gift. No registered deed was executed and the plaintiff-appellant remained in possession of the land. If the evidence adduced by the defendants-respondents be true, it merely amounts to proof that plaintiff-appellant promised to give the first defendant-respondent the land. Estoppel was not specifically pleaded, but at the hearing of this appeal it was urged that, if on the faith of plaintiff-appellant's promise the first defendant-respondent built the house with his own money, plaintiff-appellant is now estopped from asserting her title to the land.

But what "thing" did plaintiff-appellant induce first defendant-respondent to believe to be true? Supposing that he believed that a promise to give amounted to a gift, it cannot be said that this belief was induced by the plaintiff-appellant, and, moreover, a proposition of law is not a "thing" within the meaning of section 115, Evidence Act. In that section a "thing" means a fact and a fact in existence or past. The intent of a party is necessarily uncertain as to its fulfilment. No person has a right to rely on it. A person cannot be bound not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed: *Langdon vs. Doud* (1). There is thus no estoppel in this case; plaintiff-appellant may have truly intended to give the land at the time she made the promise, if she ever made it, and have subsequently changed her mind.

I am, therefore, of opinion that the first defendant-respondent cannot claim the house as his property as long as the plaintiff-appellant is willing and ready to reimburse him the money which he expended on it. It is, therefore, immaterial whether the first defendant-respondent built the house as plaintiff-appellant's agent or on the faith of her promise to give him the land; the only question is the amount which the plaintiff-appellant must pay before she can evict him.

The only direct evidence of any contribution by the plaintiff-appellant is that given by a casual visitor, a cooly who has worked for

(1) 10 Allen 433.

plaintiff-appellant for ten years. According to one of her witnesses she is poor, and there are serious discrepancies between her own evidence and that given by her witness Maung Po Kyan. I am, therefore, unable to hold that the lower appellate court was wrong in finding that it was not proved that she contributed anything towards the building, and if she did she has only herself to blame for not taking receipts and keeping accounts. The evidence adduced by the defendants-respondents as to the amount spent on the construction of the house is very deficient. The sub-divisional court found that the value of the house was Rs. 2,150. This finding was based on the report by the bailiff, which was apparently admitted in evidence with the consent of both sides. The opinions as to the value of the building expressed by some of the defendants-respondents' witnesses are valueless. The value Rs. 2,150, has not been disputed in this court and will be accepted.

The decrees of the courts below are accordingly set aside, and the plaintiff-appellant will be given a decree directing that upon her depositing in court within one month for payment to the first defendant-respondent the sum of Rs. 2,150|- the defendants-respondents shall give her complete possession of the house and ground in suit. As the parties have been both partly successful they will bear their own costs throughout.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL APPEAL No. 117 OF 1916.

MA SHWE PU PLAINTIFF. APPELLANT.

vs.

MAUNG PO DAN and another .. DEFENDANTS. RESPONDENTS.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Chatterjee.

For respondents—Mr. Mukerjee.

5th December, 1916

Stamp Act (II of 1899) s. 35.—Instrument not duly stamped.—Payment of duty and penalty.

A suit to set aside an unstamped instrument can be brought without payment of stamp duty or penalty as in such a suit it is not necessary for the plaintiff to prove the contents of the award or to put it in evidence.

If evidence of the award is necessary for the defendant's case the defendant ought to be made to pay the stamp duty and the penalty.

JUDGMENT.

McCOLL, A. J. C.—The plaintiff-appellant brought a suit to have an award set aside on the ground of misconduct of the arbitrators. The award was stamped with Rs. 5|- and the learned district judge directed the plaintiff-appellant to pay deficient stamp duty and penalty amounting in all to Rs. 2,832|8|-, as the award directed partition of property. As she failed to pay this sum her suit was dismissed.

I think the learned district judge was clearly wrong. The award could of course not be acted upon unless stamp duty and penalty were paid, but the plaintiff-appellant did not want it acted upon, it was to prevent its being acted upon that she went into court. Again it could not be admitted in evidence without stamp duty and penalty being paid, but of what could it be evidence? It could only be evidence of the decision of the arbitrators. The plaintiff-appellant did not necessarily want to prove that. She alleged that the arbitrators had taken Rs. 1,000|- from the defendants-respondents as arbitration fees. That amounted to an allegation of corruption. She again alleged that they had not examined her witnesses. If she proved these two things, that might be a sufficient reason for setting aside the award, whatever the contents of the award might be, and it would not be necessary for the district judge even to see what those contents were. Thus she might succeed without the award being put in evidence at all. On the other hand the putting of the award in evidence might be vital for the defendants-respondents' case and then it would be for them to pay the stamp duty and penalty.

“The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and, therefore, inadmissible. If that were so a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility”—*Coppoch vs. Bower* (1). The decree of the district court is reversed and the suit is remanded under Order XLI, rule 23, for a decision on the merits. Costs of this appeal will abide the final result.

The plaintiff-appellant will be given a certificate under section 13, Court Fees Act.

(1) (1838) 4 M. and W. 361.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL SECOND APPEAL No. 191 OF 1916.

MAUNG CHIT PU and another .. PLAINTIFFS. APPELLANTS.

vs.

MAUNG PYAUNG and others .. DEFENDANTS. RESPONDENTS.

Before L. H. Saunders, Esq., J. C.

For appellants—Mr. Mukerjee.

For respondents—Mr. Dutt.

6th October, 1916.

Civil Procedure Code (Act V of 1908) O. XLI, rules 22 and 33.—Power of appellate court—Cross objections.

Where a party appeals only against that portion of a decree in respect of which he has been unsuccessful the appellate court cannot unless the respondent has filed objections set aside that portion of the decree which is in favour of the appellant.

Rangam Lal *vs.* Jhandu 34 A 32 followed.

JUDGMENT.

SAUNDERS, J. C.—The plaintiffs sued to eject the defendants from certain land. The plaintiffs' case was that they had bought the land in suit in the year 1262 B. E., corresponding with the year 1900 A. D., that they had been in possession ever since, that the defendants had entered on the land and in spite of their protest taken possession and built a house on it.

The defence was that the plaintiffs had not purchased the land, that the land had been mortgaged to the mother of the plaintiff Ma San Hmi, who was also mother of the first defendant Maung Pyaung, and that Maung Pyaung had been permitted to occupy the land with the consent of his mother the mortgagee.

The court of first instance held that the sale had not been proved, but that the plaintiffs had contributed Rs. 10 towards the mortgage money of Rs. 15[- which had been paid to the mortgagor, that the plaintiffs were, therefore, entitled to two-thirds of the land in suit and the court accordingly gave the plaintiffs a decree for two-thirds of the land. The plaintiffs appealed and the district court held that the suit was wrongly framed, that it should have been a suit for possession and that the plaintiffs having failed to make out their case were not entitled to succeed at all, and the court not merely dismissed the appeal but dismissed the plaintiffs' suit. The plaintiffs now come to this court in second appeal.

The first ground of the appeal is that the defendants-respondents not having raised any objection to the decree of the court of first in-

stance, it was not open to the lower appellate court to set so much of the decree aside as was in favour of the plaintiffs-appellants.

For the respondents the provisions of Order XLI, rule 33, of the Code of Civil Procedure, are relied upon. This is a new provision of law incorporated in the present Code of Civil Procedure for the first time, and whereas there appears to have been no doubt that under the old code the court would not have been entitled to pass such an order as has here been passed by the lower appellate court, it is urged that new rule gives the court ample power to pass any decree which the case may require. It was, however, pointed out in *Rangamallal vs. Jhandu* (1) that in interpreting this rule the court should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court-Fees Act nor of the Law of Limitation. Rule 22 of the same Order provides, "any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the courts below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow." This rule clearly shows that it was intended that, *prima facie* at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule. The learned judges went on to say. "In a case in which there is not sufficient reason for a respondent neglecting either to appeal or to file objections, we think the court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant."

I think that this view of the law may be accepted and that where a party appeals against that portion of the decree in respect of which he has been unsuccessful, the court is not ordinarily entitled without any formal cross-objection by the other side to set aside so much of the decree as has been in favour of the appellant. I think, therefore, that to this extent the appeal in the present case must succeed. On the merits the appellants urge that they are entitled to a decree as prayed for. It is, however, clear that their suit was not one for ejectment. They alleged wrongful dispossession by the defendants and the suit was one for possession. This is a mistake, however, which is very commonly made and might have been and should probably have been corrected by an amendment in the court of first instance. But the evidence certainly does not show that the plaintiffs have made out their case and both the courts below have apparently agreed in holding that the sale set up was not proved while the mortgage relied upon by the defendants was proved.

In view of this finding and of the fact that the mortgagee was the mother of one plaintiff and mother-in-law of the other living upon the same land with the plaintiffs, I think it was a natural inference

(1) 34 A. 32.

that the plaintiffs were not in possession on their own account. There is, moreover, evidence that the plaintiffs gave the defendants permission to build a house upon the land. It was at least as good evidence as that of the plaintiff's witnesses.

There are no grounds for allowing the appeal except in so far as the lower appellate court has disturbed the finding of the court of first instance. To that extent the appeal is allowed and the decree of the court of first instance will be restored with costs.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

MAUNG KYIN and another.. .. APPELLANT.

vs.

MA SHWE LA.. .. RESPONDENT.

Before Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge and Mr. Amir Ali.

For appellant—Sir Erle Richards, K. C. and Mr. Coltman.

For respondent—Mr. DeGruyther, K. C. and Mr. Forster.

26th July, 1917.

Evidence Act (I of 1872) ss. 92 and 99. Construction of document—Evidence to prove that a conveyance is really transfer of a mortgage—Evidence of notice of third party's title.

When a transferee under an absolute conveyance sues for possession, evidence is admissible to show that to the plaintiff's knowledge the property transferred belonged to a third person who had mortgaged it to the transferor and that the conveyance was meant to operate only as a transfer of the mortgage.

Section 92 of the Evidence Act which excludes evidence contradicting or varying the terms of a written instrument in terms applies only "as between the parties to any such instrument or their representatives in interest." Accordingly such evidence is admissible when it relates to transactions with third parties.

The evidence in question is also admissible under Proviso 1 to the section which renders admissible any fact such as fraud etc. which would invalidate a document.

Oral evidence is not admissible for the purpose of ascertaining the intention of parties to written documents.

Balkishen vs. Legge 27 I. A. 58 followed.

JUDGMENT.

LORD SHAW.—This is an appeal originally brought by the defendants Maung Kyin, since deceased, and Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its civil appellate jurisdiction, dated the 3rd August, 1914, reversing the judgment and decree of the Chief Court in its civil original jurisdiction, dated the 17th June, 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board. The judgment upon that appeal was pronounced on the 11th July, 1911, and is reported in 38 Indian Appeals, p. 85. The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November, 1901, Myaing, having borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at 1½ per cent. per month, granted an out-and-out conveyance of two of these properties, which may be called (*a*) and (*b*), in favour of Kyin and his wife. No possession passed; interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March, 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (*a*) and (*b*) to the latter. There were two other plots of land, which may be called (*c*) and (*d*). Kyin and his wife on the 13th February, 1902, having advanced 11,565 rupees, purchased these properties, which then also belonged to Myaing, by public auction. No possession passed. On the 4th March, 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely, the 4th March, 1903, U Shwe Pe and his wife became by *ex facie* absolute conveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from 1½ per cent. per month to 1 per cent. Then, on the 20th November, 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given, and maintain in substance that, although the conveyances to U Shwe Pe and his wife appear to be absolute in form, it was well known to them that the true nature

of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because it amounts to this: that the transfer, although *ex facie* of the deeds absolute in form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were purporting to sell and the Shwe Pes purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands. The learned judge of the Chief Court (original civil jurisdiction) puts the matter thus:—“The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing’s object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant’s mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe’s letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by this fraud. I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact.”

Upon appeal in the Chief Court (Civil Appeal) the learned Judges held. “If, however, evidence is admissible for the purpose of showing what was the real transaction; the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, viz.: U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant’s mortgages in the form of outright sales.”

Upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing “no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument of their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.” The first proviso is to the effect that “any fact may be proved which would invalidate

any document, or which would entitle any person to any decree or order relating thereto; such as fraud., want or failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman vs. Govinda Kanji and another*, (1) *Hem Chunder Soor vs. Kally Churn Das*, (2) *Rakken and another vs. Alagappudayan*, (3) *Preonath Shaha vs. Madhu Sudan Bhuiya*, (4) *Khankar Abdur Rahman vs. Ali Hafez and others*, (5) *Mahomed Ali Hossein vs. Nazar Ali and others*, (6). The judgment of Mr. Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned judge expressly followed the English equity doctrine as expressed in *Lincoln vs. Wright* (7) by Lord Justice Turner thus:—"The principle of the court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this court, fraud to insist on the conveyance as being absolute, and parole evidence must be admissible to prove the fraud."

In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das and others vs. Legge*. (8) It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds:—"The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remain in India. But the respondents rightly refer to *Achutaramaraju and another vs. Subbaraju*. (9) *Maung Bin vs. Ma Hlaing*, (10) and *Dattoo valad Totaram vs.*

(1) 4 B. 594.

(2) 9 C. 528.

(3) 16 M. 80.

(4) 25 C. 603.

(5) 28 C. 256.

(6) 28 C. 289.

(7) 4 De. G. and J. 16.

(8) 27 I. A. 58.

(9) 25 M. 7.

(10) 3 L. B. R. 100.

Chandra Totaram and another, (11) and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln vs. Wright* (7) and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, What is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them," nothing was decided upon that head, except that it would give rise to important and difficult questions under the Indian Evidence Act. That question has now been settled by their Lordships, adversely to the reception of the evidence.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situation which the facts proved in the case admittedly disclose:—"Their Lordships," said he, "however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that

(11) 30 B. 119.

the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance."

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If section 92 applied, proviso I would seem to be in point, because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, section 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lordships do not hold any doubt upon the subject of fact, in that respect entirely agreeing with all the courts below. It is true that the court of appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August, 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL SECOND APPEAL No. 260 OF 1916.

MAUNG SHWE MYAT APPELLANT.

vs.

MAUNG SHWE BAN and others RESPONDENTS.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Pillay.

For respondents—Mr. Chatterjee.

12th December, 1916.

Civil Procedure Code (Act V of 1908) ss. 2 (2) and 47—Decree. O. XXI, R. 90 and O. XLIII—Appeal from orders.

All orders that come under section 47 of the code of civil procedure are not decrees, but only those orders that are not appealable under Order XLIII.

An order under Order XXI rule 90 though it comes under section 47 is not a decree because it is appealable as an order, and there can be no second appeal against such order.

JUDGMENT.

McCOLL, A. J. C.—At a sale in execution of a decree the appellant purchased certain land. The decree-holders applied to have the sale set aside on the ground of material irregularity in conducting it. Their application having been dismissed, they appealed unsuccessfully to the district court and then appealed to this court. The appeal was admitted and heard and the case was remanded under Order XLI, rule 23 read with Order XLII as the allegations of material irregularity had not been enquired to. The township judge then enquired into these allegations and again dismissed the application. The decree-holders appealed and the district court directed the sale to be set aside. The auction purchaser has now come to this court in second appeal and a preliminary objection has been taken that a second appeal does Order XLIII, rule 1 (j), Civil Procedure Code. For the appellant it is urged that the matter in dispute related to the execution of a decree and arose between the decree-holders and the representative of the judgment debtor and, therefore, came under section 47, Civil Procedure Code, and that consequently a second appeal lies. Reliance is placed on *Prosunno Kumar Sanyal vs. Kali Das Sanyal* (1) and on *Hira Lal Ghose vs. Chandra Kanto Ghose* (2).

At first sight it looks as if there were some inconsistency in the Civil Procedure Code, but if the matter be gone into the apparent inconsistency disappears.

In the first case cited above a suit was brought to set aside a sale on the ground of fraud, and it was held that the matter fell under section 244 of the Code of 1882 and that a separate suit did not lie. In the second case an application was made to have a sale set aside on the ground of fraud and a material irregularity in conducting the sale, and it was held that as the matter came under section 244 of the code of 1882, a second appeal did lie.

The judgment of Banerjee, J. in the latter case is illuminating. He held that a second appeal lay because the grounds on which it was desired to have the sale set aside were not entirely comprised in section 311 of the code of 1882, inasmuch as fraud was alleged—it is to be noted that the words “or fraud” in Order XXI, rule 90 are

(1) 19 C. 683.

(2) 26 C. 539.

new—and that therefore, as part of the order did not fall under section 588 but did come under section 244 it was a decree and a second appeal lay.

In the present case the application was to have the sale set aside on the ground of material irregularity in conducting it and fell under Order XXI, rule 90, and an appeal lay to the lower appellate court under Order XLIII, rule 1 (j). It undoubtedly was a matter relating to the execution and satisfaction of a decree and it arose between the decree-holders and the representative of the judgment-debtor. The order passed, therefore came under section 47, Civil Procedure Code, but nevertheless it was not a decree. In section 2 a decree is said to include the determination of any question within section 47 but not to include any adjudication from which an appeal lies as an appeal from an order. It is necessary to read this definition so as to exclude inconsistency and, therefore, it must be read as declaring that a decree includes the determination of any question between section 47 Civil Procedure Code, except a determination against which an appeal lies as an appeal from an order. The definition in the code of 1882 runs as follows: Decree means the formal expression of an adjudication upon any right claimed or defence set up, in a civil court, when such an adjudication, so far as regards the court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question referred to in section 244, but not specified in section 588, is within this definition: an order specified in section 588, is not within this definition." It was thus clearly laid down that all orders that came within the wording of section 244 were not decrees and though the language used in the present code is not the same, I do not think there has been any change in the law in this respect.

In the present case the order of the township judge, though it fell under section 47, Civil Procedure Code, was appealable as an order and was, therefore, not a decree, and consequently a second appeal does not lie.

It has been suggested that the memorandum of appeal should be taken as an application for revision, but none of the grounds are good grounds for revision.

The appeal is accordingly dismissed with costs.

PRIVY COUNCIL.

APPEAL (No. 45 OF 1915) FROM THE CHIEF COURT OF LOWER BURMA.
 MAUNG THWE APPELLANT.

vs.

MAUNG TUN PE .. * .. . RESPONDENT.

Before Lord Dunedin, Sir John Edge, Mr. Amir Ali and Sir Walter Phillimore.

For appellant—Mr. Saunders.
For respondent—Mr. Coltman.

5th July, 1917.

Burmese Buddhist Law—Adoption—Forfeiture of inheritance by separation—Second heir adopted by widow—Rights of two adopted sons.—Possession as administrator.

Under Burmese Buddhist Law a child adopted according to the fullest form of adoption, and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children, or in competition with them.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date. But the adoption must be a matter of publicity and notoriety.

A kittima child may forfeit his right of inheritance by separating from his adoptive parents. Whether separation operates as forfeiture is a question of intention. The fact that a child goes to live apart is some evidence of an intention to break the bond. But if the distance be not great, if the separation be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after the separation, the bond is not broken.

Under Burmese Buddhist Law it is permissible for a widow to adopt a second heir after her husband has adopted one in his life time. The position of a son so adopted is in no way inferior to that of the first adopted son.

In considering the merits of different claimants to an estate, a person is not to be treated as if he were in possession, and in a position to win his case without any proof of title upon the mere weakness of the title of the other claimant merely by reason of his having obtained administration.

JUDGMENT.

SIR WALTER PHILLIMORE.—The litigation in this case concerns the succession to the estate of U Shwe Mya and Ma Shwe I, Burmans, professing the Buddhist Faith, a wealthy married couple who died childless; the husband early in 1906, and the wife on the 9th of February, 1908. Upon the death of the latter a contest arose between the claims of Maung Thwe, a nephew of the husband, and Maung Tun Pe, a nephew of the wife, each claiming to be the sole adopted child and to succeed to the exclusion of the other. After certain abortive police proceedings the contest took a regular shape, Maung Thwe being the applicant for administration and Maung Tun Pe resisting him and setting up his rival claim. Much evidence was given before the district judge, and he in the result decreed letters of administration to Maung Tun Pe, upon what ground does not ap-

pear. Maung Thwe, being aggrieved by this decision, appealed to the Chief Court, which refused to hear the case upon the merits or to interfere with the order, the judges stating that the decision as to administration would not operate as *res judicata*, and that it would be open to Maung Thwe to establish his right in other proceedings.

Thereupon the present proceedings were instituted by Maung Thwe against Maung Tun Pe as administrator, Maung Thwe setting forth his title as an adopted son and sole heir to the estate, complaining that Maung Tun Pe wrongfully refused to deliver the estate to him, and praying for a declaration that he was the sole heir and for consequential relief. Maung Tun Pe put in a defence, in which he denied the plaintiff's adoption and all the other allegations in the plaintiff's claim, stated that he was the only adopted son and heir, having been adopted in his infancy, and prayed that the suit might be dismissed.

The district judge, who was not the same judge before whom the administration proceedings had been taken, framed three issues, which were as follows:—

1. Who of the claimants to the estate should be recognised by Buddhist law of inheritance as heir to the estate of deceased U Shwe Mya and Ma Shwe I?
2. Have either or both of them been adopted?
3. What is the extent and value of the estate of the deceased U Shwe Mya and Ma Shwe I?

By agreement between the parties the evidence in the previous case was read as evidence in this case, some of the witnesses being further examined and cross-examined, and one or two fresh witnesses being added.

By his judgment dated the 12th January, 1911, the district judge declared that Maung Thwe was the sole adopted *kittima* son of the deceased couple and their sole heir, and directed consequential accounts and enquiries. And by a subsequent order, dated the 3rd May, he directed Maung Tun Pe to transfer to Maung Thwe the property of which he had become possessed as administrator.

From these decrees an appeal was taken to the Chief Court of Lower Burma, which, by its judgment dated the 23rd September, 1913, allowed the appeal, reversed the decrees, and dismissed Maung Thwe's suit with costs in both courts.

The Chief Court found that Maung Thwe had not proved his adoption, and that it became therefore unnecessary to decide whether Maung Tun Pe had or had not proved his adoption, as he was in possession and the plaintiff had failed to prove a title against him.

From this judgment of the Chief Court Maung Thwe has appealed to His Majesty in Council.

Maung Tun Pe has died during the course of these proceedings, and his legal representatives are now parties to this appeal as respondents.

It appears to their Lordships unfortunate that the Chief Court should have failed to enquire into the rival claim of Maung Tun Pe. The previous decision of the same court had in substance decided that when the merits of the respective claimants to the beneficial interest in the estate came to be considered, neither was to have an advantage by reason of his having previously obtained administration. And yet, in the present case, the Chief Court treated Maung Tung Pe as if he were in possession and in a position to win his case without any proof of title, upon the mere weakness of the title of the other claimant. The only way to handle the case after the previous decision was to treat the two parties as competitors, starting upon an equal footing.

Their Lordships proceed to examine the case of the two parties upon this principle.

The Burmese Buddhist Law in the matter of adoption and inheritance has been the subject of discussion in several cases in the local courts and before this Board. A child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima tha* or *kittima* child. The word is sometimes written *keitima* and seems to be a corruption of the Sanscrit *krītrima*.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date. But on the other hand, the adoption must be a matter of publicity and notoriety. It is unnecessary to state all the authorities upon this subject, as the matter has twice in recent years come before this Board, in the cases of *Ma Me Gale vs. Ma Sa Yi*, (1) and *Ma Ywet vs. Ma Me*. (2) To quote a passage from the last judgment, the fact of adoption "can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to."

It is most important that adoption with a view to inheritance, which, in this community, takes the place of testamentary disposition, should be made known to all those likely to be concerned; and their Lordships are anxious in no way to weaken what has been stated to this effect in former decisions. There is a further principle of law with regard to *kittima* children, to which attention has been drawn in the course of the argument. A *kittima* child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. The texts are set forth in section 195 of Mr. Gaung's "Digest of Burmese Buddhist Law."

(1) 32 I. A. 72.

(2) 36 I. A. 192.

These authorities, however, draw a distinction between the cases where there are other children with whom the kittima child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the kittima child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate. The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken. This is the result of the modern decisions which are quoted in Chan-Toon's "Principles of Buddhist Law," pp. 88 to 95. To these may be added a decision in the Appeal Court of Upper Burma in the case of *Maung She Thwe vs. Ma Saing and another.* (3)

The general outline of the case on behalf of Maung Thwe was that he was residing with his parents at a distance of about a day's journey from the residence of his adoptive parents, that they came to his house when he was about seventeen years old, stayed there for a day or two, and then asked for him in adoption; that certain elders were called in as witnesses of the act of adoption, and that then he went away to his adoptive parents and never returned to his native village. As he appears to have been born about 1880 that would make the date of his adoption about 1897 or 1898. In support of this case, besides his own evidence there was that of his father and the three fellow villagers who had been the witnesses to the adoption, two of whom were people of some position in the village.

He stated that he lived continuously with his adoptive parents till his marriage, which took place when he was about twenty-five some nine months before the adoptive father died. He relied upon the card of invitation to his marriage which was issued by his adoptive parents, upon statements made at the marriage by the adoptive father to the effect that he was his heir, and upon the testimony of several witnesses, tenants and others, who deposed to statements by the parents that Maung Thwe was their adopted son, and that tenants were to treat him as such, and pay rent to him; and he gave other evidence of repute.

The line taken upon behalf of Maung Tun Pe was that he, as a much younger boy, could know very little about the facts alleged by

(3) 2 U. B. R. 135; 2 P. J. L. B. 520.

his rival and required strict proof. There was much criticism of the character and statements of the witnesses for Maung Thwe. It was contended that the statements on the invitation card did not support the view that Maung Thwe was a kittima child, and it was pointed out that this card was the only piece of documentary evidence that Maung Thwe could put forward.

It was beyond question that after Maung Thwe's marriage he went to live with his wife's mother. He stated that he continued to discharge such duties as his adoptive parents required of him, and that it was part of the arrangement upon his marriage which was made with the consent of his adoptive parents, that he should go and live with his mother-in-law. On the other side it was contended that this separate living was fatal to Maung Thwe's case, either as working a forfeiture, or as showing that there never had been a kittima adoption.

The affirmative case of Maung Tun Pe was that his mother lived in the same village as the adoptive parents, and had been visited by them shortly after his birth, when they had agreed to adopt him after he had been reared through his tender years, that the actual adoption began when he was twelve or thirteen years old, from which time he lived sometimes with his own parents and sometimes with his adoptive parents. He said that his adoptive parents paid his school fees, provided for a hospital doctor when he received an injury, and accepted publicly the position of parents when the ceremony of *Shinbyu* was performed. This ceremony, which ends in the boy entering for a time a Buddhist monastery, is one which a Buddhist boy goes through upon attaining puberty. His case further was that after the adoptive father's death he resided regularly with the widow, and that she put his name into the leases with the tenants, thereby showing either that he was heir to the property, or that he was already entitled to a share as representing his deceased adoptive father.

Maung Tun Pe was said to be about eighteen when the father died in 1906, which makes his birth about 1888.

Maung Thwe said that Maung Tun Pe never lived in the house of the adoptive parents during the father's lifetime.

On the other hand, Maung Tun Pe said that Maung Thwe did not live in the adoptive parents' house, but in his natural parents' village, and only sometimes visited them when on a journey.

The district judge accepted the affirmative evidence for Maung Thwe. The judges in the Chief Court looked at it with more suspicion, and thought that the evidence of the supposed act of adoption was improbable, that the witnesses put forward as elders were not of the authoritative class that one would expect, and that there were discrepancies in the statements of the witnesses as to what took place at the marriage. They accepted the evidence that for some years before the father's death Maung Thwe had resided a great deal, if not permanently, with the old couple, and helped them in their business, but they said that it would be natural that he, as a nephew, should do this.

The officiating Chief Judge thought that it was not usual to adopt at so late an age as seventeen, and then observed, somewhat inconsistently, that the old couple might have taken him with them with an intention to adopt him later if he proved suitable, but that when they married him off that idea was abandoned.

The second judge laid a good deal of stress on Maung Thwe's having gone to live apart from his adoptive parents, and of the acts of the widow indicating that she wished Maung Tun Pe to succeed to her property, as showing that the other had not been adopted.

Both judges relied upon the language of the card of invitation as being hurtful to the case of Maung Thwe, and the district judge thought that it was not helpful to his case, though, on the other hand, it was not fatal to it.

The language of this card, omitting unimportant words is in the translation as follows:—

“As according to the duty of parents it is desired to marry Maung Thwe, the nephew son of U Shwe Mya and Ma Shwe I, and Ma Nyin Ma, daughter of Ma Shwe Hlaing, you are invited to come to the marriage ceremony.”

Then the date is given, and the residence of the mother-in-law as the place. Nephew son is a translation of Tu Tha. *Tha* is “son” simply, and *Kittima tha* is “fully adopted son.” There is no doubt that Maung Thwe was a nephew, and nephew son was not inapplicable though it might be inadequate.

It is clear that too much stress must not be laid on the word *son*, because the Burmese are proverbially inexact in their terms of relationship; but its use is of some assistance to Maung Thwe's case. On the other hand, the statement that the marriage was being made according to the duty of parents, seems to show that the old couple who issued the invitation were accepting the duty of parents; and so the district judge views the phrase.

Their Lordships are unable to hold that much inference can be drawn one way or the other from the language of the invitation card, which seems consistent with either hypothesis; that is, either that Maung Thwe was an adopted son, or that he was a nephew who had been taken by the old couple to live with them, and to whom they had put themselves under obligation, which they were discharging by providing for his marriage. But they would observe that either of these positions—and one of them is certainly right—is inconsistent with the story deposed to by the witnesses for Maung Tun Pe.

Their Lordships see no reason for differing from the district judge in his acceptance of the story of the witnesses as to the statements made at the marriage by the adoptive father; and if they are accepted, they go a long way to prove the adoption.

The view taken by the Chief Court is in substance that the proof was insufficient. The officiating Chief Judge has a very long experi-

ence of Burmese habits and customs; and it has been urged on behalf of the respondents that his decision upon such a subject is of special authority. Their Lordships feel the force of this argument; but they would have attached more weight to it if the Chief Judge had examined the case of Maung Tun Pe in the same manner as he has examined the case of Maung Thwe. They are inclined to think that if he had applied the same critical solvent to the one story as to the other, he would have come to the conclusion that neither had proved an adoption; and this is a consequence in itself improbable, and one for which neither side has contended.

As to Maung Thwe living separately after his marriage, it has not been contended before their Lordships that it was a separation which worked a forfeiture, if there had been a prior adoption. It appears that it was always intended that the marriage should be followed by Maung Thwe going to live with his widowed mother-in-law, and the marriage took place not only with the consent but upon the request of the old people, who apparently first came themselves and then sent an intermediary to beg for the hand of the girl. Maung Thwe deposed that he used to help the couple after his marriage, and it was admitted that he was called in by the widow on an occasion when she was in trouble. There was evidence that he and his wife, when the adoptive father was taken ill, went and nursed him till his death; and through his cross-examination no specific failure of duty was put to him.

Upon the whole their Lordships attach no weight to the separate residence, either as working a forfeiture or (as it was rather put before them) as indicating that there never had been an adoption; and they are of opinion that Maung Thwe did make out that he was an adopted child and an heir to the old couple.

But whether he was the sole adopted child and heir is another question. The district judge thought that he was, and that Maung Tun Pe had not made out his case; and Maung Tun Pe has not the assistance of any finding in his favour in the Chief Court. But he has strong documentary evidence in the fact of the leases, in which his name appears with that of the widow after the adoptive father's death.

Some, at any rate, of the leases have been proved to be genuine and to have been effected under the authority of the widow. There is a good deal of evidence that the adoptive father took a principal part in the ceremony of *Shinbyu*, though the natural father was also present. The providing of the hospital doctor was proved, and there seems no doubt that, after the adoptive father's death, Maung Tun Pe, having by that time arrived at an age when he could be useful, did most of her ordinary business for the widow.

Maung Tun Pe's case has this weakness, that the supposed original adoption was made without witnesses. The district judge commented with force upon the fact that the act of adoption—if there was any one single act—was not witnessed by any elder or any other person

in authority, and was a wholly private transaction, and he came to the conclusion that there was no adoption by U Shwe Mya. He thought it not improbable that Ma Shwe I may have intended to have adopted Maung Tun Pe after she became a widow, but, having regard to the fact that there was already one adopted son, he thought that more proof than that supplied would be necessary to establish a subsequent adoption by the widow.

Their Lordships have been informed by counsel for Maung Thwe that he does not contend that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son.

After consideration of the evidence, they have no doubt that, at the death of the widow, Maung Tun Pe was also an adopted son. It would be difficult to fix a date when this adoption began, or to say with certainty, whether it was the act of the couple or of the widow only. The stronger evidence for it is to be found in what happened after the adoptive father's death. This might point to a subsequent adoption, but it would also be consistent with a previous adoption, the evidence for which it has not been so easy to procure.

Upon the whole their Lordships come to the conclusion that both of the claimants were adopted heirs. This being so, either in turn has asked for too much, and each should bear his own costs of the litigation.

Their Lordships will therefore humbly advise His Majesty that the decree of the Chief Court should be reversed, that it should be declared that Maung Thwe and Maung Tun Pe were heirs to the estate of U Shwe Mya and Ma Shwe I as their kittima sons, and that the case should be remitted to the district court with this declaration, and that there be no costs in either of the courts below or of this appeal.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL APPEAL No. 308 OF 1915.

NGA PO NYUN DEFENDANT. APPELLANT.

vs.

MA YIN PLAINTIFF. RESPONDENT.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Chatterjee.

For respondent—Mr. Bannerjee.

27th October, 1916.

Transfer of Property Act (IV of 1882) ss. 60 and 98.—Right to redeem—Anomalous mortgages.—Ten.lev before due date.

The insertion of a forfeiture clause in a mortgage does not make it an anomalous mortgage, but the clause is of no effect.

Anomalous mortgages like all other mortgages are subject to the provisions of section 60 of the Transfer of Property Act as to the mortgagor's right to redeem, which cannot be extinguished except by an order of court, or act of parties subsequent to the mortgage.

A tender of mortgage-money before it has become payable is of no effect.

JUDGMENT.

McCOLL, A. J. C.—The plaintiff-respondent sued to redeem a house and ground which she had mortgaged to the defendant-appellant for Rs. 50/-. The latter pleaded that a clause in the mortgage-deed gave him the right to obtain a mutation of names in the Town Lots Office if the mortgage-money and interest were not paid within five months, that he had done so and the property had become his. The plaintiff-respondent alleged that she had made one tender to the defendant-appellant's wife and one to his advocate and that the money had not been accepted. The defendant-appellant denied both tenders.

The learned district judge held that the contract could not execute itself and that plaintiff-respondent was entitled to redeem. He found that the plaintiff-respondent had tendered the money due to the defendant-appellant's wife four months after the execution of the mortgage-deed and held that defendant-appellant was not entitled to interest after that date. He gave plaintiff-respondent a decree, permitting her to redeem the property for Rs. 51/-, erroneously calculating the interest at the rate of 6 per cent per annum.

It is now contended that the mortgage was an anomalous one, that the parties are therefore bound by its terms, and that in accordance with one of them the property had become the defendant-appellant's. This condition runs as follows:—"When five months have elapsed if the principal and interest be not paid and the property redeemed, let the creditor go with this mortgage-bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely." *Nga Kyaw vs. Nga Yu Nut* (1) was a very similar case. It was there held that such a contract was not intended to execute itself and that a further transaction was necessary before the land could become the property of the mortgagees. But it is contended that the language used in the document in that case differs from that used in the present case and that it was because of the words "if we fail to redeem, we will make over outright" that it was held that a further transaction was necessary, whereas in the present case nothing remained to be done by the mortgagor. I am unable to accept this view.

I think it is clear that section 98, Transfer of Property Act must be read subject to section 60. It is one of the last sections in Chapter

(1) U. B. R. (1907-09), II Mortgage 1.

IV, in which the rights and liabilities of the parties to the different kinds of mortgages described in section 58 are laid down, and enacts that when a mortgage does not come within the definitions of those mortgages and is not a combination of the first and third, kinds or of the second and third, then the right and liabilities of the parties must be determined by the contract itself. This does not, in my opinion, take anomalous mortgages out of the operation of section 60, which occurs at the beginning of the chapter and is clearly meant to apply to all mortgages. The following passage from Gour's Law of Transfer in British India, 3rd Edition, page 729, is illuminating. "In the Civil Law the debtor was allowed to redeem the estate on payment of his debt at any time before the sentence passed, and this right he exercised in spite of a covenant to the contrary expressly made in the deed. The Civil Law always looked at the substance of the transaction, and argued that since by mortgage the property is conveyed by way of security for the loan, the creditor was not entitled to the property, if the debtor could otherwise pay off his debt."

"But this view was foreign to the English Common Law, which rigidly enforced the covenant for forfeiture on breach of the condition. Following, however, the principles of the Civil Law, the courts of Equity readily recognized the severity of literally enforcing mortgage contracts. But while the debtors had the power to strike at the rigour of the law, the Courts of Equity in England possessed no such powers. On the other hand, they professed to follow the law whilst mitigating its evils, and so in England while holding that on breach of the condition the mortgagee had the legal estate, still as it was unreasonable that he should retain for his own benefit what was intended as a mere security, they allowed the mortgagor to redeem on payment of the mortgage-money and costs, notwithstanding the forfeiture at law. And this right which was the creature of equity and the object of its solicitude came to be designated the equity of redemption. Indeed to the judges of Common Law, it was an innovation which they struggled hard to oppose, but the court of equity justified its intervention on the ground that the clause as to forfeiture was in the nature of a penalty which should be relieved against."

I think there can be no doubt that the legislature deliberately embodied this equitable principle in section 60, Transfer of Property Act, and as it is an equitable principle, courts of equity are bound to follow it even where the Transfer of Property Act is not in force. The principle is that, however the mortgage-bond be worded, the right to redeem cannot be extinguished except by an order of the court or an act of the parties, i. e., an act subsequent to the mortgage. In *Bapuji Apaji vs. Senavaraji* (2) it was explained that the rule "once a mortgage always a mortgage" means that an estate could not at one time be a mortgage and at another time cease to be so by one and the same deed. In *Kanaran vs. Kuttoly* (3) it was held that a stipulation in a mortgage that if the mortgage money were not paid on the

(2) 2 B. 231.

(4) 27 B. 297.

(3) 21 M. 110.

due date the mortgagor would sell the property to the mortgagee at a price to be fixed by an umpire, was unenforceable as constituting a fetter on the equity of redemption. In *Kanhayalal vs. Narhar* (4) Chandavarkar, J., said:—"The law is well established that though once a mortgage is always a mortgage and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee," but though the district judge had held that there had been a subsequent transaction, which the parties had for years treated as a sale, it was held that the right to redeem had not been extinguished because the parties had acted under the mistaken belief that the forfeiture clause was enforceable and their conduct had not been the consequence of a transaction independent of the mortgage. Several other rulings could be cited to the same effect. It is obvious, therefore, that if a forfeiture clause turned a simple mortgage into an anomalous one, it would still be subject to the equitable rule contained in section 60, Transfer of Property Act; but I am of opinion that the mere insertion of a forfeiture clause in a mortgage-bond does not make the mortgage anomalous, the forfeiture clause is merely of no effect. The plaintiff-respondent is, therefore, entitled to redeem.

The learned district judge held that the defendant-appellant was entitled to interest for four months only because the plaintiff-respondent at the end of that time had tendered payment to defendant-appellant's wife. Apart from the question whether she could be considered her husband's agent—they are Ponnas—the tender if made, could have no effect because the bond provided for a mortgage to last five months and so the money had not yet become payable.

The plaintiff-respondent also alleged a tender to defendant-appellant's advocate two months before the institution of the suit. There is one witness on her side who deposes to this tender, but the advocate, called as a witness by defendant-appellant, denied it and stated that the plaintiff-respondent had asked for time. There is nothing to show which of the two spoke the truth, and I must decide that the tender is not proved.

The interest due up to the institution of the suit is Rs. 39-6-4. The plaintiff-respondent could have saved further interest by depositing the redemption money in court. As she did not do so she will pay interest at the rate of twelve per cent per annum from the institution of the suit to the date of payment. The decree of the district court is modified accordingly. There will be no order as to the costs of this appeal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 101 OF 1916.

O. R. M. RAMASWAMY CHETTY APPELLANT.

vs.

MA U THA RESPONDENT.

Before Mr. Justice Ormond.

For appellant—Mr. Naidu.

31st August, 1916.

Civil Procedure Code (Act V of 1908) O. XXI, R. 90. Setting aside a sale—Notice to judgment debtor.

Failure to give notice to judgment-debtor of the sale of his property is an illegality, and renders the sale by the court void.

Ramessuri vs. Doorga 6 C. 103 followed.

JUDGMENT.

ORMOND, J.—The respondent sued on the 16th August, 1911, to set aside a court sale made on the 3rd March, 1910. She has been successful in the lower courts, both of which found that the appellant had kept the knowledge of the sale from the respondent by fraud. The appellant was an assignee of a mortgage decree for Rs. 3,800|-, plus costs, against the respondent and her husband. Appellant's name was put on the record as decree-holder before the 2nd September, 1909, on which date the warrant of attachment issued. On the 3rd November, 1909, all parties were either present or represented by pleaders, and it was agreed that the sum of Rs. 87-1-6 was due to the appellant. On the 10th of January, 1910, pleaders of both parties being present, execution was granted as prayed for. On the 21st of January, 1910, an order was made for the sale of this property on the 3rd of March, 1910; the respondent was not represented. No notice was even issued by the court to the respondent as to the date of the sale. The appellant and the process-server both state that the proclamation of sale was posted on respondent's house in the presence of certain witnesses. Two of those witnesses, whom both courts have believed, have stated that that was not so, namely, that no proclamation was ever posted up in respondent's house in their presence. Both courts have found that the respondent did not know of the sale until she learnt it from a pleader subsequently. It is contended that though the respondent did not receive a notice or that no notice issued, it was not the fault of the appellant; and that no fraud can be imputed to the appellant whereby he prevented the respondent from knowing of this sale.

I am not disposed to interfere with the concurrent findings of both the lower courts, the fact that the property was bought by the appellant for Rs. 1,000|- whereas according to the price realised by the other half which had been previously sold by court, the price should

have been over Rs. 3,000, and the fact that the appellant tries but fails to prove the posting of the proclamation of sale, would go to warrant the finding that the appellant was guilty of fraud and intentionally kept the knowledge of this sale from the respondent. But even if the appellant is not guilty of fraud, a court sale without any notice having been issued by the court renders that court sale void: it is more than an irregularity: see the case of Ramessuri Dassee *vs.* Doorga Dass Chatterjee (1). The appeal is, therefore, dismissed.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL REVISION No. 162 OF 1915.

NGA SAN BALU and another APPLICANTS.

vs.

MI THAIK and another RESPONDENTS.

Before H. E. McColl, Esq., A. J. C.

For applicant—Mr. Mukerjee.

For respondents—Mr. Pillay.

2nd October, 1916.

*Civil Procedure Code (Act V of 1908) O. XXI, Rules 52, 58, 60 and 61.
Property in custody of court—Investigation of claims—Unnecessary delay.*

Under O. XXI rule 52 the court which has custody of the property, and not the court which ordered the attachment is the proper court to make the investigation.

A court may under O. XXI, r. 58 refuse to make an investigation if the application has been designedly delayed, but once it has made an investigation it is bound to pass an order on the merits under r. 60 or r. 61.

JUDGMENT.

MR. McCOLL, A. J. C.—The township judge, after holding an investigation under Order XXI, rule 58, and reviewing the evidence dismissed the application without coming to any finding, on the ground that it had been made too late.

Considering the circumstances of the case it certainly could not be said that the application had been designedly delayed and I should feel inclined to construe the word “unnecessarily” in the proviso to Order XXI, rule 58 (1) in a generous way. Be that as it may, if the township judge had only read the proviso, he would have seen

(1) 6 C. 103.

that it did not apply because the investigation had already been made. If a judge is of opinion that an application under Order XXI, rule 58 (1), has been designedly or unnecessarily delayed he may refuse an investigation, but if he makes an investigation he is bound to pass orders under Order XXI, rule 60, or under Order XXI, rule 61, Code of Civil Procedure, and the dismissal of the application on the ground of delay after the investigation had been made was illegal.

On behalf of the respondent it has been suggested that the investigation should have been made by the subdivisional court but it is clear from Order XXI, rule 52, that it is the court which has custody of the property and not the attaching court that has to make the investigation.

The order of the township court is set aside and the application is remanded to the court in order that it may be disposed of according to law. There will be no order as to costs, as the respondent was not responsible for the mistake made.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL SECOND APPEAL No. 307 OF 1915.

SONILAL PLAINTIFF. APPELLANT.

vs.

DELAWAR DEFENDANT. RESPONDENT.

Before H. L. Saunders, Esq., J. C.

For appellant—Messrs. Chatterjee and Vakil.

For respondent—Mr. Lutter.

23rd October, 1916.

Upper Burma Land and Revenue Regulation (III of 1889) ss. 23, 24 and 53 (2) (II)—Claims to ownership or possession of State Lands—Jurisdiction.

Section 53 (2) of the Upper Burma Land and Revenue Regulation bars the jurisdiction of civil courts over claims to the ownership or possession of State Lands only in respect of such matters as the local government or a revenue officer is empowered under the regulation to dispose of.

Semle. The claims referred to in section 53 (2) are claims against the state.

The Regulation does not empower revenue officers to dispose of claims between private persons to the ownership or possession of State Lands for more than a year after the date of the declaration by the collector that the land is Satta Land and consequently civil courts can take cognisance of such claims.

JUDGMENT.

SAUNDERS, J. C.—The plaintiff-appellant sued the defendant-respondent in the township court and prayed for a mortgage-decree. The judge gave him a money decree and he then appealed to the district court, which gave him a mortgage decree as prayed for. The plaintiff then applied to execute this decree by sale of the mortgaged properties, which included 4.83 acres of land. The judge's order is by no means clear, but it appears that the judgment-debtor had ceased to occupy the 4.83 acres which had been mortgaged: he would seem to have been in occupation of 1.79 acres of the area under a license from the deputy commissioner, and another area of 1.79 acres had been assigned to one Maung Po So by the deputy commissioner, and in each case the land was held under a license issued in accordance with the rules under the Upper Burma Land and Revenue Regulation. It would appear that the order cancelling the original license of the judgment-debtor and ordering the issue of two licenses for 1.79 acres each was passed on the 5th May, 1914, more than a month before the date of the decree which the decree-holder was seeking to execute. The township judge apparently refused to execute the decree against the land, and the decree-holder thereupon appealed to the district judge who directed as to the area of 1.79 acres only, standing in the name of the judgment-debtor that the township court should allow the judgment-debtor's interest in the land to be sold for the benefit of the decree-holder. Against this order the decree-holder now comes to this court in appeal, on the ground that the district court erred in holding that 1.79 acres of land should be excluded from the execution of the appellant's decree.

In the course of the argument it appeared that the land in question was State land. It has been held in Upper Burma that the jurisdiction of the civil courts is barred in respect of claims to the ownership or possession of State land by the provisions of section 53 of the Upper Land and Revenue Regulation. The validity of that section was called in question recently in two cases of this court, Civil Second Appeal No. 195 of 1913, and Civil Second Appeal No. 372 of 1913, in which the additional judge held that section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation is not validly enacted, and the civil courts have power to try suits between private individuals for the possession of State land.

The learned advocate for the appellant has maintained this view in the present appeal, and as the question of jurisdiction went to the root of the matter, notice was given to the local government as representing the secretary of state and Mr. Lutter has been heard on behalf of the secretary of state in support of the validity of this section of the Act.

The view that section 52 (2) (ii) of the Land and Revenue Regulation bars the jurisdiction of the civil courts appears to have been first put forward in the case *Maung Tha Aung vs. Maung San Ke* (1).

(1) U. B. R. 1897-01, II 207.

This decision was followed in *Maung Nat vs. Ma Mi* (2) and in *Maung Ke vs. Maung Po Hmi* (3).

Before considering whether the section in question was validly enacted or not, it appears necessary to consider whether the rule laid down in those judgments was correct, since if the jurisdiction of the civil courts is not expressly or impliedly barred, there can be no doubt that under section 9 of the Code of Civil Procedure the court may take cognizance of and try all suits of a civil nature relating to State land. The material portion of the judgment in *Maung Tha Aung vs. Maung San Ke* (1) was as follows:—"Now in section 53 (2) of the Land and Revenue Regulation it is laid down that a civil court shall not exercise jurisdiction over any of the following matters, which shall be cognizable exclusively by Revenue Officers, namely.....(ii) any claim to the ownership or possession of any State land..... Consequently this suit is barred in the civil courts." Now it appears to me that a reference to the Regulation in question does not justify this view, and it could only be arrived at by taking a portion of the section in question out of its context and applying it as a general and absolute rule. Section 53 runs as follows:—Except as otherwise provided by this Regulation (1) a civil court shall not have jurisdiction in any matter which the Local Government or any Revenue Officer is empowered by or under this Regulation to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under this Regulation; and in particular..... (2) A civil court shall not exercise jurisdiction over any of the following matters which shall be cognizable exclusively by Revenue Officers, namely," and then follow fourteen clauses of which one was cancelled by Regulation 4 of 1896. The second of these clauses is that quoted above. The clause in full runs as follows:—"Any claim to the ownership or possession of State land, or to held such land free of land revenue or at a favourable rate of land revenue, or to establish any lien upon or other interest in such land or the rents, profits, or producē thereof." It is clearly, therefore, necessary to interpret this clause in relation to the general rule laid down in the sub-section (1) of section 53, of which it forms a particular instance. It is not a rule which bars the jurisdiction of a civil court over claims to the ownership or possession of any State land except in such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. And the question, therefore arises, whether the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of any claims to the ownerships or possession of any State land.

The second rule laid down in section 53, sub-section (1) barring the cognizance by the civil courts of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under the Regulation does not apparently apply in the present case, but it is clear that it does not bar or purport to bar the

(2) U. B. R. 1897-01, II 209.

(3) U. B. R. 1897-01, II 211.

cognizance by civil courts of the manner in which the Local Government or Revenue Officer exercises its or his powers, except so far as those powers are vested in it or him by or under the Regulation.

For the purposes of the present appeal the only part of the Regulation with which we are concerned is that part contained in Chapter III which relates to State land. Section 23 contains a definition of State land. Section 24 (1) lays down that "any land.....declared by the collector to be State land shall be deemed to be such land until the contrary is proved." The only reference to claims to the ownership or possession of State land is contained in sub-sections (2), (3) and (4) of section 24. Sub-section (2) lays down that "a claim to the ownership or possession of any land with respect to which such a declaration" (as has been referred to in sub-section 1) "has been or may be so made, or to hold such land free of land revenue or at a favourable rate of land revenue, or to establish a lien upon or other interest in such land or the rents, profits or produce there-of shall be cognizable by the collector only." From the words of this sub-section, it would appear probable that the claims referred to are claims against the State, but, whether this is so or not, the following sub-section, which lays down that the period of limitation for a claim under the last preceding sub-section shall be one year from the date of the declaration made by the collector, makes it quite clear that the provisions of this section do not apply to claims made more than one year after the date of the declaration. There is no suggestion that in the present case that the claim of the appellants falls within this period of limitation, and there must in fact be very little land in Upper Burma in respect of which a declaration under the provisions of section 24 (1) of the Regulation was not made very much more than a year ago. Sub-section (4) merely empowers the collector to withdraw a declaration made under sub-section (1) before the passing of an order or any claim preferred under sub-section (2). Section 25 of the Regulation lays down some of the incidents of the tenure of State land. There is nothing in this section from which it can be held or inferred that the jurisdiction of the civil courts is barred in the case of a claim to the ownership or possession of State land. Section 26 gives power to the Financial Commissioner to make rules in respect of State land which is waste, and sub-section (4) of section 26 lays down that no person shall acquire by length of possession or otherwise any interest in land disposed of, occupied or allotted in pursuance of the rules made by the Financial Commissioner under clause (1) beyond such interest as is conferred by the rules.

The rules framed by the Financial Commissioner do not appear anywhere to lay down that the jurisdiction of a civil court is barred in case of claims to State land. Financial Commissioner's Notification No. 8, dated the 8th July, 1889, directs that claims as against the State to the ownership or possession of any land with respect to which a declaration that it is State land has been made or may be made, shall be tried by collectors only and that claims between private individuals to the occupation or possession of State land shall be tried by a collector or by an assistant collector of the first or second

class. But this notification does not purport to do more than define the class of revenue officers by which claims of different descriptions shall be tried, and neither from the notification nor from the rules or directions framed under the act is it possible to infer that any such monopoly of the trials of claims to State land as is apparently recognized in the published rulings of this court quoted above, is either claimed or suggested.

If there were any doubt as to whether the thirteen or fourteen clauses included in sub-section (2) of section 53, Land and Revenue Regulation, were intended to lay down an absolute rule without reference to sub-section (1), I think it would be laid at rest by a reference to some of the other clauses. For instance clause (ix) purports to bar the jurisdiction of a civil court over any claim connected with or arising out of any right in an irrigation work or any charge in respect of any land irrigated from such a work or any matter which the collector is bound to ascertain and record under section 36.

Section 36 of the Regulation has been repealed and the Regulation now contains no provisions relating to irrigation work which are dealt with in the Burma Canals Act, II of 1905.

Similarly clause (x) bars the jurisdiction of a civil court in respect of any claim to a right to fish, or connected with or arising out of the demarcation or disposal of any fishery. The regulation now contains no provisions relating to fisheries, section 32 having been repealed by the extension of the Burma Fisheries Act (1905) to Upper Burma. The view that these two clauses depended on, and were restricted to, the other provisions of the Regulation and did not lay down a general rule of law irrespective of those provisions, appears to be the view which has also been taken by the Local Government, since in the foot-notes appended to those clauses at page 27 of the Upper Burma Land and Revenue Manual which is published under the authority of Government, it is pointed out that clause (ix) should apparently have been repealed by Burma Act II of 1905, and that clause (x) ceased to apply since the extension of Burma Fisheries Act, 1905, to Upper Burma.

I think, therefore, there can be no doubt that clause (ii) to sub-section (2) of section 53 of the Upper Burma Land and Revenue Regulation neither bars nor purports to bar the jurisdiction of civil courts except in respect of such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of, and inasmuch as the Regulation does not empower Revenue Officers to dispose of claims to the ownership or possession of any State land more than one year after the date of the declaration by the collector that the land is State land, and does not give any authority to the Financial Commissioner to make rules for deciding such claims, I am of opinion that the jurisdiction of the civil courts is not barred and that they are entitled and bound to take cognizance of such claims.

I have already stated that the terms of the Financial Commissioner's Notification No. 8 of 1889 do not appear to be intended to em-

power Revenue Officers to dispose of claims between private individuals and there does not seem to be any rule giving them such powers. If, however, there is any such rule or if it was the intention of the notification to confer the power upon Revenue Officer of deciding claims between private individuals to the occupation or possession of State land, I think it is clear that, except in so far as such notification or rule is issued or framed under the authority of, and in conformity with, section 24, sub-section (2), or section 26 or otherwise to effect the purposes of the Regulation, it cannot have the effect of barring the jurisdiction of a civil court since it is not made or issued by or under the Regulation. I am unable to find that the Regulation anywhere empowers revenue officers to decide claims to occupy or possess State land between private persons except within one year of a declaration that the land is State, or gives any power to make rules by which revenue officers may be so empowered.

In this view of the case it is not necessary to consider whether section 53 of the Regulation was validly enacted or not. But I do not think it is possible to pass over in silence two of the arguments used by the additional judge of this court in arriving at the conclusion that the section was not validly enacted.

It is apparently urged that the word "allegiance" which occurs in section 22 of the Indian Councils Act of 1861, is used in the sense of devotion or loyalty, and it is apparently argued that as the allegiance, in the sense of devotion or loyalty of the person may depend upon the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, any law which may be held to affect those unwritten laws or that constitution must be illegal, since the allegiance, in the sense of devotion or loyalty of any person to the Crown may depend upon such a law. I am of opinion that the word "allegiance" used in section 22, India Councils Act, is used in the ordinary legal sense of a duty or obligation of loyalty owed by a subject to his Sovereign. This is the sense in which the word is used in Chapter X of the first Book of Blackstone's Commentaries, and I have no doubt that the object of the section was to lay down in the words of a learned writer that "the Council may not pass a law affecting the authority of Parliament or any part of the unwritten law or constitution of the United Kingdom dealing with the allegiance or the sovereignty or the dominion of the Crown over any part of British India." (Professor A. Berredale Keith, *The Journal of the Society of Comparative Legislation*, Volume XXXVI, page 211.)

Nor can I agree with the argument that whereas the section might be validly enacted in respect of the natives of the country, it is invalid in respect of Englishmen and, is, therefore, entirely invalid. The suggestion that whereas the allegiance of an Englishman might depend upon his right to have recourse in all cases to the ordinary tribunals, whereas in the case of a Burman it would not so depend, appears to me to be merely an instance of the difficulties into which the courts would be landed if they attempted to give the meaning to allegiance attributed to it by the additional judge and is entirely opposed to the general spirit of legislation in this country.

Since the jurisdiction of the civil courts is not barred, the appeal will now be heard upon the merits.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

BALAKRISHNA UDAYAR APPELLANT.

vs.

VASUDEVA AIYAR RESPONDENT.

Before Viscount Haldane, Lord Atkinson. Sir John Edge and
Mr. Ameer Ali.

For appellant—Mr. DeGruyther, K. C. and Mr. Sproute.

For respondent—Sir Erle Richards, K. C. and Mr. K. Brown.

21st May, 1917.

Religious Endowments Act (XX of 1863) s. 10.—Appointment of member of committee—Judicial Act—Civil Procedure Code (Act V of 1898) s. 115.—High Court's powers of revision—Case.

Under section 10 of the Religious Endowments Act, a civil court can direct the members of the committee appointed under the act to fill up a vacancy in their number, or may fill up the vacancy itself. It cannot direct the committee to hold an election.

An order under section 10 of the act is a judicial act not an administrative order passed by the judge as *a persona designata*.

Section 115 of the code of civil procedure applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

The word "case" in section 115 of the code includes an ex-parte application.

JUDGMENT.

LORD ATKINSON.—This is an appeal from a judgment and order of the High Court of Madras dated the 23rd September, 1913, setting aside an order of the district judge of Tanjore dated the 19th July, 1913, by which the appellant was appointed a life member of the Devasthanam (Temple) Committee of Negapatam. This order of the district judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by section 10 of Act XX of 1863, the Bengal and Madras Native Religious Endowment Act.

That section runs as follows:—

"Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the local government and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the civil court, on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the civil court may appoint a member to fill the said vacancy."

By the second section the words "Civil Court" and "Court" are defined to mean "the principal court of original civil jurisdiction in the district in which the mosque, temple, or religious establishment is situate relating to which or to the endowment whereof any suit shall be instituted or application made under the provisions of this Act." It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different courts may in relation to it and its affairs be civil courts within the meaning of the definition. Moreover, it is to the civil courts and not to an individual judge who may preside in, or constitute the civil court that jurisdiction is given.

A vacancy occurred in the abovementioned committee by the death on the 3rd May, 1912, of the Honourable Dewan Bahadur R. Raghunatha Rao, C. S. I. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June, 1912, directed their managing member to request the then district judge of Tanjore, Mr. A. F. G. Moscardi, to nominate, in exercise of the powers conferred upon him by the abovementioned section, a person to serve upon the committee. That request was duly made by the managing member by letter addressed to the district judge on the 16th July, following. The district judge having considered this letter, made an order on the 1st October 1912, requesting the managing member to report "if there was any reason why the court should not order that the vacancy should be filled up by the election, as provided in section 10 of the Act." It is clear from this letter that the district judge considered he had under the statute jurisdiction to order the committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently made upon the 6th January, 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October, 1912, the managing member replied to the district judge's communication of the 1st October, 1912, forwarding a copy of a resolution passed by the committee in the previous June

to the effect that they would not hold an election, and renewing the request to the judge to nominate a member. On the 2nd January, 1913, the present respondent, in the character of a person interested, filed a petition in the district court praying the court to fill up the vacancy in the committee by nomination, on the ground that the list of voters was stale, and that delay would occur in preparing a new list. The same district judge, Mr. Moscardi, made on this petition the order already referred to of the 6th January, 1913. On the face of the order it is set forth that it was argued "that the intention of the legislature in section 10 of the Act was clearly that such vacancies should be filled by the committee by election, and only in the last resort by the court." It is also pointed out that "the committee had a voters' list down up so recently as 1909; that there was no reason why an election should not be held in this case. . . . and no reason was argued why the provisions of section 10 of the Act should not govern this case." The last paragraph of the order runs thus: "It is clear to me that it is the duty of the committee to fill up the vacancy by election, and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the committee are to fill up the vacancy, whether by election or by nomination or co-option. The members of the committee, however owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th March, 1913, they accordingly did. The appellant was the only candidate; 1745 votes were recorded for him. The committee thereupon declared him duly elected, and reported the result to the district court.

About this time a new judge, Mr. C. G. Spencer, was appointed to the district of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the district court one bearing date the 23rd June, 1913, by the present appellant, praying that he might be permitted to perform his duties; one of the same date by the present respondent alleging that the election was void, and praying that the court might, by its own nomination, fill the vacancy; and two bearing the respective dates of the 17th May, 1913, and 18th July, 1913, by one Dakshina Moorthi Pillai, praying that the election might be declared void for several reasons including amongst others the alleged defective nature of the voters' lists.

On the 19th July, 1913, the district judge Mr. C. G. Spencer, dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the committee, on the ground that upon the true construction of the 10th section of the aforesaid Act of 1863, the words, "or may order that the vacancy be forthwith filled up by the remaining members of the committee" must be taken to mean by

implication "filled up by the members of the committee by election," since that is the mode prescribed in the earlier portion of the section of filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. Moscardi of the 6th January, 1913, was in effect an order directing the committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August, 1913, presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and temple committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the district court did not on the legal construction of the statute in such a matter as that dealt with in section 10 of Act XX of 1863 lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the district court had no jurisdiction whatever to order the remaining members of the committee (as it was taken it had ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the district judge, Mr. Spencer, dated the 19th July, 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the district court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the civil court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, and there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the district court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the court was a member of the

committee. The words of the statute are "And whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy." If the election be valid and regular, the person elected becomes a member of the committee without any consent or approval being given by the district court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the statute—a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their Lordships, as to the true position of the civil court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a committee appointed under section 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by the order of the civil court. Surely in such a question as the motion of an officer from his office for misconduct or unfitness, the court which makes the order removing him is exercising judicial functions. Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice or affording him an opportunity of defending himself, would clearly be voidable or void.

Again under section 14, any person may sue in this civil court the manager or superintendent of the mosque or the members of this very committee for breach of trust or misfeasance. And the court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him, or might remove him from office. Under section 16 the court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the civil court exercises its powers as a court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July, 1913, was passed did not constitute a "case" within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word "case." It cannot in their Lordships' view be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the court. It must they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code.

The case of *Meenakshi Naidoo vs. Subramaniya Sastri* (1) decided by this Board, is wholly different from the present. There the dis-

(1) 14 I. A. 160, S. C. 11 M. 26.

strict judge had, under this section 10 by his order appointed the appellant to fill a vacancy in the temple committee. An appeal was taken from this order, on the ground of the appellant's unfitness for the post by reason of his religious belief. The question of the jurisdiction of the civil court to make the order was not raised. It was not pretended that a right of the appeal—which, if given at all, must be given by statute—was given by Act XX of 1863; but it was contended that it was given by the 540th section of Act X of 1877, which gives a general right of appeal from decrees of courts exercising original jurisdiction. The definition of the word "decree" given in this Act is modified by Act XII of 1879, and, as modified, runs as follows:—"Decree" means a formal expression of an adjudication upon any right, claim, or defence set up in a civil court where such adjudication decides the suit or the appeal."

It is obvious that an order made by the civil court on an application which may be made by "any person whatever," appointing a particular man to fill a vacancy on a committee, is not a "decree" within the meaning of this definition. The Board on that occasion, carefully abstained from expressing any opinion upon the question whether proceeding somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst members of a committee occurs the statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a mandamus, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after the date: but the order of the court requiring the remaining members of the committee to forthwith fill up the vacancy may not be made till long after this period of three months has lapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them, he according to the statute, "shall be a member of the committee to fill the vacancy." If in such a case the vacancy can properly be said

to be filled up by anybody, it is by the electors rather than by the remaining members of the committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors or other persons, and it would appear to their Lordships it must be an act kindred in character to that which the court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if this construction of the section be adopted it would enable the remaining members of the committee, by their own default, practically to disfranchise the electors and at the discretion of the court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the statute, it might furnish a powerful argument for its amendment; but the function of this Board is to declare the law, not to alter it, and the argument cannot therefore here avail. In addition it is to be remembered that where the civil court appoints, the electors are by and through the same default of the same members of the committee equally disfranchised, yet that is expressly authorised by the statute. The court must be trusted not to confer upon these members by its order the power to appoint where the nature and circumstances of their default show that they are unworthy of being trusted with the privilege of appointing a member. Their Lordships are for these reasons of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they humbly advise His Majesty accordingly.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF
CENTRAL PROVINCES.

DAL SINGH APPELLANT.

vs.

KING-EMPEROR RESPONDENT

Before Viscount Haldane, Lord Atkinson, Lord Shaw, Lord Parmoor
and Mr. Amir Ali.

For appellant—Mr. DeGruyther, K. C. and Mr. Parikh.

For respondent—Sir Erle Richards, K. C. and Sir W. Garth.

8th March, 1917.

Criminal Procedure Code (Act V of 1908) s. 172. Police diary—Admissibility in evidence.—Appeal to Privy Council in criminal cases.

A diary prepared under section 172 of the criminal procedure code can be used to assist the court in elucidating points which need clearing up, but not as containing entries which can by themselves be taken

to be evidence of any date, fact, or statement contained in it. The police who made the entry may be confronted with it, but not any other witnesses.

The testimony of a witness cannot be tested by a reference to the earlier statements made by him to the police, and entered in the police diary. An entry in the diary cannot be used for the purpose of discrediting a witness.

Queen-Empress *vs.* Mannu 19 A. 390 approved.

The Judicial Committee of the Privy Council is not a court of review in criminal cases, and will interfere only where there has been such disregard of the proper forms of legal process, or violation of principle as amounts to a denial of justice.

JUDGMENT.

VISCOUNT HALDANE.—In this case the appellant was convicted of murder by the Sessions Court of Jabulpore, and was sentenced to death. The court of the Judicial Commissioner of the Central Provinces heard the appeal and dismissed it, and confirmed the sentence under the provisions of the Indian Code of Criminal Procedure.

A petition for leave to appeal was presented to the King in Council. It was argued before this Board in support of the petition that the judgments in the courts in India had been vitiated by an illegal and prejudicial use of the police diaries in the case, and that the credibility of the witnesses had been thereby wrongly estimated. What had taken place, it was alleged had led to such a miscarriage of justice as to bring the conviction within the exceptional class of cases in which His Majesty in Council will review the proceedings in a criminal trial in India.

It is well settled that the unwritten principles of the constitution of the empire restrain the Judicial Committee from being used in general as a court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. Their Lordships have now heard full arguments in the case before them, and have examined the procedure and evidence with some minuteness.

Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The constitution of the empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted court of

criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do this Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the court below.

* * * * *

Their Lordships have scrutinised the evidence in order to see whether any miscarriage of justice of the exceptional kind already defined has taken place. So far from finding any such miscarriage in the proceedings at the trial, they see no reason for differing from the conclusions come to by the presiding judge, or from the reasons given by him in weighing the credibility of the witnesses. They have formed the same impression as he did of the probabilities of the two stories, as well as of the effect of the medical evidence. Had the decision been given solely on the testimony of the witnesses called at the trial and such documents as were plainly admissible, the proceedings would have given rise to no question of substance. The learned judge who tried the case gave his judgment to so large an extent on proper materials that, even if, here and there, he alludes to documents which were not properly in evidence, he has in no case done so in such a fashion as to imperil the conclusion at which he arrived, tested by the standard of substantial justice.

But in the court of appeal further material was brought under consideration, and it is in this connection that more difficult questions have been raised. The court of appeal might, in their Lordships' opinion, have properly dismissed the appeal on the simple ground that an examination of the evidence on the record disclosed no reason to differ from the finding of the judge who tried the case. But they were not content to confine themselves to this safe ground, for although they expressed substantial agreement with the reasons he gave, they went on to take into consideration the police diary made during the preparation of the case and antecedently to the trial. The question which has now to be considered is whether the appearance of this feature in the judgment of the court of appeal vitiates the judgment and confirmation required by the Criminal Procedure Code.

Under section 172 of the Code every police officer making an investigation is to enter his proceedings in a diary, and any criminal court may send for the police diaries of the case under enquiry or trial in such court and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Such a diary was kept in the present case, and the judge who tried it had the diary before him. Under Part VII of the Code an appeal is permitted, subject to certain restriction, and an appeal was brought to the court of the Judicial Commissioner in the present case and was heard by two judges. By section 374, when the court of Sessions passes sentence of death,

the proceedings are to be submitted to the High Court (in this instance the Court of the Judicial Commissioner), and the sentence is not to be executed unless it is confirmed by the High Court. On the 19th April, 1916, the sentence on Dal Singh was confirmed by the Court of Judicial Commissioner "for the reasons given in our judgment of this date" on the appeal.

Had the court of appeal simply taken the same course as the sessions judge and affirmed his judgment on the evidence on the record, it is evident that the conviction would not have been reviewed by this Board. For as their Lordships have already stated, there was adequate and proper evidence upon which that judge could and did convict. The judges in the court of appeal considered this evidence, and did not differ on any material point from the view he took of it. But, apparently with the view of making their opinion still more conclusive, they went on, after examining the evidence of the witnesses and testing the credibility of these called for the defence by referring to the discrepancies in the testimony of the witnesses on which the trial judge had properly dwelt, to test the testimony still further by reading the earlier statements of these witnesses made to the police and entered in the police diary. In other words, they treated what was thus entered as evidence which could be used at all events for the purpose of discrediting these witnesses.

In their Lordships' opinion this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Procedure Code. To use the diary for the purpose they did was to contravene the rule laid down in *Queen Empress vs. Mannu* (1) where a full court pointed out that such a diary may be used to assist the court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. The police who made the entry may be confronted with it, but not any other witness.

The question which arises is, therefore, whether the improper use made of the entries by the court of appeal is a sufficient reason why the Judicial Committee should recommend interference with the judgment and sentence. In their Lordships' opinion it is not such a reason. They have already stated that they have no ground for doubting that the trial judge properly convicted and sentenced Dal Singh. He then had an appeal heard by the proper court, and the sentence was confirmed by that court. The conditions of the code as to jurisdiction have thus been complied with. The court of appeal had before it evidence on which it placed reliance, and on which it could properly have based its affirmation and confirmation of the conviction. It plainly went wrong in using the diary. Now it is true that error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of a constitutional or statutory right to be tried by a jury, or by some

(1) 19 A. 390.

particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if their Lordships thought the accused guilty, they would not hesitate to recommend the exercise of the prerogative, were such the case. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one whether substantial justice has been done, and, if substantial justice has been done, it is contrary to the general practice to advise the Sovereign to interfere with the result. The point in the present appeal is, therefore, whether, looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one.

In the result their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. There will, as hitherto has been usual in such cases, be no order as to costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 290 OF 1916.

HNIN YIN APPLICANT

vs.

THAN PE RESPONDENT

Before Mr. Justice Robinson.

For applicant—Mr. Maung Kin, Asst. Govt. Advocate.

For respondent—Mr. J. A. Maung Gyi.

3rd November, 1916.

Criminal Procedure Code (Act V of 1913) ss. 350 and 537 (1)—evidence of witnesses resummoned—illegality.

When a magistrate who has heard a part of the evidence in a trial is succeeded by another and the accused demands that the witnesses be resummoned, the court must recommence the trial, and rehear and record the evidence of the witnesses afresh.

Omission to do so is an illegality which cannot be cured under section 537.

JUDGMENT.

ROBINSON, J.—This case has been referred by the district magistrate. The evidence was heard and a charge framed and all but one witness for the defence were examined by Mg. Shin. He was then transferred and Mr. Page took up the case. The accused exercised

2nd November, 1916.

Criminal Procedure Code (Act V of 1898) ss. 107 and 144—Disturbing public tranquility by a wrongful act—s. 435—Revision at initial stage of order under s. 112.

Under section 107 of the Criminal Procedure Code a magistrate can take action against a person who is likely to commit a breach of the peace, or against a person who may be the indirect cause of a breach of the peace by doing a wrongful act.

The fact that the doing of a lawful act may lead to a breach of the peace authorises action against the persons likely to commit the breach not against persons doing the lawful act.

Feroze Ali *vs.* King-Emperor 12 C. W. N. 703 followed

If a breach of the peace is expected owing to illfeeling between persons likely to attend a meeting the magistrate should take action under section 144.

If the information before a magistrate does not justify an order under section 107 the High Court can interfere in revision to stop further proceedings.

Rajendra *vs.* King-Emperor 17 C. W. N. 238 referred to.

JUDGMENT.

SAUNDERS, J. C.—Certain residents of Mandalay made a report to the district superintendent of police which was forwarded to the district magistrate, who recorded the information given by three of their number and thereupon issued warrants for the arrest of two persons under section 107 of the Code of Criminal Procedure and then transferred the proceedings to the eastern sub-divisional magistrate for disposal.

Against this order the two persons arrested have come to this court in revision and the government prosecutor has been heard for the district magistrate. The persons who gave the information to the district magistrate were also cited, but they do not wish to be parties to the proceedings and they have not supported the order.

The information given in the first instance is in writing and it was accompanied by a printed notice and a copy of a newspaper. The notice is an invitation to a meeting "to clear up doubts." It stated that the sayadaws from the four quarters of Mandalay had been invited to give their decision on certain matters and all friends of the persons who issued the notice were invited to attend. The newspaper article stated that the sayadaws from the four quarters were to be entertained, and after that the question whether beef should or should not be eaten would be considered. The injunction by the Ledi Sayadaw and various other pongyis would be read, after which the opinion of the sayadaws would be asked for, and they would give their decisions. The written information stated that there would be a serious

dispute resulting in a breach of public peace, because when there is a difference among pongyis there will a difference among laymen. It stated that the notice and the newspaper article convening a meeting would encourage a great and serious dispute between half of the residents of Mandalay who revere the Ledi Sayadaw and the rest, and if the meeting is held the information states that there will, through ill-feeling on each side, be a serious quarrel. The information stated that a public meeting was to be held at which the two applicants intend to attack the Ledi Sayadaw's propaganda for putting a stop to the eating of beef, that a very large number of priests and laymen had been called by the two persons mentioned to attend the meeting, and unless they are placed on security their action would result in a breach of public (apparently a misprint for "peace.")

It is contended that this information did not justify the arrest of the two applicants and proceedings being taken against them under section 107 of the Code of Criminal Procedure. On the other hand, it is urged that the information did justify that action and this court should not interfere at this stage of the proceedings. I think there is no doubt that if the information did not justify the issue of a warrant, this court is entitled to interfere. It had been held constantly that it is the duty of the High Court to prevent the abuse of the provisions of the law. A recent case is that of *Rajendra Narayan Singh vs. Emperor*. (1)

Section 107 of the Code Criminal Procedure authorises a district magistrate to take action upon information that any person is likely to commit a breach of the peace, or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity.

It is clear that there are two distinct sets of circumstances in which a magistrate may take action under this section first, where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, e. g., by committing an assault, and, secondly, where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act, but in the latter case the magistrate may only take action where the act anticipated is a wrongful act. It has been laid down in a number of rulings that this section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is wrongful, and that the mere fact that the doing of a lawful act may lead to a breach of the peace, while it may authorise the magistrate to take action against the persons expected to commit that breach, does not authorise action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or disturb the public tranquillity. The distinction has been explained in *Feroze Ali Mullick vs. Emperor* (2), where certain persons proposed to take a procession along a public road and it was pointed out by Woodroffe, J., that

(1) 17 C. W. N. 238.

(2) 12 C. W. N. 703.

if those persons "have the right claimed, it is obvious that they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party." The law was similarly explained in *Mahomed Yakub vs. Queen-Empress* (3). The matter was discussed at great length in *Sundram Chetty vs. Queen-Empress* (4).

There can be no question that the right of public discussion is a right which every subject possesses, and that in convening a meeting to discuss religious matters the applicants in the present case were not doing a wrongful act. If owing to the prevalence of ill-feeling between certain persons likely to attend the meeting, or any other cause, a breach of the peace was expected the magistrate had ample power under section 144 of the Code of Criminal Procedure to secure that the peace was not broken. But I am clearly of opinion that in arresting the applicants in the present case and in ordering an enquiry into their conduct, the district magistrate was not, upon the information which was before him, justified by the provisions of the Code of Criminal Procedure. If information is or was available that the applicants themselves intended to commit a breach of the peace or to disturb the public tranquility, the fact should be or should have been recorded.

The proceedings of the district magistrate must be quashed and the warrants for the arrest of the applicants cancelled.

(3) 32 A. 571.

(4) 6 M. 203.

THE BURMA LAW TIMES.

Vol. XI.]

MARCH-APRIL, 1918.

[No. 3 and 4.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 157 OF 1917.

ARRACAN COMPANY, LIMITED APPELLANTS.

vs.

H. HAMADANEE & CO. RESPONDENTS.

Before Sir Daniel Twomey, C. J. and Mr. Justice Ormond.

For appellants—Mr. Lentaigne.

For respondents—Mr. N. M. Cowasji.

14th February, 1918.

Contract to sell rice milled by certain firms. Election—Interpretation.

A contract to sell rice milled by one of certain firms gives the seller a right to select the rice to be supplied under the contract. Once he has elected and his election has been accepted by the buyer the seller is bound to supply rice of the same milling, and the buyer cannot demand rice of another milling.

When the contract provided that the seller is to be absolved in case of accidents to machinery and the mill is destroyed by fire, the seller is not bound to supply rice of another of the mills named in the contract.

JUDGMENT.

TWOMEY, C. J. AND ORMOND, J.—The defendants in Rangoon agreed to sell to the plaintiff 10,000 bags of rice, delivery to be taken "ex hopper in April 1916 at Moulmein" date at sellers' option. The contract was in writing, upon one of the defendants' Rangoon printed forms of "rice sale notes."

The plaintiff took delivery of 6442 bags from the defendants' mill at Moulmein up to 26th April, when the mill was burnt down and the deliveries under the contract ceased. The plaintiff sued for damages for breach of contract in not delivering the balance. The defendants rely upon clause 16 of the contract:—"Accidents to

machinery strikes or sickness of mill hands or coolies always excepted." Clause 18 gives the sellers the right of delivery under the contract the milling of seven specified firms, some of which have no mill at Moulmein, and the defendant's mill is not included. No evidence was taken at the hearing and there is nothing in the contract to show that the defendants had a mill or were entitled to give delivery of their own milling. But the plaintiff in his plea says "that in terms of the said contract the defendants delivered to the plaintiff 6442 bags and the learned judge on the original side has assumed that the contract was for the defendants' milling. He gave the plaintiff a decree on the ground that clause 18 applied not only to the defendants' mill but to the other mills mentioned therein as well; and that the defendants were bound to deliver from those other mills if they could not deliver from their own mill.

Clause 16 is in the interest of the seller and absolves him from giving delivery, if prevented from doing so by a breakdown in the mill. Mr. Lentaingne for the defendant-appellant contends that clause 16 refers to the defendants' mill. Mr. Cowasji for the plaintiff respondent contends that clause 16 would not operate to absolve the seller from giving delivery, until all the mills mentioned in the contract had broken down:—which in effect means that clause 16 applies only to the last surviving mill.

If the contract had stated that the defendants were selling their own milling the defendants would not have been under any obligation to deliver their own milling. They could have selected any one or more of the mills mentioned in clause 18; and having communicated to the buyer their election to deliver the whole or a portion of the rice from one of those mills, the contract would have to be read as if the buyer had expressly agreed to buy that quantity of rice of that milling; and the buyer could not require the seller to give him any other milling.

If A agrees to buy rice from B of X milling "ex hopper" and gives B the right of delivering under the contract, Y milling, and if B elects to give Y milling, A cannot compel B to give delivery of X milling. And the fact that delivery of Y milling has after B's election has been communicated to A become impossible, does not alter the case. Under the contract, the seller is entitled to say that he will give delivery from one mill only. The learned judge was in error in construing clause 18 which is clearly inserted for the benefit of the seller, as if it imposed an obligation upon the seller to deliver, in certain circumstances from all the mills.

Clause 16 clearly refers to the mill from which delivery is to be taken or is being taken; and means that if that mill breaks down, the seller is absolved from giving or completing delivery of so much rice as the buyer would have had to take from that mill if it had not broken down. The clause absolves the seller from anticipating and providing against a breakdown in the mill from which delivery is to be given.

In the present case the plaintiff accepted a milling notice on the defendants' mill. It must be taken therefore that the parties had agreed that the defendants should be at liberty to give delivery under the contract from their own mill and the milling notice has been taken to have been in respect of the whole quantity of rice. Clause 16 therefore applies to a breakdown of machinery in the defendants' mill which actually occurred, and the defendants are absolved from any further delivery.

The appeal is allowed and the plaintiff's claim is dismissed with costs in both courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 166 OF 1916.

AUNG MA KHAING APPELLANT.

vs.

MI AH BON RESPONDENT.

Before Sir Daniel Twomey C. J. and Mr. Justice Ormond.

For appellant—Mr. Ba Dun.

For respondent—Mr. Lambert.

11th December, 1917.

Letters of Administration—Claim based on alleged adoption—enquiry as to adoption. Burmese Buddhist Law—Adoption by married women, single women, and divorced women.

When one of the applicants for letters of administration is a relation who would not be an heir if an adoption by the deceased could be proved and the other is a person who claims as sole heir by adoption the court is bound to go into the question of adoption.

Mi Tok vs. Ma Thi 5, L. B. R. 78 distinguished.

The rule in *Mi Tok vs. Ma Thi 5, L. B. R. 78* applies only when one of the applicants is a person who would be one of the heirs in any case—whether there was an adoption or not—and the other is a person who would be an heir only if his or her adoption could be proved.

An unmarried woman and a woman who is divorced and has divided the joint property with her husband can adopt.

Semble. A married woman cannot adopt without her husband's consent. If she does, and the husband divorces her because of such adoption, the adoption remains good without any formal re-adoption provided the intention to adopt continued.

JUDGMENT.

TWOMEY, C. J. *and* ORMOND, J.—The present respondent Mi Ah Bon applied for letters of administration to the estate of Chi Ma Pru who died in May 1916. The present appellant Aung Ma Khaing opposed the application alleging that she was an adopted daughter of the deceased. She is also the natural half niece of the deceased. Ma Ah Bone is the full sister of the deceased. Ma Khaing appeals from the order of the district judge granting letters of administration to Mi Ah Bon.

Mr. Lambert for Mi Ah Bon contends upon the authority of *Ma Tok vs. Ma Thi* (1) that Mi Ah Bon was entitled to letters of administration inasmuch as she was an admitted relation and the adoption of Ma Khaing was in dispute; but that decision refers to the case of an admitted heir and if the adoption of Ma Khaing in this case is proved Mi Ah Bon would not be an heir. She would not be a person entitled to letters of administration under section 23 of the Probate and Administration Act because she would not be entitled to any share in the estate. The district judge has taken we consider a correct view of the case cited. He took the evidence in support of the adoption which lasted a whole day and then decided that it would be waste of time to take the evidence against the adoption, because it was shown that the deceased Chi Ma Pru adopted Ma Khaing against the wish of her husband. In consequence of this adoption by Chi Ma Pru there was a divorce between her and her husband by mutual consent and a division of their property was made. The learned Judge was of opinion that a sole woman can adopt but that a married woman cannot adopt without the consent of her husband and that the adoption of Ma Khaing at its inception being invalid, could not become valid after the divorce without some formal adoption or re-adoption in order to place her in the position of a child who had been adopted with a view to inherit. No authorities have been cited to show that a single woman cannot adopt. In *Ma Bu Lone vs. Ma Mya Sin* (2), it was taken for granted that a spinster could adopt. Mr. May Oung in his work on Buddhist Law remarks that it is quite usual for widows to adopt. There is no reason in principle why a woman who is divorced from her husband and has divided the joint property with him should be in a different position as regards the power to adopt. It seems probable as held by the district judge in this case that a married woman living with her husband cannot adopt without his consent. But an adoption is to a great extent a matter of intention and if Chi Ma Pru's intention to adopt Ma Khaing continued after the divorce and full effect was then given to that intention, there would be a good adoption without any formal declaration.

From the evidence, so far as it has been taken, it would appear that Chi Ma Pru's intention was to adopt Ma Khaing; that such attempted adoption was the cause of the divorce and that Chi Ma Pru's intention continued after the divorce and that she gave effect to it.

(1) 5, L. B. R. 78.

(2) 14, Bur. L. R. 9.

The case is remanded in order that Mi Ah Bon may be allowed an opportunity of adducing evidence to show that Ma Khaing was not adopted; and the district court will dispose of the application in accordance with the above remarks. The costs of this appeal will abide the final result.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 81 OF 1916.

BA TU and one APPELLANTS.

vs.

BAMAN KHAN and one RESPONDENTS.

Before Mr. Justice Maung Kin.

For appellants—Mr. Ba Dun.

For respondents—Mr. Khan and Mr. Dhar.

19th February, 1917.

Contract Act (IX of 1872) section 25—Agreement without consideration—Jurisdiction.

A promise to pay what one is already under an obligation to pay is a promise without consideration, and cannot give rise to a cause of action.

A promise to repay a loan at a certain place for the convenience of the creditor does not give the creditor a right to sue at that place, unless there was some consideration for the promise.

JUDGMENT.

MAUNG KIN, J.—In the Small Cause Court, Rangoon the plaintiff sues for the recovery of Rs. 1,631-8-0 the balance found due at a settlement of accounts made between him and the first and second defendants at Twante. The transaction to which the settlement related was an agreement entered into at Twante between them for the plaintiff to manufacture *kutch*a bricks at Twante at a certain rate. The third defendant is sued as having guaranteed payment. The fourth defendant was added as a party defendant after the institution of the suit in consequence of his claim to have a share in the subject matter of the suit. All the defendants reside at Twante.

The plaintiff, however, claims to be entitled to sue in Rangoon by reason of an alleged promise of the defendants made at the settlement of accounts to pay the amount found due to the plaintiff at his house in Rangoon on a later date.

The first and second defendants plead among other things to the jurisdiction of the court. The lower court held that the said pro-

mise to pay at Rangoon gave it jurisdiction to entertain the suit and after hearing the case on the merits passed a decree for a certain sum against the first, second and third defendants.

The first and third defendants now object that the lower court had no jurisdiction. After carefully considering the law on the subject I have come to the conclusion that the objection must be upheld.

It is clear that without the promise to pay at Rangoon, the suit must be filed at Twante, being the place where the original contract was entered into and was to be performed or where the balance was struck and the amount became due and payable. In my judgment what gave rise to the cause of action was the original contract which was made or was to be performed at Twante or the settlement of accounts which was made at the same place: See *Luckmee Chund vs. Zorawur Mull* (1). The promise in question was no part of the settlement and it is at best a promise to pay what the defendants were already under an obligation to pay either under the original contract or under the settlement of accounts and as it is a promise without any consideration, it can give rise to no cause of action. If it was part of the original contract as indicating the place of performance, then there can be no doubt it will give the Rangoon court jurisdiction. But that was not the case. I am unable to see how it can form part of the settlement of accounts, as on the balance being struck the amount found due became payable without any promise on the part of the defendants to pay.

My view is supported by authority.

As to the nature of the promise, there is the case of *Kankani vs. Maung Po Yin* (2) where it was held that a naked promise to pay what the promisor is already under an obligation to pay gives rise to no cause of action.

In *Sheshagiri Row vs. Nawab Askur Jung* (3) the plaintiff sued the defendant at Madras for services rendered at Hyderabad, where also the contract was made, alleging a promise, after the work had been done, to pay at Madras. It was held that as there was no allegation of any consideration for the promise and as it was not a promise falling under section 25 (2) of the Indian Contract Act, there was no contract in law to pay at Madras, which would give the Madras courts jurisdiction.

There is no difference between this case and the case before me. The real thing to pay attention to is that the promise of the defendants was separate and apart from the settlement of accounts, which, without any promise on their part to pay the amount found due, would have given rise to a cause of action. Therefore any separate promise made to pay the amount at any particular place must be supported by a consideration, before it can give rise to legal consequences. It was rightly conceded before me that if, after a contract

(1) (1860) S. M. I. A., 291.

(3) (1907) 30, Mad., 438.

(2) (1902) 8, Bur. Law Rep., 101.

of loan has been made, the debtor makes a promise to repay the loan at a certain place for the sake of the creditor's convenience, the promise cannot entitle the creditor to sue at that place solely by reason of it, unless it is supported by a consideration.

For the above reasons I am bound to hold that the lower court had no jurisdiction to entertain the suit. I allow the appeal with costs and direct that the plaint be returned to the plaintiff for presentation to the proper court.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 271 OF 1916.

CONSTERDINE PLAINTIFF.

vs.

SMAINE DEFENDANT.

Before Mr. Justice Young.

For plaintiff—Mr. Giles and Mr. Villa.

For defendant—Mr. DeGlanville and Mr. Miller.

6th July, 1917.

Divorce Act (IV of 1869) ss. 4, 18 and 19. Jurisdiction to be exercised subject to the provisions in this act contained and not otherwise.—Fraud.—Christian Marriage Act (XV of 1872) s. 5—solemnized according to the rules, rites, ceremonies and customs of the church.

Section 4 of the Divorce Act which provides that the jurisdiction in matters matrimonial shall be exercised according to the provisions of this act and not otherwise does not preclude the court from considering whether a marriage was duly solemnized under the provisions of the Christian Marriage Act, and the court can make a decree declaring a marriage null and void on grounds other than those contained in section 18 of the Divorce Act.

Gasper *vs.* Gonsalves, 13, Beng. L. R. 109 dissented from.

Fraud as a ground for avoiding a marriage means such fraud upon the other party to the marriage as procures the appearance without the reality of consent. No degree of deception can avail to set aside a marriage knowingly made unless the party imposed upon has been deceived as to the person and thus has given no consent at all.

Fraud means fraud upon the other party to the marriage and does not include fraud upon a third party acting in granting the licence.

The word "solemnized" in section 5 of the Christian Marriage Act means "celebrated," and deals with the ceremony only.

The words "rules, rites, ceremonies and customs of the church" in section 5 mean only the rules etc. as to ritual, and do not include rules or customs as to the capacity of the parties.

In a suit for nullity of marriage the question is not whether the marriage is void under the law of the church but whether it is void by the law of the country.

JUDGMENT.

YOUNG, J.—In this suit the petitioner seeks to have it declared that his marriage with the respondent is null and void (a) on the ground that his consent was procured by fraud (b) on the ground that they were married by a Roman Catholic priest who was by the rules and regulations of his church incapable of marrying them in as much as the respondent was a divorced woman, a fact of which he was unaware when he performed the marriage ceremony.

Mr. DeGlanville for the respondent raised a preliminary objection to the jurisdiction relying on sections 4, 18 and 19 of the Indian Divorce Act the effect of which is clearly, if this act alone is to be considered, to deprive the court of any jurisdiction to consider the petitioner's second ground. Mr. DeGlanville also urged that section 4 which provides that the jurisdiction then exercised by the High Courts in all causes suits and matters matrimonial shall be exercised subject to the provisions of the Divorce Act and not otherwise, precludes the court from considering the provisions of section 4 of the Christian Marriage Act which declares that every marriage solemnised otherwise than in accordance with the provisions of section 5 shall be void. In support of his contention he relied upon the case of *Gasper vs. Gonsalves* (1) in which Pontifex, J., held that the High Court could not entertain a suit of a matrimonial nature otherwise than as provided by the Indian Divorce Act, and therefore had no jurisdiction to make a decree of nullity on the ground that the marriage was invalid. This case however was decided *ex parte*. Further in *Lopes vs. Lopes* (2) where the question was whether a certain marriage was void on the ground that the parties were within the prohibited degrees—one of the grounds on which a marriage may be declared null and void under the Indian Divorce Act—it was also argued that the marriage was void under the Christian Marriage Act and Wilson, J. who delivered the opinion of the Full Bench stated as follows: "Section 5 of Act XV of 1872 enacts as did the Act of 1865 that marriages may be solemnised in India (1) by any person who has received episcopal ordination provided that the marriage be solemnised according to the rules, rites, ceremonies, and customs of the church of which he is a minister. It was argued that the words rites, rules, ceremonies, and customs here used include rules as to capacity to marry, and make those rules in each case depend upon the law of the church whose minister performs the marriage. That argument would lead by a short process to the same conclusion at which we have arrived upon this reference. The construction of these words is difficult: we are not prepared to express a unanimous opinion upon it and it is unnecessary that we should deal with it."

(1) 13, Bengal L. R. 109.

(2) 12, C. 706 at p. 731.

The case was therefore decided on the Indian Divorce Act, but while it is unfortunate that this court is deprived of the advantage of learning the views of the Calcutta High Court on the meaning of these words, it is significant that it never occurred either to counsel or to court to question the jurisdiction to decide the reference under the Christian Marriage Act. The court refrained from doing so only from lack of unanimity and because it was possible to decide the question raised in the case under the Divorce Act. I am of the same opinion: the Christian Marriage Act in section 4 expressly declares that marriages are null which are not solemnised in accordance with the provisions of section 5 and I fail to see how if as here the question is whether a particular marriage was so solemnised I can refrain from deciding it and declaring the result in accordance with the law. I cannot agree with the decision in *Gasper vs. Gonsalves* (1), if, and so far as, it decides to the contrary, and I am not bound by it, and if I were I should require to be satisfied that the suit being one to declare a marriage solemnised in Chandernagore a French settlement null and void, the learned judge had any jurisdiction to deal with the case at all, for under the Divorce Act decrees of nullity can only be granted in cases where the marriage has been solemnised in British India (section 2) and the same is the case under the Christian Marriage Act. Unless therefore Chandernagore is in India with seems to me doubtful under the General Clauses Act which defines India as meaning British India together with any territories of any native prince, or chief under the suzerainty of His Majesty the decision would be one without jurisdiction. As however I am not bound by the decision, I do not propose to discuss the point on which I have not had the advantage of hearing argument. I hold that I have jurisdiction to deal with both grounds of the petition.

As regards the first ground viz that the petitioner's consent was obtained by fraud, the cross-examination of the petitioner showed that if there was fraud within the meaning of the Divorce Act, it was condoned and the authorities of *Moss vs. Moss* (3) and *Swift vs. Kelly* (4) shew that the frauds alleged do not according to the principles and rules of the English courts which under section 7 of the Divorce Act I am bound to follow afford grounds for granting the relief sought. Thus in *Swift vs. Kelly* (4) the Judicial Committee stated as follows: "It would seem indeed to be the general law of all countries as it certainly is of England that unless there be some positive provision of statute law requiring certain things to be done in a specified manner no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent would never have been obtained. Unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made" and in *Moss vs. Moss* (3) Sir Frances Jeune expressed his agreement with this view of the law of England, and stated (p. 268) that "when in England Law fraud is spoken of as a ground for

(3) 1897, P. 263.

(4) 3, Knapp. 257 at p. 293.

avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent." In this case it is not alleged that there was no consent, the petitioner expressly pleads that he did consent, but that his consent was procured by fraud. He also pleads that the license was fraudulently obtained by the respondent concealing from the priest that she had been divorced. The alleged fraud upon the petitioner is expressly dealt with by both the above authorities and the fraud upon the priest is inferentially dealt with in *Moss vs. Moss* (3) and expressly in *Swift vs. Kelly* (4) where their Lordships say: "If such be the law touching consent to the marriage itself and the fraud whereby that consent was obtained it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party, acting immaterially in granting the license to celebrate it." Moreover section 19 does not include fraud upon a third party as one of the grounds for invalidating a marriage. At the commencement of the second day's hearing I asked Mr. Giles whether in the face of these authorities and the evidence as to condonation it was worth while proceeding with the case upon the ground of fraud, and he abandoned this portion of it.

It remains to deal with the second ground viz that the marriage was celebrated by a Roman Catholic priest in this city of Rangoon and that as the lady had been divorced the marriage was null and void under the provisions of the Christian Marriage Act. Section 5 of the Act provides that marriages may be solemnised in India by (amongst others) any person who has received episcopal ordination provided that the marriage be solemnised according to the rules, rites, ceremonies and customs of the church of which he is a minister. There is no doubt that in this case the celebrant had received episcopal ordination and no doubt that the marriage was celebrated according to the rules, rites, ceremonies, and customs of his church except as regards the fact that the lady had been divorced. There is equally no doubt on the evidence that according to its rules and customs no priest of the Church of Rome can celebrate a marriage between persons one or both of whom has been divorced, and no person can marry a divorced man or woman. The question however is not whether the marriage is valid in the eyes of the church which is simple, but whether it is valid in the eyes of the law which is difficult. It is exactly the question on which the Calcutta High Court were not unanimous, and on which unfortunately they expressed no opinion, and the answer depends upon the meaning of the words "provided that the marriage be solemnised according to the rules, rites, ceremonies and customs of the church." According to the tenets of the Roman Church such a marriage is bigamous, no priest can solemnise it, no person can enter into it. According to the law it is otherwise and if the parties had had their marriage solemnised by a marriage registrar or a clergyman of the Church of England, no question so far as I can see could have arisen, and it undoubtedly would have been more prudent if the lady who it may be assumed desired to contract a marriage that would be binding had adopted this course. But she elected not to do so, and it is therefore necessary to determine not whether the union

is binding according to the Church of Rome but whether it is binding in law.

In my opinion in this act "solemnised" means celebrated see Q. E. *vs.* Paul, (5) and while the Divorce Act gives the external reasons and causes for which apart from the ceremony a marriage may be declared null and void, the Christian Marriage Act in these sections deals with the ceremony and the ceremony only. Section 4 does not say that persons may marry each other if the law of the church by which they are married so permits, and does not say that priests may marry such persons if and only if the law of their church allows, but merely provides, as it seems to me, how every Christian marriage is to be solemnised or celebrated. "Every marriage" it says "shall be solemnised in accordance with the provisions of section 5 and every marriage not so solemnised shall be null." Again section 5 does not say that Christians in India may marry one another provided that they are married by a person who has received episcopal ordination and provided further that they are permitted to marry each other by the rules of the church and are married in accordance with its rules, rites, ceremonies and customs, but that marriage may be solemnised in India by certain persons, provided that they are solemnised in accordance with certain rules. In other words the section in my opinion deals only with the ceremony and the person who may perform it and not with the capacity of the persons on whom it is performed or with the capacity of the person who performs it save as is expressed in the section viz:—that he should have received episcopal ordination. It is not suggested that the parties are not Christians or that the person who performed the marriage ceremony had not received episcopal ordination or that the ceremony was performed in any way differently from that in which marriages are celebrated in the Roman Church. Such being the case the marriage in my opinion fulfilled the conditions required by the Christian Marriage Act, and the parties in the eyes of the law are man and wife.

I dismiss the application with costs—eight gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 20 OF 1916.

C. KALIYAPARAMA PADIYACHI APPLICANT.

vs.

For applicant—Mr. Mya Bu.

For respondent—Mr. A. B. Banerji.

C. V. R. R. CHETTY RESPONDENT.

Before Mr. Justice Maung Kin.

(5) 20, M. 12.

15th February, 1917.

Civil Procedure Code (Act V of 1908) s. 115.—Revision High Court's power to interfere on a question of limitation.

Although a wrong decision on a question of limitation is not a good ground for revision under section 115 of the civil procedure code, the fact that the court has not dealt with the question of limitation in a case which on the face of it is barred by limitation is a good ground for revision.

Semble. Even when a lower court has acted without jurisdiction the High Court ought not to interfere in revision if the objection was not taken in the lower court and the interference would result in an injustice to the respondent.

Dayaram *vs.* Goverdhandas 28, B. 458 approved.

JUDGMENT.

MAUNG KIN, J.—The respondent was plaintiff in a case in the township court of Kyauktan fixed for hearing on the 12th October, 1915. He went to Kyauktan for the case but as he heard that there was a criminal warrant out against him in Rangoon he returned to Rangoon leaving a clerk behind to inform the court of what had happened. The clerk went to the court but the judge held that as he had no power of attorney from the plaintiff he could not legally put in an appearance for his master. The suit was therefore dismissed for default. There was no appearance on the part of the defendant either.

On the 12th of November 1915, the plaintiff applied to have the order of dismissal set aside saying that he had to go back to Rangoon suddenly, owing to a criminal warrant being out against him there and that the clerk he had sent to the court did not inform him of the dismissal order until "now." Apparently the court did not notice that the application was out of time by one day and no objection was taken by the defendant on the ground of limitation. The court set aside the dismissal order finding that the plaintiff had sufficient excuse for not being present on the 12th October.

The defendant invoked the revisional powers of this Court under Section 115 of Code of Civil Procedure on two grounds, namely (1) that the township court should not have entertained the application of the plaintiff, as it was time-barred on the face of it and (2) that that court erred in holding that the plaintiff had sufficient excuse for not appearing on the date fixed. At the hearing the second ground was given up by the learned counsel for the defendant.

He, however, very strongly pressed the first ground. He contended that the provisions of Section 5 of the Limitation Act are mandatory and in view of the stringent requirements of the section which casts upon the judges the duty of applying the rules of limitation, even when they are not pleaded, the township court failed to exercise a jurisdiction vested in it by law.

The learned advocate for the plaintiff urged that section 115 of the code gives discretionary power to the High Court to interfere and that the court is not bound to act in every case. When the plea, he contended, is one of limitation raised for the first time in revision the court should not interfere. He read out passages in notes to Section 115 of Woodroffe's Code in support of his argument and I may now deal with the cases upon which I gather he laid especial stress. In passing I may say that in this case there is no question of the township court having exercised its discretion under section 5 of the Limitation Act, for there was no application under that section before him.

Vasudeva vs. Chinnasami (1). In this case, the district court admitted an appeal presented out of time on certain grounds. It was held that the High Court could not interfere on revision. Turner, C. J. saying, "We cannot interfere on revision with an exercise of discretion."

Sundar Singh vs. Doru Shankar, (2). The head-note which correctly represents the ruling is that the fact that a court having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision under section 622 (now 115) of the Code of Civil Procedure.

The third case is *Ram Gopal Jhoon Jhoonwallah vs. Joharmall Khemka*. (3) There it was held that an error by the small cause court on the question of limitation does not justify the interference of the High Court under section 115 of the Code.

The fourth and last case which may be noticed is *Anunda Lall Addy vs. Debendra Lall Addy*, (4) where it was held that a wrong decision on a question of limitation is not open to revision by the High Court.

These cases are distinguishable from the case before me, inasmuch as it is one in which there has been no decision on the question of limitation at all. It is a case in which the learned judge of the township court has failed to discharge his duty in that he did not look into the question, whether the application was within time or not.

Mr. Mya Bu for the defendant cited *Har Prasad vs. Jafar Ali* (5) where it was held that a court, which admits an application to set aside a decree *ex parte* after the true period of limitation, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of section 622 of the Code of 1882 and such action may therefore be made the subject of revision by the High Court. Mahmood, J's observations in that case are especially instructive. The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan vs. Sheo Baksh Singh*, (6) he said, "in its broad legal sense may be taken to mean the power of administer-

(1) 7, M. 584.

(2) 20, A. 78.

(3) 39, C. 414.

(4) 2, C. W. N. cccxxxiv.

ing justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority."

In *Kailash Chandra Halder vs. Bissonath Parmanic*, (7) it was held that where the lower courts have entertained an application which is on the face of it barred by limitation without adverting to the question of limitation the High Court can interfere in revision. Petheran, C. J., observed:—"The period of limitation which is fixed for making this application is thirty days, so that the time had long expired on the 18th September, and the only way in which the matter could then be brought within the period of limitation was by the operation of section 18 of the Limitation Act. Section 18 of the Limitation Act has not been dealt with by the district judge in his judgment and unless he could come to the conclusion that he could deal with it in that way and as it appears on the face of this record that the matter was barred, unless it could be brought within that section, it appears to us that he had no jurisdiction to deal with the matter and therefore we have jurisdiction to interfere under section 622 C. P. C."

The two last cases cited above clearly show that where the lower court has not applied its mind, as in this case, to the question of limitation the High Court has the right to interfere in revision.

On the question whether the provisions of section 5 of the Limitation Act are mandatory the last word has been said by the Special Bench of seven Judges of the Calcutta High Court in *Balarin vs. Mangta Dass*, (8) where six of the Judges held that the provisions of a similar section of the old Limitation Act are mandatory, where the bar appears to be on the face of the plaint and there are no questions of fact involved.

There is one more argument of Mr. Banurji which I might deal with. That is that assuming that the lower court acted improperly and with material irregularity in admitting the application which was on the face of it out of time, the High Court should not interfere, as the defendant did not raise the plea of limitation, for the effect of the interference by this court would be to prevent the plaintiff from bringing his suit owing to its being now time-barred and thus cause an injustice to him. This contention was based upon *Dayaram Jagjivun vs. Govardhandas Dayaram*, (9) and it is a sound one as a proposition of law. But the difficulty is that the facts do not fit in with it. The suit was upon a pro-note dated 1st of September 1914 and it would not be barred by Limitation until the 1st of September 1917, so that the plaintiff has quite a long time left in which he may bring a fresh suit.

(5) 7, A. 345.

(6) 11, C. 6.

(7) 1, C. W. N. 67.

(8) 34, C. 941.

(9) 28, B. 458.

I hold that the present application should be allowed on the ground that the original application to set aside the dismissal order was out of time and it is accordingly allowed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 3 OF 1917.

HOWA APPLICANT.

vs.

SIT SHEIN and one RESPONDENTS.

Before E. W. Ormond, Esq., Offg. C. J. and Justices Parlett, Young,
and Maung Kin.

For applicant—Mr. Ba Kya.

For respondents—Mr. Palit.

31st May, 1917.

Civil Procedure Code (Act V of 1908). Order XXXIII, Rules 2, 5, 7 and 15.—Rejection of application to sue as pauper—Bar to subsequent application.

The rejection under Order XXXIII r. 5 (a) of an application to sue as pauper on the ground that it is not properly presented in the manner prescribed by Rules 2 and 3 after notice issued to the other party is not a bar under Rule 15 to a subsequent application of a like nature on the same cause of action.

5th March, 1917.

ORDER OF REFERENCE.

PARLETT, J.—The petitioner filed an application on the 28th of July 1915 for permission to sue the two respondents as a pauper. Notice was served upon the respondents who on the 7th December filed through an advocate a written statement setting out, among other things, that the application for leave to sue as a pauper was not framed according to law. The district judge found that the schedule of the property belonging to the applicant annexed to her application was not verified, nor was it referred to in the application itself, which was verified. He therefore rejected the application under Order 33 Rule 5 (a) as not being framed in the manner prescribed by Rule 2. On the 22nd January 1916 the petitioner filed another application for leave to sue as a pauper and notice was issued to the respondent who filed a written statement pleading, among other things, that the refusal of the former application constituted a bar to the entertainment of the present one, and on the 23rd March 1916 the district judge so held and dismissed the application under Order 33 Rule 15. The petitioner now applies for revision of the

district judge's order on the ground that the order of rejection under Rule 5 (a) does not amount to an order of refusal under Rule 7 so as to constitute a bar to the further application under Rule 15. If this be so, the district court in refusing to consider the second application on its merits failed to exercise jurisdiction vested in it, and so the matter is open to revision.

The district judge relied upon *Kali Kumar Sen vs. N. N. Barjarjee* (1). In that case the applicant filed a petition for permission to sue as a pauper upon which notice was issued under Order 33 Rule 6. Subsequently an amended petition was filed adding the names of several new defendants to whom notice was also issued. The application was rejected by the district judge for want of verification in proper form, and revision of that order was sought. A bench of this court decided that though the verification might perhaps be held to comply substantially with the rule the petitioner was bound to fail for want of a schedule of the property belonging to the applicant, so there was no ground for interference with the district judge's order. It was however further laid down that order was clearly passed under Rule 7 and should have been a refusal to allow to sue as a pauper. The reason for this view is not stated but it would appear to be that the petition was not rejected in limine under Rule 5 but after the opposite party had appeared in response to a notice issued under Rule 6. But the point does not appear to have been necessary for the decision of the case nor even to have arisen in it. I think the same may be said of the remark in the judgment that the absence of a schedule of the property rendered the applicant subject to the prohibition specified in Order 33 Rule 5 (a).

In *Nassiah and 2 vs. Vithalingam Thinganda and others* (2) where an application to sue as a pauper had been rejected for want of a proper verification after, as the record shows, notice had been issued to the opposite party under Rule 6, a Bench of this court expressly refrained from recording an opinion as to whether a subsequent application would be barred under Rule 15.

In *Ranchod Morar vs. Bezanji Edulji* (3) an application to sue in forma pauperis was rejected as the applicant did not wish to proceed with it, and it was held that this order amounted to a refusal under Section 409 and was a bar to a further application under Section 413 of the Code 1882 corresponding to Rules 7 and 15 of Order 33. It was remarked that an order of rejection under Section 407, corresponding to Rule 5 (a), can only be made on preliminary grounds before notice is issued and before enquiry is held into the applicant's pauperism, whereas in the case then being dealt with such an enquiry had commenced.

In *A. T. Sen and others vs. P. P. N. Mukerjee and others* (4) a second application was held to be barred under Rule 15 where the former application was ostensibly rejected under Rule 2 for failure

(1) 7, L. B. R. 60.

(2) 6, L. B. R. 117.

(3) 20, B. C. 86.

(4) 20, C. W. N. 669.

to furnish the particulars required in regard to the plaint, but in reality after evidence had been taken on both sides and it had been found that the applicant had made a false statement as to the property he owed; (and) I think the dictum that there is no distinction between rejection under Rule 5 and an order of refusal under Rule 7 was intended to apply to a case like that under consideration, where evidence had been given on both sides.

It appears to me therefore that there is no strong authority for holding that when an application to sue as a pauper which is not framed and presented in the manner prescribed by Rules 2 and 3 is rejected only after the opposite party had appeared in answer to a notice, such rejection is an order refusing to allow the applicant to sue as a pauper, which under Rule 15 bars a subsequent application. On general principles such a view would not appear to be right. Rules 4, 5 and 6 imply that it is the court's duty to scrutinize the application to see whether it complies with the conditions laid down as to both form and substance, and to reject it forthwith if it, on the face, fails to satisfy any one of those conditions. The applicant can then present another application. If the court neglects its duty in this respect and issues notice upon an application which is not in proper form, and thereafter rejects it on that ground, it would be unjust that the applicant should be put in a worse position by reason merely of the court having failed to do its duty.

Turning to the Rules themselves, Rule 5 lays down that an application to sue as a pauper must be rejected unless it conforms to each of five conditions. Briefly it must be rejected (a) where it is improperly framed and presented (b) where the applicant is not a pauper (c) where he has within two months fraudulently disposed of any property in order to be able to apply for permission to sue as a pauper (d) where his allegations do not show a cause of action and (e) where he has entered into a champertous agreement with reference to the subject matter of the proposed suit. Of these conditions it would be obvious on the face of the application whether (a) and usually whether (d) was fulfilled or not. The decision as to the others could only be arrived at on enquiry and after taking evidence, so if (a) and on the face of it (d) are complied with a notice should issue under Rule 6. When the opposite party appears, the conditions (b) to (e) may be gone into, but if the court has done its duty no question as to (a) ought to arise at this stage, and the decision to which the court is required to come under Rule 7 should on the face of it have no reference to clause (a) of Rule 5. Clause (2) of Rule 7 runs: "The court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5." The language is somewhat unusual but the word prohibition appears to me to refer to some status of the applicant or to some conduct on his part which disqualifies him from being allowed to sue as a pauper, and not to any formal defect in his application. The fact that he is not a pauper disqualifies him, so would a fraudu-

lent disposal of his property or an agreement such as are referred to in clauses (c) and (e) and these three disqualifications are clearly prohibitions. Usually I think failure to show a cause of action would not be, but however, that may be, I am clearly of opinion that a merely formal defect in the frame of the application cannot be said to render the applicant subject to a prohibition.

It is significant that section 405 of the Code of 1882 required the application to be rejected if not framed and presented in the prescribed manner, thus corresponding to clause (a) of Rule 5, while section 407 enjoined rejection for the reasons now appearing in clauses (b) to (e) of Rule 5, and section 409, corresponding to Rule 7, provided for the application being allowed or refused after considering whether the applicant was or was not subject to any of the prohibitions specified in section 407. It is clear therefore that under the old code a formal defect in the application was not regarded as a prohibition to which the applicant was subject and I cannot see that it becomes one merely because all the grounds on which the application must be rejected are now grouped together in one rule. From all points of view it appears to me that the district court's order of 7th of December 1915 in the present case should not have been held a bar to the application of 20th January 1916.

I think the question should be further considered whether the rejection of an application to sue as a pauper because it is not framed and presented in the manner prescribed by Rule 2 and 3 of Order 33 is a bar under Rule 15 to a subsequent application of a like nature in respect of the same right to sue merely because the order of rejection is passed after the opposite party has appeared in response to a notice issued under Rule 6.

ORMOND, J.—I agree that the question suggested should be referred to a Full Bench in view of the decision in *Kali Kumar Sen vs. N. N. Burjorjee* (1).

The Opinion of the Full Bench was delivered in the following

JUDGMENTS.

ORMOND, Offg. C. J.—The question we have to determine is whether the rejection of an application to sue as a pauper—because it is not framed and presented in the manner prescribed by rules 2 and 3 of Order 33 is a bar under rule 15 to a subsequent application of a like nature in respect of the same right to sue—such order of rejection having been passed after the opposite party has appeared under notice issued under rule 6.

It is contended for the applicant that under the rules an order of rejection and an order of refusal are in effect the same and amount to a final dismissal of the pauper application; and that the word "prohibitions" in rule 7 includes clause (a) of rule 5. If this contention is correct, a pauper who through ignorance presents his application through a pleader is altogether debarred from having his application heard.

Rule 15 implies that if the application has been rejected, such rejection would not of itself be a bar to the subsequent presentation of the application.

Rules 4 and 5 shew that it is the duty of the court when the application is presented, to see that it is in proper form and duly presented. The court need not at that stage examine the applicant and consider the merits. But it may do so;—and if it does and is satisfied upon the admission made by the applicant, that he is not a pauper according to rule 5 the application must be rejected and no notice can issue under the rule 6. But if the court without going into the merits, issues notice under rule 6 and then finds that the applicant is not a pauper according to rule 7 the application must be refused. It is clear that such order or rejection under rule 5 must have the same effect as the order of refusal under order 7 and that it operates as a final dismissal of the application—for both orders are made upon the finding that the applicant is not a pauper. It is unreasonable to suppose that the legislature intended that when the court has come to a finding that the applicant is not a pauper, the application should not be finally dismissed; or to suppose that a finding based upon the admission of the applicant was intended to be of less effect than a finding based upon the evidence of the opposite party.

In my opinion an order of rejection under rule 5, which is based upon a finding that the applicant is subject to any of the prohibitions referred to in rule 7, must by necessary implication have the effect of a final refusal of the application.

The question then is:—does the word “prohibitions” in rule 7 include clause (a) of rule 5? The word appears in the corresponding section of the code of 1882 (section 409) and if in rule 7 it is used in the same sense as in the old section 409, it would not include clause (a) of rule 5. Again, clause (a) of rule 5 refers to irregularities in the framing and presentation of the application; and I do not think such a clause could be said to contain a prohibition in the ordinary sense of the word.

In my opinion clause (a) of rule 5 is not one of the prohibitions referred to in rule 7; and an order of rejection under rule 5, on the ground that the applicant has not complied with the provisions of clause (a), does not operate as a bar to a subsequent presentation of the application in proper form.

The last clause of rule 7: “The court shall then either allow or refuse to allow the applicant to use as a pauper,” does not mean that if the application should have been rejected under clause (a) of rule 5, it is too late for the Court to do so after notice has issued to the opposite party. That clause merely states what order is to be made when the court has decided whether the applicant is or is not subject to any of the prohibitions; and it has no applicability to the question of an order of rejection under clause (a) of rule 5.

In my opinion an order of rejection under clause (a) of rule 5 can be made after a notice has been issued under rule 6.

For the above reasons I would answer the question referred in the negative.

Rules 5, 7 and 15 are no doubt ambiguous. I think the ambiguity arises from the word "reject" appearing in section 407 of the old Code:—which must be a mistake for the word "refuse." Section 408 begins "If the court sees no reason to *refuse* the application on any of the grounds stated in section 407"—and the mistake has been overlooked when these rules were framed.

PARLETT, J.—I set out my views fully in the order of reference and none of the arguments adduced at the hearing have led me to modify them in any respect. Briefly they are as follows:—The enactment of Rule 15 of Order XXXIII shows clearly that every unsuccessful application for leave to sue as a pauper is not necessarily a bar to a subsequent similar application. An application which has been refused under rule 7 (3) is such a bar. An application is refused under that rule when the applicant is subject to one or more of the prohibitions specified in rule 5. In my opinion the failure to frame and present the application in the manner prescribed by rules 2 and 3 is not one of those prohibitions, and is not a ground for an order of refusal under rule 7 (3). The appropriate order whenever such failure comes to the notice of the court, is one rejecting the application and an order of rejection on such grounds is not a bar under rule 15 to a subsequent application. The question whether an order of rejection passed under rule 5 on other grounds may be such a bar was not referred or argued, and I express no opinion upon it. The question referred I would answer in the negative.

YOUNG, J.—The question referred is whether the rejection of an application to sue as a pauper because it is not framed and presented in the manner prescribed by Rule 2 and 3 of Order 33 is a bar under Rule 15 to a subsequent application of a like nature in respect of the same right to sue merely because the order of rejection is passed after the opposite party has appeared in response to a notice under Rule 6.

Order 33 Rule 15 is quite plain and enacts as follows:—An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. It goes on to provide that in such a case the applicant may still sue in the ordinary way. The words an order refusing to allow an applicant to sue as a pauper throw us back on to Rule 7, and we see that for the same defects (set out in Rule 5) the court is bound either to reject an application for leave to sue as a pauper or to refuse to allow a person so to sue. Which order is to be passed depends on the time and method of detection (Rule 6). If the court detects the defect unaided, it passes an order of rejection under Rule 5; if it fails to do so, and it is pointed out by the opposite side, an order of refusal under Rule 7 is the necessary consequence.

In ordinary language rejection and refusal are practically synonymous: but the legislature does not lightly use different words in the same sense in the same Act: an order of rejection and an order of

refusal are clearly different orders verbally at any rate, and when we see that under Rule 15 the bar to making a second application is confined to an order of refusal one is inclined to doubt whether the same consequence follows an order of rejection.

The rest of the code I think confirms these doubts. Section 141 enacts that the procedure provided for suits shall be followed in all proceedings in a court of civil jurisdiction and Order 7 Rule 13 provides that when a plaint is rejected another may be brought.

An application for leave to sue is clearly not an application in a suit, it is equally clearly a proceeding in a court of civil jurisdiction, and the result in my opinion is that the word rejection is not only different from the word refusal but each has different results attached to it by the legislature.

In other words an order of rejection under Rule 7 does not prevent, but an order of refusal under Rule 7 does prevent a similar application of the like nature by the same person in respect of the same right. It is a curious result making as it does the consequence depend not upon the nature of the fault but upon the time and method of its detection. It is however a construction which so far as Rule 5 is concerned is in favour of the subject and in my opinion it is the true construction.

This however is a case under Rule 7. The applicant has committed a purely formal mistake, which unfortunately was not detected by the court under Rule 5 but under Rule 7, and the question is whether we can see our way to allow him to correct this formal error in a subsequent application.

Rule 7 is very clear and gives the court no option but to pass an order of refusal. Rule 15 is equally clear as to the result that follows. The only method by which we can give relief lies so far as I can see in clause 1, 2 and 3 of Rule 7 which direct that the court shall see whether the applicant is subject to any of the prohibitions specified in Rule 5, if he is, the court is bound to refuse the application. It cannot reject it. Rule 5 deals with the circumstances and causes for which a court is to reject an application. They are five in number and are briefly speaking as follows:—

- (1) Where the application is not properly framed and presented.
- (2) Where the applicant is not a pauper.
- (3) Where his application is fraudulent.
- (4) Where he does not disclose a right to sue.
- (5) Where it is champertous.

So far as I can see these are all prohibitions: the applicant is prohibited from applying in a wrong manner—he is also prohibited from applying if he is not a pauper, or if he has been fraudulent or champertous or if his application shews he has no right to sue. They are all prohibitions the results of which differ according to the method and time of detection of the errors committed.

Under the former code the first ground was treated separately and an applicant who made these trivial formal errors only had his application rejected. The legislature however deliberately removed these formal errors from the special section and incorporated them in Rule 5. Whether it intended the result that in my opinion follows may perhaps be doubted, but it is not for a court to speculate on what the legislature intended, but to construe what it has enacted. In my opinion an applicant is as much prohibited from presenting an application in a wrong manner as he is from presenting it fraudulently.

I should have expected the legislature to have provided different results but the legislature has chosen to enact otherwise in plain and unmistakeable language and I see no room for interference. I would therefore answer the question referred in the affirmative—the courts can however in future mitigate the results of the commission of these formal defects by rejecting in such cases the applications under Rule 5 of their own motion and should therefore peruse the applications carefully.

MAUNG KIN, J.—In my judgment the answer to the question referred should be in the negative. I do not think that the failure to frame and present an application to sue *in forma pauperis* in the manner prescribed by rules 2 and 3 is a prohibition within the meaning of the word “prohibitions” as used in rule 7.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 190 OF 1916.

J. G. BUCHANAN PLAINTIFF.
 vs.
 S. C. MALL DEFENDANT.

Before Mr. Justice Robinson.

For plaintiff—Mr. Clifton.
 For defendant—Mr. Mehta.

23rd March, 1917.

Trading with enemy—Paying a bill of exchange against goods shipped in enemy bottoms.

Paying a bill of exchange against goods shipped in enemy bottoms is trading with the enemy within the meaning of the Royal Proclamation of 5th August 1914.

JUDGMENT.

ROBINSON, J.—Plaintiff and defendant entered into a contract whereby plaintiff bought 18 tons of German tool or faggot steel. The

price was fixed per ton c. i. f. Rangoon, shipment to be in July 1914. Plaintiff obtained a contract of affreightment by the S. S. "Schildturm" whereby the goods were to be shipped and carried from Bremen to Rangoon and the goods were so shipped. Plaintiff also arranged a contract of insurance.

In accordance with the contract plaintiff drew a bill of exchange on defendant payable ninety days after sight with interest added. On the 12th August 1914 plaintiff caused the bill of exchange to be duly presented to the defendant for acceptance through the Merchantile Bank of India, Ltd. and with it were tendered the bill of lading, invoice, and insurance note. Defendant refused to accept the bill of exchange and plaintiff now sue him for the price of the goods etc.

War having broken out on the 4th August 1914 the S. S. Schildturm was seized by the Belgian Government at Antwerp.

Defendant pleads the Royal Proclamation of the 5th August 1914 and urges that as the bill of lading was a German bill to plaintiff's order the contract has become void. It is not denied that the bill of lading is a German bill of lading. The contract of affreightment was with a German line. Plaintiff urges that he has done all that he had to do under the contract, that the outbreak of war would only effect an executory contract and that the goods though in a German ship were to be delivered to a British subject at a British port. He says that the risk thus became defendant's risk and that he is entitled to be paid.

I have tried the issue as a preliminary issue. I have been referred to certain recent authorities *Duncan Fox & Co., vs. Schrempt and Bonke* (1). The decision was affirmed on appeal (1895, 3, K. B. 355).

The goods in this case were to be delivered in Germany and further performance of the contract would have involved a trading in goods destined for the German Empire in violation of the Royal Proclamation of 5th August 1914.

This authority need not be referred to further. The next case is that of *Arnhold Karberg & Co. vs. Blythe Green Jourdain & Co.* (2). This involved two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam. Payment was to be net cash in London or arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance but not later than three months from date of bills of lading. The beans were shipped in July '14 on German vessels which on the outbreak of the war entered ports of refuge in the east. At the expiration of the three months the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance; in the other both the bill of lading and the policy of insurance were

(1) 1915, 1, K. B. 365.

(2) 1915, 2, K. B. 379.

German. The buyers refused the tender and were held entitled to do so. This decision was appealed but the decision was affirmed (1916, 85, L. J. R. 665).

This decision was followed by Mr. Justice Beaman in *Marshall & Co. vs. Naginchand Fulchand* (3). Lastly in *S. K. Cama vs. K. K. Shah* (4) of this court Sir Charles Fox, C. J. took the same view.

Having regard to this mass of authority I need only briefly record my findings full authority for which can be found in the cases referred to above and in the rulings referred to in them.

By the contract entered into plaintiff undertook to buy the goods, to enter into a contract of affreightment to Rangoon, which will be evidenced by a bill of lading and to take out a proper policy of insurance. The defendant undertook to pay as settled by the contract against these documents. When this has been done the plaintiffs as sellers will drop out but they must supply defendant with a bill of lading and a policy which are still subsisting and can be enforced. Now here the contract of affreightment was made with a German subject with reference to a German ship and the effect of the out-break of the war was that the contract of affreightment was dissolved. The result was that the shipper was no longer bound to continue the voyage and there was no force left in the bill of lading by which defendants could compel him to do so or to recompense him.

It is not sufficient to say that the policy of insurance was with an English subject for defendants are entitled to have the contract carried out by plaintiff before they pay and that plaintiff could not do.

The Royal Proclamation of the 5th August 1914 forbids the obtaining from the German Empire or from any person resident therein any goods, wares or merchandise; it also forbids the trading in any goods, wares, or merchandise coming from the said Empire or from any person resident, carrying on business or being therein. If the contract had remained good the effect would only have been that to pursue it defendant might have had to enter into contractual relations with a German subject or subjects.

The proclamation by forbidding trading in goods coming from the German Empire as these did, rendered the contract abortive and illegal and so void. Plaintiff was bound to tender and defendant was entitled to get documents that were valid and effective, documents by which he could recover what might be lawfully recovered under such documents. Plaintiff did not and could not tender such document in respect of the contract of affreightment and this being so defendants are entitled to refuse to pay against them.

The suit therefore fails and is dismissed with costs.

(3) 18, Bom. L. R. 915.

(4) 9, B. L. T. 99.

IN THE COURT OF THE FINANCIAL COMMISSIONER
OF BURMA.

REVENUE (STAMP) REFERENCE NO. 5 OF 1918.

In re M. A. RAEBURN & CO.

Before the Honorable Mr. Thompson, F. C.

14th March, 1918.

Stamp Act (II of 1899) section 2 (2), schedule I, article 13—Bill of exchange.

An order on a firm of Chetties directing the firm to pay a specified sum of money to a certain person or bearer is a bill of exchange within the meaning of section 2 (2) of the Stamp Act and is chargeable with a stamp duty under article 13 of the first schedule to the Act.

Reference by the Collector of Rangoon as to whether an unstamped document worded as follows is chargeable with stamp duty:—

MEMO.

Rangoon, 6th February, 1918.

T. S. Perichiappa Chetty,

12, Mogul Street.

Pay to Messrs. Goolam Ariff Estate Company or bearer rupees three hundred and seventy five only.

Rs. 375/-.

(Sd.) M. A. Raeburn & Company.

ORDER.

THOMPSON, F. C.—The instrument which has been referred to me by the Collector of Rangoon under section 56 (2) of the Indian Stamp Act, and which is filed at page 3 of his Proceeding No. 211 of 1917-18, is undoubtedly a bill of exchange payable on demand and is chargeable with a duty of one anna under article 13 of the Schedule I of the Act.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL REVISION No. 129 OF 1916.

MAUNG HME and one APPLICANTS.

vs.

TUN HLA RESPONDENT.

Before H. L. Saunders, Esq., J. C.

For applicants—Mr. Chatterjee.

For respondent—Mr. H. M. Lutter.

23rd October, 1916.

Upper Burma Land and Revenue Regulation (III of 1889) s. 53 (2) (X)—Right to fish or connected with or arising out of, the demarcation or disposal of any fishery.

Section 53 (2) (X) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of civil courts in respect of claims to a right to fish, or connected with or arising out of, the demarcation or disposal of any fishery.

The provisions relating to fisheries in the Regulation have been repealed by the extension of the Burma Fisheries Act of 1905 to Upper Burma.

JUDGMENT.

SAUNDERS, J. C.—This is a reference by the district judge to this court under section 113 of the Code of Civil Procedure. The district judge has not stated precisely the question on which orders are required, but it appears that he is in doubt whether section 53 (2) (x) of the Upper Burma Land and Revenue Regulation was validly enacted. Apparently the district judge has assumed that this provision of the Regulation bars the jurisdiction of the civil courts, but for the reasons stated in the judgment in *Sonilal vs. Delawar* (1) of this court, I am of opinion that this is not the case. It is clear that clause (x) of sub-section (2) of section 53 must be read subject to the provisions of sub-section (1) of that section. It does not purport to bar the jurisdiction of civil courts to all claims to a right to fish, or connected with, or arising out of, the demarcation or disposal of any fishery, but only claims which the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. The provisions relating to fisheries which are contained in section 32 of the Regulation have been repealed, and the Local Government or a Revenue Officer is not, therefore, empowered by or under the Regulation to dispose of any such claim: that this is also the view adopted by the Local Government would appear to be the case from the footnote to section 53 at page 27 of the Upper Burma Land and Revenue Manual published by the authority of Government, in which it is stated that clause (x), section 53, sub-section (2), ceased to apply since the extension of the Burma Fisheries Act, 1905, to Upper Burma.

Since the jurisdiction of the civil court is not barred, under section 9 of the Code of Civil Procedure the court is entitled to take cognizance of the matter. It may be added that this is a suit for damages for trespass on the plaintiff's fishery, and there appear to be no provisions of the Revenue Law by which such a suit can be entertained or the order or decree of the Revenue Court enforced.

(1) 11, B. L. T. 42.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL APPEAL No. 200 OF 1913.

MI SAING PLAINTIFF. APPELLANT.

vs.

NGA YAN GIN DEFENDANT. RESPONDENT.

Before H. E. McColl, Esq., A. J. C.

For appellant—Mr. Pillay.

For respondent—Mr. Mukerjee.

11th May, 1914

Burmese Buddhist Law.—Divorce—Re-union Partition on second divorce—Rule of nissayo and nissito.

When the parties to a divorce reunite after separation there is a complete restoration of the status quo ante, and they stand on the same footing as if there had been no divorce.

The status of the parties at the time of the first marriage is to be taken as the starting point in determining their rights on the second divorce. If at the time of the first marriage they were nge lin nge maya (bachelor and spinster) they are to be regarded as such again on their reunion.

Mi Dwe Naw *vs.* Maung Tu, S. J. L. B. 14 and Maung Shwe Lin *vs.* Mi Nyein Byu, S. J. L. B. 175 dissented from.

In a case of divorce between a man who had been married before and a woman who had not, the woman must be looked upon as in the same position as if her husband had not been previously married and the partition of property should be regulated accordingly.

Ma E. Nyun *vs.* Maung Tok Pyu, U. B. R. (1897-1901) II 39 followed.

The rules for partition on divorce by mutual consent between cindaunggyis are

- (1) each takes his or her payin property.
- (2) if the parties are equally matched as regards property at marriage the property acquired after marriage otherwise than by inheritance is equally divided between them.
- (3) if one of the parties brought much property to the marriage and the other little, then on the principle of *nissayo* (supporter) and *nissito* (dependent) the supporter gets two thirds of the jointly acquired property and the dependent one-third.

- (4) if one of the parties inherits property during the marriage he or she gets two thirds of that property on the same principle.

The rules for partition on a second divorce by mutual consent, between parties who were once divorced from each other are.

- (1) the wife is entitled to one third of the property which the husband brought to his first marriage with her and to half of the property acquired during her coverture.
- (2) if the husband acquired any property during the period of divorce that property should be regarded as his *thinthi* as the other party had no share in its acquisition.

When cruelty by the husband is proved the wife is entitled to divorce on the same terms as if it was a divorce by mutual consent.

Maung Pye *vs.* Ma Me, U. B. R. (1904-06) II Bud. Law Div. 6 followed.

JUDGMENT.

McCOLL, A. J. C.—The plaintiff-appellant sued the defendant-respondent for a divorce and a partition of property on the ground of cruelty.

The latter is wealthy and the former is the daughter of poor parents. He married her when she was a young unmarried girl of 15. He was 38 years older and had been married before. This was in 1261 or 1262. Between then and the institution of this suit there were two divorces and re-unions. The defendant-respondent appears to be a very uxorious person, to use a mild term, because in the course of these years he is said to have taken six wives, all of whom he divorced after a short time, and he admits having taken four girls to wife after the plaintiff-appellant. All of these were divorced and they got little or no property on divorce. They were probably daughters of poor parents like the plaintiff-appellant and made no fuss. Possibly they were concubines, and not wives. If they were wives they must have been either very ignorant of their rights or exceedingly anxious to be quit of the defendant-respondent at all costs. The latter evidently hoped to be able to treat the plaintiff-appellant in the same way as he did them, and in fact did so on the occasion of the two previous divorces because he obtained her signature to documents by which she agreed to accept Rs. 100 on one occasion and jewellery worth Rs. 70 and clothes worth Rs. 30 on the other in full satisfaction of her claim for a partition of property.

No doubt it was these facts that led the learned additional judge of the district court to suspect that the plaintiff-appellant was not a wife but a concubine, and he, therefore, framed an issue on this point. But the issue was quite unnecessary. The defendant-respondent never explicitly denied plaintiff-appellant's allegation that she was his wife, and he subsequently admitted that she lived with him openly as his

wife and that he treated her as much. The fact, however, that the defendant-respondent is rich and the plaintiff-appellant poor is no reason why she should not get the full rights to which she is entitled. The parties come within the description "Husband rich—wife poor" given in the Manukye Dhammathat, and to quote that authority: "These different kinds of husbands and wives have been enumerated above that their separate classes may be known; but though the class be different, they have become man and wife, and the law makes no difference with regard to their separation. It must be noted that what has been said above regarding the separation of a man and wife, both the children of nobles, is the law for all."

Again with reference to one kind of slave wife: "Let the wife, the party not wishing to separate, take the whole of the property, animate and inanimate, acquired after they became man and wife, and let the husband pay the debts mutually contracted during the same time. Why is this? Also for another reason because he voluntarily raised her to the rank of wife, with the full knowledge of her being a slave."

The last re-union between the parties lasted only twenty days. The defendant-respondent then beat the plaintiff-appellant and the latter left him and prosecuted him and he was fined Rs. 50.

The learned additional judge of the district court has held that this last reunion must be taken as the starting point in determining the rights of the parties, that they must be treated as *eindaunggyis* and that as during the twenty days this marriage lasted no property was acquired there can be no joint property, and each party is entitled to take back what he or she brought to the marriage, and as plaintiff-appellant brought nothing she is entitled to nothing. He followed *Mi Dwe Naw v. Maung Tu* (1), in which it was held that where there had been a divorce and a reunion, it was the date of the reunion that had to be taken as the starting point when determining the rights of the parties on a subsequent divorce and said; "I must hold that where husband and wife both assent to divorce and no fault is proved, each is entitled to take back property brought at marriage." In this passage the learned additional judge adopted some of the exact words used in the ruling cited above, though they do not exactly apply in the present case, because the plaintiff-appellant's case was that the defendant-respondent had been guilty of cruelty, but no doubt as the plaintiff-appellant merely claimed that the cruelty had only been such as entitled her to a divorce as by mutual consent the difference between the two cases would not signify.

Mi Dwe Naw vs. Maung Tu (1) was cited with approval in *Maung Shwe Lin vs. Mi Nyein Byu* (2), which was also relied upon by the additional judge. He, however, overlooked the ruling *Mi Myin vs. Nga Twe* (3), in which after explaining the principle of *nissayo* and *nissito*, the learned judicial commissioner said: "the rule of *nissayo* and *nissito* seems to be equally applicable to persons who have been

(1) S. J. L. B. 14.

married before." The rule just laid down was that in the case of persons, neither of whom had been married before, if they stood to each other in the relation of supporter and dependent, the latter on divorce obtained one-third of the former's *payin* property, and that when one spouse inherited property during marriage he or she was considered a *nissayo* in respect of that property. If that rule applies in its entirety to persons who have been married before, then even assuming that the parties in the present case are to be regarded as *eindaunggyis* the plaintiff-appellant must be entitled to one-third of the property, which the defendant-respondent brought to be the last reunion.

But the remark of the learned judicial commissioner quoted above was an *obiter dictum*, because in that case the parties had not been married before. The principle of *nissayo* and *nissito* is clearly indicated in the texts collected in section 257 of U. Gaung's Digest, Vol. II, but it is applied differently. In the case of *eindaunggyis*, the principle appears to be only applied to the property acquired after marriage, not to *payin* property. The only text which in the English translation appears to imply the contrary is the one from the Dhamma, which runs as follows:—"If the husband and wife both of whom have been previously married, mutually desire to divorce, neither of them being in fault, let each take his or her property brought out the marriage and liquidate his or her debt, if any, contracted before the marriage. The property acquired jointly shall, if they were equally matched at the time of marriage in respect of property and means, be divided equally between them. Debts, if any, contracted jointly shall be liquidated in the same way. If the husband alone brought property and debts to the marriage or inherited them after the marriage, the whole of their property and debts shall be divided into three shares: he shall take two shares and the wife one share. If the wife alone brought or inherited property and debts, she receives two shares and the husband one share." The words "the whole," however, are an addition of the translator's. The translation ought to run "the husband shall take two-thirds of the property and good and bad debts. What property is meant is not stated explicitly, but seeing that it is with reference to the partition of the *lettetpwa* property that the words are used, it seems probable that it is that property that is meant. This text would then agree with the other texts, and the rules for partition on divorce by mutual consent between *eindaunggyis* would be—(1) Each takes his or her *payin* property, always; (2) if the parties were equally matched as regards property at marriage the property acquired after marriage otherwise than by inheritance is equally divided between them; (3) if one of the parties brought much property to the marriage and the other little, then on the principle of *nissayo* and *nissito*, the supporter gets two-thirds of the *jointly acquired property* and the dependent one-third; (4) if one of the parties inherits property during the marriage he or she gets two-thirds of that property on the same principle.

(2) S. J. L. B. 175.

(3) U. B. R. 1904-06, Bud. Law Div. 19.

If these rules are to be applied to the present case it is clear that the plaintiff-appellant can get little or nothing, as very little property can have been acquired during the twenty days that the last re-union lasted and there is no allegation that the defendant-respondent inherited any property during that period. But the Lower Burma rulings on which the lower court relied are merely based on general principles, no authority is given for the decisions. There are now available texts which were not available then.

The texts collected in section 323 of the Digest, Volume II, lay down that if a husband and wife reunite after a divorce and a partition of their property they commit no fault, and two of those texts have a direct bearing on the point now being considered.

The Wunnana lays down that in the case of such a re-union the parties shall possess exactly the same rights as they had originally without the slightest difference. *Paing-daing-yi-makin-tacho-paing-gya-myo-i*. It is very emphatic. The text from the Rasi though not so emphatic appears to lay down the same thing.

Though no definite reference is made to property the words *makin-tacho* would be meaningless, if the parties only partially resumed their previous rights. It is clear that what is laid down is that there is to be a complete restoration of the status quo ante, and consequently if they had never been married before, at their first marriage they are to be regarded as *nge-lin-nge-maya* on their reunion and not as *ein-daunggyis*.

I think such a rule is perfectly intelligible and equitable and as there is the authority of two texts for it and no authority on the other side, that I am aware of except the two Lower Burma rulings cited above which were based on general principles and not on texts, I think this rule should be followed.

The parties, therefore, must stand on the same footing as they would have done had there been no divorce.

Now as I have said the plaintiff-appellant was a maiden when she married the defendant-respondent, whereas the latter had been married before, and there are no texts in the Dhammathats which provide for a divorce by mutual consent between two such persons. The texts collected in section 261 of U. Gaung's Digest Volume II, refer to divorce against the will of one party and are evidently supplementary to the general rule that either party can claim a divorce against the will of the other on surrendering all the joint property and paying the joint debts and provide for the case, where no joint property has been acquired. In *Ma E Nyun vs. Maung Tok Pyu* (4) it was held that in the case of a divorce between a man who had been married before and a woman who had not, the woman could not equitably be placed in a worse position than she would have been in had her husband not been previously married, and that, therefore, the divorce should be regulated by the rules prescribed for couples, neither

(4) U. B. R. (1897—1901), II, 39.

of whom had been previously married. The reasons given for this decision appear to me to be very sound and in the absence of any text opposed to the decision it certainly should be followed.

That the plaintiff-appellant is entitled to a divorce as by mutual consent there can be no doubt whatever. It appears whenever the plaintiff-appellant has given birth to a child the defendant-respondent has insisted upon the child being at once given away to another, with result that out of four children only one is now alive. That in itself was a crime against the maternal instinct and must have caused the plaintiff-appellant both mental and bodily pain. In the next place he has accused her of infidelity and has not substantiated his accusations. In the case of the only accusation that appears to have any substance in it, I would remark that if the child born in 1268 was not the defendant-respondent's, it must have been conceived during the period of the first divorce, at a time when the plaintiff-appellant owed no fidelity to the defendant-respondent. If this child were not conceived during the period of divorce there is obviously not the slightest reason for supposing that it was not the defendant-respondent's child. In this connection I would remark that the deposition of one Maung Nge given in another case and the confession of one Pou Nya were wrongly admitted in evidence, as it was not shown that section 33, Evidence Act, in the one case or section 32, Evidence Act, in the other, applied. Finally the defendant-respondent has been guilty of violence towards the plaintiff-appellant and has on that account been convicted and fined by a criminal court, and has not even proved any extenuating circumstances. It was this violence, which led to the final separation and the present suit. The case is very similar to *Maung Pye vs. Ma Me* (5), and in accordance with that ruling the plaintiff-appellant is entitled to a divorce as by mutual of consent.

-It follows that she is entitled on divorce to one-third of the property which the defendant-respondent brought to the marriage, when he married her for the first time in 1262 and to half of the property marriage, when he married her for the first time in 1262 and to half of the property acquired during her coverture. If he acquired any property during the period of divorce that property should, I think, in the absence of any authority on the point be treated as his *Thinthi* property, as the plaintiff-appellant had no share in its acquisition.

As the additional judge held that the plaintiff-appellant was entitled to no property he did not go into these points, and, therefore, a remand is necessary.

The suit is accordingly remanded to the district court for the trial of the following issues:—

1. What property did the defendant-respondent bring to his first marriage with the plaintiff-appellant? And what is its value?

(5) U. B. R. (1902—03); 11, Bud. Law Div. 6.

2. What property was acquired by the parties during their marriage? And what is its value?

3. How much of these two classes of property remained at the time the suit was instituted? And what is its value?

The proceedings to be returned with findings within two months.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL SECOND APPEAL No. 220 OF 1916.

NGA MEIK and one PLAINTIFFS. APPELLANTS.

vs.

NGA GYI DEFENDANT. RESPONDENT.

Before A. E. Rigg, Esq., A. J. C.

For appellants—Mr. Pillay.

For respondent—Mr. Mukerjee.

19th March, 1917.

Civil Procedure Code (Act V of 1908) ss. 2(2) and 80.—Decree—Suit against public officer—Notice.

A decision as to whether notice under section 80 of the civil procedure code is necessary before institution of a suit is not a preliminary decree.

The bench clerk of a court is a public officer within the meaning of section 2 (17) of the code and notice under section 80 is necessary before institution of a suit for recovery of money alleged to be lost through his carelessness in his duties as such public officer.

JUDGMENT.

Rigg, A. J. C.—The respondent, Maung Gyi, was the bench clerk of the sub-divisional judge, Yamethin. The appellants sued him for the recovery of a sum of money they alleged they had lost through his carelessness in losing or concealing an application for an execution of a decree which became time barred through the loss. They asserted in the plaint that about the 10th February 1915 they sent the defendant Maung Gyi, notice under section 80 Code of Civil Procedure, but denied that any notice was necessary. The receipt of the notice was not admitted, and a preliminary issue was fixed as to whether such notice was necessary or not. The sub-divisional judge decided that it was and on appeal the decision was upheld. The date of the decision of the sub-divisional judge was the 19th January, and the 7th February was fixed for the hearing of evidence. On the 5th February, the appeal was filed and was decided the same day. On

the 7th the appellants failed to produce any evidence and their suit was dismissed under Order XVII, rule 3. The final order was one rejecting the plaint under Order VII, rule 11 (d). The rule did not apply to the case, as there was no statement in the plaint from which it appeared that the suit was barred by law. The district court dismissed the appeal. In his judgment the district judge pointed out that Order XVII, rule 3, had no application to the case as the hearing had not been adjourned at the instance of the appellants, but at the same time he said that the appellants had no valid excuse for not producing their evidence on the date fixed for hearing.

The appellants appeal to this court on the ground that there has been a substantial error in the procedure of the sub-divisional court in not granting an adjournment on payment of costs for the issue of subpoenas to their witnesses after the dismissal of the appeal on the 5th February. Two other points have been argued at the hearing: (1) whether notice was necessary to Maung Gyi under section 80 Code of Civil Procedure, and (2) whether the lower appellate court had power to decide the point, as the decision of the preliminary issue was not, it is contended, a decree. As regards the latter point, I am of opinion that the lower appellate court erred in entertaining the first appeal.

Decree is defined in section 2 (2), Code of Civil Procedure, as the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and the decree may be either preliminary or final. In the present case there was no formal expression of adjudication, and none was ever asked for and refused. Undoubtedly if the expression "matters in controversy" be interpreted in its widest sense, it would include every question in dispute between the parties. The result of such an interpretation would be that the parties would be bound to appeal under section 97 of the Code against every issue that was decided against them in the course of the trial, and litigation would be prolonged indefinitely. Order XV, rule 3, provides that where the parties are at issue on some question of law or fact and issues have been framed, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, the court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly whether the summons has been issued for the settlement of issues only, or the final disposal of the case, provided that where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects. Under section 33, a decree must follow on the judgment. A decree of this kind may be either a final or a preliminary decree, if it is based on some preliminary point or points that are held to govern the whole case. Besides this Order XXI, rules 12-18, specify cases where a preliminary decree can be passed. If these provisions are borne in mind, it will be seen that the adjudication referred to in the definition of a decree is an adjudication granting

or refusing any of the reliefs claimed in the plaint, and embodied in a formal declaration. All that the decision of the sub-divisional judge amounted to was to declare that the notice was necessary. The appellants said that notice had been given, and an appeal against the sub-divisional judge's decision was clearly premature.

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

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

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR NO. 339 OF 1915.

OFFICIAL ASSIGNEE PLAINTIFF.

vs.

HAJI MAHOMED HADY DEFENDANT.

Before Mr. Justice Robinson.

For plaintiff—Messrs. Cowasji and Das and Mr. Bannerji.

For defendant—Mr. Giles.

31st July, 1917.

Judgment—Change of Judges—Findings of predecessor.

The judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a judge who has tried a part of the cases, and such decision can be reconsidered even though it was given by consent of parties.

Ma Nyo vs. Ma Yauk 4 L. B. R. 256 followed.

ORDER.

ROBINSON, J.—This case came on for hearing last January before another judge who framed the issues. By consent of parties he heard arguments and decided the first issue. The case did not come up again till now for various reasons. Mr. Giles now urges that the decision on the first issue be reopened and that I must reconsider that issue. He relies on a ruling of a bench of this court. *Ma Nyo vs. Ma Yauk* (1) which decides that the judge deciding the case on the conclusion of all the evidence is not bound by the previous decision on certain issues and can decide them afresh. I am bound by this decision with which I entirely agree. The only question is whether the parties having consented to this course it is open to either of them to claim a fresh decision. The question covered by the issue is not an easy one, and it is now said that the translation of the will the interpretation of which was involved is incorrect. I feel that I should have to consider and come to a conclusion on this issue in any case, and therefore even if the parties were estopped I should still desire the matter to be argued.

I am not bound by the previous decision, but I do not think I should decide adversely to the previous decision if I should have to do so, without hearing counsel.

The whole case must therefore be started now on all the issues as amended by me.

 IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 190 OF 1916.

SAN HLA BAW APPELLANT.

vs.

MI KHOROW NISSA and others RESPONDENT.

Before Mr. Justice Rigg.

For appellant—Mr. Bose.

For respondents—Mr. Lambert.

3rd December 1917.

Evidence Act (I of 1872) s. 165—Judgment to be based on facts relevant and duly proved—Judge's personal knowledge.

Although a judge cannot without giving evidence as witness import his own knowledge of particular facts into a case, he can make use of his knowledge of the general character of the parties and witnesses in forming his conclusions about the merits of a case, by the credibility of evidence.

Hurpurshad vs. Sheo Dayal 3, I. A. 259 distinguished.

 (1) 4, L. B. R. 256.

JUDGMENT.

RIGG, J.—San Hla Baw sued Mi Khoraw Nissa, wife of Kalathan deceased, Mi Shorbi, Kalathan's daughter, and three minor children of the first defendant for recovery of Rs. 120/- said to be the balance rent due on a lease executed by Kalathan on the 9th May 1913. The suit was filed in the township court of Rathedaung on the 25th November 1915. Neither party was assisted in the township court by an advocate in the trial in which as the district judge has remarked the evidence was recorded in a somewhat perfunctory way without any attempt being made to test the credibility of the witnesses. The township judge decreed the claim. The decision was reversed on appeal to the district court, Akyab. On second appeal to this court exception has been taken to the nature of the judgment written by the learned district judge. He commences his judgment by saying "This is a typical 'San Hla Baw' case. He wants really to get a decree for certain land standing in some one else's name so he brings a suit, something like two years after it is due, for rent against the heirs of the late owner. * * * His ways of business are, I know, very slipshod, and usually sail very close to the wind, * * * San Hla Baw, of course, is a convicted perjurer and a man who by his own admission is prepared to swear to anything to gain time when he is pressed." The judge also refers to the evidence of Tha Kaing who he states is a man who to his own knowledge is accustomed to give evidence on behalf of San Hla Baw. He describes Tha Kaing as San Hla Baw's creature. It is urged in the appeal to this court that the judge was not justified in making remarks about the characters of the witnesses when such characters were not established by any evidence on the record but were matters of personal knowledge of the judge. In *Bamundoss Mookerjee vs. Mussamut Tarinee* (1) their Lordships of the Privy Council observe as follows: "An observation, however, is made by the Sudder Diwanny Court, that the Zillah judge, with respect to two of the attesting witnesses, has spoken of them from his own knowledge, as being what he calls 'professional witnesses,' persons of no character, and, therefore, entitled to no credit whatever. He does not say that, as we understand him, from his own personal knowledge of the parties, as being in the habit of coming before his court. Now, the judges in the Sudder Dewanny Court have passed a severe censure upon the Zillah Judge, for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them." Again in *Mahomed Buksh Khan vs. Hosseini Bibi* (2) their Lordships say that they thought the subordinate judge was right in relying on the evidence of the sub-registrar and of the mokhtar with whose character the subordinate judge seemed to have been acquainted. "The subordinate judge says he holds a diploma, and is a respectable

(1) 1885, 7, M. L. A. 169 at p. 203.

(2) 15, I. A. 81 at p. 91.

person in his community, and the court has never seen any act of his by which it can suspect him." These cases are sufficient authority for justifying a judge in using his knowledge about the character of the parties to come to a decision upon the credit to be attached to their evidence or the case set up by them. On the other hand, it has been laid down by their Lordships in *Hurpurshad vs. Sheo Dyal* (3) that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. Their Lordships appear to draw a distinction between the conclusion drawn from the knowledge of a judge about the general character and position of the parties and their witnesses and his knowledge regarding any particular facts connected with the facts in issue in the case. I am of opinion, therefore, that the district judge was justified in alluding to his experience of San Hla Baw's litigation in his court and in declining to believe in the bona fides of the class of the cases launched by him, many or others of which had been found to be false, unless the case was supported by evidence that left no doubt in the mind of the judge about its credibility.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 947 OF 1917.

CHIT THA APPELLANT.

vs.

KING-EMPEROR RESPONDENT.

Before Sir Daniel Twomey, C. J. and Mr. Justice Ormond.

10th January, 1918.

Penal Code (Act XIV of 1860) s. 302. Murder—Sentence of death.—

Ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases, and it should always be taken into account by sessions courts in exercising the discretion vested in them by section 302 of the Penal Code.

Nga Pyan vs. Crown, 1, L. B. R. 359 dissented from.

JUDGMENT.

TWOMEY, C. J. AND ORMOND, J.—The appellant Nga Chit Tha has been sentenced to death for murder. The case is clear and the appeal was admitted only for the purpose of considering the propriety of the sentence. The appellant who is an agricultural labourer had been working with a wood-cutting dhama in his hand and returned to his employer's house to get a light for his cheroot. There he suddenly encountered the deceased Mg. San Mya with whom he had a quarrel

(3) 3, I. A. 259 at p. 286.

some months before. He fell upon the deceased with the Da and inflicted fatal wounds on his head. The appellant at first stated that he had been threatened with death in an anonymous letter which he attributed to San Mya and when he suddenly met San Mya he was terrorstruck and attacked him so as to prevent San Mya from attacking him. The sessions judge was inclined to believe this story though the appellant modified it considerably when he was examined in court. He then alleged that the deceased abused him and assaulted him when he entered the cooking place of the house.

There can be no doubt that the appellant was rightly convicted of murder. His age according to the medical subordinate who gave evidence at the trial is between 17 and 19. The superintendent and medical Officer of the jail where Chit Tha is now confined was asked to give his opinion on this point and he reports that in his opinion Chit Tha is 16 years of age.

The sessions judge thought that he would not be justified in remitting the extreme penalty on the ground of youth only. The learned judge was perhaps influenced by the ruling in *Nga Pyan vs. Crown*. (1) The following is an extract from Mr. Justice Fox's judgment in that case:—

“The present case is one in which a youth must have silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, but in the end his act was deliberate, previously meditated, done in cold blood, and was accompanied by great ferocity. To refrain from confirming a sentence of death in such a case on account of the criminal's youth would, in my opinion be an act of pure mercy. The exercise of mercy is the prerogative of the crown to be exercised in this country by the very highest authorities, and, if mercy is exercised towards a criminal, he and the public should understand that the mitigation of the sentence passed upon him by the court of justice is due to the exercise of the power of clemency which is an attribute of the King-Emperor, alone.”

In the murder case now under consideration there appears to have been no deliberation; is probable that the appellant acted on a sudden impulse. The case is therefore distinguishable from that of *Nga Pyan*.

As to the general principle we are of opinion that ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. We refrain from laying down that the lesser penalty should be awarded in every murder case where the accused is below a certain age. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by sessions courts in exercising the discretion vested in them by section 302 of the Indian Penal Code. We respectfully dissent from the view suggested in *Nga Pyan's* case

(1) L. B. R. 359.

that a sessions court which on the ground of the criminal's youth imposes on him the lesser sentence provided in Section 302 is thereby encroaching on the prerogative of the Crown.

Having regard to the youth of the present appellant and the circumstances of the case we consider that the sentence passed on him may properly be reduced to one of transportation for life and it is reduced accordingly.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 267A OF 1917.

KING-EMPEROR APPLICANT.

vs.

U GYAW RESPONDENT.

Before Mr. Justice Rigg.

For the crown—The Government Advocate.

24th November, 1917.

Burma Forest Act (Burma Act IV of 1902) s. 31. Forest Rules 22 and 98.)—Liability of licensee under Forest Rules.

A licensee under the Forest Act is liable for the acts of his servants even if they are in contravention of his instructions provided the servants are acting within the scope of their employment unless he can show that he did all that could be expected of him to prevent a breach of the terms of the licence.

JUDGMENT.

Rigg, J.—U Gyaw has been convicted under rule 98, read with rule 22 of the Burma Forest Act for having felled undersized kamaung trees in contravention of a license issued in the joint names of U Mra Tha Tun and himself. The case was tried summarily, and the facts are not as clearly stated as is desirable. They have not however been challenged, and the only point argued is whether on the magistrate's finding, the accused is liable to be convicted of any offence. The magistrate found that three undersized kamaung logs were cut by coolies employed by the accused; that the accused did not remove the logs (possibly because he had already been fined for a similar offence) and that in any case, whether the cutting was authorised by the accused or not, he was responsible and liable to the punishment prescribed by rule 98.

Rule 22 is as follows:—

“ No person shall fell, cut, girdle, mark, lop, tap, or injure by fire or otherwise . . . any teak tree or any other tree of the kinds specified

in the First Appendix and within the areas therein specified... save under and in accordance with the conditions of a special agreement with government or a license etc."... This rule is framed under the powers conferred on the Local Government by section 31 of the Act. Section 31 is in chapter III, which is headed "General Protection of Forests and Forest Produce." The object of the Forest Act is to enable the Local Government to control the administration of forest areas by declaring some areas to be reserved forest, by regulating the felling of trees and the extraction of forest produce, and by imposing duty to be paid for privileges granted to individuals to trade and work within areas under forest. To secure this control, rules have been framed, and licenses are issued. It is well known that licensees seldom fell trees themselves and employ coolies for such work. The accused probably held a license under form III, the 8th condition of which is that any breach of the conditions of the license will render him liable to lose his license and to the punishment prescribed in the Act or the rules made thereunder. In *Shin Gyi vs. K. E.* (1) a Full Bench of this Court held that a licensee of a liquor shop whose agent or servant permits drunkenness is punishable under the provisions of section 50 of the Excise Act. The principle on which the decision in that case proceeded is that the object of the Excise Act would be defeated if a licensee was permitted to excuse himself on the ground that his servants had disobeyed his orders, provided that the servants were acting within the scope of their authority. This principle is very clearly stated in the *Commissioners of Police vs. Cartman* (2) by Lord Russell, C. J. in the following passage "How do they (the licensees) carry on their business? From the nature of the case it must be largely carried on by others; it is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to others: are the licensees in these cases to be liable for the acts of others? In my opinion they are, subject to this qualification that the acts of the servant must be within the scope of his employment... It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise the object of the section would be defeated." A similar principle was applied in *Strutt and one vs. Clift* (3), which was a case under the Customs and Inland Revenue Act, 1888, in which case the appellant was held liable for the unauthorised act of his bailiff in bringing back his family from the station in a milk cart and using the milk cart thus without a license. It seems to me that having regard to the objects of the Forest Act a similar responsibility must be attached to person felling timber by coolies, otherwise the provisions of that Act would be rendered nugatory. The correct rule seems to be as follows:—"A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of

(1) 9, L. B. R. 81, 10, B. L. T. 262.

(3) 27, T. L. R. 14.

(2) 1896, 1, Q. B. 655.

his instruction, provided that those servants were acting within the scope of their master's authority, and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber."

There is no reason for interference with the conviction in the present case, and the proceedings are returned.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 87 OF 1917.

N. S. IYER ACCUSED. APPELLANT.

vs.

T. MUDALIAR COMPLAINANT. RESPONDENT

Before Mr. Justice Parlett.

27th April, 1917.

Penal Code (Act XLV of 1860) s. 499. Defamation Privilege—libellous statement in pleadings.

The whole criminal law of libel in India is contained in the Indian Penal Code, and all defamatory statements are punishable unless they fall within one or more of the exceptions to section 499.

The statement of a person accused of a criminal offence is not privileged, and it is for the accused to show that the statement was made in good faith for the protection of his own interests.

Mya Thi vs. Henry Po Saw, 3, L. B. R. 265 approved followed.

JUDGMENT.

PARLETT, J.—This is a squalid case from which few of those concerned have emerged with any credit. Complainant was a clerk in Government service at Pyinmana, and had a daughter, hereinafter referred to as Kamala, who in 1914 was about 17 years of age. Accused was a clerk in the office of the Inspector-General of Civil Hospitals and Manickam Pillay was a subordinate in that department being sub-assistant surgeon at Pyinmana. The latter was a friend of accused and introduced him to the complainant's family. Both accused and Manickam Pillay posed as apostles of theosophy, the former being treasurer of the Burma branch. It was arranged for Kamala to go to a Theosophical College in Benares ostensibly to improve her knowledge in some branches in which she was backward and to qualify so her for admission to the Benares College, she came to accused's house in September 1914 and remained there till November. After a short visit to Pyinmana she accompanied accused to

India and eventually got to Benares. While in his house accused seduced her, and continued to have intercourse with her there and on the journey. In the spring she returned to Pyinmana for the holidays, where she was found to be pregnant and on the 13th August 1915 she gave birth to a child. She applied for maintenance in Pyinmana in January 1916, but accused succeeded in balking her by a plea of want of jurisdiction. In April 1916 she applied in Rangoon and accused again tried the same tactics, but was defeated, and finally on the 20th July 1916 on his own admission, she obtained an order for maintenance. In the course of that case accused on 21st June 1916 filed a written statement containing certain allegation in respect of which complainant prosecuted him for defamation. He was convicted and has appealed.

Coming to the principal item in the charge, the statement complained of is obviously defamatory and it is for the accused to show that he was protected in making it. It is contended for him that his statement was absolutely privileged, on the strength of *Potaraju Venkata Reddy vs. Emperor* (1), where the Madras High Court affirming a previous decision in *in the matter of Alraja Naidu*, (2) held that the statement of a person accused of a criminal offence is absolutely privileged. This is not the view of other High Courts, though in the recent case of *Golap Jan vs. Bholanath Khetry* (3) the Calcutta High Court has departed from its earlier decisions and has held that a complaint is absolutely privileged. In any event the Madras ruling would not govern a case like the present, which was not that of a statement made by an accused person on his trial for committing a criminal offence, but a written statement filed in proceedings which, though before a magistrate, partook largely of a civil nature, by a person who was not only a competent witness, but who clearly ought to have gone into the witness-box. It appears to me, however, that the sounder view is that which was adopted by this court after an exhaustive examination of the authorities then available in *Mya Thi vs. Henry Po Saw* (4), and that the whole criminal law of libel in India is contained in the Indian Penal Code, and that defamatory statements are punishable unless they fall under one or more the exceptions to section 499. In this case, therefore, accused must show that he made the statement in good faith for the protection of his own interests.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 265B OF 1917.

PO NYEIN APPLICANT.

vs.

MA SHWE KIN RESPONDENT.

(1) 36, M. 216.

(3) 38, C. 880.

(2) 30, M. 222.

(4) 3, L. B. R. 265.

Before Mr. Justice Pratt.

For appellana—Mr. Maung Gyi.

For respondent—Mr. W. Po Thit.

16 th Novembsr, 1917.

Criminal Procedure Code (Act V of 1908) s. 488 (4)—Maintenance—Burmese Buddhist Law—Refusal to live with husband—sufficient cause.

Ordinarily the fact that the husband takes a second wife is among Burman Buddhists a good reason for the first wife declining to live with him unless he provides her with a separate house. But when the wife chooses to live separately from her husband, and declines to return to him when asked, and the husband takes a second wife, she is not entitled to maintenance under section 488 (4) of the Criminal Procedure Code.

JUDGMENT.

PRATT, J.—Applicant has been ordered to pay maintenance for his wife Ma Shwe Kin. His case was that there was a divorce but this was not proved. It is clear, however, that owing to incompatibility of temper or other cause they separated and the wife ceased to live under her husband's protection. About seven months after the separation applicant remarried. Respondent declines to return to live with applicant, who is willing to take her back, unless he provides her with a separate establishment.

Ordinarily the fact that the husband took a second wife might be a good reason for the first wife declining to live with him, unless he provides her with a separate house. In the present circumstance, however, I do not consider the claim is reasonable. Respondent chose to live separately from her husband and there is evidence that when asked to rejoin him she declined.

She was apparently willing to effect a divorce. By her conduct she could only expect that the natural result would be to force her husband into marrying again. In fact his remarriage was the natural result of her refusing to live with him and separating from him for a number of months. Applicant is not a well to do man, and cannot afford to maintain two separate establishments.

His offer therefore to support his wife, if she will resume conjugal relations, is reasonable and I do not consider that she is entitled to maintenance because she elects to live apart from him. She must be prepared to accept the result of her own conduct. I set aside the order of the magistrate for maintenance of Ma Shwe Kin.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 109 OF 1917.

PO SO APPELLANT.

vs.

KING-EMPEROR RESPONDENT.

Before Mr. Justice Maung Kin.

19th March, 1917.

Penal Code (Act XLV of 1860) s. 75—Subsequent offence—Sentence.

The words "subsequent offence" in section 75 of the Penal Code mean an offence committed subsequently to the previous conviction.

A person is not liable to enhanced punishment under this section unless the subsequent conviction is for an offence committed after the previous conviction.

JUDGMENT.

MAUNG KIN, J.—I am satisfied that the evidence establishes the guilt of the accused and that the offence he committed is robbery. The learned district magistrate has awarded him seven years' transportation, owing to there being three previous convictions against him. The use of section 75 of the Indian Penal Code in this case is illegal, because the previous convictions are not such as come within the purview of that section. The offence of which the accused was convicted in this case was committed in April 1907, the previous convictions were in November 1909, May 1910 and November 1911, so that they are "previous" only in the sense that they were had before the conviction in the present case and they are *subsequent* to the commission of the offence of which the accused is now convicted. The meaning of the section is very clear. It provides that any person, *having been convicted* of any offence punishable under Chapters XII of XVII of the Indian Penal Code, shall be guilty of any offence punishable under either of those parts of the same Code, he shall for *every such subsequent offence* be liable to the penalties therein declared. The words underlined indicate that the offence for which enhanced punishment is awardable must be one *committed* after the convictions by reason of which it is claimed that the accused is liable to enhanced punishment. In other words, the accused renders himself liable to enhanced punishment by reason of there having been previous convictions against him before he *committed* the present offence. The other convictions should not therefore, have been taken into account. The point appears to me to be quite simple but if authorities are required, the following may be cited:—*Reg vs. Sakya* (1)

(1) 5, B. II. C. R. 36.

(3) 1, A. 637

and *Empress vs. Megha* (2). The conviction under section 392 of the Indian Penal Code is hereby confirmed, but the sentence under section 392 and 75 of the Indian Penal Code is hereby quashed.

In considering what measure of punishment should be meted out to the accused, I shall not allow myself to be influenced by the fact of there having been other convictions previous to this conviction. I shall treat this offence as the accused is entitled to have it treated as if before the commission of it he had a clean sheet. As two year hard labor is normal sentence for a first offence of robbery which falls under the first part of section 392 of the Indian Penal Code, I shall sentence him to two years' rigorous imprisonment for robbery under the first part of section 392 of the Indian Penal Code.

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MAY-JUNE, 1918.

[No. 5 and 6.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 144 of 1916.

BALTHAZAR & SONS PLAINTIFFS.

vs.

M. A. PATAIL DEFENDANT.

Before Mr. Justice Maung Kin.

For defendant—Mr. Connell and Mr. Rahman.

For plaintiff—Mr. Bagram.

14th December, 1917.

Ancient Lights—Obstruction—Nuisance.

To constitute an actionable obstruction of light and air it is not enough that the light is less than before. There must be such a diminution of light as to constitute a nuisance, and to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and in the case of business premises to prevent the plaintiff from carrying on his business as before.

Paul *vs.* Robson (P. C.) 42 C. 46 followed.

JUDGMENT.

MAUNG KIN, J.—The plaintiffs allege interference with the access of light and air to their ancient windows and claim Rs. 5,000[- as damages. The plaintiffs' building is a three storied brick house consisting of two portions, the front portion known as No. 92 Dalhousie Street and the back portion as No. 85, 30th Street. On the Dalhousie Street or southern side and the 30th Street or eastern side there are openings on all the three floors. There are no openings on the western side as there is another building flush with it. The plaintiffs say that on the northern side there are two windows on the ground floor, three on the first and six on the second floor, and it was the light and air coming through these windows that has been interfered with

by the defendant causing a three storied building to be erected right up to the northern wall of the plaintiffs' building. The plaintiffs base their claim on the following allegations of fact. Before the defendant's present building was put up there stood on its side an old two storied brick building with a sloping tiled roof. This belonged to the defendant and was pulled down to make room for the defendant's present building. This old building of the defendant was divided from theirs by a narrow strip of vacant land measuring in length twenty-nine feet nine inches running east and west and in width one foot at the eastern end gradually increasing in breadth towards its western end where it is one foot six inches in width. The defendant's old building rose to a height of twenty-six feet and the roof on its southern side projected beyond the wall to a distance of about twelve or fifteen inches leaving a space between the eaves of the roof and the plaintiffs' northern wall. Thus the two windows on the ground floor let in light and air vertically into the two water closets there. Through the three windows on the first floor also the plaintiffs enjoyed light and air. Through the six windows on the second floor they enjoyed light and air freely and without any obstruction. They claim that they have acquired an easement of light and air in respect of all these windows by prescription.

The defendant admits having built a three storied brick building close up against the plaintiffs' northern wall as alleged, but states that it was erected on the alignment of the old building and denies that there was any vacant strip of land between the old building and the plaintiffs' premises. He does not admit that the windows on the northern wall on the ground floor and first floor of the plaintiffs' building were made at the time the building was erected and denies that any light or air entered through these windows. As regards the windows on the second floor the defendant does not admit that they were made at the time the plaintiffs' building was erected, or that they occupy the same position as any windows that may previously have been made by the plaintiffs. He further denies that the plaintiffs have acquired any easement of light or air by means of these windows. Finally the defendant says that even assuming the plaintiffs have acquired an easement of light and air he is entitled to erect his building as he pleases provided that in so doing he does not deprive the plaintiffs of such amount of light and air as is reasonably required for the purpose for which the different floors have been used.

During the course of trial, Mr. Bagram dropped plaintiffs' claim in respect of the ground floor.

The first point to consider is whether there was a strip of land between the plaintiffs' building and the defendant's old building. On this point we have the evidence of Messrs. Nahapiet, Dumont, Abraham, Din Mahomed, Abdul Latif and Clerks

* * * * *

I therefore hold that there was a strip of land between the two houses and that it was twenty eight feet nine inches long and twelve

inches wide at the eastern end of it, and eighteen inches wide at the western end. The next point to consider is the height of the southern wall of the defendants' old building. The plaintiffs try to make out that the line of eaves of the roof of the old building on its southern side did not reach more than a little way up the windows on the first floor of their own building so that they had access of light and air through the windows of that floor over the roof of the defendant's old building.

* * * * *

On the evidence I hold that the eaves of the old building did not touch the plaintiffs' wall, and there was an opening through which there might be an access of light and air to the plaintiffs' windows on the first floor.

The next point to consider is whether there were windows on the second floor as alleged by the plaintiffs. * * * * In my judgment I am bound to accept the evidence of Rahimatullah Abdul Latif supported by that of Mr. Nahapiet, and the plans he made against that of the defendant and his witness Maung Ba. The result of my findings is that the defendant has interfered with whatever access of light and air there was to the windows on the first floor by erecting his present building close up against the northern wall of the plaintiffs' building. As regards the windows on the second floor they had uninterrupted access of light and air through them and the defendant has completely obstructed and darkened these windows. As regards the question whether those windows on the first and second floor are ancient windows there is no doubt whatever that they are, because the erection of the plaintiffs' building began in 1890, and was completed in 1891, and the windows have remained unaltered upto the present date.

Now we come to the most important question whether the defendant's act as complained of will give rise to any cause of action.

Mr. Bagram for the plaintiffs contended that if he succeeded in showing that the windows which had admittedly been darkened by the defendant's new building were ancient windows, he would be entitled to damages on the basis of the depreciation in the rental and selling values of the house, as a result of the defendant's act. Mr. Connell contended on the authority of *Colls vs. The Home and Colonial stores* (1) *Jolly vs. Kine* (2) and *Paul vs. Robson* (3) that what the plaintiffs would have to show was that by the defendant's act there was such an invasion of their right that the floors in question did not get that measure of light and air required for the ordinary purposes of habitation or business of the tenement according to the ordinary notions of mankind * * * I thought that for the right decision of the case I should have evidence as to whether there was still left sufficient light and air to the floors in question to render them

(1) 1904, A. C. 179.

(3) 42, C. 46.

(2) 1907, A. C. 1.

fit for the ordinary purposes of the inhabitancy or business of the tenement according to the ordinary notions of mankind. Both Mr. Bagram and Mr. Connell assented to this and such evidence as they have been able to procure in a place like Rangoon has been placed before me.

Paul vs. Robson (3) is a Privy Council case, and I am bound by it if the facts justify my application of it to the case. It seems clear that prior to the decision in *Colls vs. The Home and Colonial Stores* (1) there were divergent views in regard to the nature and extent of rights of light acquired by prescription for Land Moulton who delivered the judgment of their Lordships in *Paul vs. Robson* (3) says (p. 51): "Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the courts prior to the decision in *Colls'* case. It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of twenty years there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of right of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby.

The former stream of authorities is what Mr. Bagram wishes the court to follow. The latter is what Mr. Connell relies on. Lord Moulton proceeds: "This conflict of views was fully recognised by the noble Lords who took part in the decision, and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future." His Lordship later in his judgment held that in *Colls'* case the legal test in an action for the infringement of rights of light formulated by Lord Davey was adopted by the House of Lords. The test formulated by Lord Davey is as follows: "The owner . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance." Lord Moulton then considered the decision of the House of Lords in *Jolly vs. Kine* (2) and came to the following conclusion (p. 54): "In the judgment of the House of Lords in *Jolly vs. Kine* (2) there is therefore an authoritative exposition of the decision in *Colls'* case (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly vs. Kine* (2) as throwing some doubt upon the interpretation of the decision in *Colls'* case (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of

previous enjoyment of the light." When *Jolly vs. Kine* (2) was before the Court of Appeal as *Kine vs. Jolly* (4) Vaughan Williams and Cozens-Hardy, L. J. J. held that the plaintiff had a cause of action, and Romer L. J. held that there was none. But there was no difference between Vaughan Williams, L. J. and Romer, L. J. as to the law which they took to be as laid down in *Colls's* case by the House of Lords, the difference between the learned judges being on the facts. Cozens-Hardy L. J. said that he did not entirely agree with his colleagues as to the law, and said: "The decision in *Colls vs. Home and Colonial stores Ltd.*, therefore does not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not in law justify an action, even though a large proportion of light previously enjoyed has been lost. It has been strenuously argued on behalf of the appellant that all we have to consider is the amount of light left. I cannot accept that view of the law." Mr. Bagram argues from this that as he has proved by the evidence of Mr. Shircore that both the letting and selling values have been lessened by the defendant's act, the plaintiffs have a cause of action. But obviously the view of Cozens-Hardy, L. J. as above set forth is not the view adopted by the House of Lords on appeal in that case, and is in conflict with the law laid down in *Colls's* case.

Now what have we as evidence? As regards the first floor there were three small windows all of the same size measuring four feet by three feet with a brick space of five and a half feet between the central one and either of the end ones, and also a brick space of five feet from the tops of the windows to the floor above. The defendant's old building rose at the apex of the roof to a height of nine feet from the first floor and completely covered these windows. I paid a visit to the house with the learned counsel on both sides, and was struck by the fact that these windows could not have had much access of light and air to them. As to the light there would be practically none coming through any of them. I cannot therefore see my way to holding that there is the slightest ground afforded by the evidence for the contention that there is a cause of action in respect of the windows on the first floor.

As regards the second floor there can be no doubt that there is a considerable difference as regards light and air to that floor by reason of the northern windows being closed up by the defendant's present building. The upshot of Mr. Shircore's evidence is that there is sufficient light and air in that room now for the purposes of a school—there is one now—but as a dwelling-house it cannot be used with the former comfort and convenience, but it can be used for dwelling purposes all the same.

Mr. Dumont, Buildings Engineer of the Rangoon Municipality says that the light in the room on the second floor is one-eleventh of

(4) 1905, 1, Chun. Div. 480.

the floor area, and adds. "By reason of defendant's blocking the plaintiffs' house on the north, the plaintiffs' room on the second floor has been rendered uncomfortable for occupation by the class of people who would live there." The witness then says that the municipality would not allow the dark part to be converted into a room for dwelling purposes by means of a partition, but in regard to the rest of it adds "Moveable screens seven feet high may be allowed. We will allow two rooms in front of the five windows and two rooms at the back." The meaning of this evidence is that at present there is not in that room the measure of light and air required by the municipal rules, but there is sufficient light and air for dwelling purposes even with two bed rooms and a sitting room in front. I think that portion which is dark now is in that state owing to the recent action of the plaintiffs themselves in closing three of the eight windows on the eastern side by building the water-closet and the bath-room, and Mr. Dumont says that if there were eight windows instead of five as there are now on the eastern side the quantity of light would be one-ninth of the floor area. This means very little less than is required by the municipal rules. Dr. Hormusjee assistant health officer of the municipality says that the room is still quite comfortable for dwelling purposes, and he would allow partitions as would Mr. Dumont.

The evidence leads forcibly to the conclusion that the room is still sufficiently lighted and ventilated for the ordinary purposes of inhabitation or business, according to the notions of the experts who have come before the court, for the class of people living in the locality in which the house is. What the evidence of Mr. Shircore and Mr. Dumont comes to is that as compared with its previous condition with the northern windows free, the room is now less comfortable; nevertheless it would be comfortable for dwelling purposes for the people who are likely to use it. * * * I must hold that the plaintiffs have no cause of action against the defendant.

The suit is dismissed with costs, special advocate's fee six gold mohurs for every effective day after the first day of hearing. I certify for two counsel.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 78 OF 1917.

C. M. R. M. A. R. PERIANEN CHETTY. .. APPELLANT.

vs.

MAUNG BA THAW and one RESPONDENTS.

Before Sir Daniel Twomey, C. J. and Parlett, J.

For appellant—Mr. Anklesaria.

14th August, 1917.

Evidence Act (I of 1872) s. 68.—Admission in evidence of documents required by law to be attested. Transfer of Property Act (IV of 1882) s. 59.—Attestation on acknowledgment of signature.—Defective execution.

A document required by law to be attested^d cannot be admitted in evidence unless one at least of the attesting witnesses has been called to prove execution.

An attesting witness must witness the actual execution of the instrument. A person who signs relying on an acknowledgment by the person executing it is not an attesting witness.

The provisions of section 59 of the Transfer of Property Act are imperative, and an appellate court can of its own motion reject an instrument that is not properly executed.

JUDGMENT.

TWOMEY, C. J. AND PARLETT, J.—The learned Judge of the district court has dismissed the suit of the plaintiff-appellant firm holding that the execution of the mortgage instrument is not proved. The circumstances attending the alleged execution, as set out in the judgment, give rise to strong suspicion of fraud and it is remarkable that though the mortgagor Azim is said to have died in 1909 a few months after the document was executed, and the mortgaged property passed into other hands, the mortgagees took no steps to enforce their mortgage rights in respect of either principle or interest for a period of seven years.

But though we are inclined to agree with the remarks of the district court as to the suspicious character of the whole transaction, we find that it is unnecessary to decide the question whether the mortgage should be held unproved on that ground alone. For there is a fatal defect on the face of the mortgage instrument and the evidence called by the P. A. Firm to prove it. Under section 59, Transfer of Property Act the mortgage instrument requires for its validity the attestation of two witnesses. It purports to have been signed by two witnesses, Palaniappa Chetty and Virappa Chetty. Virappa was not called as a witness, and it is clear from the evidence that Palaniappa did not in fact witness the alleged execution by Azim at all. Palaniappa says that the document was brought to him at Pegu for signature and before signing it he was told by Azim that he had executed it. It must now be regarded as a well established rule of law, that mere acknowledgment of the signature by the executant is not sufficient; the witnesses must sign only after seeing the actual execution of the deed. *Shaum Patter vs. Abdul K. Rowther* (1) Palaniappa was therefore not an attestation witness as contemplated by law. The document is not only inadmissible in evidence under section 68 of the Evidence Act,

(1) 35, Madras 607.

but owing to the want of two attesting witnesses under section 5 of the Transfer of Property Act, it did not effect a mortgage at all. The provisions of section 59 are imperative, and although the defect was not noticed in the lower court we are bound to take cognizance of it. On these grounds the appeal is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 99 OF 1916.

CURPEN CHETTY DEFENDANT. APPELLANT

vs.

ANA MAHALINGAM PLAINTIFF. RESPONDENT

Before Mr. Justice Maung Kin.

For appellant—Mr. Campagnac.

For respondent—Mr. Nariman.

7th June, 1916

Limitation Act (IX of 1908) Sch. I, Art. 182(5) step in aid of execution.—Application without necessary certified copies—Defects in application.

An application for execution of a decree without a previous application to the court which passed the decree to transfer it for execution to the court to which the application for execution was made and without a certificate showing that the decree had not been satisfied is a step in aid of execution within the meaning of article 182 of the Limitation Act, and gives a fresh starting point for purposes of limitation.

An application for execution that is in substantial compliance with the requirements of law is not vitiated by reason of trivial defects or informalities.

Gopal Chander vs. Gosain Das 25 C. 595 approved.

JUDGMENT.

MAUNG KIN, J.—In Suit No. 12 of 1911 of the sub-divisional court of Kyauktan Ana Mahalingam sued Parma Soomi and obtained an attachment before judgment. The attachment was subsequently raised by Curpen Chetty executing a bond as surety for the amount of the decree. After this the suit was transferred to the district court for disposal. That court passed a decree on the 4th of March 1911. On the 5th April 1911 the plaintiff applied to the district court for execution against Curpen Chetty. The court held that Curpen Chetty was bound under the bond to the sub-divisional judge and referred him to the sub-divisional court. On the 30th September 1913 plaintiff applied to the sub-divisional court for execution of the decree by the enforcement of the bond without having previously applied to the

district court for the transfer of the decree with a certificate of its non-satisfaction and without attaching a certified copy of the decree. But as the bond could not be found no further action was taken either by the plaintiff or by the court. On the 11th March 1914 the plaintiff again applied to the district court for execution by the arrest of the judgment-debtor and the Chetty surety. This application was dismissed on the ground that it had already been held that the bond could not be enforced by the district court and as that decision was not appealed against, the application was barred by *res-judicata*. The plaintiff appealed from this order of dismissal but was unsuccessful. On the 3rd of March 1915 the plaintiff again applied to the sub-divisional court for execution by the enforcement of the bond. The court held that the application was time-barred. On appeal to the divisional court it was held that the application was not time-barred and the case was remanded for decision on the merits. The defendant appeals to this court.

It is contended that the application of the 5th April 1911 to the district court was not an application for execution, or a step-in-aid of execution, in accordance with law, as it was made to the wrong court and should be disregarded, as also the application of the 11th March 1914. The contention is obviously correct. By reason of the ruling in the case of *Narayan vs. Timmaya* (1) the application of the 11th March 1914, though also against the judgment debtor and in order in regard to him, does not save limitation in regard to the surety. We have then left for our consideration only the question whether the application to the subdivisional court of the 30th September 1913 would save limitation for the application in question here of the 3rd of March 1915. Mr. Campagnac for the defendant contended that the application of the 30th September 1913 was not in form in accordance with law, inasmuch as it was not accompanied by a certified copy of the decree and no application had been made for the transfer of the decree to the subdivisional court as required by law and as more than three years had elapsed from the date of the decree to the date of the present application, if the 30th September 1913 is left out of consideration the present application is barred by limitation under article 182 of the Limitation Act. The Bombay case of *Sadashiva Raghunath vs. Ramachandra Chintaman* (2) supports the learned counsel's contention. But this case was dissented from by the Madras High Court in *Pachiappa Achari vs. Poojali Seenan* (3). In the latter case as in the Bombay case the defect relied on was the failure to produce a copy of the decree sought to be executed and it was held that the defect had reference to an extraneous matter and the application, though accompanied by such a defect, was in accordance with law.

In the latter Bombay case of *Ramachandra Sadashiv vs. Laxman Sadashiv* (4) the Madras case cited above was followed and it was said in regard to the Bombay case cited above that Mr. Justice Chandavarkar, who was a party to it, would no longer adhere to the

(1) 31, B. 50.

(2) 5, Bom. L. R. 394.

(3) 28, M. 557.

(4) 31, B. 162.

decision of his colleague, who pronounced the judgment. So that case was not followed. The Full Bench case of the Calcutta High Court, reported as *Gopal Chander Manna vs. Gosain Das Kalay* (5), may be cited in support of the Madras and the later Bombay cases, as it was therein held that material defects only could vitiate an application for execution. Another Bombay case, *Vinayak Vaman vs. Ananda Ramji* (6), decided in 1909 may also be cited as denying the correctness of the view contended for by Mr. Campagnac. There is also the Allahabad case of *Abdul Majid vs. Muhammad Faizullah* (7), which may also be cited against Mr. Campagnac's contention.

I, therefore, hold that by reason of the application of the 30th September 1913 the application now in question is not barred by limitation, though it was not accompanied by a certified copy of the decree and though the decree has not been transferred to the subdivisional court for execution. The appeal is dismissed with costs, and the case will, therefore, be sent back to the subdivisional court for decision upon the merits as ordered by the divisional court.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 98 OF 1913.

E. N. M. K. CHETTY APPLICANT.

vs.

CHARTERED BANK OF INDIA, AUSTRALIA

& CHINA and another RESPONDENTS.

Before Mr. H. S. Hartnoll, Esq., Offg. C. J. and Mr. Justice Twomey.

For applicant—Mr. MacDonnell.

For respondents—Mr. Ormiston.

5th January, 1914.

Civil Procedure Code (Act V of 1908) O. XXI, Rules 60 and 61.—Investigation of claims.

In an investigation of claims to property under attachment the court should consider whether the judgment-debtor was or was not in possession of the property, and if in possession whether he was in possession on his own account, or in trust for some other person. If this involves a decision as to the bona fides of an alleged sale, or the legal effect of a deed of conveyance, and the circumstances attending its registration, the court ought to go into such matters.

(5) 25, C. 594.

(7) 13, A. 89.

(6) 34, B. 68.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The respondents had many decrees against the Chetty firm of K. P., and in execution of such decrees attached certain immoveable properties. The applicant firm applied for removal of the attachments alleging that they had purchased the properties by registered deed of the 23rd June, 1912 and since then had been in possession. Respondents contended the application and alleged that the sale was a bogus one. The district judge would not in his judgment consider whether the sale was a genuine one, nor did he come to any definite finding as to who was in possession at the time of the attachments. He said "It is quite possible that it may ultimately be found that at the time of the attachment some of the properties were in the possession of the K. P. firm and some were not." He went on to say: "It seems to me quite possible that the K. P. firm may have had some attachable interest in at any rate some of the properties if not in all of them." He refused to remove the attachments and considered that a regular suit should be brought.

It seems to me that the district judge has not dealt with the case according to law. Order XXI rules 60 and 61 lay down the lines on which his decision should have been based. He should have considered whether at the time of the attachments the K. P. firm was in possession of the properties or any of them as its own property, and not on account of any other person, or whether the properties or any of them when attached were not in possession of the firm, or that being in possession of the K. P. firm they were in its possession not on its own account or as its own property but on account of or in trust for the appellant firm. If this entailed a consideration of the *bona fides* of the sale, or the legal effect of the deed of conveyance including the circumstances of the registration of it, such matters should have been gone into.

I would set aside the order of the district court and remand the case back to it to deal with it according to law namely on the lines set out by me.

I allow applicants the cost of this application—three gold mohurs. I set aside the order passed by the court as to costs. Costs in that court will abide the result of the further investigation now ordered.

TWOMEY, J.—I concur.

 IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 62 OF 1916.

HLA GYAW and others	..	..	..	APPELLANTS.
			<i>vs.</i>	
AUNG PYU and others	..	..	..	RESPONDENTS.

Before Mr. Justice Maung Kin.

For appellants—Mr. Campagnac.

For respondents—Mr. Sin Hla Aung.

18th June, 1917.

Limitation Act (IX of 1908) Sec. 1, Articles 123 and 142. Suit to set aside sale of undivided ancestral property by one of the plaintiff's co-heirs.

A suit to set aside a sale of undivided ancestral property by one of the plaintiff's co-heirs and for possession is not a suit for a distributive share of an estate within the meaning of article 123 of the Limitation Act, but is one for possession governed by article 142.

Ma Ko U *vs.* Tun E 3, L. B. R. 7 followed.

JUDGMENT.

MAUNG KIN, J.—The land in dispute at one time formed part of the estate of O Pauk Ke, who died about fifteen years ago leaving sixteen shins of land and four children, namely, Maung Hla Gyaw, Me Dok, Maung Kyaw and Mg. Lon. Maung Hla Gyaw was the eldest son, Maung Lon the youngest son. Maung Lon mortgaged the lands in dispute to Aung Pyu the defendant, and later on made them over to him in satisfaction of the mortgage debt. Some time afterwards Maung Lon sued Aung Pyu for the redemption of the land and failed to get a decree. This was followed by the present suit in which Hla Gyaw, Me Dok and the heirs of Maung Kyaw since deceased sued Maung Lon and Aung Pyu for three fourths of the lands on the ground that they formed part of an undivided estate left by O Pauk Ke and that they had an interest jointly to the extent of three fourths of the lands.

The subdivisional judge in his judgment describes the suit as one for a distributive share of an estate and this has somewhat strengthened the contention that article 123 of the Limitation Act applies, and as O Pauk Ke died fifteen years before the suit it was barred by time. I do not think the subdivisional judge's description of the suit is correct. Although the plaintiffs asked for three-fourths, which was their joint share in the property, the suit must be held to be one in which they asked that the sale to Aung Pyu be set aside to the extent of their joint share and for the possession of that share. That being the case, article 123 does not apply but according to the ruling in Ma Ko U *vs.* Tun E (1), article 142 would apply. The sale was in 1272 B. E., which would be the time when the plaintiffs were dispossessed. The suit is, therefore, not time-barred.

The next point to be considered is, whether as a fact there had been a division of the estate, the result of which was that the land in suit fell to the share of Maung Lon. The sub-divisional judge held that there had been no such division. I think he was right, for the evidence shows that the three older heirs of O Pauk Ke had been working portions of the estate by arrangement without having

(1) 3, L. B. R. 7.

had their shares distributed among them and that when Maung Lon got married, he was allowed to work the lands in suit which had been worked by Maung Kyaw who had by that time died.

The next point to consider is whether as held by the divisional judge, the sale to defendant Aung Pyu was with the consent of the plaintiffs. . . . The burden is on the defendant Aung Pyu to prove the consent of all who were interested in the property. I am unable to hold that he has discharged it.

However that may be, neither the mortgage nor the sale was valid because neither was by a registered instrument as required by sections 59 and 54 respectively of the Transfer of Property Act.

I allow the appeal by reversing the decree of the divisional court and by passing a decree that the transfer to Aung Pyu be set aside, and that the defendant Aung Pyu do give the plaintiffs possession of three-fourths of 16.50 acres which is equal to 12.37 acres. The respondents will pay costs throughout.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT MADRAS.

KRISHNASAMI PANIKONDAR APPELLANT.

vs.

RAMASAMI CHETTIAR and others RESPONDENT.

Before Lord Parker of Waddington, Lord Wrenbury, Sir John Edge,

Mr. Amir Ali and Sir Lawrence Jenkins.

For appellant—Sir Erle Richards, K. C. and Brown.

For respondents—Mr. DeGruyther, K. C. and Mr. O'Gorman.

8th November, 1917.

Limitation Act (IX of 1908) s. 5.—Ex parte order admitting appeal.

An *ex parte* order under section 5 of the Limitation Act admitting an appeal as within time can be reconsidered by the court hearing the appeal.

The practice of leaving the question of sufficiency of cause for admitting an appeal till the final argument is open to grave objection. The question of limitation ought to be finally decided at the time of admission, after notice to all parties.

JUDGMENT.

SIR LAWRENCE JENKINS.—On the 4th November 1908 the High Court of Madras dismissed an appeal from an original decree on the

ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction, and secondly, that it was erroneous on the merits.

The original decree was passed on the 8th February 1905 in the court of the additional subordinate judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the court reopened after vacation: but it was not presented until the 12th July 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the court that he had sufficient cause for not presenting his appeal within the prescribed period.

He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before Sankara Nair, J., sitting as a single judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November, affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the court on the 7th October 1908, and at the outset it was objected that the appeal was out of time and so not competent. The court, after an examination of the several affidavits accepted this view and dismissed the appeal, as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by Sankaran Nair, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to re-consider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to re-consideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the courts in India.

But there remains the contention that, at any rate the court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the bearing of the appeal. This objection,

however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Aiyangar; nor was it even mentioned in the original review petition. It was no doubt advanced at a later stage as an additional ground for review but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the court. The authorities moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to re-consider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the court comes to decide on the question of delay. Their Lordships, therefore, desire to impress on the courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned judges distrusted his explanation and held that sufficient cause had not been shown. The court, therefore, declined to exercise in his favour the powers to excuse delay. It has not been shown that in this the court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL REVISION No. 47 OF 1917.

MAUNG SAN BA APPELLANT.

MAUNG LUN BYE RESPONDENT.

Before A. E. Rigg, Esq., A. J. C.
For applicant—Mr. R. K. Banerjee.

18th May, 1917.

Civil Procedure Code (Act V of 1908) O. 21, Rules 58 and 63.—Investigation of claims to property under attachment.—S. 115. Revision of order. Existence of special remedies.

Where a remedy by way of a regular suit is specially provided against orders of a summary nature the High Court will interfere in revision only when the lower court has plainly infringed the extrinsic conditions of its legal activity, and when it is manifest that an adequate remedy or the intended remedy cannot be had by the ordinary and prescribed method.

Shiva Nathji *vs.* Joma Kashinath, 7 B 341 followed.

JUDGMENT.

Rigg, A. J. C.—This is an application in revision against an order passed by the township judge, Thazi, directing the removal of attachment of certain lands. The judge held that the lands were in the possession of the objector at the time of the attachment and not of the judgement-debtor or some person in trust for him. San Ba's grounds for moving this court in revision are that the judge had acted with material irregularity in not applying his mind to the provision of section 110, Evidence Act, and in not considering the evidence produced. An objection is also taken to the amount of costs awarded. Rule 63, Order XXI, provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but that, subject to the result of such suit, if any, the order shall be conclusive. The first point that has been argued at the Bar is whether any revision lies against an order such as the one passed by the township judge, and if it does lie, within what limits this court will interfere in revision. In *Ittilachan vs. Velappan* (1) the court appeared to think that it had no power to revise orders in cases investigated under Order XXI, rule 58, but the point was not argued and the opinion is merely an obiter dictum. In *J. J. Guise vs. Jaisraj* (2) Burkitt, J., said that the rule of the court was that if a party applied to the court to exercise its powers in revision he must satisfy the court that he has no other remedy open to him under the law to set right what has been done illegally, irregularly or without jurisdiction. In *Ghulam Shabbir vs. Dwarka Prasad* (3) a Bench of the same court interfered in revision on the ground that it was doubtful whether a separate suit would lie. In the matter of *Sheoraj Nandan Singh vs. Gopal Suran Narain Singh* (4) and *Monmohiney Dassee vs. Radha Kristo Dass* (5) the Calcutta High Court interfered in two

(1) 8, M. 484.

(2) 15, A. 405.

(8) 18, A. 163.

(4) 18, C. 290.

(5) 29, C. 543.

cases where the court had gone beyond the determination of the question of possession only. The decision proceeded apparently on the ground that the court below had acted illegally in the exercise of its jurisdiction in directing execution to issue. In *San Tun Pru vs. Mi Ani Me* (6) interference with the lower court's order was made for similar reasons to those given in the Calcutta cases. The latest reported decision in Lower Burma is that of *Maung Tun U vs. Palaniappa Chetty* (7), where the learned Chief Judge said: "The course which the plaintiff should have pursued is very clearly indicated in rule 63 of Order XXI of the Code of Civil Procedure, which says that where a claim or an objection is preferred to an attachment, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, . . . the order shall be conclusive. . . . With such plain provisions staring him in the face, it was sheer culpable negligence on the part of the advocate. . . . to incur the risk of the plaintiff losing all remedy by filing the appeal and the application for revision." The case does not decide that under no circumstances will revision lie. The only reported decision in Upper Burma is *Maung Thaing vs. Maung Thale Ni* (8), where Thirkell White J., said: "In a case in which the court of first instance has acted on insufficient materials, has dealt with the case in a perfunctory manner or has given a decision which is plainly perverse, this court would be justified in interfering in revision." None of the authorities seem to have been brought to the notice of the learned judge, and I venture to doubt whether the law laid down correctly states the grounds on which revision is justified under section 115, Code of Civil Procedure. The most fully considered decision that I have been able to find is that of a Full Bench of the Bombay High Court in *Shiva Bathaji vs. Joma Kashinath* (9) where the question referred for the decision of the Full Bench was, "Whether the High Court should exercise its extraordinary jurisdiction under section 622, Code of Civil Procedure or otherwise on behalf of persons who feel themselves aggrieved by orders passed by court. . . . in cases in which it appears the law has specifically prescribed another remedy by suit or otherwise." After a very elaborate discussion of the authorities, seven propositions were laid down of which the most important was the fifth, which is as follows: "Where a decree or order of a subordinate court is declared by the law to be, for its own purposes, final or conclusive, though by its nature provisional, as subject to displacement by another decree in a more formal suit, the court will have regard to the intention of the legislature that promptness and certainty should, in such cases be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior court where the extrinsic conditions of its legal activity have plainly been infringed, but where the alleged, or apparent, error consists in misappreciation of evidence, or misconstruction of the law intrinsic to the enquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an

(6) 1, L. B. R. 180.

(8) 1897—1901, U. B. R. II,

(7) S. L. B. R. 146; 8, Bur. L. 1

(9) 7, B. 341.

adequate remedy, or the intended remedy cannot be had." The principles laid down in this decision were approved in Sheo Prasad Singh vs. Kastura Kuar (10) by Mahmood J., who described the judgment as one deserving of the highest respect from the Indian Courts, and I think that it should be followed in this court. In the present case I see no reason why the petitioner should not resort to the ordinary remedy by suit. It is not shown that there has been any infringement of the extrinsic conditions of the lower court's legal activity. The judge found after taking evidence that the lands in dispute were in the objector's possession on his own account and not on account of the judgment-debtor and he had power to decide the point. The application for revision is dismissed.

IN THE COURT OF THE FINANCIAL COMMISSIONER
OF BURMA.

STAMP REFERENCE NO. 11 OF 1918.

IN RE MAWCHI MINES, LIMITED.

Before H. Thompson, Esq., F. C.

For applicant—Mr. Okeden.

4th June, 1918.

General Clauses Act (X of 1897) s. 3 (7) British India. Stamp Act (II of 1899) s. 3 (c). Instruments chargeable with duty.

Instruments executed out of British India, and not relating to any property situate, or to any matter or thing done or to be done in British India are not chargeable with duty under the Stamp Act.

The Karenni states are not part of British India within the meaning of the General Clauses Act.

Reference by the Collector of Rangoon under section 56 (2) of the Indian Stamp Act (II of 1899) regarding the liability to stamp duty of two documents executed in England one being an assignment and the other a mortgage of certain property belonging to the Mawchi Mines Limited and situated in the Karenni State of Bawlake.

ORDER.

THOMPSON, F. C.—The instruments under reference were not executed in British India, and do not relate to any property situate or to any matter or thing done or to be done in British India. The documents are not therefore chargeable with stamp duty under the Indian Stamp Act 1899.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 339 OF 1915.

OFFICIAL ASSIGNEE PLAINTIFF.

vs.

HAJEE MAHOMED HADY DEFENDANT.

Before Mr. Justice Young.

For plaintiff—Mr. Cowasjee and Mr. A. B. Banerji.

For defendant—Mr. Giles.

29th January, 1918.

Civil Procedure Code (Act V of 1908) O. XL, R. 1. Appointment of receiver.—Insolvency of Administrator.

The insolvency of an administrator is a good reason for appointing a receiver. The facts that the administrator has been administering the estate for a number of years, and has kept proper accounts, that waste or mismanagement is not alleged, and that all the persons for whom the estate has been administered have not joined in the application are not sufficient reasons for refusing to appoint one.

ORDER.

YOUNG, J.—This is an application by the official assignee for the appointment of a receiver to collect the rents and profits and take charge of a certain property until further orders.

The property in question is at present being held by the respondent partly in his personal and partly in a representative capacity as administrator de bonis non. In his personal capacity the respondent is an insolvent, and therefore his personal share vests in the official assignee who sued the insolvent as heir and as administrator for the determination of his share and its delivery to him. The official assignee obtained a decree on the 23rd August 1917. The insolvent has appealed and by consent the taking of the accounts has been stayed pending the hearing of the appeal without prejudice to this application for a receiver.

The insolvent states that he is keeping accounts and this is not denied, nor is any mismanagement alleged.

The suit was filed at the end of 1915 and no decree was passed for nearly two years. During the whole of this time the official assignee was content to leave the management of the property in the hands of the administrator and never applied for a receiver. The respondent has been in possession for nearly forty years, and so far as the papers before me show has managed it without giving cause for complaint; and none of the persons or bodies for whom he is administering join in the application. The official assignee is joint tenant with the ad-

ministrator to the extent of the insolvent's personal share. As such he is entitled to be protected from waste, but none is alleged. The sole ground for the application appears to be his insolvency.

In re Johnson Steele vs. Cobham (1) shows how loth the court is to allow an insolvent to manage another's estate. It was an administration action brought by a creditor against an administrator who subsequently became in his personal capacity insolvent. A receiver was appointed apparently as a matter of course on the ground that the court could have no confidence in the insolvent. There however the administrator became insolvent on the 18th January 1866, and the plaintiff in the administration suit took out a summons at once. Here the insolvent was adjudicated on the 7th August 1912, and no application was made till the 21st December 1917, and though the official assignee sued in 1915 to have the insolvent's share defined and partitioned and prayed for a receiver, no application was ever made in the suit till now.

In re Hopkins (2) is an authority to the same effect, but there also action was taken as soon as the administrator became insolvent. If similarly prompt action had been taken by the official assignee my course would have been plainer, but when the beneficiaries have been content with his administration for nearly forty years, are content with it still despite his insolvency and when his creditors as represented by the official assignee have despite the same fact been content with his management for nearly six years, the matter is less easy. On the whole however I do not see how I can allow him to continue managing a property, an undefined portion of which belongs to his creditors except with their consent. He manages for the official assignee who is a trustee for the creditors and is therefore a trustee for them himself and as Jessel Master of the Rolls said *in re Hopkins* (2) it is not fit that a man who is a bankrupt should continue to be a trustee without the consent of the cestuisque trustent. These did consent up till now, but do not consent any longer and there is nothing more to be said. They are entitled to have their share protected; what their share is it is impossible to determine at present. Till it is determined, they have rights over the whole and there must therefore be a receiver of the whole despite the fact that the charities and other bodies for whom the respondent holds as administrator are content to leave their shares in his hands. The application must therefore be allowed with costs, two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 147 OF 1916.

PHAUNG THA RHI APPLICANT.

vs.

MI ME BAW RESPONDENT.

(1) L. R. 1 Ch. A. 325.

(2) 19, Ch. Div. 61.

Before Mr. Justice Maung Kin.
For applicant—Mr. Kyaw Htoon.

5th June, 1917.

Maintenance—Liability of father.

A father who is paying for his child's maintenance under an order of court is not bound to pay bills for medical attendance on the child unless he has expressly or impliedly contracted to do so.

JUDGMENT.

MAUNG KIN, J.—Mi Me Baw sued her former husband Phaung Tha Rhi for Rs. 17-4-0, the amount of the medical bill tendered by the medical attendant of her son by the defendant. The parties had been divorced, their son being taken by the mother while the father promised to pay her Rs. 10 per month for the maintenance of the child. The child fell ill and a doctor attended on him and then presented the above bill. According to the doctor he has been paid rupees six by the plaintiff and there still remain Rs. 11-0-0 unpaid. I do not understand how she came to sue for Rs. 17-4-0 when she had paid only six rupees. She cannot sue for what she has not paid or for what she has paid, because the latter amount must have come out of the monthly allowance. Even if she had paid the whole amount out of her own pocket, the monthly allowance having been spent on other requirements of the boy there is no obligation on the part of the father to pay fees for medical attendance, unless he has expressly or impliedly contracted to pay the same.

In *Mortimore vs. Wright* (1) it was held that the moral obligation which a father is under to provide for his child imposes no liability to pay the debts incurred by the child and that he is not so liable, unless he has given the child authority to incur them or has contracted to pay them. In *Fluck vs. Tollemache* (2) it was held that a father is not bound to pay for clothes furnished to his son, without some contract, express or implied, on his part to do so.

In *Elizabeth Urmston vs. Newcomen* (3) the question was whether a father deserting his infant child would be liable in *assumpsit* to a party who supplied the child with necessaries, no further proof of contract being given. It was held that no such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

The above authorities seem to me to be against the plaintiff, even if she could prove that, the monthly allowance not being available for the purpose of paying the bill, she had paid the whole of the amount out of her own pocket.

(1) 1840, 6, M. and W. 482; 55, R. R. 704.

(2) 1823, 1, Car. and P. 5; 28, R. R. 765.

(3) 1836, 4, A. and E. 899; 43, R. R. 514.

The application is allowed and the decree of the lower court is set aside. I, shall, however make no order as to costs of this application, as I think the defendant, being able to pay, as he is a well-to-do broker, should have considered himself morally bound to pay.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CIVIL REVISION No. 249 OF 1916.

SANTA APPLICANT.

vs.

BATTERSBY RESPONDENT.

Before A. E. Rigg, Esq., A. J. C.
Mr. H. M. Lutter.—Amicus Curiae.

18th June, 1917.

Army Act (44 and 45 Vict cap.58) s. 136 and 144—attachment of soldier's pay.—Civil Procedure Code (Act V of 1908) s. 60, sub-section 2(b).

The pay of a non-commissioned or warrant officer is exempt from attachment by a civil court by virtue of the provisions of sections 136 and 140 of the Army Act.

JUDGMENT.

RIGG, A. J. C.—This is a reference by the township judge, Bhamo, as to whether the pay of a non-commissioned officer in charge of the Supply and Transport, Bhamo, is liable to attachment in execution of a decree passed by the court under its small causes court jurisdiction. It is contended on behalf of the judgment-debtor that his pay is exempt from attachment under section 144 of the Army Act (44 and 45 Vict. . . . c. 58). Neither party has been represented by counsel at the hearing, but Mr. Lutter has kindly argued the case as amicus curiae.

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

Provided that (1) "Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left at his last quarters, proceed in such action or suit to judgment and have execution, other than against the person, pay, arms, ammunition, equipments, regimental necessaries or clothing of such soldier." . . . The section commences by exempting any soldier of His Majesty's forces from being taken out of the service by process, execution, or order of a court of law, except in respect of (a) a charge of or conviction for crimes or (b) debts, damages or money exceeding £30 over and above the costs of suit. The section then explains what is meant by

a crime, a court of law, and the method of proof of debt, damages or money, and declares that all proceedings in contravention of the section are void. The proviso contains an exception to the privileges conferred by the first four sub-clauses of the section, and although as pointed out in *Murray & Company vs. Prins* (1), the drafting of the section is open to criticism, I think there is no doubt that the pay of the soldier is exempt from attachment unless there is any other provision of law that is inconsistent with it and prevails. Section 136 Army Act, lays down that the pay of an officer or soldier should be paid without deduction other than the deductions authorised by the Act, etc, or by any law passed by the Governor-General in Council. The last clause was added at the same time as section 151 was repealed, which dealt with the way in which a civil court could award execution against persons subject to military law other than soldiers. In *Prins vs. Murray & Company* (2) it was held that sub-section 2 clause (b), section 60 Civil Procedure Code, does not amount to a declaration that the provisions of sub-section 1 of section 60 do not constitute a law passed by the Governor-General in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular forces. The doubt that existed about the correctness of this view in consequence of the differences in opinion in the High Courts of India has been set at rest by the repeal of sub-section 2 (b) of section 60 by Act X of 1914. The question for decision, therefore, resolves itself into one of whether sub-section 60, Code of Civil Procedure, authorises the attachment of soldiers' pay and if so, how it is to be reconciled with section 144 Army Act. Clause 1 exempts to a certain extent the pay of the public officers or servants referred to in clause (h) from attachment, when they are on duty. "Public officer" is defined in section 2 (17), Code of Civil Procedure, and includes commissioned or gazetted officers in the military forces of His Majesty and every officer in the service or pay of the Government. It is urged that non-commissioned officers fall within the latter description, and that, therefore, their pay is subject to attachment to the extent allowed in section 60 (1), unless section 144, Army Act, is to override this section. The reply to this argument is that in section 136 Army Act, the term "officer" does not include a non-commissioned or warrant officer, who is merely a soldier within the meaning of that section, and the provisions of section 144, Army Act, prevent the operation of section 60 (1), Code of Civil Procedure. This is clear from the definition of "officer" in clause (4), section 190, Army Act had the Legislature intended to include non-commissioned officers within the meaning of section 60 (1), Code of Civil Procedure, I think this intention would have been clearly shown by including them in clause (c), section 2 (17), Code of Civil Procedure. I am of opinion that Sergeant Battersby's pay is not liable to attachment in execution of the decree in the township court, Bhamo.

(1) 10, Ind. Cas. 719.

(2) 23, Ind. Cas. 935.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 176 OF 1916.

YAGAPPA CHETTY APPELLANT.

vs.

K. Y. MAHOMED and others RESPONDENT.

Before Mr. Justice Maung Kin.
 For appellant—Mr. Khastigar.
 For respondent No. 2—Mr. Das.

4th May, 1917.

Limitation Act (IX of 1908) ss. 21(1), 21(2). Agent duly authorised to pay.—Guardian of person.—Payment by one of several debtors.—Civil Procedure Code (Act V of 1908) s. 34(2).—Decree silent as to payment of interest.

Payment of interest by one of several heirs of a deceased debtor does not save limitation against the other heirs.

A guardian of the person of a minor is not an agent duly authorised to pay within the meaning of section 21 (1) of the Limitation Act.

When a decree is silent as to the payment of interest after the date of decree the court must be taken to have refused such interest.

JUDGMENT.

MAUNG KIN, J.—This appeal arises out of a suit in which the defendants respondents were sued on a promissory note in their representative capacity. The pro-note was executed by K. Y. Cassim, since deceased. First defendant is elder brother, and second and third defendants are daughters of the deceased. Fourth defendant is the deceased's nephew. Third defendant is a minor and appeared by her *guardian ad litem* even in this court. She was eleven years old, when the suit was filed. Of the defendants the first three only are the heirs of the deceased the fourth (defendant Mahomed) not being an heir at all.

The plaintiffs claim that the suit is not barred by limitation on the ground that the first defendant made two part payments which save limitation as against all the defendants. First defendant did not appear to contest the suit. I have to take it that the alleged part-payments have been proved as the suit has been decreed as against defendants one and four. The finding has not been assailed here either. Now it has been held in *Arjun Rampal vs. Rohima Banu* (1) that the payment of interest by one of his heirs on a debt due by a deceased person does not save limitation against the other heirs.

But it is alleged that the first defendant made the part-payments on his own behalf as well as on behalf of the second and third de-

(1) 14, Ind. Cas., 128.

defendants as their duly authorized agent, inasmuch as he was then the manager and head of a joint family of which defendants two and three were members. This the latter defendants deny. And there is not a scrap of evidence to show that the first defendant was such a head. Moreover although the case laid shows that the head of a joint Hindu family might have the necessary authority it does not appear that the same rule prevails among Mahomedans.

The learned judge below observed in his judgment that it is not alleged that the first defendant was the natural guardian of either of defendants two and three. But it has been argued before me that the first defendant was the lawful guardian of defendant No. 3 and as such was a person who falls within the meaning of the words "agent duly authorized in this behalf" in sections 19 and 20 of the Limitation Act, as defined by section 21 (1) of the same Act. Sections 107 and 109 of Wilson's Digest of Anglo-Mahomedan Law show that failing all the female relatives mentioned in section 107 the custody of a minor girl under the age of puberty belongs to the father, and failing him to the nearest male paternal relative within the prohibited degrees reckoning proximity in the same order as for inheritance. In Mahomedan law puberty is presumed on the completion of the fifteenth year in the case of both males and females, unless there is evidence to show that puberty in the particular case was attained earlier. Third defendant was only eleven years old at the date of the institution of the suit and as the part-payments were made nearly three years before, she must have been about eight years old then. The first defendant was therefore the natural guardian of the person of the minor defendant which means according to the books that the guardianship is for custody and education. I find also that even if the minor defendant had attained puberty the first defendant would be the guardian of her person, failing father, executor of father's will and father's father provided the minor is unmarried. See section 111 of Wilson's Mahomedan Law. But this is not in my opinion sufficient for the purposes of section 21 (1) of the Limitation Act. I think the first defendant should be the guardian of the minor's property as well, because the act in question of his is sought to be made binding on the minor's estate.

Section 112 of Wilson's Mahomedan Law gives a list of the natural guardians of the property of a minor indicating the order of priority among them. The father's brother is not included in that list and the section goes on to say that failing all of these it is for the court to appoint a guardian or guardians. I hold therefore that the first defendant was not "a person duly authorised" within the meaning of section 21 (1) of the Limitation Act. The result is that the payments made by the first defendant cannot bind the second and third defendants. The appeal is therefore dismissed as against the second and third defendants with costs.

Defendants one and three have not appeared before this court and as against them the plaintiffs ask for interest at six per cent per annum from the date of the institution of the suit till realization.

They say that they asked for that in their plaint and the learned judge below failed to deal with their prayer.

Section 34 (2) of the code of civil procedure provides that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment, the court shall be deemed to have refused such interest, and a separate suit therefore shall not lie. The matter must therefore be treated as if the lower court had exercised its discretion and refused to give interest, unless perhaps the plaintiff can show that the silence of that court upon the point was due to an oversight or mistake, but there is nothing to show this. That being the case, the proper course is to follow the case of *Majmundar Hiralal vs. Desai* (2) of which the facts were similar to those in this case, and which decided that the High Court was right in declining to allow the prayer. The appeal is dismissed as against the second and third respondents with costs, the costs in this court being confined to one advocate's costs, as at the hearing Mr. Das appeared for both and Mr. Judge though set down as an advocate for the third respondent did not appear. The appeal against the first and fourth respondents as regards the interest asked for is dismissed. The lower court's decree against them will stand. There will be no order as to costs in their favour, as Mr. A. C. Dhar who the list shows was appearing for first respondent did not appear and the fourth defendant was absent.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CRIMINAL REVISION No. 350 OF 1917.

EMPEROR PROSECUTOR.

vs.

NGA PO MYA and one ACCUSED.

Before A. E. Rigg, Esq., A. J. C.

1st June, 1917.

Criminal Procedure Code (Act V of 1898), ss. 342 and 364. Examination of accused. S. 537.—Omission to examine accused.—Validity of trial.

Omission to examine an accused person under section 342 and 364 of the code of criminal procedure is fatal to the validity of a trial. The provisions of section 342 are imperative and failure to comply with them is not a mere irregularity curable under section 537.

JUDGMENT.

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

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

The district magistrate has commented on the irregularity of the method of trial in this case. The magistrate fixed the case for the 2nd of December at Pakokku, but proceeded to the village where the land was situated on the 30th of November without giving any notice to the advocates and pronounced judgment on the 2nd of December. The convictions and sentences are set aside, and a re-trial is directed. The fines that have been paid will be refunded.

 IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 68A OF 1917.

EMPEROR PROSECUTOR.

vs.

NGA TUN KAING ACCUSED.

Before Mr. Justice Maung Kin.

28th May, 1917.

Penal Code (Act XLV of 1860) s. 83. Act of a child under twelve. Ss. 375 and 511. Rape—attempt.

A boy of twelve can be convicted of an attempt to commit rape. Queen *vs.* Williams 1893, I. Q. B. 320 followed.

ORDER.

MAUNG KIN, J.—The accused, a little boy of twelve, has been found guilty of an attempt to commit rape upon a little girl of four. The girl's parts were found to be bruised. The accused was convicted of an attempt to commit rape. In England the rule at Common Law is that a boy under fourteen is under a physical incapacity to commit the offence of rape and that is a *praesumptio juris et de jure* and judges have from time to time refused to receive evidence to show

that a particular prisoner was in fact capable of committing the offence. In *Queen vs. Williams* (1) the prisoner being under the age of fourteen, it was held by Lord Coleridge, C. J., Hawkins, Cave, Day and Collins, JJ., that he was entitled to be acquitted of having had carnal knowledge of a girl of thirteen but that he was guilty of an indecent assault. But the question whether the boy would have been convicted of an attempt at rape was expressly left an open question by Hawkins and Day, JJ. The former said: "I do not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do."

In India, there seems to be no ruling except in the unreported case of *Gopala Rama*, which is quoted in Ratanlal's Law of Crimes (eighth edition), at page 786 from Unreported Criminal Cases 865. The volume cited is not available. There it is stated to have been held that a person physically incapable of committing the offence of rape cannot be held guilty of an attempt to commit it. The point to consider is whether that view is correct.

In *Queen vs. Ramsarun Chobey* (2) Turner, J., says: "To constitute then the offence of attempt under this section 511, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in attempting the commission of the offence."

Having regard to the above definition and to the fact that it is necessary only to prove penetration in a charge of rape, I think the offence committed was an attempt to commit rape.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 314B OF 1916.

GNANAKANNU APPLICANT.

vs.

VEERAVAGU RESPONDENT.

Before Mr. Justice Parlett.

For applicant—Mr. Gaunt.

For respondent—Mr. Wiltshire and Mr. Bose.

12th January, 1917.

Penal Code (Act XLV of 1860) s. 211. Making a false charges against a number of persons.—District offences.

A person who lays an information containing a false charge against a number of persons commits a district offence against each of the

(1) (1893), 1, Q. B. 320.

(2) 4, N. W. P. 46.

persons against whom he makes a charge, and may be separately prosecuted under section 211 of the Penal Code for each of such offences.

JUDGMENT.

PARLETT, J.—On 31st March 1916 respondent laid information at the police station that one Poonuswamy Nadar had caused hurt to him with a dah, and that applicant and others were present and abetted the causing of hurt. On 3rd April he filed a complaint to the same effect. Applicant and others appeared in court and subsequently on 1st July applicant was discharged. On 10th July he applied for sanction to prosecute the respondent for falsely charging him with an offence under section 211 Indian Penal Code. On 21st July the applicant and respondent and their pleaders appeared and arguments were heard, and the case was adjourned for orders on 24th July. Orders were not ready then, and the case stood over till the 26th, when sanction to prosecute was granted. On the same day the magistrate gave judgment acquitting the other persons accused in the hurt case and ordering respondent's prosecution for falsely charging them.

On 2nd August applicant instituted a prosecution on his sanction and the trial proceeded till 16th August. On the 22nd August the respondent applied to the sessions court to revoke the sanction and on 6th October this was done. The applicant now seeks to have it restored.

The sessions judge's reasons for revoking the sanction were that the interests of justice will be sufficiently served by the prosecution of the respondent ordered by the magistrate on 26th July and that to allow the sanction to stand would be unduly harrassing the respondent in that he would be twice prosecuted for practically one offence, and that it was never intended by the legislature that courts should be used for the purpose of gratifying people's own feelings against other persons. . . . I cannot agree with the sessions judge. It is not the case that respondent's allegation that he was cut with a dah is entirely false. Having been so cut he falsely accused Poonuswamy Nadar of cutting him and applicant and others of being present and abetting the cutting. It seems to me that to falsely charge one person with being implicated in a crime is not the same offence as to falsely charge another person with being implicated in the same offence. The circumstances under which and the motives from which such false charges are made may be totally different, and it appears to me that there is no impropriety in the offender being called to account for making each of such false charges. In the present instance it does appear that the alleged false charge as against the petitioner may have been in some respects on a different footing from those against the other five persons, and I do not consider that the prosecution in respect of the five constituted sufficient reason for disallowing a prosecution by the petitioner, though in the event of both prosecutions ending in conviction it might be proper to take the sentence in one into account in passing sentence in the other. I think there were not sufficient reasons for revoking the sanction and I restore

it. The trial in Criminal Regular No. 177 of 1916 of the First Additional Magistrate of Insein will proceed.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 49B OF 1917.

NOOR MAHOMED APPLICANT.

vs.

KING EMPEROR RESPONDENT.

Before Mr. Justice Parlett.

For applicant—Mr. McDonnell.

For respondent—Mr. Gaunt.

27th April, 1917.

Evidence Act (I of 1872) s. 91. Exclusion of oral evidence.—Criminal Procedure Code (Act V of 1898) ss. 161 and 172—Special diary.

Statements made to a police officer in the course of an investigation can be proved by the evidence of persons who heard them made. Section 91 of the Evidence Act has no application to matters embodied in a special diary prepared under section 172 of the Code of Criminal Procedure.

Solai Naik vs. Emperor, 34 M, 349, referred to.

JUDGMENT.

PARLETT, J.—The petitioner has been convicted of giving false evidence in a judicial proceeding. He appealed through an advocate on the facts and his appeal was dismissed. He now applies in revision on the ground of inadmissibility of certain evidence.

The facts are that a bundle of stolen clothing was found by the police officer in petitioner's presence on the premises which he occupied, and that he told the police officer the bundle had been left there by one Abdulla Meah. At the trial of Abdulla Meah petitioner gave the evidence in respect of which he has been convicted. That evidence consists of two main points—One is to the effect "I know nothing in this case. I did not know about police seizing a bundle of clothes. No bundle of clothes was found either in my possession or in the building where I lived;" the other is "I did not state before any police officer that accused Abdulla Meah entrusted to me a bundle of clothes." There was evidence against the petitioner of persons who saw the clothes found in his presence on his premises and who heard him make the alleged statement to the police officer. No question has been raised as to the admissibility of the evidence on the first point, and therefore the conviction was justified, and it is really unnecessary

to decide as to the admissibility of the evidence on the second point which has been questioned. I have however considered the point raised and will decide it. It was that a police officer investigating an offence under Chapter XIV of the Criminal Procedure Code is bound to incorporate in the diary prepared under section 172 (the special diary) the statements of the witnesses examined by him; consequently by section 91 of the Evidence Act no evidence of such witness's statements shall be given except the diary itself. Thus somewhat startling proposition is based upon some remarks of the judges in *King Emperor vs. Mannu* (1) where four judges held that all statements reduced to writing under section 161 should be in the special diary and not elsewhere. Two other judges however, held to the contrary that such statements if entered in the diary are not an integral part of it and are not privileged, but an accused person or his agent is entitled to see them; so far from the case being an authority that matters contained in the special diary can only be proved by production of the diary, the entire full bench held the exact opposite namely that entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained. It appears to me clear that section 91 has no application to matter embodied in a special diary for if it had, no proof at all could be given of such matter in as much as section 172 forbids a special diary being used as evidence except for certain limited purposes. This view has been expressed with reference to search lists in *Solai Naik vs. Emperor* (2) where it was held that even if the narrative of an extrinsic fact must by law be reduced to writing, it may still be proved by oral evidence. At the conclusion of their judgment the learned judges remarked. "We need hardly point out that if the provisions of section 91 were to apply to the case of a search list prepared under section 103 Criminal Procedure Code the results would be startling and there would be grave risk of miscarriage of justice in many trials in criminal cases." The results would be still more startling and absurd if the legislature should be held to have enacted that most of the vitally important matters relating to the investigation of criminal offences should by being reduced to writing be excluded altogether from proof at the trial.

So far as this province is concerned the executive Government have forbidden the incorporation in special diaries of witnesses' statements in extenso (see para 613 Burma Police Manual). Even were it not so, the provision in section 172 Criminal Procedure Code that the circumstances ascertained in the investigation should be noted in the special diary, could not be held to require the statements of witnesses to be taken down as they made them in that diary, and if the Allahabad decision really affirmed the contrary which I doubt, I must respectfully express my dissent from it. There is in my view no rule whatever excluding oral evidence being given of statements made to the police by witnesses who heard them made. The application is dismissed.

(1) 19, A. 390.

(2) 34, M. 349.

IN THE COURT OF THE JUDICIAL COMMISSIONER
UPPER BURMA.

CRIMINAL APPEALS NOS. 24-33 OF 1917.

NGA SAN NYEIN and others APPELLANTS.

vs.

EMPEROR RESPONDENT.

Before A. E. Rigg, Esq., A. J. C.

For appellants—Mr. Pillay.

For the Crown—Mr. Lutter.

27th March, 1917.

Evidence Act (I of 1872) ss. 30 and 114(b) and 133—Confession of a co-accused—Evidence of accomplice. Penal Code (Act XLV of 1860) ss. 37 and 396.—Co-operation by doing one of several acts constituting an offence. Criminal Procedure Code (Act V of 1898) s. 144 examination of the accused.

The confession of a coaccused person is not the same as the testimony of an accomplice.

The court may under section 30 of the Evidence Act take the former if properly proved into consideration against all the accused as lending support to other evidence. But in the absence of other evidence it is not a proper basis for a conviction.

A conviction may under section 133 of the Evidence Act be based on the uncorroborated testimony of an accomplice who has been examined as a witness.

A person who is keeping watch while others are committing a dacoity co-operates in the commission of the offence and is guilty of an offence under section 396 read with section 37 of the Penal Code.

The object of examining an accused person is to give him an opportunity of explaining anything appearing in the evidence against him. All the points appearing against him should be put to him, and he must be invited to offer his explanation. Anything in the nature of cross-examination should be avoided.

JUDGMENT.

RIGG, A. J. C.—Nga San Nyein, Nga Ngwe Zin, Nga Kyi Byu, Nga Hme, Nga San Byaw, Nga Shin, Nga Yan Nyein, Nga Po Min, Nga Thu Daw and Nga Tet Si have all been convicted by the sessions judge, Magwe, of committing dacoity with murder at Kyaung-yagan on the 19th September last and with the exception of Nga Tet Si have been sentenced to death. There is no doubt whatever that a dacoity was committed in the course of which Maung Nyi Maung was killed by some of the dacoits. The evidence shows that late at night, six or seven men came armed with dahs, sticks and a tube-gun to the house of Maung Shwe Daik. They demanded money and some

of them called out that they had caught one of the inmates of the house. Thereupon Nyi Maung San Kwin and Nyi Maung attacked the dacoits with dahs. Both of them were wounded and Nyi Maung died three days later in the Yenangyaung hospital. The fight took place whilst the dacoits were still near the house of Shwe Daik and not whilst they were retreating after abandoning their attempt to commit the robbery. Section 396 clearly applies to the case. San Kwin and Nyi Maung were justified by the right of private defence in attacking the dacoits, who were not justified by the provocation thus given in killing Nyi Maung. Nyi Maung was cut several times with a dah, one of the wounds being a severe one on the back, and there can be no doubt that in causing his death, his assailants committed murder. San Kwin wounded one of the dacoits on the head. The dacoits left behind them Exhibits Nos. 1—7, of which the most important are a pawa with a dah cut and some human hair, and three sticks of dahat wood. The wounded dacoits managed to escape. Nga San Nyein was found wounded after the dacoity, and his wounds correspond in respect of position and age with those of the man attacked by San Kwin.

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

(1) 29, A. 434.

(2) 38, B. 164.

Jaffir Ali (3), Queen *vs.* Naga (4) Queen Empress *vs.* Dosa Jiva (5) Queen Empress *vs.* Khandia (6) Queen Empress *vs.* Ram Saran (7) Queen Empress *vs.* Nirmal Das (8) Giddigadu *vs.* Emperor (9) Emperor *vs.* Ashootosh Chuckerbutty (10) Yasin *vs.* King Emperor (11). In Queen *vs.* Sadhu Mundal (12) Phear, J., said "It is true that the instance of corroboration which is appended to illustration (b) of section 114 Evidence Act, is corroboration to be found in accounts of an occurrence given by the accomplices; but it is noticeable that the legislature...makes it a condition...that these accomplices should have been captured on the spot and kept apart from each other and...there is not the slightest indication that the legislature intended in this passage by the term accounts given by the accomplices anything other than accounts given in due course of examination as witnesses." Section 133 Evidence Act, modifies the general rule laid down in section 114, but it clearly refers only to accomplices who have been examined as witnesses. The result of the decisions cited above appears to be that the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. Mr. Lutter who has appeared in this court for many years, informs me that it has been the rule not to uphold convictions based merely on the confessions of co-accused persons. He is not prepared to support the convictions of Yan Nyein, Po Hin, San Byaw or Nga Shin. These convictions rest entirely on the retracted confessions of other appellants and are set aside. Nga San Nyein, Nga Po Min, Nga San Byaw and Nga Shin are acquitted and will be set at liberty.

* * * * *

The law relating to retracted confessions was fully discussed in Chit Tun and others *vs.* Crown (13) and I adopt the conclusions of the learned judges of the Chief Court in that case. The weight to be given to such confessions depends on the circumstances under which they were made, and on the intrinsic credibility of the confessions. In my experience confessions in Burma are seldom the result of physical ill-treatment by the police. Sometimes the person confessing is under police surveillance and is induced to confess under threat of prosecution coupled with a promise that if he confesses, he will be given a pardon. Sometimes the police have a certain amount of evidence against a man and induce him to confess under a similar promise. Relatives are not infrequently called in to persuade him

(3) 19, W. R. Cr. 57.
 (4) 23, W. R. Cr. 24.
 (5) 10, B. 231.
 (6) 15, B. 66.
 (7) 22, A. 495.
 (8) 22, A. 445.

(9) 33, M. 40.
 (10) 4, C. 483.
 (11) 28, C. 689.
 (12) 21, W. R. Cr. 69 at page 71.
 (13) 1, L. B. R. 238.

that it will be better for him to confess. Others confess in the hope that they will derive some benefit from doing so, and will be less severely punished. Some confessions are made out of resentment against those who have already confessed; and with the view of securing their punishment, whatever may happen to the person confessing. Not infrequently confessions are due to a belief that everything is lost, and that the result of deeds in a former state of existence has brought the prisoner into peril. He succumbs to his ill luck and does not attempt to fight against it. . . . I have no doubt that Kyi Byu's confession was due to a feeling that he could not escape from punishment, and that he might as well yield to his fate. I am of opinion that his confession is substantially true, so far as the part played by him in the crime is concerned. He has been rightly convicted.

Against Tet Si the only evidence is that of the confessing co-accused, and that is an insufficient basis for a conviction. The conviction of Tet Si is set aside, and he is acquitted. The sessions judge has sentenced the others to death. It was pointed out in *Queen-Empress vs. Nga Pyon Cho and others* (14) that sentences of death should be passed in cases under section 396 Indian Penal Code, unless there are extenuating circumstances. The gang in this case went out armed with two tube guns and dahs and the probability of some villager being killed must have been present to their minds. The persistency with which these offences are committed in Burma calls for the severest punishment. According to the confessions, Nga Hme and Kyu Byu waited outside the village. They were keeping watch there, and according to the map, were one hundred and twenty five yards from the house attacked. They are equally liable under section 37, Indian Penal Code for the dacoity, and their mere presence at the actual scene of the crime is immaterial: *Empress vs. Teja* (15). The alibis set up are so weak as not to require discussion. I dismiss the appeals of San Nyein, Ngwe Zin, Kyi Byu, Thu Daw and Nga Hme.

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

(14) S. J. L. B. 636.

(15) 17, A. 86.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 266B OF 1917.

TAMBI APPLICANT.

vs.

KING-EMPEROR RESPONDENT.

Before Mr. Justice Ormond.

For appellant—Mr. G. B. Dawson.

For respondent—Mr. Sutherland.

*2nd November, 1917.**Criminal Procedure Code (Act V of 1898) s. 208(2)—Postponement of cross-examination.—Evidence Act (I of 1872) s. 138.*

In magisterial inquiries into cases triable by sessions courts the accused has no right to reserve his cross-examination of the witnesses for the prosecution until they have all been examined-in-chief.

JUDGMENT.

ORMOND, J.—The petitioner was being prosecuted for an offence of abetment of attempt to murder and the enquiry was being held under Chapter XVIII of the Code by the second additional magistrate, Kyaikto. Eleven prosecution witnesses were examined in chief and the diary shows that the cross-examination was reserved until the sessions. Then the doctor was examined as the twelfth prosecution witness and the pleader for the accused wished to cross-examine him but the magistrate refused to allow it then, as the cross-examination of the previous witnesses had been postponed. This order was clearly wrong. Two other witnesses were then examined in chief and the diary shows that the cross-examination was reserved till the sessions. Mr. Dawson then appeared for the accused and a discussion took place as to whether the cross-examination of the witnesses had been postponed till the sessions or until the witnesses for the prosecution had all been examined in chief; and he obtained leave to recall the witnesses for cross-examination, after the remaining witnesses had been examined. Mr. Sutherland who appeared for the complainant then applied *ex parte* to the district magistrate to set aside the order of the additional magistrate and his application was granted. The petitioner now applies in revision against that order of the district magistrate. It is clear that the district magistrate had no power to cancel the order of the additional magistrate. He had power to call for the record and to submit the proceedings to this court. But Mr. Sutherland contends upon the authority of *Po Win vs. Crown* (1) that if the order that was made by the district magistrate without jurisdiction would be a proper order for this court to pass, it is the duty of this court to go into the case and to pass such an order. The

(1) 1, L. B. R. 311.

first question therefore is: was the order of the additional magistrate allowing an accused to recall witnesses for the prosecution for the purposes of cross-examination a proper order or not. The proper time for cross-examination is no doubt immediately after the examination in chief—Section 138 Evidence Act; and an order by a magistrate allowing an accused without any special reason, to postpone cross-examining the prosecution witnesses until they had been all examined in chief, is a procedure not contemplated by the code. The following authorities bear out this view:—*In re Mohamed Kasim* (2) *Durga Dutt vs. Emperor* (3) and *K. E. vs. Channing Arnold* (4). On the other hand Mr. Dawson refers me to the case of *Fazarali vs. Mazakarulla* (5), where it was held that the accused has the right to recall the prosecution witnesses for cross-examination so long as the prosecution case is not closed; and to the case of *Jogendra Nath Mookerjee vs. Mati Lal Chukerbutty* (6), where it was held that it was open to the magistrate under section 213 sub-clause 2 of the code to recall witnesses for the prosecution if required by the defence for cross-examination. Upon the balance of authorities I am of opinion that the accused has no right to postpone his cross-examination of the witnesses for the prosecution until they have been all examined in chief. But this is far from saying that the magistrate would not be right in recalling witnesses for further cross-examination if the circumstances of the case called for it. The Manual of this court in paragraph 123 expressly lays down that it is the proper course, if the accused wishes it, for all the witnesses for the prosecution after having been examined in chief to be recalled for cross-examination. That direction has not the force of a judicial decision, though the magistrate can hardly be blamed for acting under it; and as pointed out above, it is not I think in accordance with the practice contemplated by the code.

Now assuming that the order of the additional magistrate was not a proper order, what order should this court pass? By prohibiting the accused from cross-examining the prosecution witnesses this court would be prejudicing the accused's right in consequence of the accused having acted according to the direction of the magistrate who acted under the direction of this court's Manual. The utmost this court could order would be to put the parties so far as is possible in statu quo; which would be to allow the cross-examination to take place now. There are still ten witnesses to be examined for the prosecution. The order of the district magistrate is set aside as having been made without jurisdiction and the additional magistrate is directed to allow the accused to recall all or such of the fourteen witnesses already examined as he may wish to cross-examine. They will be cross-examined and re-examine if necessary, after which the

(2) 22, I. C. 173.

(3) 15, I. C. 75.

(4) 6, L. B. R. 129 at p. 132; 5, B. L. T. 239.

(5) 16, C. L. J. 45.

(6) 39, C. 885.

remaining ten witnesses will be examined and cross-examined and the cross-examination of each witness will follow immediately after the examination in chief.

The case was sent up on the 10th April and evidence was not taken until the 23rd August which seems to be an unnecessary long time and the magistrate is directed to proceed with the case without delay.

* List No. XX of amendments to the Lower Burma Courts Manual issued in October 1917, repeals the direction No. 123(1) referred to in the judgment.—*Editor, B. L. T.*

THE BURMA LAW TIMES.

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JULY-AUGUST, 1918.

[Nos. 7 and 8.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 105 OF 1917.

A. C. KUNDU APPELLANT.

vs.

BABU N. ROOKMANAND RESPONDENT.

Before Sir Daniel Twomey, C. J. and Mr. Justice Parlett.

For appellant—Mr. J. R. Das.

For respondent—Mr. Leach.

17th August, 1917.

*Transfer of Property Act (IV of 1882) s. 58—Mortgage-money—s. 69—
Power of sale in default of payment of Mortgage-money.*

Under the definition of the term mortgage-money in section 58 of the Transfer of Property Act interest is mortgage-money just as much as the principal sum secured.

The words "default of payment of mortgage-money" in section 59 of the Act include default of payment of interest.

JUDGMENT.

TWOMEY, C. J.—The parties carried on business in Moulmein, one of the towns to which section 59 of the Transfer of Property Act expressly extends, and on December 19th, 1913, the plaintiff firm mortgaged certain immoveable property to the defendant for Rs. 25,000/- advanced and such further sums as might be advanced up to Rs. 75,000/- in all. The mortgage-instrument allows redemption on payment of principal with interest on December 31st, 1919. It stipulates that interest shall be paid monthly. It also gives the mortgagee a power of sale to be exercised "at any time" and provides that if the power is exercised the sale-proceeds after meeting the incidental expenses shall be applied "to pay and satisfy the monies which shall then be owing upon the security of the mortgage," any surplus being paid to the mortgagor. To the power of sale is annexed

a proviso that "the power of sale shall not be exercised unless a default shall be made in payment of the said principal sum or the interest thereof."

As the interest was not paid monthly and was heavily in arrear, the defendant (mortgagee) threatened in February 1917 to exercise his power of sale. The plaintiff firm (mortgagor) then brought this suit for an injunction to restrain the defendant from exercising the power of sale. The district court has dismissed the suit and the plaintiff firm now appeals to this court.

Their main contention is that in India a power of sale under the mortgage must conform with the provisions of section 69 of the Transfer of Property Act and that the power contemplated in that section is not exercisable unless there has been a default in payment of the principal money, which cannot occur until the period allowed for redemption has expired. I think the first part of this contention is correct but not the rest. The section clearly contemplates the exercise of the power of sale when interest amounting to Rs. 500/- at least is in arrear and unpaid for three months after becoming due. "Default of payment of the mortgage money" in the first paragraph of the section would include default of payment of interest, for the term "mortgage money" is defined in section 58 as the principal money and interest of which payment is secured, and thus it appears that interest is "mortgage-money" just as much as principal is. The use of the conjunction "and" does not imply that the term "mortgage-money" is applicable only to principal and interest in combination. In my opinion it cannot be held that there is anything in the section inconsistent with the exercise of the power of sale prior to the expiration of the period allowed for redemption. We have been referred to the ruling of the Privy Council in *Venkatavarada vs. Venkata* (1). The mortgage instrument in that case had a clause giving a power of sale which was exercisable if any "obstruction" was caused by the mortgagor in respect of the conditions in the mortgage and it was provided that in the event of such obstruction the mortgagee could sell the property before the expiry of twelve years the period of redemption and could pay himself from the sale proceeds the full amount of principal and interest, not merely the interest then due but interest also for the unexpired portion of the term of twelve years. It was held that this clause was in the nature of a penalty and could not be enforced; but that is a different thing from saying where the deed gives a power of sale on default of payment of interest that the mortgagee cannot exercise it to the extent of recovering the full amount of principal and the interest due up to the time of the suit unless the period allowed for redemption has expired. In the Privy Council case the clause was held to be in the nature of a penalty only because it provided for the recovery of interest for the period which had still to run. If the Privy Council ruling gave rise to any doubt on the subject it has been set at rest by section 69 of the Transfer of Property Act which as noted above clearly contemplates

(1) 23 W. R., 91.

the exercise of the power of sale even if there has as yet been no default in respect of payment of the principal money.

We have however to consider whether the mortgage instrument in this suit does in fact provide for the power of sale on default of payment of interest alone and for the recovery of the full amount of principal and interest up to date in the event of such default. The power of sale is to be exercised according to the instrument "at any time" on default of payment of principal or interest." The provision in the deed as to the disposal of the sale proceeds shows that when the power of sale is exercised not only the interest which is in arrear but also the principal amount secured is to be recoverable from the sale proceeds. The mortgagee is to take the monies which shall then be "owing on the security of the mortgage." Although the principal money could not in ordinary circumstances be demanded till December 31st, 1919, still it is a debt and is *owing* to the mortgagee from the time when the money was actually advanced to the mortgagor.

It is true that the exercise of the power of sale before 31st December, 1919, has the effect of defeating the express provision for reconveyance on payment of principal and interest on that date. But the document must be taken as a whole and it appears to me that the parties clearly intended the right of redemption on 31st December, 1919, to be dependent on punctual payment of the monthly interest as it fell due in the meantime. I can see no reason why the courts should not give effect to this intention. I would therefore dismiss the appeal with costs.

PARLETT, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION No. 142 OF 1917.

In re THE ESTATE OF A. H. COTTON.

EVELYN SARAH DOVER.. .. . PETITIONER.

Before Mr. Justice Maung Kin.

For petitioner—Mr. Okeden.

5th December, 1917.

Trusts Act (II of 1882) s. 2. Trustee, s. 41. Power to apply property of minors for their education.

An administrator of an estate is not a trustee for the minor heirs, and the court cannot under section 41 of the Trusts Act grant him permission to apply the property of the minors towards their maintenance.

Quære. Whether an administrator could not under section 269 of the Succession Act apply the property for such purpose.

JUDGMENT.

MAUNG KIN, J.—The petitioner applies as administratrix of the estate of Alfred Hubert Cotton deceased for certain orders under section 41 of the Indian Trusts Act. By his will the deceased gave all his property to his two children and appointed his brother Cecil Bidwell Cotton to be the executor of the will and also trustee for his children. The executor is now dead and the petitioner has been appointed administratrix *de bonis non*. She states that these two children are still minors and that they have been in her charge. The estate moneys amount to about Rs. 12,500|- and she says at five per cent per annum there would be a yearly income of about Rs. 625|- but that the cost of maintenance and education of the children will in future be not less than Rs. 1200|-. Besides this there is a balance due to her of Rs. 645-6-6 from the estate. She therefore prays under section 41 of the Indian Trusts Act that she may be permitted to raise out of the capital of the trust fund of the estate sufficient to pay for the maintenance and education of the children until they attain majority and also to pay to herself the sum of Rs. 645-6-6 which is due to her.

The question to consider is whether she can be treated as a trustee of the estate fund. I do not see any reason for holding her to be such. The passages read out to me from Lewin on Trusts deal with cases where trusts have been implied from circumstances. The question here is not whether there is a trust for the children but whether, if there is such a trust, the petitioner can under the circumstances of the case be regarded as a trustee in place of Cecil Bidwell Cotton appointed trustee under the will. Assuming that there is a trust, the petitioner does not come before the court to invoke its aid because for want of a trustee the trust would fail. Her case is that the circumstances of the case are such that she is now the trustee of the children and must be regarded as such. In my opinion there is no reason for holding that she is an implied trustee of the children simply because she happens to be the administratrix of the estate. The petitioner not being a trustee her application under section 41 of the Indian Trusts Act must fail. If the contention is that there is a trust, and that that trust should not fail for want of a trustee, it may be open to the beneficiaries to take action under section 74 of the Indian Trusts Act to have a trustee appointed. I will therefore reject this application.

 IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 105 OF 1916.

APPAN CHARAN APPELLANT.

vs.

KYAUKSE MA RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Chari and Mr. Ray.

For respondent—Mr. Broadbent.

4th May, 1917.

Limitation Act (IX of 1908) Sch. I, Arts. 142 144. Suit for possession—Burden of proof—Laches—Acquiescence.

When a plaintiff sues for possession alleging dispossession or discontinuance of possession the period from which limitation runs is the date of dispossession or discontinuance of possession. The suit is governed by article 142 not by article 144 of the schedule to the Limitation Act, and the burden is on the plaintiff to show that he has been in possession within twelve years from the date of suit.

Mohima Chunder vs. Mohesh Chunder 16, C. 473 and *Maung Ya Gyaw vs. Ma Ngwe* 2, L. B. R. 56 followed.

Where there is a statute of limitation the doctrine of laches does not apply till the expiration of the time allowed by the statute.

Acquiescence is different from laches; it means more than laches. Mere neglect to enforce a claim for the period during which the law permits a plaintiff to delay without losing his right is not acquiescence.

If a party who could object lies by and knowingly permits another to do an act under the belief that it will not be objected to, and so gives permission to another to alter his position he may be said to acquiesce.

Archbold vs. Scully 9, H. L. C. 360 and *Ramsden vs. Dyson*, L. R. 1, H. L. 129 followed.

JUDGMENT.

MAUNG KIN, J.—Both the lower courts have held that the defendant-respondent did encroach on the plaintiff-appellant's land to the extent sued for by building on it.

The main defence however is involved in the question whether article 142 or 144 of the Limitation Act applies. The plaintiff alleges that he was in possession when the encroachment took place in 1908 or 1909, and that he was thereby dispossessed of the land taken up. Following the ruling of their Lordships of the Privy Council in *Mohima Chunder Mozoondar vs. Mohesh Chunder Neogli* (1) a divisional bench of this court has held in *Maung Ya Gyaw vs. Ma Ngwe* (2) that if a plaintiff claims on the ground that he and his predecessors have been in possession but have been dispossessed or have discontinued possession, the period from which limitation runs is the date of dispossession or discontinuance, and the burden is on the plaintiff to show that he or his predecessors in title have been in possession within twelve years of the date of suit. I hold that article

(1) 16, C. 473; 16, I. A. 23.

(2) 2, L. B. R. 56.

142 applies to the case and that it is upon the plaintiff to show that he was dispossessed within twelve years of the date of the suit, that is to say that the defendant built her house within that period. On this point the court of first instance held that the defendant built her house about six years before the suit. The district court on appeal disagreed with that finding.

The plaintiff's witnesses on this point are Maung Po Thaug, Maung Tun Baw, Maung Po Thin, Kammusami and Rahim Bux.

* * * * *

In my view the evidence of Mg. Po Thaug and the other Burman witnesses is absolutely reliable, and I hold that the plaintiff has succeeded in discharging the onus that was on him.

Counsel for the defendant argued that even if the plaintiff's case was established in its entirety, the defendant should not be compelled to pull down the house which she had occupied for so long, but should be ordered to pay such compensation as was reasonable under the circumstances. The reason urged for this contention is that the plaintiff waited six or seven years before he filed his suit, without having previously made any complaint. Mr. Broadbent cited *Bromo Moyee Debia vs. Koomodinee Kant Bannerjee* (3) and *Nil Kant Sahoy vs. Jujoo Sahoo* (4). In the first case there were two appeals in the second of which the suit was to have a privy erected on a very small bit of land (four cowries) demolished. Both the lower courts held concurrently that the privy had been erected for seven years or so with the consent of the plaintiffs. The consent appears to have been inferred from the fact that the plaintiffs had been aware of the fact that the privy was erected, and allowed it to be completed and to remain standing for many years. The learned judges of the High Court held that the consent had been rightly inferred and dismissed the appeal. In the second case the plaintiff claimed to enforce his right to an easement. Upon the facts it was held that he had not proved such user as would be necessary for the purpose of establishing the right of easement claimed, but the learned judge went on to say: "We will add that supposing that the plaintiff had the right which he alleges in this case, he could not be allowed in equity to stand by and see the defendant building a house and erecting a chaboot-rah before he complained in any way of his right being infringed by any of these acts. He was bound at once to do his best to prevent the defendant from putting a permanent obstacle in the way of the enjoyment of his rights. If he silently stands by and permits him to go to the expense of erecting a building upon his own land before he complains, a court of equity ought to be very slow to listen to his complaint. When the consequence of giving effect to that complaint will be to cause a very considerable damage and loss to the defendant." With due respect I am unable to accept the law as laid down in either of these cases, for in my opinion it is too general in expression, and too wide in effect. The law was laid down in somewhat similar terms to that in the above cases by a subordinate judge in

(3) 17, W. R. Civ. 466.

(4) 20, W. R. Civ. 328.

Gopi vs. Bisheshar (5). "If a man permits another to build upon his land and with the knowledge that the building is being erected stands by and does not prevent the other from doing so, then no doubt equity comes in and by the rules of equity which in this respect are the same as those of law he cannot eject that other person," and Their Lordships of the Privy Council in *Bem Ram vs. Kundanlal* (6) remarked that it was to be regretted that the loose and inadequate statement of the rule of equity reported in *Gopi vs. Bisheshar* should have been accepted apparently without much consideration by the learned judges of the High Court.

I shall deal first with the English law on the subject of laches and acquiescence. "A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the Statutes of Limitation; *vigilantibus et non dormientibus lex succurrit*. A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his rights for a length of time. He is then said to be barred by his laches. The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar operating expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable." (7) But there appears to be a distinction between laches and acquiescence. In *Archibald vs. Scully* (8) Lord Wensleydale points out the distinction in the following words:—I take it that where there is a statute of limitation, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar." With these observations must be read what was said by the same learned judge and Lord Chancellor Cranworth in *Ramsden vs. Dyson* (9). There both their Lordships declared that if a stranger builds on the land of another supposing it to be his own and the owner does not interfere but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profit. But if a stranger builds on the land of another knowingly, there is no principle which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that if a tenant does the same thing he cannot insist on refusing to give up the estate at the end of the term. It was his own folly to build. This was stated in the Allahabad case of *Uda Begum*

(5) 5, A. W. N. 100.

(6) 21, A. 496.

(7) Halsbury's Laws of England, Vol. 13, section 203, p. 168.

(8) 9, H. L. C. 330 at p. 333.

(9) L. R. 1, H. L. 129.

vs. Imam-ud-din (10) as the effect of the observations of their lordships and was adopted as the law applicable to India. "These dicta" say the learned judges of the Allahabad High Court "of the highest authority illustrate the application of the general rule. There must be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies." Then the learned judges in dealing with the facts of the case proceeded to say that the appellant, knowing that the respondents were building on her lands, abstained from commencing proceedings for one or two years, that the respondents must have known that they had no claim to the land and that they could hardly have doubted that it belonged to the appellant, and that the delay in bringing the suit was therefore not sufficient to deprive the appellant of her right to relief.

In *Beni Ram vs. Kundan Lal* (6) their lordships of the Privy Council adopted the principle laid down by Lord Chancellor Cranworth and Lord Wensleydale in *Ramsden vs. Dyson* (9). In *Fatehyab Khan vs. Muhammad Yusuf* (11) the suit was for the removal of a building erected by the defendants upon certain land over which the plaintiffs alleged that all the residents of the mohulla where the parties lived had from time immemorial exercised a right of way to and from their residences, besides using it for social gatherings and other common purposes. *Ramsden vs. Dyson* (9) was followed and Edge C. J. observed on the facts:—"It appears to me that the acquiescence cannot possibly arise here. It is not suggested that there was any evidence that the plaintiff had given their mutual consent to the building, and the only evidence of acquiescence can be that they did not immediately protest. It appears to me that the defendants in erecting this building must have known perfectly well that they were building upon a courtyard which their neighbours had a right to use." It is clear from the foregoing that besides the plaintiff's delay in instituting proceedings the court would have to go into the question as to whether or not the person building had reasonable grounds for supposing that the land built on was his own land.

In *Muhammad Umar Daraz Khan vs. Maru*, (12) Karamat Husain, J. following *Beni Ram's* case (6) laid down the law as follows: "In order to constitute acquiescence and to raise the plea of equitable estoppel an abstinence from interference is not enough. In addition to this there must also be mistaken belief in the builder that the land upon which he was building was his own property." So that the defendant may show that he did not build on the land of another knowingly but under a mistaken belief that it was his.

Turning to the question of fact whether the defendant's husband knew that he was building on a portion of the plaintiff's land or whether he had reasonable grounds for believing that he was doing so on his own land, I am unable to come to any other conclusion than that the defendant's husband built the house taking in a portion of

(10) 1, A. 2.

(11) 9, A. 434.

(12) 1, I. C. 821.

the plaintiff's land knowingly and that there was no possibility of a mistake having occurred as to whose property that portion was.

The appeal is allowed. The decree of the district court is set aside, and that of the court of first instance restored. The defendant respondent will not however be ordered to pay any costs in any of the courts, as I think the plaintiff should have brought his suit earlier than he did.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 96 OF 1914.

E. S. ABOO APPELLANT.

vs.

E. E. MOOLLA.. .. . RESPONDENT.

Before Sir Charles Fox, Kt., C. J. and Mr. Justice Parlett.

For appellant—Mr. Das.

30th November, 1917.

Probate and Administration Act (V of 1881) s. 90.—Permission to administrator to sell property.

Permission to sell immoveable property ought not to be granted to an administrator without the fullest enquiry and only when debts and other charges on the estate cannot be paid without selling the property.

The fact that an estate can be wound up conveniently by distributing the sale proceeds among the heirs is no ground for granting permission to sell.

JUDGMENT.

FOX, C. J. AND PARLETT, J.—This is an appeal against an order refusing permission to an administrator to sell immoveable property of the estate which he has to administer. He asked for such permission for the purpose of winding up the estate as conveniently as it can be in order to distribute the proceeds of sale among the persons entitled thereto.

This is not a good ground for giving permission under the section. The Act does not contemplate that the family of a deceased whose estate vests in an administrator should be deprived of the right of retaining for themselves the immoveable property which according to the law to which they are subject devolved on them. Such an idea would be entirely repugnant to the feelings of Hindus, Mohamedans and Buddhists who attach affection and reverence to the family house and property, yet if permission is granted to an administrator to sell immoveable property of the estate on the ground put forward, it would

be in the administrator's power to sell such house and to turn the family out of a property which may have been in the possession of their ancestors for centuries. Permission should only be granted when the money and proceeds of the immoveable property left by a deceased are insufficient to pay debts and the other necessary outgoings payable by the administrator. After he has paid these he can fulfil his functions as administrator by executing conveyances of the immoveable properties to the persons jointly entitled to the deceased's estate. If any of these wishes to obtain his share separately it is open to him to bring a suit for partition, and so to obtain his share under the safeguards afforded by a suit.

It is not the function of an administrator to act as a commissioner of partition or to bring about a partition by selling property in order to divide the proceeds. Long experience in this court has shown that gross wrongs have been committed on females and minors when permission under the section have been too readily granted, and it is to be hoped that it will be the settled practice of the court in future not to grant permission without the very fullest enquiry into the necessity for selling immoveable property of an estate. The appeal is dismissed, with costs, two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION NO. 201 OF 1917.

H. G. ARIFF APPLICANT.

vs.

SURATEE BARA BAZAAR COMPANY, LIMITED . . . RESPONDENT.

Before Mr. Justice Maung Kin.

For applicant - Mr. Das.

For respondent - Mr. Giles.

8th March, 1918.

Indian Companies Act (VII of 1913) s. 28. Rectification of Register—s. 107. Table A. Regulation 97. Dividends to be paid only out of profits.

The articles of association of a company provided that "the directors may before declaring any dividend set aside out of the profits of the company such sums as they shall think proper as a reserve fund." The directors declared no dividend for several years, but purchased shares of the Suratee Bara Bazaar Company, Ltd., out of the profits, and credited the shares so purchased to the reserve fund. At a meeting of shareholders it was resolved that the amount standing to the credit of the reserve fund account be retransferred to the profit and loss account, and a certain amount be distributed as bonus amongst shareholders.

In pursuance of this resolution forty eight shares of the Surattee Bara Bazaar Company, Limited, were transferred to one of the shareholders out of the reserve fund account.

The Surattee Bara Bazaar Company, Limited, refused to register the transfer on the ground that it was ultra vires.

Held on application by the transferee for rectification of register that the reserve fund represented undivided profits and not capital; and that the company should rectify its register of members by entering the name of the transferee in the register of members.

JUDGMENT.

MAUNG KIN, J.—This application has reference to the Goolam Ariff Estate Company, Limited. The objects of the Company are set out in its memorandum of association, and so far as they concern this application are:—(a) to combine and consolidate the shares of the members in the estate which belonged to Hajee Goolam Ariff and to co-operate so as to prevent the dissipation of the same.

* * * * *

(c) to receive the dividends of the shares belonging to the company and to invest the same in shares of other companies, or in the purchase of other immoveable property in the town of Rangoon.

* * * * *

(g) to invest and deal with the monies of the Company not immediately required, upon such securities and in such manner as may from time to time be determined; and to lend money to such persons and on such terms as may seem expedient."

In article 5 of the memorandum of association the capital is stated to be 20 lakhs divided into 2000 shares of Rs. 1000/- each and among other properties of which the said capital consists are certain shares in Rangoon mentioned in the said article as regards the appropriation of the profits, article 124 of the articles of association of the company lays down that they "shall be divisible among the members on the shares held by them respectively." Article 127 says that "no dividend shall be payable except out of the profits arising from the business of the company." Article 135 provides that "the directors may before declaring any dividend set aside out of the profits of the company, such sum as they shall think proper as a reserve fund, to meet contingencies or for repairing, improving or maintaining the property of the company, for paying mortgages, debentures, or borrowed money, for equalizing dividends or for such other purposes as they may think fit." It appears from Moosa Goolam Ariff's affidavit, the truth of which is not denied by the opposite party that owing to long litigation and other circumstances the company did not for several years declare any dividends out of its profits, and that out of the profits thus accumulated the company purchased shares of the Sooratee Bara Bazaar Company, Limited, and of other companies and some immoveable property and kept such shares and immoveable property as a reserve fund of the company and that the value of such shares and property was credited to the reserve fund account

On the 4th October, 1917, an extraordinary general meeting of the company was held and the following resolutions were passed:—

That the amount standing to the credit of the reserve fund account on the 31st December, 1916, be retransferred to the profit and loss account.

That (a) out of the amount that will, after such retransfer, be standing to the credit of the profit and loss account a sum not exceeding 14 lakhs of rupees be distributed as bonus among the share-holders pro rata i. e. according to the number of shares held by them in the Goolam Ariff Estate Company, Limited.

(b) the directors be and are hereby authorized to pay the pro rata amounts to the share-holders in the following manner:—

(I) by transferring rateably to the individual names of the share-holders such integral number of shares held by the Goolam Ariff Estate Company, Limited, in other joint stock companies as were purchased out of the profits of the company and are available for distribution:

(II) by sale of the actual number of shares as will be necessary to pay in cash the value of the fractions left after transfer of the integral number of shares:

(III) by rateable distribution of the cash available:

(IV) should the payments and transfer mentioned above not be sufficient to make up the amounts sanctioned for distribution, the directors are also authorized to sell as many of the houses and landed properties purchased out of profits, as will be necessary to raise the required balance in cash and to distribute it rateably among the share-holders."

At a subsequent extraordinary general meeting of the company held on the 26th October, 1917, the said resolutions were confirmed.

In pursuance of the said resolutions forty-eight shares of the Sooratee Barra Bazaar Company, Limited, bearing Nos. 384 to 386 etc. . . . which had been purchased by the Goolam Ariff Estate Company, Limited, out of the moneys of the reserve fund account were transferred to the applicant H. G. Ariff one of the share-holders of the Goolam Ariff Estate Company.

The applicant then sent to the Sooratee Barra Bazaar Company, Limited, the transfer-deed of the said forty-eight shares which had been executed by the directors of the Goolam Ariff Estate Company in the applicant's favour together with the share certificates request ing the Sooratee Barra Bazaar Company to transfer the said shares to the applicant's name in their registers, but that company refused to comply with the request, unless ordered to do so by a competent court. Hence this application praying that the Sooratee Barra Bazaar Company, Limited, be directed to rectify their registers by transferring the said forty-eight shares to the applicant's name. The Sooratee

Barra Bazaar Company, Limited, have appeared by counsel who said on their behalf that they did not wish to incur any risks in the matter and only solicited the directions of the court.

It is quite clear from the facts stated above that the said forty-eight shares do not form part of the original capital but have been acquired consistently with the objects (c) and (g) of the memorandum of association and the Goolam Ariff Estate Company, appear to have carried the shares and other property purchased with the said accumulated profits to the credit of the reserve fund account under the provisions of article 135 of the articles of association.

It is common ground that if the shares and other property bought and carried to the reserve fund account as stated above have thereby become part of the capital of the company the company has no power to distribute it among the shareholders and the said resolutions would be *ex facie* ultra vires. Otherwise they would be in order and could be legitimately carried out. Now I am unable to see anything in the memorandum of association showing that if shares in other companies were bought with the dividends of the shares already belonging to the Goolam Ariff Estate Company the shares so bought would thereby become part of the capital.

So far as I am able to see, the profits must remain profits whether they have been converted into other forms of property or not, unless and until they become by virtue of the memorandum of association or by consent of the shareholders part of the capital. That seems to be in accordance with plain common sense, and there is authority for this in the cases of *Bouch vs. Sproule*, (1) *Sugden vs. Alsbury*, (2) *Re Armitage* (3) and *Dicido Pier Co.* (4) in all of which the following principle as deduced by Palmer in his *Company Law Precedents* Vol. 1, 10th edition, p. 684, is laid down and recognized as good law:—"A reserve fund accumulated out of profits preserves its character of undivided profits unless and until something is done effectually to convert it into capital." On this point the observations of Lord Bramwell in *Bouch vs. Sproule* (1) are illuminating. His lordship says "My lords, the authorities bearing on the question in this case, are to my mind very unsatisfactory. I can deduce no principle from them. Cases have been decided differently where the facts were the same, because different words had been used. This in my opinion can never or very rarely be right. There seems to have been a confused notion that undivided profits at some time and somehow become capital. The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate trades with all the money he has got, let him have got it how he may. A sole trader with a capital of £10000|- who makes in a year a profit of £2000|- and spends £1000|- only leaving the other £1000|- in his business may well in the next year be said to have a capital of £11000|-; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership.

(1) 12, App. Cas. 385.

(2) 45, C. D. 237.

(3) 1893, 3 Ch. 337.

(4) 1891, 2 Ch. 354.

The undivided profits of any period, a year or a shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time, or by their being used in the trading." I would therefore hold that the said resolutions were in order, and the Goolam Ariff Estate Company, Limited had the right to transfer the said forty-eight shares to the applicant and the Sooratee Barra Bazaar Company, Limited, were bound to recognize the right of the applicant in respect of those shares. Order as prayed. No order as to costs as the Sooratee Barra Bazaar Company had reasonable grounds for the apprehension that the resolutions might not be in order.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 45 OF 1917.

MA BA U APPELLANT.

vs.

MAUNG PE LAN and one RESPONDENTS.

Before Mr. Ormond, Offg. C. J. and Mr. Justice Parlett.

For appellant—Mr. Giles with Mr. Po Han.

For respondents—Mr. Lentaigue.

23rd July, 1917.

Arbitration.—Civil Procedure Code (Act V of 1908) Schedule II, para 17.—Death of arbitrator, or refusal to act.

Apart from any enactment an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die, or refuse to act, and thus make the agreement incapable of performance.

In such a case the court cannot make an order of reference to the remaining arbitrators who are willing to act.

JUDGMENT.

ORMOND, OFFG. C. J. AND PARLETT, J.—The appellant and respondents agreed to refer a matter to the arbitration of six persons who were named, one of whom refused to act from the commencement and another died. Fourteen months later the respondents applied to the district court to file the agreement in court under paragraph 17 of second Schedule of the Civil Procedure Code. Under clause 4 of the paragraph, the district judge made an order of reference to the four of the six arbitrators, who apparently were willing to act. It is from that order that this appeal is preferred, on the ground that the court had no jurisdiction to make the order of reference. Clause 4

is as follows:—"Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrators appointed in accordance with the provisions of the agreement or if there is no such provision and the parties cannot agree the court may appoint an arbitrator." Apart from any enactment an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act, and thus make the agreement incapable of performance. The provisions of this agreement were that there should be six specified arbitrators and the court had no jurisdiction under clause 4 to make an order of reference except to those six arbitrators, which was impossible.

It is contended for the respondents that paragraph 19 gives the court power to act under paragraph 5. Paragraph 19 is as follows: "The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the court under that paragraph to the award and to the decree following thereon." Under paragraph 5 the court would have the power to appoint arbitrators in the place of the arbitrator who died and the arbitrator who refused to act, but paragraph 19 only comes into operation when an order of reference has been made under paragraph 17.

The appeal is allowed and the order of the district judge is set aside. The appellant will have her costs in both courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 1 OF 1916.

MAUNG SHWE TON and others APPELLANTS.

vs.

MAUNG TUN LIN and others RESPONDENTS.

Before Sir Daniel Twomey, C. J. and Justices Ormond, Maung Kin,
Rigg' and Pratt.

For appellants—Mr. J. A. Maung Gyi.

For respondents—Mr. May Oung.

13th February, 1916.

Burmese Buddhist Law—Jurisdiction of Civil Courts in ecclesiastical questions in Lower Burma—Devolution of pongyi's property.

Civil courts in Lower Burma have jurisdiction to decide suits of a civil nature in which points of Ecclesiastical Law arise.

U Wisaya vs. U Zaw Ta, 8, L. B. R. 145 followed.

Questions of Ecclesiastical Law are to be decided according to the Vinaya and the various commentaries thereon. The authority of the Dhammathats is not recognized by the ecclesiastical tribunals, but they cannot be entirely excluded from consideration.

A pongyi, cannot after ordination inherit from his lay relatives, and on the death of a pongyi his lay relatives cannot inherit from him land which had been given to him as an outright gift.

ORDER OF REFERENCE.

10th January, 1916.

TWOMEY, J.—In this case a pongyi's brothers claim a piece of paddy land worth about Rs. 700/- which the pongyi left when he died.

The three plaintiffs are the sons of Shwe Waing and Ma Bwin to whom the land measuring 4.52 acres formerly belonged. It was alleged in the plaint that Shwe Waing died in 1249, B. E. and his widow Ma Bwin in 1259 B. E. that after Ma Bwin's death there was a partition of the family lands in 1260 B. E. and that in this partition the piece of land in suit being about one half of the whole, was allotted to the eldest son a pongyi named U Wiscitta, also called shortly U Seitta, for his support. U Seitta died in 1274 B. E. and then the second defendant a *pongyi* named U Sekkeinda a disciple of U Seitta claimed that the land had been given outright to him and another *pongyi* U Nyanawuntha by the deceased and refused to comply with the plaintiffs' demand to restore the land to them. The first defendant Tun Lin is a *Kappya* or lay steward of a monastery who managed the land for U Seitta and continued to manage it after U Seitta's death. The total area of the land left by Ma Bwin was 9.52 acres and U Seitta received such a large portion as 4.52 acres because one of his brothers, Shwe Chon and a niece named Mi Mya Mey gave up their right to shares in favour of their *pongyi* brother. The balance, five acres, was taken by the three plaintiffs and it appears that it was subsequently sold by them.

The plaintiff Shwe Ton in his examination before issues were fixed alleged that U Seitta renounced his share of the family property at the partition of 1260 B. E. but that his brothers nevertheless made over the land to him for his support during his lifetime on his agreeing that it should revert to the coheirs on the *pongyi's* death.

The district court found as a matter of fact that there was no such agreement, that the whole land (9.52 acres) was first given by the father Shwe Waing to U Seitta, but that subsequently (i. e. after Ma Bwin's death) the land was partitioned "on the brothers (i. e. plaintiffs) clamouring for it" and that U Seitta received his own share and was made a gift of Shwe Chon's share and the share of Ma Dwe's daughter Ma Mya Me.

The district court found, secondly, that U Seitta "left" the land to two *Rahans* his pupils U Sekkeinda and U Nyanawuntha not specifically but by a deathbed gift or bequest in general terms of his *garubhan* property, and that this gift or bequest was valid.

The plaintiffs' suit was therefore dismissed. They appealed to the divisional court which conceived that "the only point for determination is—Was the plaintiff land only made over to U Seitta for his lifetime?" and had no difficulty in affirming the decision of the district court on this point. The divisional court left the matter there and dismissed the Plaintiffs' appeal without considering the further questions (raised in para 2 of the memo of appeal) as to U Seitta's powers of disposing of the land and as to the validity of the alleged gift or bequest to his two disciples. These questions called for consideration and solution because it is clear from the pleadings that the plaintiffs as the brothers of the deceased *pongyi* claim the land as land belonging to the family. Shwe Ton in his examination said:—"On the death of U Seitta the land reverted to the heirs of Shwe Waing and Ma Bwin." The plaint says nothing about an allotment to U Seitta for his life-time. It was only in the preliminary examination of parties that the allegation of a life-time allotment was made. Although the plaint does not contain an express claim by the plaintiffs as heirs of the deceased I think this alternative claim is involved in the pleadings. It was apparently for this reason that the district court did not confine itself to deciding the issue as to the alleged agreement for a life-time usufruct, but went on to decide whether U Seitta disposed of the land in his life-time and whether the disposal he made was valid as against the next of kin.

Mr. Burjorji for the appellants has asked leave to amend the plaint now so as to make it clear that the plaintiffs claim in the alternative as heirs of U Seitta and I think this may be done. There can be no objection on the score of want of parties as the other co-heirs were joined at the outset as co-defendants on the application of the defendants Tun Lin and U Sekkeinda (para 5 of the written statement).

There is a concurrent finding of fact on only the one point namely that the plaintiffs' story of a definite agreement for a lifetime usufruct is untrue. That finding appears to be correct and it would not be proper to disturb it on second appeal.

As to the district court's further findings the divisional court has given no decision and they may therefore be considered now. It is not proved that the father Maung Shwe Waing gave the land 9.52 acres to U Seitta. If the whole land had been given to U Seitta before 1249 B. E. (the year of Shwe Waing's death according to the plaint) it is unlikely that U Seitta would have consented to the partition in 1260 by which the plaintiffs got more than half of the land. There is no evidence that U Seitta had any of the land before Ma Bwin's death (1259). The witness U Sandima's evidence as to the gift by Shwe Waing is mere hearsay, and U Sandima himself says that U Seitta was using the land for about 15 years only. That would tally with the view that U Seitta got it only after Ma Bwin's death. The defendants' witness Maung Pye (husband of Ma Dwe deceased and therefore a brother-in-law of the plaintiffs) who speaks of Shwe Waing's gift of the land to U Seitta says "the *pongyi* left the land in Maung Shwe Waing's possession," from which it may be inferred that Shwe Waing even if he intended giving the land to his *pongyi*

son did not actually carry out his intention by making over possession in his life-time. Moreover the extract from the Kwin map for 1897-98 (attached to plaint) shows that the whole land was entered in the revenue records as the widow Ma Bwin's holding after Maung Shwe Waing died.

I think it may be taken as established that U Seitta got the land in 1260 B. E. when the ancestral holding of 9.52 acres was partitioned by the circle thugyi Maung Tha Nyo (7, D. W.) into two portions one of which viz:—the land now in suit measuring 4.50 acres, was allotted to the *pongyi* brother U Seitta and the rest to the three plaintiffs. The 4.50 acres included besides the *pongyi*'s proper share, the portions that would have gone to Shwe Chon and Ma Mya Me had they not piously relinquished their shares in favour of U Seitta. Shwe Chon predeceased U Seitta. Ma Mya Me says that she went privately through a libation ceremony (*Ye-Set-Kya*) of dedication and that her uncle Shwe Chon did so too. It appears that at the time of partition Mi Mya Me got 15 or 18 tickals of gold and the plaintiffs say she got this gold in place of her grandchild's share of Shwe Waing's land, but Mi Mya Me contends that she was to get a share of the land as well as the gold. She says that both her gift of her share of the land and her uncle Shwe Chin's gift of his share were *Thingika* gifts i. e. were intended to be ultimately to the *Thinga* or *Assembly*. In view of the Thugyi Maung Tha Nyo's evidence (7, D. W.) I think the district court was right in holding that Mi Mya Me and Shwe Chon were entitled to shares at the partition of 1260 B. E. and that they virtually made a gift of their shares to U Seitta.

U Seitta remained in possession of the land till he died in 1274 B. E. It is not seemly for a *Rahan* to engage in trade or agriculture or to handle money and to do so is inconsistent with the precepts of the *Vinaya*, but much may be done through the convenient agency of the *Kappiya Karaka*, or monastery lay steward. By acting through a *Kappiya* the *Rahan* can enjoy most of the privileges of property without actually soiling his hands. It appears that U Seitta had a series of *Kappiyas* the last being Tun Lin the first defendant who was in charge of the land at the time of U Seitta's death and still has charge of it. Tun Lin let the land to tenants and supplied the *pongyi* with money whenever he wanted it. According to Tun Lin, the *pongyi* a few days before his death dedicated the monastery, *thein* and paddy land to the sacred Order in perpetuity. He says:—"U Seitta made over the land to me entirely in trust for the priesthood to keep the monastery in repair and to maintain the *pongyis* of the monastery. He entrusted it to no other person." He also says: "U Seitta made over his *garubhan* and *Lahubhan* properties to U Sekkeinda and U Nyannawuntha." What U Sekkeinda says is much to the same effect: "U Seitta left the monastery, *thein*, land on which they are, and the paddy land to me and U Nyannawuntha but the paddy land was to continue in the possession of Maung Tun Lin for the benefit and upkeep of the monastery, *thein*, and *pongyis* in charge of them." U Sekkeinda mentions U Seitta's making over his *Garubhan* and *Lahubhan* properties to the two pupils and suggests that paddy land can

be included in *Garubhan*, but he admits that U Scitta said the paddy land was to continue in Maung Tun Lin's possession and in another place he says U Scitta ordered the monastery, *thein* and paddy land to be *weithongama* (*). He probably had only a vague idea of the meaning of that word. The second disciple U Nyannawuntha was not present at all when the *pongyi* made his alleged dying dispositions. It is clear I think that there was no actual gift of the paddy by U Scitta to the two pupils. Tun Lin was to go on managing the land and was to apply the proceeds as before for the support of the *pongyis* and the upkeep of the Kyaung.

U Scitta probably desired to make this arrangement permanent, but there was no transfer of the land in trust to Tun Lin and the *pongyi* died still possessed of it. It has been definitely ruled in Upper Burma that a gift made by a Buddhist monk not accompanied or followed by delivery of possession and intended to take effect after his death is not valid U Thathana *vs.* U Awbatha (1). The ruling applied specially to a gift of a monastery but there is certainly no reason to think that it should apply with any less force to a gift of paddy land.

It still remains to decide whether the lay co-heirs of the deceased *pongyi* are entitled according to Buddhist law to inherit the paddy land from him or whether it goes to the Assembly.

The possession of paddy lands by a *Rahan* is clearly inconsistent with the fundamental rules of the Order as expounded in the *Vinaya*. Mr. Burgess held in *Ma Pwe vs. Maung Myat Tha* (2) that a person who becomes a Buddhist monk *ipso facto* divests himself of his worldly possessions and the texts cited in that case are sufficient to establish this proposition. No express vow of poverty is taken in the ordination ceremony of a *pongyi* but the Order which he joins is a community of mendicants and both the marriage-tie and the rights of property of him who renounces the world are regarded as *ipso facto* cancelled by the "going forth from home into homelessness" (3). It is clearly implied that the only possessions which a *Bhikkhu* or Mendicant can lawfully hold or which he could dispose of on his death-bed are the simple necessities of monastic life. In some texts, parks and monasteries (*Arama, Vihara*) are mentioned but only as the indivisible property of the Assembly, not of individual *Bhikkhus* (4). The learned

(*) I have ascertained that this compound word is made up of two Pali words meaning "separate" and "village" i.e. separate from the general village land. It is commonly used in Burma in connection with the dedication of *Theins* (Ordination-halls) to signify that the land is freed from all Government claims and set apart in perpetuity for religious uses.

(1) 2, U. B. R. (1897-01) P. 62.

(2) 2, U. B. R. (1897-01) P. 54.

(3) "Buddha, his life, Doctrine and Order": Oldenburg, translation by Hooy 1882, P. 355.

(4) Kullavaga VI, 15, 2. Mahavaga I, 22, 18. Vinaya Texts Pt. III and Pt. I (Sacred Books of the East).

author of "Buddha his life etc." remarks in particular that nothing is found in the *Vinaya* texts which points to the pursuit of agriculture except one quite solitary passage. Mahavagga VI 39, which hardly refers to more than the occasional sowing of seed in the land belonging to the *Aramas* or parks (attached to monasteries) (5). On the other hand it is expressly laid down that whatsoever *Bhikku* shall dig the ground or have it dug—that is a *Pakittiya* i. e. a matter requiring expiation (6). The learned author above cited after referring to the four requisites of a *Bhikku* viz: clothing, food, lodging and medicine, goes on to say that "what did not come within the narrow circle of these immediate necessities of life could as little constitute part of the property of the Order as that of the individual monk. Lands, slaves, horses, and livestock the Order did not possess and was not allowed to accept. It did not engage in agricultural pursuits nor did it permit them to be carried on on its account." The opinion that the Order was allowed to have any kind of possession whatever which was forbidden to the individual brethren is considered by him to be quite groundless (7). (Presumably, however, the Order or a body of monks under a head monk could possess as the general property of the monks, a monastery and its site with or without a garden attached to it, these being possessions which the *Vinaya* recognizes as lawful.)

According to the letter of the ecclesiastical law it is clear that neither an individual *Bhikkhu* nor the Assembly (*Sangha*) can hold paddy lands. It is true that the strict letter of the law has not been followed in this respect. The Chinese Buddhist traveller I. Tsing (7th Century, Christian Era) appears to have found the Buddhist monasteries in India in possession of farms and gardens the produce of which was distributed to the monks annually in shares (8). The description he gives of "the arrangement of affairs after death" shows that there was practically no limit to a *Bhikkhu's* possessions Archipelago by I. Tsing. Clarendon Press 1896, pp. 189, 193. in those days. Coming down to modern times we do not find Buddhist monks and monasteries in Burma in possession of extensive endowments. But the primitive austerity of the *Vinaya* is by no means universal. Mr. Burgess writes in the case cited above: "In modern days the Burman Buddhist monk's vows of poverty sit lightly on him, as is well known and is recognized even in the *Dhammathats* (see *Manukye*, X, 63 and *Wunnana* 75 *Et. seq.*). But it seems clear enough that his possessions must have been bestowed upon or acquired by him after ordination." Another Judicial Commissioner of Upper Burma, Mr. Copleston, in *Maung Talok vs. Ma Kun* (9) said "whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may as far as authorities go, possess property" (meaning *inter alia* paddy lands). He cited *Wunnana*, 82, according to which property "*hlu'd*" to a *Bhikkhu* reverts to the donor on the *Bhikkhu's* death and *Manukye* VIII, 3 which divides gifts "having

(5) Buddha his life etc., P. 357 Note.

(6) Pakittiya, P. 33, Vinaya Texts, Pt. I.

(7) Buddha his life etc., P. 356.

(8) Record of the Buddhist Religion as practised in India and the Malay Archipelago by I. Tsing. Clarendon Press 1896, pp. 189, 193.

(9) 2, U. B. R. (1892-96) 78.

reference to a future state of existence" into *Poggalika* and *Thingika*, and says that the *Poggalika* donee has a right to keep the property while property given as a *Thingika* gift becomes the property of the Assembly. This text goes on to say that the original donor has no further claim to what he has given but it is not clear whether this applies to *Poggalika* gifts as well as *Thingika* or only to the latter.

In the case last cited the claim was in some respects similar to that of the plaintiffs in the present case. It was a case in which land had been *hla'd* to a *pongyi*. Then the donor died. Subsequently the *pongyi* made a gift of the land to certain laymen. The heirs of the original donor sued to recover the land. The district judge held that "*pongyis* cannot own *Poggalika* property and at most can only have a usufruct in such things as gardens etc. for the purpose of obtaining by means of their produce those few things lawful to be possessed," and this view is certainly in accordance with the *Vinaya* canon. But allowing for the relaxation of the rules of the Order in modern times the learned Judicial Commissioner differed from district judge and decided the case in favour of the deceased *pongyi's* donees and against the heirs of the original donor.

The subject of gifts by *pongyis* has been examined again by Mr. McColl in a more recent Upper Burma case *Po Thin vs. U Thi Hla* (10). The learned judge decided that the *Vinaya* texts should be applied and held that a gift by a monk whether to a layman or to another monk of a monastery or of a site for a monastery whether it has been dedicated to him personally or not (i. e. whether *Poggalika* or *Thingika*) is invalid, which decision is in accordance with that of the district judge in the earlier case cited above. Mr. McColl also expressed the opinion that a monastery dedicated to a monk does not become his absolute property and he can only claim exclusive rights over it for twelve years at most, after which it would become the property of the Assembly.

In the present case we are dealing not with a monastery site but with paddy-land and, at any rate as regards part of it, it is land that was not made over by way of gift to the *pongyi* U Seitta but which came to him by partition of inheritance. A further difference between this case and the Upper Burma case is that the deceased *pongyi* U Seitta made no disposition of the land in his life-time.

The rules for the partition of a *Rahan's* or *Pongyi's* estate as contained in the various *Dhammathats* are set out in Chapter XXV of the Digest. Mr. McColl points out that these rules are very conflicting and as the Kinwun Mingyi has remarked they are more inconsistent with the rules laid down in the *Vinaya* (Digest P. 461). Side by side with stringent provisions that only *Rahans* can inherit from *Rahans* are found texts which allow lay coheirs (or other laymen) who attended on the deceased during illness to inherit his property (Section 406). According to the texts in section 407 a *Rahan's* lay co heirs cannot inherit property given to him by others as a religious

(10) I. U. B. R. (1910-13) 183.

gift, but section 408 allows parents and relatives to resume property given by them "as such property does not properly belong to the members of the Order." On the question of property reverting to the donor sections 405 and 410 are in direct conflict. The texts in section 409 are instructive as showing that even in modern times Buddhists generally look askance on the acquisition of worldly possessions by *Rahans*. The texts in section 408 also support this view showing that the possession of certain kinds of property by members of the Order is unbecoming. The *Cittara* (*) extract in section 406 also bears directly on this point. It is as follows:—

"It is forbidden in the case of a *Rahan* or novice who owns paddy and culturable lands, to devote much of his attention to them, nor is he permitted to let the lands on his own motion, but he is permitted to give his consent to any one requesting him to have them let at a specified rent. On the death of the *Rahan* possessing such lands, his co-heir (*Amwe-saing-thu*) who attended on him and performed the burial rites shall inherit them; while those who did not render such services shall be debarred from inheriting the property."

This text clearly contemplates that a *pongyi's* lands shall go to his next of kin and not to his religious brethren.

The rules as to the *Garubhan* and *Lahubhan* property of *Rahans* are given in sections 396, 397 and 398. The line of demarcation between the two kinds of property seems to be purely arbitrary, but in general terms it may be said that *Garubhan* includes the monastery and its site and any garden lands appurtenant to it as also the more important utensils and furniture used by a *pongyi*, while all the less important personal effects fall under the head of *Lahubhan*. *Garubhan* property is not subject to partition but goes to the Assembly, while *Lahubhan* property is divided among the disciples of the deceased. None of the *Dhammathats* mention paddy lands as capable of being *Garubhan*. (The district court judgment now under appeal refers to *Wunnana* section 82 as authority for including paddy lands in *Garubhan* property but I think the learned judge has misread the text).

From a consideration of the conflicting *Dhammathats* and the *Vinaya* texts it may perhaps be inferred that the rule prohibiting laymen from inheriting a *Rahan's* property applies only to property which a *Rahan* may lawfully possess according to the rules of the Order, viz: *Garubhan* and *Lahubhan* property and not to worldly possessions such as paddy lands, cattle etc. which he may have acquired by gift or by way of inheritance. It would I think be going too far to say that a *Rahan* is incapable of holding such property, seeing that the *Dhammathats* clearly recognize gifts of lands etc. to *Rahans* as religious offerings and (as in the present case) we find *Pongyis* accepting such gifts and acquiring land by inheritance. But as the rules of the Order do not permit such possessions it would perhaps be correct to treat a *Rahan* holding paddy lands on the footing of a

(*) Author and date of this compilation are unknown. See Digest P. 13.

layman to that extent, and to hold that the lands if not disposed of in the *Rahan's* life-time are inherited by his next of kin in the same way as if he were not a *Rahan*. It cannot in my opinion be held that on the *Rahan's* death the lands pass to the Assembly (*Sangha*), for in the first place the Assembly is an indeterminate body with little or no coherence and without a recognized hierarchy (at any rate in Lower Burma), and secondly, because as the learned author of "Buddha, his life etc." points out there is no authority for the view that the Order was allowed by its Founder to have any kind of possession which was forbidden to the individual brethren. It would be wrong for the Assembly to hold lands and so far as I am aware it has never been the practice in Burma for paddy lands and other worldly property to be held either by the general body of monks or by monastic groups. We find individual monks infringing the *Vinaya* rules by holding paddy lands and the Burmese Buddhist law books recognize the practice. But very little will be found in the *Dhammathais* to support the view that the Assembly in general may hold paddy lands. In section 410 of the Digest the *Kungyalinga* extract provides that when a gift of specified kinds of property including paddy lands is made to all *Rahans* in general the property does not revert to the donor, and in the *Yazathat* extract a similar rule is implied. But I have already referred to *Dhammathat* texts indicating that the possession of lands is repugnant to the Order. Finally, as Mr. McColl points out in the case *Po Thin vs. U Thi Hla* (10) already mentioned, the members of the Order in Burma still profess to regulate their lives by the strict rules of the *Vinaya*, and though backslidings and eccentricities on the part of individual monks may be tolerated, it would seem that in a matter such as this affecting the fundamental character of the Order, the authority of the *Vinaya* ought to prevail and it should be laid down definitely that the Assembly is incapable of holding paddy lands, and that if such property is given to a Pongyi (whether the gift is expressed as a *Thingika* gift or a *Poggalika* gift) or inherited by him he has disposing power over it during his life but if he leaves it undisposed of at his death it goes to his next of kin.

A correct and authoritative decision on these points is very desirable in the interests not only of the lay community but also of the Order. I therefore refer for decision by a Bench the following question:

A pongyi dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands?

CIVIL REFERENCE No. 1 OF 1916.

Before Mr. Justice Parlett and Mr. Justice Maung Kin.

Mr. May Oung—for 1st and 3rd to 6th respondents.

June 2nd, 1916.

MAUNG KIN, J.—The question referred is:—

A Pongyi dies possessed of paddy-lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands—

The first point that arises is, as to the law that is applicable. Are the *Vinaya* texts or the *Dhammathats* or both applicable? The point has been dealt with by Mr. McColl in *Nga Po Thin vs. U Thi Hla* (1) where the dispute was between a Buddhist layman and a monk, relating to land on which a monastery stood. The learned judge said:—“If the *Dhammathats* be referred to, it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the *Vinaya*. Thus in Volume I, U Gaung's Digest, page 464, the compiler says:—“The rules laid down in the old *Dhammathats* are inconsistent with those in the *Vinaya* and an attempt has been made in the present treatise to reconcile them and readers are requested to exercise their own discretion in their application of the rules.” The learned judge then goes on to point out certain inconsistencies contained in Sections 405, 399 and 404 of Volume I of the Digest and to observe:—“The questions which arise for decision in this are such as would be better decided by the Ecclesiastical authorities, but as I have found that the civil courts have jurisdiction to try this case, those questions must be decided, and I think the proper basis for the decision should be the texts of the *Vinaya* so far as they can properly be applied * * * * * All monks profess to be bound by them and when a case of this nature is brought before the Ecclesiastical authorities for decision it is in accordance with texts from the *Vinaya* that they decide it.”

The rules of the *Vinaya* are to be found in

- (1) *Vinaya Pitaka*.
- (2) *Vinaya Pali Atthagathas*.
- (3) *Vinaya Tikas*.

The *Vinaya Pitaka* consists of five books, namely, *Parajikam*, *Pacittiya*, *Mahava* or *Mahavagga*, *Chulava* or *Chulavagga* and *Pariva*. Since the death of Buddha there have been five convocations at which the *Pitakas* were rehearsed by the learned *Bhikkus*. The first was held at Rajagaha, at that time the capital of Magadha, sixty-one days after the death of Buddha or B. C. 543. The whole of the *Pitakas* was then rehearsed, every syllable being repeated with the utmost precision, and an authentic version established. The last was in Burma in the reign of King Mindon, when the texts of the *Pitaka* were engraved on stone slabs which are now kept under proper supervision at the *Lokamarzain Kuthodaw* Pagoda at Mandalay

The *Atthagathas* are the Commentaries on the *Pitakas* written in Pali by *Shin Buddha-ghosa* in 630, the year of the Religion, in Ceylon.

(1) I, U. B. R. (1910-13) 183.

As regards the *Tikas* there are the Old and the New. The Old *Tikas* were written in Pali by a monk named *Shin Thariputta* in Ceylon, during the reign of *Thirimahaparakkama Bhahu*, a King of Ceylon. The New *Tikas* were written also in Pali by a monk named *Munainda-ghosa* in the reign of *Thalunmintayagyi* of Burma. The *Pitaka Thamaing* does not give the date of either the old or new *Tikas*. The *Tikas* are Commentaries on the *Atthagatha*.

The Buddhist monks of Burma profess to be governed by the *Pitaka* the *Atthagathas* and the *Tikas*, and texts from these are quoted and relied on in the decisions of *Sayadaws* on disputes relating to property between monks or between monks and laymen, where the property in question is that of a monk. My enquiries in Mandalay show that the *Dhammathats* are never referred to in the decisions of such disputes and that only the *Tipitaka* and the Commentaries are relied on. I am therefore of opinion that the law applicable to this case is that to be found in the rules of the *Vinaya* and not in those of the *Dhammathats*. In these texts we find seven kinds of sin mentioned.

The sins are as follows:—

- (1) Parajikam.
- (2) Thingadissesa.
- (3) Thulliccasya.
- (4) Suddha pacittiya.
- (5) Nithaggi pacittiya.
- (6) Dukkata.
- (7) Dubbhasi.

The first class is unpardonable and consists of four sins, viz. (1) Murder, (2) theft of property worth 5 ticals or more, (3) unchastity, and (4) a false profession of the attainment of *rahatship*. The direct result of the commission of any of these four sins is that the offender ceases to be a *rahan* and is no longer eligible for ordination. By the commission of any of the other classes of sins, a member does not lose the character of a *rahan*. He may confess to his particular sin and thus get free from the consequences of it.

The sins committed by holding property are *Nisaggi pacittiya* and *Dukkata* and in this connection property is divided into *Nisaggi*, *Dukkata*, and *Kappiya*.

Nisaggi property consists of valuables, such as gold, silver, precious stones and the like. Among the *Dukkata* property are classed culturable lands, such as paddy-lands and garden-lands. *Kappiya* are things other than *Nisaggi* and *Dukkata* and are things fit to be possessed by *rahans*.

An individual monk may not possess gold or silver or precious stones. If he does he is guilty of *nisaggi apat*. He may be pardoned for it, if he confesses to it and discards the property. Nor may he possess land, such as paddy land. If he does, he is guilty of *Dukkata Apat* for which he may be pardoned on confessing. A monk who pos-

sesses such property remains guilty (အာလင်ဆဲလ်) so long as he does not confess but he does not thereby cease to be a *rahan*.

But even *Nissaggi* and *Dukata* property may be accepted by a *rahan*, if he accepts it in the right way.

All that a *rahan* requires are (1) food, (2) raiment, (3) shelter (*Kyaung*) and (4) medicine. Beyond these he ought to have no requirements. These requirements are described as (အတ္တိကောပစ္စည်းတို့) If money is offered to a *rahan* for the purpose of the four requirements, he may accept the gift by appointing a *kappiya karaka*, a person who makes (*karaka*) it right (*kappiya*) for the *rahan* to accept a gift of property which he is not allowed to handle. The *kappiya karaka*, or shortly *kappiya* will then actually receive it, and out of it supply the *rahan* with his requirements. The proper words for the donor to use in offering money are "*navakammassa dema*" (နဝကမ္မာဒေဝ) which means I make you a gift of your future (literally new) requirements. This kind of gift of money is made to monks frequently at the present day.

At pages 180-186 of Volume I, of his *Tipitaka Vinissaya Kyan*, Maingkaing Sayadaw, one of the most learned in the reigns of King Mindon and King Thibaw explains how a *rahan* may receive a gift of paddy lands. He says that if the donor says "I make a gift of this paddy-land to this *kyaung*," the gift may be accepted and the property will then remain for the benefit of those residing in the *kyaung* and if there is only one at the time of the gift the property is to all intents and purposes his, but as a *rahan* is not permitted himself to cultivate the land or let it to tenants, the donee must appoint a *Kappiya Karaka* to take charge of and work the property and to supply the needs of the residents out of the profits of the land. There are other permissible modes which it is not necessary to mention here. The learned author quotes texts from the *Tipika*, *Atthagathas* and *Tikas* in support of his views. The work was written in 1237 B. E. that is, forty years ago and was printed in 1901 by the Mandalay Times Press. The result of my inquiries is that the printed book is widely read by the monks of Mandalay and acknowledged to be a correct copy of the original on palm leaf. At page 229 of his printed work, "*Tipitaka Pakinnakadipawi Kyan*," Monangon Sayadaw, a recognised authority, expresses the same views as Maingkaing Sayadaw on the subject. This work is also widely read in Mandalay.

And the practice of dedicating paddy and other culturable lands to monasteries for the necessary repairs of the buildings and for the maintenance and support of those monks who dwell in them has grown up in Burma as being in accordance with the teachings of the Sage.

The inscriptions of Pagan, Pyinya and Ava translated by Maung Tun Nyein, Government Translator, show that the practice was very general in those ancient capitals of Burma commencing from about the 12th or 13th century A. D. In one of the inscriptions it is stated

that the dedication of certain lands was made to a monastery "in order that the Religion might continue to flourish during its period of 5000 years." See page 169 of the "Inscriptions." At the present day also we know of many cases of lands being *blued* for the maintenance of monks in monasteries.

For the above reasons it may be held that there is nothing in Buddhist literature which prohibits gifts of paddy or other culturable lands to Buddhist monks, if made and accepted in any of the prescribed ways.

The next question for consideration is what becomes of the property of a deceased monk.

The question is discussed at pages 58 to 69 of the printed work "Winiphatton" (Decisions on *Wini (Vinaya)* by Thalon Sayadaw). This work was printed and published under the editorship of Saya U Pye, a renowned Pali scholar of Rangoon who has received the title of *Ayyamahapandita* for his distinguished scholarship. Thalon Sayadaw was a famous scholar who flourished in the reigns of Pagan and Mindon. Two of his pupils were Thingasa Sayadaw and Shwegyin Sayadaw both of whom were respected for their learning and piety throughout Burma. There can be no doubt as to the authority of the book and it is largely used by the monks as a handbook on matters concerning Discipline. The texts quoted are all on the subject of *Matasantaka*, the property of a deceased monk and are from *Mahavagga*, *Mahavagga Atthagatha*, *Vajirabuddhitika*, *Sarathadipanitika*. I have had these quotations verified by a Pali scholar who found them correct. Indeed, the fact that Saya Pye saw the book through the press is a sufficient guarantee of its authenticity. The first quotation is from *Mahavagga*, Chapter on *Civarakkhandhaka*. It means that if a *rahan* dies leaving property, all of it becomes the property of the *Sangha*. But as much credit is due to those who tend a sick person, such things as begging bowl and robes may be given to one who tended the deceased during his illness. As regards the remainder of the *lahubhan* property, it may be divided amongst those *rahans* who were present on the occasion. As regards *garubhan* property let it not be divided and no one is allowed to give it away.

The next quotation is from *Mahavagga Atthagatha* and it means that on the death of a *rahan*, such things as his robes and begging bowl may be given to the person who tended him during his illness. What remains, whether it be *Kappiya* property (property which it is proper for monks to possess or own) or *Akappiya* (property which it is not proper so to do or property which it is not proper to partition amongst the monks) or *Nisaggi* property (property which should be abandoned) or *Anissaggi* (property which need not be abandoned) is the property of the *Sangha*. The *Sangha* should therefore deal with it in accordance with the rules of Discipline. The other quotations are to the same effect as the above.

In 1250 B. E. two years after Upper Burma was annexed the ex-ministers of the old regime referred the questions whether a *rahan*

could make a gift of his property to take effect upon his death and if not, what the nature of his property would be on his death, were submitted to Maingkaing Sayadaw and his answer was that a gift made by a monk to take effect upon his death was not valid and that the property became, on his death, the property of the *Sangha*. See page 440, of Volume II of *Tipetaka Vinissaya Kyan*.

From these authorities it seems clear that property left by a deceased *rahan* becomes the property of the *Sangha*, whether it had been held by the deceased in accordance with the *Vinaya* rules or not and that it is for the *Sangha* to deal with it in such a way that it may be lawful for them to hold and possess it. And I have shown above how *Nissaggi* property and *Dukata* property may properly be received by a *rahan*.

I am therefore of opinion that the answer to the reference should be in the negative.

PARLETT, J.—Though the first source of authority to be looked to for an answer to the question referred is the *Vinaya*, I think we are at liberty to look further than that, e. g., at the *Dhammathats*, at any rate on points on which the *Vinaya* is silent or regarding which the *Dhammathats* are not clearly in conflict with the *Vinaya*. Further I think that in endeavouring to interpret the *Vinaya* we may have regard to the views of commentators of recognised or proved authority and apply its rules in the light of what are found to be the actual modern condition of the Buddhist monkhood. I presume that the Buddhist monastic Orders in all countries accept as authoritative some such code of rules as that which we call the *Vinaya*. Doubtless in all countries they have availed themselves of tradition and the ingenuity or sophistry of subtle writers to modify or enlarge the strict provisions of those rules. Scarcely any rules could be plainer than those prohibiting the handling of money and enjoining celibacy, yet it is a matter of common experience that, some at least, of the monks of Ceylon handle money freely, while many lamas of the Northern School marry and have families. I doubt not that these phenomena are plausibly explained by the theologians of those countries. Though it has been thought by some writers that the *Vinaya* does not recognize the possession of arable land either by individual monks, or by the monastic Order, possession of both kinds has been recognised by the courts in Burma, *Maung Talok and one vs. Ma Kun and others* (1), and *Maung Hmon and one vs. U Cho and one* (2) and the present reference is based upon possession by an individual monk. If an individual monk can possess it one obstacle to its possession by the other appears to be removed. Nor do I think that the indeterminate nature of the Order and the absence of a recognised hierarchy are fatal objections to its holding lands. The Buddhist priesthood in Burma is, I should say, as determinate a body as the clergy of most religions. Moreover property is sometimes dedicated to and held by the incumbents for the

(1) 2, U. B. R. (1892-96), 78.

(2) 2, U. B. R. (1892-96), 397.

time being of a particular monastery or group of monasteries (*taik*) which are sufficiently definite bodies. As to the hierarchy, Government may not have officially recognised the *Thathanabaing's* authority in Lower Burma, but I believe that in matters of discipline and doctrine the monks of Lower Burma submit to his rulings. But whether that be so or not a hierarchy extending to the next lowest rank, namely the *Sayadaws*, exists and I should think is thus far as complete and full of vitality as when Bishop Bigandet wrote his article upon it and formed the opinion which he expressed in the following striking words:—"There is another characteristic of the religious order of Buddhists which has favourably operated in its behalf and possibly contributed to maintain it for so many centuries in so a compact and solid a body that it seems to bid defiance to the destructive action of revolutions. We allude to its regularly constituted hierarchy, which is as perfect as it can be expected, particularly in Burma and Siam (3)". It is recognized that the order shall be capable of holding, and it does in fact hold, land (parks and gardens) and it appears to me that there is no practical reason why it should be incapable of holding land used for other purposes.

The provisions of the *Vinaya* as to the disposal of the effects of a deceased monk are brief and refer expressly only to property which it is necessary for him to have or which the canon allows him to possess, and this goes to the surviving members of the order. Sections 391 to 412 of Volume I of the Kinwin Mingyi's Digest contain fuller rules collected from the *Dhammathats*, and these too repeat the general rule that a layman cannot inherit the property of a monk. The property of monks is classified as *Garubhan* and *Lahubhan*; broadly speaking the former goes intact to the order, the latter is shared by the inmates of the deceased's monastery. Culturable lands are not expressly included in the list of the *garubhan* property though the *Dhammathatkyaw* quoted in section 393, groups it with other property which is *Garubhan*. On the other hand the *Cittara*, quoted in Section 406, gives culturable land to a lay co-heir attending upon the deceased, as being property to which a monk is forbidden to devote much attention. If, as I understand, the term *Garubhan* means that property of a monk to which importance is attached, I consider it should be confined to the articles necessary for him and to such other property as the *Vinaya* expressly allows him to hold, and that it cannot properly include culturable land of which the possession, if not implicitly forbidden, is certainly not countenanced. If this be so, it is difficult to see how the whole Order can succeed to such land if left undisposed of by a deceased monk. None of the texts appear to class culturable land as *Lahubhan* property of a monk, nor do I think that that term can be properly applied to property which it is not contemplated that a monk should hold at all. On the contrary it appears to me that the fifth principle deduced in *Maung On Gaing vs. U Pandisa* (4) can be traced both in the passage from *Cittara* referred to above and also in the texts in Section 409 of the

(3) Bigandet's Legend of Gautama, pages 23 and 250.

(4) P. J. L. B., 614.

Digest, and that property either acquired by laymen's pursuits or which like culturable land it is not proper for a monk to possess is not religious property and reverts to the lay heirs of the deceased.

My learned colleague has deduced from the *Vinaya* and commentaries that a monk may possess even property which it is improper for him to hold, if he holds it in the right way, which I take to mean vicariously. Unless one can be assured that the Buddha himself would have countenanced what appears to be a subterfuge, I doubt if one should accept it.

The land covered by the reference is moreover of two kinds, part inherited by, and part given to the deceased monk, after his ordination, and it appears to me that the two classes are not necessarily on the same footing. Bishop Bigandet wrote "His (the Buddhist Monk's) complete separation from the world has broken all the ties of relationship. * * * * Like Buddha himself he parts with his family, relatives and friends, and seeks for admission into the society of the perfect" (5). It may be doubted whether one who has entirely severed all ties of blood, one who is even enjoined to pull his own mother out of a pit with no more regard for her personality than if she were a log of wood, is capable of inheriting at all from kinsmen from whom he has so completely cut himself off. In this view this part of the land at any rate should properly go to his surviving next of kin.

As regards the land given to him a passage is cited from a work by the *Maungkaing Sayadaw* showing how a monk may receive a gift of culturable land. The *Sayadaw* explains that a donor may make a gift of paddy land to a *kyaung* for the benefit of those residing in it. Then if there chance at the time to be only one inmate of the *kyaung*. "the property is to all intents and purposes his." It appears to me however that even in the circumstances supposed, the monk is at most a trustee of the land for future incumbents of the monastery. A monastery is, or at any rate can be, *Thingika* property, and land dedicated to a monastery for the maintenance of those who from time to time occupy it, would attach to the monastery and become *Thingika* equally with it. The conditions assumed by the *Sayadaw* are not present in the case under reference, which deals with a gift, not to the residents of a monastery for the time being, but to a particular monk; the passage therefore does not apply to the present case though at the same time it does appear to my mind to imply that a gift of culturable land cannot be made to or accepted by an individual monk. I have heard it suggested that a monk could not rightly refuse such a gift, as he would thereby be denying the acquisition of merit to the would-be donor. I confess that this savours to me of sophistry, and that I cannot fathom the philosophy which treats as a meritorious act an attempt to seduce a monk from his vows or at any rate to induce him to break the canon of his order. It appears to me that the omission in the *Vinaya* of arable land from the property which alone the Buddhist Order of mediant monks may possess in too strong an

(5) Bigandet's Legend of Gautama pages 249 to 255.

authority to be explained away by mere commentators, and that a monk cannot accept a gift of culturable land. If he does so, it is not religious, but lay property, and if left undisposed of at his death, it should go to his next of kin.

In view of this difference of opinion the question must be referred to a Full Bench.

JUDGMENT.

The opinion of the Full Bench was delivered in the following:—

TWOMEY, C. J., ORMOND, MAUNG KIN, PRATT AND RIGG, J. J.—The question referred to the full Bench in this case is as follows:—

“A Pongyi dies possessed of paddy lands part inherited after his ordination and part given to him after his ordination. Are his next of kin entitled to inherit the lands?”

The reference was originally heard by a Bench of two Judges but as they disagreed it was further referred to a Full Bench. There is no doubt that the civil courts have jurisdiction to adjudicate on this question. This point is clear from the decision in *U Wisaya vs. U Zaw Ta* (1) which was a suit for the recovery of certain lands, both parties being Buddhist monks, the Bench held that civil courts in Lower Burma have Jurisdiction to decide suits of a civil nature in which points of ecclesiastical law arise. Certain questions arising from the present reference were framed by the court and sent to the Mandalay Thathanabaing with the request that he would favour the court with his opinion on them. The Thathanabaing has been so good as to comply with this request and his answers to the questions have been considered by the court.

The first point that arises is as to the law which should govern our decision. The Thathanabaing's answers show that if the case were to be decided by an ecclesiastical tribunal the tribunal would be guided by the Vinaya text and the various commentaries thereon (Atthakathas, Tikas etc.) and that the authority of the Dhammathats is not recognised by the ecclesiastical tribunals. In the Upper Burma Case *Po Thin vs. U Thi Hla* (2) which was a dispute between a Buddhist layman and a monk relating to a monastery site the learned Additional Judicial Commissioner held that the proper basis for decision should be the Vinaya text (i. e. what is known in Burma as “The Palidaw”). We are at one with Mr. McColl in holding that cases of this nature should be decided according to the ecclesiastical law but we think that in basing his decision on the *Palidaw* alone he took too narrow a standpoint. The Vinaya and its commentaries form part of the Buddhist law and where the devolution of the property of a Pongyi is concerned it seems right that this branch of the law should govern the decision. Moreover, there are passages in U Gaung's Digest which suggest that

(1) S. L. B. R. 145.

(2) U. B. R. (1910-13) 183.

in the learned compiler's opinion the Vinaya writings and not the Dhammathats should be regarded as the authentic guide in such matters (Vide Vol. 1, pages 452, 463, 464). At the same time we cannot entirely exclude the Dhammathats from consideration and where the ecclesiastical law is silent we are of opinion that the provisions of the Dhammathats should be taken into account, if they are not inconsistent with the Vinaya and its commentaries, for the Dhammathats throw a valuable light on the established custom of the country, even in regard to ecclesiastical matters, at a period still very recent when compared with the age of the Vinaya and the earlier commentaries thereon.

The general rule to be drawn from the Vinaya (See *Mahavagga* Vol. 8, Chapter 27, section 5) (3) is that religious property belonging to a *bhikku* or *rahan* passes on his death to the *sangha*. Provision is made for the division of the less important article—*Lahubhan*—amongst the members of the Order who are present. But the more important property—*Garubhan*—is impartible and passes to the *sangha*. This rule no doubt was originally intended to apply only to property falling within the description of the four requisites food, raiment, shelter i. e. monastery and site, and medicine—for these are the only things which a *rahan* could possess. But it is clear that this restriction has long ceased to be operative. Individual *rahans* do possess paddy land and other property not of a monastic kind which the original Vinaya text would forbid to them. Modern monks interpose a *Kappiya Karaka* or lay steward who holds the forbidden property for the *rahans*. The germ of this practice may be found in the *Palidaw* itself. The passage from *Parajikam Vinaya* in the extracts from *Winipyatton* (4) given in Mr. Justice Maung Kin's notes attached to this judgment shows that if gold and silver was received by a *rahan* he had to abandon it and confess a sin. A *taga* (layman) could then pick it up and buy robes etc. for the other *rahans* but not for the *rahan* who originally received it. In modern times as the extracts from *Winipyatton* (4) and *Tipitaka Winisaya* (4) show the *Kappiya* practice has been much extended. Gifts of paddy land and even gold and silver which it would be sinful for a *rahan* to accept directly are taken vicariously by means of a *Kappiya*. The gifts are expressed to be made for the purpose of supplying the four requisites and property received in this manner becomes what is called *Kappiya* property i. e. property which a *Rahan* may hold lawfully. The *Kappiya* system is approved in the answers sent to our questions by the *Thathanabaing* who is the head of the Upper Burma monks. It may be objected that the system in its present extended form is not consistent with the spirit of the rules laid down by the Great Founder of the Order seeing that it would enable a monk to evade most of the onerous obligations of the monastic life. It cannot be forgotten that the order is essentially an order of mendicants who have renounced the world. Although they make no actual vow of poverty they divest themselves of all worldly possessions at the time of ordination and

(3) Sacred Books of the East, Vol. XVII Vinaya text part II, p. 245.

(4) See annexure to this judgment.

the Vinaya text certainly contemplates a body of ascetics living in poverty and dependant upon alms even for the necessaries of life. But the civil courts have not hitherto questioned the propriety of the *Kappiya* system and it does not appear competent for them to do so. On the other hand the courts have in many cases tacitly admitted that there is nothing to prevent a pongyi from holding paddy land. This view is in accordance with long established custom; it is supported by passages in the *Attakathas*, the authority of which is regarded as inferior only to that of the *Palidaw* itself, and the practice in its existing extended form has the approval of the Thathanabaing in Upper Burma. If reform is desirable, a point as to which we express no opinion, it must come from within the order itself or must be brought about by pressure of lay Buddhist opinion; it cannot be imposed by the action of the civil courts for it appears in effect that the rigid monastic rule contemplated in the canonical text has long since become only a pious memory and a counsel of perfection. The Dhammathats moreover support the view that a pongyi may hold property which is not of a monastic kind. Although arable lands is not included in the lists of *Garubban* property in section 396 of the Digest other sections show that the holding of such land by Pongyis has long been recognised by custom (See sections 407 and 410).

In the question referred to us it is assumed that a *pongyi* may inherit paddy land from his lay relatives and that he may accept a gift of such land. As regards gifts, for the reasons noted above it appears that there is nothing unlawful in the dedication of paddy land to a pongyi as a religious gift. But the case of inheritance is different and we are not prepared to hold that a pongyi can inherit from his lay relatives. When a *pongyi* or *rahan* is ordained his severance from his family is so complete that, if he was a married man before, he is regarded as having divorced his wife. He is certainly cut off as completely from his original family as if he had been adopted into another family. Sir George Shaw in *Ma Taik vs. U Wiscinda* (5) pointed out that it is nowhere laid down in the Dhammathats that a monk is incapable of inheriting and he thought that there was nothing to prevent a monk from acquiring by inheritance "property which he proceeds to devote to religious purposes." We are unable to agree in this view as we consider it inconsistent with a pongyi's personal status that he should inherit from his natural family with whom all ties of relationship have been annulled. Although the Dhammathats do not lay down that a monk is incapable of inheriting from his family we are not aware that there is any passage in the Dhammathats or in the Vinaya or its commentaries which expressly recognises that a monk is capable of inheriting. If therefore land is allotted to a *pongyi* by his relatives as his share of the family inheritance and the pongyi accepts it in accordance with the *Kappiya* method, it can only be regarded as a religious gift to that pongyi.

Dealing now with the main question referred, as to the disposal of a *pongyi's* land after his death, the general rule deducible from the

(5) Chan Toon, L. C. II 235.

Vinaya and the commentaries is clearly that all *Garubhan* property which had been given to the *pongyi* outright by way of religious gift and of which he dies possessed goes to the *Sangah* and that the layman cannot inherit such property from a *pongyi* and this general rule is recognised also in the Dhammathats (See section 397). The *Winipyatton* contains an extra from *Mahavagga Atthakatha* extending the rule to all *Kappiy* and *Akappiya* property, but the original *Atthakatha* text has not been traced (See extract No. 2 from *Winipyatton* in annexure). The Dhammathats cited in section 407 of the Digest lay down expressly that a *rahan's* co-heirs shall not inherit property given to him by others as a religious gift but that all such property shall go to the Order. The same rule is found in the *Manukye* text extracted in section 398, and other texts in that section also reiterate the rule that a lay co-heir cannot inherit the property.

When land is given outright to an individual *pongyi* as a religious gift it becomes the property of the Order on his death or on his leaving the Order. We regard this as a devolution not by inheritance but by virtue of the original dedication to religious uses made by the donor.

Sections 408, 409 and 410, of the Digest contain texts which at first sight appear to conflict with the general rule that laymen cannot inherit from a *rahan*. Section 408 provides that lay co-heirs can resume property given to a *rahan* by parents as a religious gift "because such property does not properly belong to the members of the Order" (*Yazathat Manu Vananna and Kungyalinga*). Other texts from the same three Dhammathats (vide Section 410) provide that gifts made to an *individual Rahan* revert on his death to the original donor. According to the texts in section 409 the *rahan's* lay relatives inherit property which he himself acquired by trade, agriculture, or usury. The special provisions contained in these three sections appear to contemplate cases in which the property in question has not been given outright as a religious gift. In such cases the property would not devolve on the Order on the owner's death. The texts in section 408 should be read with section 97 which deals with the revocation of parental gifts; the texts in section 409 clearly relate to property which is not religious property at all; and the texts in section 410 expressly state that the property which the lay co-heirs inherit is property in respect of which the dedication was limited to the *individual rahan* with no intention that the property should ultimately pass to the Order generally.

In the appeal out of which this reference arose the district and divisional courts treated the land in suit as having become the outright property of the deceased *pongyi*. Accordingly in answering the reference we confine ourselves strictly to the case of land given to a *pongyi* outright as a religious gift. Cases may occur in which the land is not given outright, the intention being to make a gift of the produce only for the donee's lifetime. Our decision does not relate to such cases. Nor does it relate to the class of cases exemplified in the Digest, section 409 in which the *pongyis* acquire land otherwise than by religious gift.

We answer the reference as follows:—A *pongyi* after his ordination cannot inherit from his lay relatives. On the death of a *pongyi* his lay relatives cannot inherit from him land which had been given to him outright as a religious gift.

The questions referred to the Thathanabaing, his answers and the texts in support thereof, and Mr. Justice Maung Kin's extracts from the Maingkaing and Thalon Sayadaws' treatises on Buddhist Ecclesiastical Law will be appended as annexures to this judgment.

Questions referred to the Thathanabaing.

(1). When a matter concerning *rahans*, which involves a dispute between monks themselves or between monks on the one hand and laymen on the other, comes before an ecclesiastical tribunal, by what written authorities should the tribunal be guided?

(2). Is it permissible to look to any authorities besides the actual canonical text of the five Vinaya books? If so by reference to what authoritative works should the dispute be decided? (Please enumerate them fully in the order of their importance.)

(3). Where the dispute is between a layman and a *rahan* to what extent is the authority of the dhammathats recognized by the *sangha*?

(4). Can the *sangha* (the whole order) or a *gana* (group of *rahans*) accept a *saughika* gift of paddy lands?

(5). Can a *bhikkhu* inherit paddy lands or any other property from his deceased relatives? If the surviving heirs of a deceased relative allow the *bhikkhu* to take a share would that be considered an inheritance or a gift?

(6). What are the properties which a *bhikkhu* can legally own as his *pogalikka*? Can a *bhikkhu* own paddy lands as *pogalikka* so as to have exclusive control over it and to receive the rents and profits for his individual use, and to dispose of it at his pleasure to whomsoever he chooses?

(7). Bearing in mind the answers to questions 4, 5 and 6, where a *bhikkhu* dies leaving paddy lands the profits of which he had enjoyed in his lifetime, on whom do the lands devolve, the *sangha*, the *gana* or the *bhikkhu's* next of kin?

C. E. Fox,

C. J.

22-8-16.

The Thathanabaing's Answers.

To question I.

The written authorities are:

- (a) The five books of *Vinaya Texts*.
- (b) The *Athagathas* or the commentaries on the *Vinaya Texts*.
- (c) The *Tikas* or the sub-commentaries.
- (d) The *Gandhandara* or scholia.

To question II.

Other authoritative works besides the five books of *Vinaya Texts* in order of their importance are:

(a) *Samanta Pasadika Athagatha* or commentaries on the five books of the *Vinaya*.

(b) *Kankha Vitarani Athakatha* or commentary on the *Pati Mokkha*.

(c) *Vajira Buddhi Tika*
 (d) *Saratta Dipani Tika*
 (e) *Vimati Vinodami Tika* } There are sub-commentaries on the *Vinaya* and the *Samanta Pasadika*.

(f) *Kankhavitarini Tika* (old)
 (g) *Kankhavitarini Tika* (new) } There are sub-commentaries on the *Kankhavitarini Athakatha*.

(h) *Vinaya Sangha Athagatha*
 (i) *Vinaya Sangha Athagatha Tika* (old)
 (j) *Vinaya Lankara Tika* (new)
 (k) *Uddha Sikkha*
 (l) *Mula Sikkha* } Scholia on the above.

To question III.

There is no precedent for the *Thathanabaing in Council* to recognize the authority of the *Dhammathats*. They are accustomed to decide according to the *Vinaya* only.

To question IV.

If gifts of paddy lands are made in accordance with the *Vinaya* rules the *Sangha* (the whole order) and the *gana* (group of rahans) can accept them as *sanghika* gifts.

To question V.

A *rahan* can inherit paddy lands or other property from his parents or relatives in accordance with the *Vinaya* rules and the property that he inherits is called his inheritance.

To question VI.

The properties which a *bhikkhu* can lawfully own as his *poggalika* are:—

(a) robes, food, monastery and medicine known as the *Four Requisites*.

(b) all utensils allowed by the *Vinaya*.

(c) When paddy lands are made over to a layman (the *Kappiya Karaka*) and the benefits derived from the said lands are handed over to the *bhikkhu*, he can enjoy them according to the *Vinaya* rules.

The *bhikkhu* owns the paddy field as his *poggalika* and has full rights of disposal.

To question VII.

Bearing in mind the answers to questions IV, V and VI, if a *bhikkhu* dies leaving paddy lands without disposing of them in his lifetime the lands so left become *sanghika* property. If in his lifetime he gave them away in accordance with the *Vinaya* to others and the donees accept them in accordance with the *Vinaya* rules the donees who so accept them are the owners thereof.

Translation of Pali passages in support of the answers.

Question I.

(a) O. Ananda, I have already preached to you the *dhamma* and ordered the rules of the *Vinaya*. Let them be as teachers to you all when I have passed away.

Sutta Mahavagga—Maha Parinibhana Sutta.

(b) The *Vinaya Pitaka* is called *Anadesana* or mandatory sermons because rules were enjoined by the Lord Buddha who had authority to make rules.

Question II.

The Buddha explained the meaning of every passage. There is no passage which can be said to have been left unexplained by him.

Majjima Panasa Athakatha, Upali Sutta.

Question III.

Same as (a) in question I.

Question IV.

(a) If the donor says "I give this irrigation tank or reservoir, this field, this plantation to the monastery" the gift should not be declined or refused.

Samanta Pasadika; Parajikam Atthakatha Raja Sikkhapada.

(b) How is a gift lawfully made? When the gift is accompanied with the words "make use of the four requisites."

If the donor says "My Lord, I pray you let the order make use of the four requisites" then the gift is lawful.

Samanta Pasadika; Parajikam Atthakatha Raja Sikkhapada.

(c) A gift is made accompanied with the words "Please make use of the four requisites." Now with reference to this or in explanation of this the gift is valid if the following words are used "We give this irrigation tank in order that the *bhikkhus* may make use of the four requisites" or the words "We give this irrigation tank for the purposes of the four requisites." So much the more fitting is it therefore if the words used are "We give the profits derived from this irrigation tank for the four requisites."

Saratha dipani Tika—Samanta pasadika Parajikam athakatha.

Question V.

(a) *Bhikkhu*. A debtor should not be ordained. He who ordains such a one is guilty of a dukkata offence.

Vinaya Mahagarva.

(b) O *bhikkhus*. The meaning of "debtor" in the sentence "a debtor should not be ordained" is as follows:—

A man's father or grandfather has contracted debts; or he himself has contracted debts; or his parents have taken property from others with limiting conditions; that person commences to pay the debts or binds himself to pay the debts; for that reason he is called a debtor.

Mahakandaka (commentary).

Question VI.

(a) If without naming either the *sangha* or the *gama* or an individual *bhikkhu*, gold or silver be offered with these words "This gold and silver I give to the pagoda (*cetiya*) or to the monastery for the purpose of the four requisites (*nava kamassa*, new purposes) the gift should not be refused. The *Kappiya Karaka* should be told that the *bhikkhus* have need (of these offerings) for such and such purposes.

Samanta pasadika parajikam athakatha; Raja Sikkhapada
(commentary).

(b) It is lawful to appoint a *Kappaya Karaka* to be in charge of an irrigation tank reserved for the purpose of the four requisites.

Samanta pasadika parajikam athakatha; Raja Sikkhapada
(commentary).

Question VII.

(a) At that time a certain *bhikkhu* died possessed of much property and utensils (*bandha and parakkhara*) and they told this to the Blessed One.

The Blessed One said "O *Bhikkhus!* the *sangha* are the owners of the robes and the begging bowl of the deceased. But as the *bhikkhu* nursing the deceased has rendered great services I allow the *sangha* to give him either the three robes or the begging bowl. Now with regard to the property left by the deceased *bhikkhu* I allow the *lahubau* or light property to be divided among the *sangha* actually present. As to the *garuban* or heavy property and immoveable property I ordain that it shall not be divided but be reserved for the *sangha* from the four quarters.

Vinaya Mahavagga—Civara Kandaka.

(b) If while living (a *bhikkhu*) gives away all his utensils or furniture to another and that other knowing it accepts it, the property passes to the donee.

Vinaya Mahavagga Atthakatha Civara Kandaka (commentary).

(c) If the furniture which is kept elsewhere (i. e. away from the donor) is not given away then such furniture belongs to the *bhikkhu* residing where the furniture is, it is *sanghika* property.

Vinaya Mahavagga Atthakatha Civara Kandaka (commentary).

Thathanabaing's Quotations.

Quotations in support of the answer to Question 4.

(a) Same as quotation No. 3 of Maingkaing Sayadaw's.

(b) Lines 24-27 page 560 Vol. II of *Parajikam Atthakatha Raja-sikkhapada* Chapter, Saya Pye's edition.

(c) Lines 29-30 page 103 and lines 1-3 page 104 Vol. I of *Tarasakam Tika*, otherwise known as *Saratthadipani Tika*.

Quotations in support of answers to question 5.

(a) Lines 26-28 of Mahvagga page 88 Saya Pye's edition.

(b) Lines 15-18 page 231 Vol. I of *Pacitaradi Atthakatha*. *Mahakhanda* Chapter.

Quotations in support of answer to question 6.

(a) Lines 23-26 page 559 Vol. II of *Parajikam Atthakatha*.

(b) Lines 29-30 page 561 *ibid*.

Quotations in support of answer to quotation 7.

(a) Same as the first quotation of Thalone Sayadaw's.

(b) Lines 10-12 page 349 Vol. I of *Pacitaradi Atthakatha Civarakhanda* Chapter.

(c) Same as the third quotation of Thalone Sayadaw's.

Sd. MAUNG KIN,
Judge

Translations of Texts cited by Maingkaing Sayadaw at pages 180 to 183 of *Tipetakawwinissaya Kyan*.

(1) Gautama the excellent *Paya* abstained from receiving (a gift of) paddy lands.

Silakhan Pali.

(2) One (a *rahan*) should not accept for the benefit of himself or of the *gana* (i. e. a group of *rahans*) or of the *Sangha* (i. e. five or more of the Order) any *nisaggi* property. The *Rahan* who receives (such property) for the benefit of himself is guilty of *nisaggi pacitti apat*. The *Rahan* who receives it for the benefit of other *sanghas* (i. e. *rahans*) is guilty of *dukkata apat*. When he receives *kappiya* property he is not guilty of any *apat*.

Rupiya Sikkhapada Chapter Parajikam Atthakatha.

Lines 15-19 page 570 Vol. II *Parajikam Atthakatha* Saya Pye's edition.

(3) If *ya* land which gives crops, large or small, or paddy land is given with the words "I give you this *ya* or this paddy land" it is not competent (to a *rahan*) to accept the gift. The same is the case where a bunded reservoir, i. e. a tank formed by raising a bund on one side, is given in a similar way. If (it) is given in accordance with the *Kappiya* practice (*Kappiyavohara*—*kappiya*=*kappiya*;

vohara = practice) that is to say, if it is given with the words, "I give it in order that you may obtain the four requisites," then it is competent to the donee to receive it. If a forest is given in this way it is proper to accept it.

Lines 14-17 pages 563 *ibid.*

(4) If land growing with crops is given the donor regarding it as a *sima* (*thein*) the gift is acceptable.

Line 24 page 563 *ibid.*

(5) "If the gift is made with the words "I give this paddy land, this *ya* land to the *kyoung* it is not competent to the *rahan* to reject it.

Lines 1-2 page 565 *ibid.*

(6) All things, such as paddy land, can be received only for the Sangha, because the Pali texts (Tipitaka) say that they cannot be received for the individual. Why? Because the Atthakatha speaks of the giving of a *kyoung* with the intention of benefitting the Singha,

(*Vimativino Dani Tika*, *Saya Pye's edition*, Vol. I, lines 1-3 page 309).

(7) If the gift is made with the words "I give you this tank (bunded reservoir or other tank)" it can be accepted with the words "Very well, taga, I shall now have water to drink" or some such *kappiya* words.

Lines 5-7 page 561 Vol. II *Parajikam Atthakatha Rajasikkhapada*, *Saya Pye's edition*.

(8) In the case of a gift of paddy land or *ya* land it can be accepted, if the donor says "I give this rice or this bean (taking the particular *ya* to be for raising beans) to the sanga.

Lines 27-30 page 562 Vol. II of *Parajikham Atthakatha*, *Saya Pye's edition*.

(9) If the donor says "O Monk, I give these; the four requisites for your use" the gift is proper.

Lines 26-27 page 560 Vol. II of *Parajikham Atthakatha Rajasikkhapada*, *Saya Pye's edition*.

(10) *Re* the statement that, if the gift is to the Sanga it is valid. If the words used in giving paddy lands and bunded reservoirs are "I give this individual *rahan* the four requisites" the gift should not be accepted. But, if in giving a tank (bunded reservoir or other tank) to a *rahan* who possesses a pure mind, it is said "I am giving it so that you may be able to obtain water" the gift can be accepted.

Lines 24-28 page 307 Vol. I of *Vimati Tika*. *Saya Pye's edition*.

(11) Taga! I will not take the money equivalent of a robe. I will only take a robe."

Lines 3-5 page 258 of *Parajikam Vinaya, Rajasikkhapada*. *Saya Pye's edition*.

(12) If a *Rahan* takes pleasure in finding gold and silver near him or if he desires to appropriate the same to himself, he shall not touch it with (any part of) his body or otherwise give expression to his thought, for instance by saying "I will take it." It is property which is *nakappi* i. e. *akappi*. If the *rahan* refuses the gift he is not guilty of any *apat*.

Lines 28-30 page 570 and line 1 page 571 Vol. II of *Parajikam Atthakatha, Rupiya Sikhapada*, Saya Pye's edition.

Comment by Maingkaing Sayadaw.

The Sayadaw's comment on text No. 6 from *Vimativinodani Tika* is:—

"Generations of excellent Sayas have disapproved of this view. If paddy land cannot be accepted by an individual monk, because as stated by the author of *Vimativinadani Tika* the Pali texts do not justify even an acceptance for the benefit of the *Sanga*. Acceptance by *Sangha* must also be held to be improper. (Page 181 of *Tipetaka Winissaya Kyan*).

Regarding text No. 10 the Sayadaw's comment is:—

"It is stated that the paddy land and *ya* land can be accepted only by the *sangha* but not by the *gana* or an *individual rahan*, while as regards a tank it is stated that it may be accepted by the *sangha* or a *gana* or an *individual monk*. I dare not accept such a proposition (*Ibid* page 182).

Regarding text No. 12 the Sayadaw says:—

"Although such is this text, it has also been stated that if it is given as the four requisites in accordance with the *Kappiywohara* practice an *individual monk*, a *gana* or the *sangha* may accept the gift. Why should it be said that only the *sangha* can accept it and not a *gana* or an *individual monk*? (*Ibid*. page 182).

Translation of the lines as extracted by me in which quotation II of Maingkaing Sayadaw occurs:—

"Suppose the king or his minister or a *ponna* or a *thuta* intending to make a gift of it to a *rahan* sends the price of a robe by a messenger saying:—"Go, buy a robe with this money and give it to so and so (or cover so and so with it)" and the messenger approaches the *rahan* and says thus:—"O Lord, my master has sent me to give you the price of a robe. Please receive it," the *rahan* ought to reply thus:—"O taga! we *rahans* do not receive the price of a robe. We wish to receive robes only at the proper time." Suppose in that case the *taga* says to the *rahan* thus:—"O Lord; is there one who carries out your affairs?" the *rahan* who wishes to obtain a robe should point out a person saying thus:—"This watchman (or this *taga*) is the person who looks after the affairs of *rahans*." The messenger should say "O Lord you have pointed out the *veyavissa karaka*, you have caused me to know him. O Lord! At the proper time he will give you a robe." When the *rahan* wishes to obtain a robe, he should approach the *veyavissa karaka* and give him notice of his wishes two or three times, etc., etc., etc. (Lines 29-31 p. 257 and lines 1-22 of *parajikam vinaya*. Saya Kye's edition.)

MAUNG KIN,
Judge.

Translations of the texts quoted in Thalon Sayadaw's *Winipyatton* Pages 58, 59 and 60.

(1) At that time a *rahan* who possessed much property (*Bhandha* and *Parikhaya*) had died. And certain rahans reported the news to the excellent *Paya*. The *Paya* said, O *Rahan* the *sangha* will get the alms, bowl, and the robes. Even so, I will allow you, *Rahans*, to give the three robes (*ticivaram*) and the alms bowl to the person who attended on the deceased during his illness because gratitude is due to him. If the deceased *Rahan* died possessed of *lahubhan bhandha* and *lahuparikkhaya*, I will allow the property to be distributed among the *Sanghas* present, *Sammukhibhutena Sanghena* (*). If in that place there were the deceased's *Garubhandha* and *garuparikkhaya* such property should not be abandoned or given away to, or be divided among the *Sangha* including those who have arrived, those at the point of arriving, and those who are expected to arrive. Lines 30-31 p. 349 of *Mahavagga* and Lines 1-6 p. 350 of the same.

(2) If the *rahan* died within the precincts of his *kyaung*, only his almsbowl and robes may be given to the person who attended on him during his illness. If, after giving what should be given to such an attendant, there should remain property proper for the use of the *rahan* (*kappiya bhandha*) and property not proper for the use of the *rahan* (*Akappiya bhandha*), if there is proper or improper property or property which may be divided or property which may not be divided or property which is *nissaggi* or which is *anissaggi*, all such property belongs to the *Sangha*. Act according to the *Palidaw*.

Mahavagga Atthakatha.

(This passage is not to be found in any printed edition of the *Mahavagga Atthakatha*.)

(3) If there is property at a distance which has not been given away to another, such property should go to the *Sangha* of the place where it is. Lines 13-14 page Vol. I *Pacitayadi* chapter *Saya Pye's* edition, *Mahavagga Atthakatha*.

(4) O *Rahan*! if a *rahan* dies the *Sangha* get the alms bowl and the robes. But gratitude is due to the person who attended the deceased during his illness; I, the *Paya*, allow you to give his alms bowl and robes to such attendant.

The commentary on the last Pali text according to the sayadaw is as follows:—

(5) The person who attends upon a sick person whether a monk or a layman or even a female should be paid his or her hire."

(6) The sayadaw goes on to say "In *Vajiyabuddhi Tika*, a sub-commentary on a commentary (*Atthakatha*) known as *Samantapasa-tika* it is stated:—In a certain *kyaung* there live two monks. One

(*) The four or more rahans who were present within a radius of twelve cubits of the place of death.

of them dies. If the other *rahan* takes the property of the deceased with the intention of stealing it but not by resolving that it shall come to him, it would be decided that the *rahan* is responsible for the value of the property, because he takes a *rahan's* property. If, when that *rahan* takes it, it is not within the precincts of the *kyaung* but outside, the decision should be different. Why? Because he can take ownerless property. If the property of the deceased *Rahan* consists of *akkapiya* property, such as, gold and silver, such property can be received, only if it should be received according to rules of *Uggahisikkhapada* (rules of discipline re the receipt of gold and silver). To receive it according to rules, the *Kappiya karaka* should be informed. If a slave is to be received, the monk will have no control (over him). If a watchman is to be received, the monk will have rights over him. If bulls or buffaloes are to be received, the monk will have right and control over those within the precincts of the *kyaung*. He will have no control over those outside. If he caught them outside and brought them within the precincts of the *kyaung*, after having made them his property, the manager of the *kyaung* will have the right to control them. If property was left in trust with the watchman of the *kyaung*, the result is the same."

Tajjyabuddhi Tika, Saya Pye's edition page 167 lines 1-4.

The sayadaw next quotes from *Sarathhadipani Tika*, a sub-commentary upon *Vinaya* known as *Samantadipani Passadika* as follows:—

(7) Regarding the resolution made in connection with robes the explanation is this:—If a *rahan* who is on a journey and has with him a robe belonging to another *rahan*, hears of that *rahan's* death, and this was not at a *kyaung* but outside in the field which is not 'Kyaung' he may resolve, "May this robe come into my possession" provided that there is no other *rahan* within the radius of twelve cubits. *Sarathhadipani Tika* also called *Terasakam Tika*, Lines 6-8 of the latter Vol. II. Saya Pye's edition.

(8) The next quotation is from *Cullavagga Atthakatha* a Commentary on *Cullavagga Palidax*, whose author is *Buddhaghosa*. "Suppose one of the five *rahans* who live together dies having said that his *parikhaya* should go to his teacher or his pupil who lives with him or to his father or to any other person, the property left does not go to any of those persons. It shall belong to the *sangha*. This is true. Even if the *rahan* had said to his fellow dwellers, "On my death take my property," the gift will not be good. The layman's gift to the five *rahans* who live together saying, "On my death you all may take my property" is good.

Lines 20-25 page 379 Vol. II *Pacitaradi Atthakatha*. *Cullavagga section*.

Uggahisikkhapada referred to in quotation 6 above is, as I have found, as follows:—

A *rahan* takes gold and silver, makes another to take it for him, or desires to possess such (gold and silver) as is near him, he ought to abandon it or the desire (as the case may be) as he is guilty of *paritta apat*.

Explanation of terms used in the passage translated as above follows and then the text goes on:—

The *rahan* should approach the *sangha* and seated on his haunches with (one end of) his proper garment on his left shoulder should shiko (the *Senior rahan* with joined hands and say thus: "My Lord I have received this (gold and silver). It is right that I should abandon it. I (hereby) abandon it to the *sangha*. After this abandonment confess the guilt. The confession should be received by the *rahan* who knows how to receive it. If where the abandonment has taken place, the watchman of the monastery or a *taga*, happens to be present, it should be said thus:—

"Avuto imam janahi," "O *taga* know this" What then is the *taga* to do with the thing? He should not say thus:—"I bring this thing (to you)" he should say "Ghee, Oil (sessamum) honey, or jaggery is suitable." If the *taga* brings a *kappiya* thing by exchanging the gold for it, all the *rahans* except the one who has received the gold can enjoy it (i. e. the thing brought).

Parajikam Vinaya Rupiyasikkhapada lines 11 to 29 page 271 of Saya Pye's edition.

Sd. MAUNG KIN,
Judge.

The following note has been furnished by Mr. May Oung after consultation with Aggamahapandita Saya Pye.

The Thalon Sayadaw was a high ecclesiastic of Shwebo district, renowned during the reign of Pagan Min and Mindon Min for his erudition. He was the teacher of the Thingaza and the Shwegyin Sayadaws the latter of whom founded the Shwegyin or Sulaghandi sect (as apposed to the Thudhamma or Mahaghandi sect). The Thingaza Sayadaw was also highly venerated, and in his day was head of the Mahaghandi sect. But the monks of both sects look up to the decisions of the Thalon Sayadaw given in his Winipyatton.

The Maingkaing Sayadaw was of the Mahaghandi Sect and flourished in the reigns of Mindon and Thibaw. He died after the annexation of Upper Burma. His principal work, *Tipitaka Vinicchaya* is very highly esteemed by all scholars in Burma.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 152 OF 1915.

P. T. CHRINTENSEN APPELLANT.

vs.

R. F. COMMOTTO and others RESPONDENTS.

Before E. W. Ormond, Esq., C. J. and Mr. Justice Parlett.

For appellant—Mr. McDonnell.

For respondents—Mr. Shaw.

11th July, 1917.

*Civil Procedure Code (Act V of 1908) s. 11. Resjudicata—Construction of
plaint.*

To decide whether a suit is barred by the rule of res judicata the
plaint in the previous suit must be construed in the same way as the
court which decided that suit construed it.

JUDGMENT.

ORMOND, OFFG. C. J. AND PARLETT, J.—The firm of Dominic and
Co. of Rangoon had stevedoring contracts with certain shipowners in
London. Dominic & Co. was a firm owned by Dominic alone. He
employed the plaintiff to do the stevedoring for him at Moulmein on
such ships as should go there. The 1st defendant, Commotto, became
a partner with Dominic. Then Dominic died and Commotto took the
2nd defendant, McDonald, into partnership with him. The defend-
ants became the stevedores for the London shipowners in the place of
Dominic & Co.

The plaintiff's agreement with Dominic & Co. was to last five years.
Before the termination of the five years the plaintiff entered into a
stevedoring agreement with these defendants on the 17th January,
1913, and these defendants terminated that agreement on the 13th
March, 1913. The plaintiff then instituted a suit on the 11th August,
1913, in which he sets out his agreement with Dominic & Co. and
also his agreement with these defendants and asks for an injunction
to restrain the defendants from preventing him from doing stevedor-
ing work under these agreements at Moulmein. One of the defences
taken in that suit was that the plaintiff had no right of suit because
he was merely Dominic's agent and the suit was dismissed on that
ground. The plaintiff then filed the present suit for damages for
breach of the agreement between the plaintiff and these defendants.
The suit has been dismissed on the ground that these damages having
accrued at the time that the first suit was instituted the present claim
is barred under Order II, rule 2, sub-clause 3, and it is also dismissed
on the ground that, as regards the plaintiff's claim for battens sup-
plied, his claim is res judicata, i. e., that the plaintiff is debarred from
suing in his own name. We think the learned district judge has mis-

understood the plaintiff's claim as to this. Plaintiff's claim is for damages against the defendants for breach of contract made between the plaintiff and the defendants. The former suit was dismissed because it was taken to be a suit on the Dominic contract, in the present suit he is suing on a contract between plaintiff and defendants.

It is contended by Mr. Shaw for the defendants that this suit was rightly dismissed under Order II, rule 2 sub-clause 3, because the plaint in the former suit shows that his cause of action there was based not only on the Dominic contract but also on the present contract. We agree with him that that would be a proper construction of that plaint, but it clearly was not so construed by the court that dismissed that suit, and the view taken by the court in that suit was the view that was pressed upon it by the defendants' advocate. For the purpose of res judicata we clearly must construe the plaint in the same way that the court that decided that suit construed it, i. e., that it was based solely on the contract between the plaintiff and Dominic & Co., and had nothing to do with the present contract. Consequently Order II, rule 1, sub-clause, 3 has no application and this suit was wrongly dismissed.

The appeal is allowed, the decree is set aside and the case will be sent back to be retried on its merits.

There will be a refund of the appellate courtfees under section 13 of the Court fees Act. Costs ten gold mohurs allowed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 152 OF 1916.

SHWE ZAN U. PLAINTIFF. APPELLANT.

vs.

SHWE PRU DEFENDANT. RESPONDENT.

Before Mr. Justice Ormond.

For appellant—Mr. Lambert.

14th February, 1917.

Principal and Surety—Payment by surety by undertaking a fresh obligation—Suit against principal.

A surety who has paid off the debt is entitled to recover from the principal, and it makes no difference that the payment was made by undertaking a fresh obligation, and not by actual delivery of cash to the creditor.

JUDGMENT.

ORMOND, J.—The defendant borrowed Rs. 2,500 from the Bank of Bengal, which the plaintiff stood surety for, on the 28th October, 1915, payable seventy-five days after date; the due date was 14th January, 1916. The Bank demanded payment and on the 20th June, 1916, the plaintiff borrowed Rs. 2,500 from the bank on a promissory note which he executed in favour of Ma Baw who endorsed the same to the bank, payable after three months, and the plaintiff paid the discount or interest in advance on that loan in cash. The money on that loan was taken to repay the previous loan, which was wiped out. The plaintiff then sued to recover the amount. Both the Lower courts dismissed the suit upon the authority of Putti Narayanamurthi Aiyar *vs.* Marimuthu Pillai (1). There are, no doubt, certain English authorities which show that if the surety merely undertakes a fresh obligation, he cannot recover against the creditor as if that fresh obligation had operated as a payment of the old debt. Troyluckho Nath Roy *vs.* Kashee Nath Roy (2) is an authority in favour of the plaintiff. The question is was the old debt paid off by the surety? This was a fresh debt which the plaintiff had contracted and, in my opinion, it matters not whether he incurred a fresh obligation to the same bank or to another bank. Neither does it matter that the money was not actually handed over to the plaintiff and returned to the bank. The bank was in fact paid off by the plaintiff with the moneys which the bank advanced to him by way of a new loan. The appeal is allowed and there will be a decree for the plaintiff for the amount claimed with costs in all courts. The appeal was *ex parte*.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 124. OF 1915.

S. P. S. CHOKKAPPA CHETTY APPELLANT.

vs.

S. P. S. R. M. RAMEN CHETTY and others RESPONDENTS.

Before Justices Ormond and Parlett.

For appellant—Mr. J. R. Das.

For respondents 1 to 3—Mr. Lentaigue and Mr. Chari.

9th August, 1917.

Civil Procedure Code (Act V of 1908) ss. 11, 13 and 14—Resjudicata—Foreign Judgment.

A foreign judgment is not *res judicata* in a suit in a British court unless the court which passed such judgment was competent to try the subsequent suit.

(1) 26, M. 322.

(2) 14, W. R. 458.

JUDGMENT.

ORMOND, J.—The plaintiffs sued in the district court of Pegu for partition of a moneylending business which their father, the first defendant, carried on in that district, as being joint family property. The father claims it as his own business. The second defendant is a son of the first defendant and the third defendant is a grandson. The parties are therefore the sons and grandsons of the first defendant. The district judge gave the plaintiffs a decree and the father now appeals.

The parties have their domicile in Konapet in the Pudukkottai State, and previous to this suit the plaintiffs had obtained a decree in the Chief Court of Pudukkottai declaring that these parties formed a joint Hindu family; a decree for partition of the properties in Pudukkottai and a declaration that this money lending business in Pegu was also joint family property, and that the plaintiffs were entitled to partition of this business;— but the Pudukkottai Court held that it had no jurisdiction to make a partition of the property in Pegu. The district court held that the finding of the Pudukkottai Court that the family was a joint Hindu family and the finding that there was joint family property in Pudukkottai was *res judicata*, but that the finding that this business was a family business was not *res judicata*. The district court found as a fact that this moneylending business was part of the joint family property. The father was precluded from giving evidence to show that the family was not a joint family.

Funds for this moneylending business were obtained from an "Oor" account, which means literally 'big house' and probably means 'Home account' and funds from the business were also remitted to that account. The funds of that account, according to the Pudukkottai decision, formed part of the joint family property. If the finding of that court as to this is *res judicata* in the present case, there can be no doubt that this money lending business also forms part of the joint family property. The question therefore is whether the finding of the foreign court is *res judicata* in the present suit. Section 11 of the Code which deals with *res judicata* says that the first court, the decision of which is sought to be *res judicata* in a subsequent suit, must be a court competent to try such subsequent suit. The judgment of the Pudukkottai Court is a foreign judgment. Section 13 of the Code, which deals with the conclusiveness of a foreign judgment, says "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title," except in certain specified circumstances. The case of *Prithisingji Devisingji vs. Umedsingji Sangaji*, (1) shows that a foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a court which is competent to try the subsequent suit. In the case of *Musammut Maqbul Fatima vs. Amir Hasan Khan* (2) this question was raised under the new Code. In that case the judges of the High Court of Allahabad held that the

(1) 6, Bom. L. R. 98.

(2) 20, C. W. N. 1213.

decision of a court to be *res judicata* in a subsequent suit, must be the decision of a court that was competent to try the subsequent suit; and that the question of the effect of a foreign judgment can only properly be raised in proceedings based upon the foreign judgment—i. e. that section 13 applied only to such proceedings. Upon appeal to the Privy Council, their Lordships did not see their way to reverse the decision and dismissed the appeal without giving reasons.

The Pudukkottai court was not competent to try the present suit which related to property in Pegu. In my opinion section 13 of the new Code has not altered the law. The words, "a foreign judgment shall be conclusive," mean that a foreign judgment shall be taken to be a final and conclusive judgment, i. e., the findings shall not be called in question in any other proceedings as not having been properly made in the foreign suit.

It is a final and conclusive judgment for all purposes:—whether for bringing a suit upon the foreign judgment or for the purposes of *res judicata*—but the word "conclusive" does not render a foreign judgment of greater effect than a final and conclusive judgment of a court in British India.

I would set aside the decree and remand the case to be retried:—the evidence already taken, to be evidence in the case and award 10 gold mohurs to the appellant, the costs to abide the result.

PARLETT, J.—Section 13 of the Civil Procedure Code enacts that a foreign judgment shall be conclusive as to any matter thereby adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except where it has not been pronounced by a court of competent jurisdiction, or where it exhibits certain other defects which do not concern the present case. Reading section 13 with section 14, I have no doubt that the expression "judgment pronounced by a court of competent jurisdiction" means a judgment pronounced by a court competent to pronounce it. Where a suit is brought in a court in British India on a foreign judgment the meaning and effect of section 13 are clear, viz., that the decision of the foreign court can only be impugned upon certain specified grounds, among them being that the court which pronounced it had not jurisdiction to do so. Were section 13 applicable to such suits alone no difficulty would arise. It is not however expressly so limited but is framed in general terms. If, therefore, it is to be applied to cases where it is sought to make a foreign judgment *res judicata* of a matter which it decides, it would at first sight appear to attach to the judgments of foreign courts, of whatever grade, greater authority and finality than to those of courts in British India. Upon careful consideration however I have come to the conclusion that the language of section 13 may be so construed as not to create any such anomaly, if the word "conclusive" be understood as equivalent to the expression "finally decided" in section 11, and if the conditions of that section as a whole be applied to a foreign judgment for the purpose of determining whether it constitutes a *res judicata*. The court in British India cannot question the finality of

the decision of a competent foreign court properly arrived at as to any matter, but that decision would only bind the court in British India if the foreign court is competent to try the suit in which such matter has been subsequently raised. I, therefore, concur in the above order.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 283 OF 1917.

T. P. SMITH, PETITIONER.

vs.

MA PWA SHIN *alias* Mrs. SMITH RESPONDENT.

Before Mr. Justice Maung Kin.

For petitioner—Mr. Villa.

19th December, 1917.

Divorce Act (IV of 1869) s. 14. Evidence of adultery—Confession by respondent—Collusion.

An uncorroborated confession of adultery by a respondent in matrimonial proceedings may be accepted as evidence against the party making it, and may be acted upon if the court is satisfied that the confession is true, and that there is no collusion between the parties.

Robinson vs. Robinson and Lane 29, L. J. P. and M. 178 and *Arnold vs. Arnold* 38, C. 907, followed.

JUDGMENT.

MAUNG KIN, J.—In this case the petitioner asked for a dissolution of his marriage with the respondent on the ground of her adultery. The parties were married at the Methodist Episcopal Church, Rangoon, on the 25th June, 1912; thereafter they lived and co-habited at Akyab; from Akyab they went to Tavoy. They were not happy at Tavoy, and separated from each other by a deed of separation Exhibit B. The petitioner says that his reason for the separation was that he suspected the respondent of having been unfaithful to him, but there is nothing said about that in the deed, the reason therein stated being that it was not possible for them to live together. The deed is dated the 20th May, 1915. In November 1915, the petitioner was transferred to Rangoon and he says that on his arrival at the wharf respondent met him and told him that she had engaged a flat for both of them, and asked whether he would live with her there. He refused at first but later agreed to live with her in the same house provided they had no marital relations. * * * * In May or June, 1916, petitioner says that as his wife complained of rheumatic pains he called in Dr. Goudie to treat her. Dr. Goudie came, examined her and asked him if his wife was pregnant. He said he did not know.

Dr. Goudie then examined her again, and as a result pronounced that she was five months advanced in pregnancy. This statement was made in English, and addressed to the petitioner, and the petitioner says that the respondent knew sufficient English to understand what Dr. Goudie said. The petitioner goes on to say that in the presence of the respondent he told the doctor that he was not the father of the child, as he had not co-habited with her for over eighteen months and that she must have heard all this, but made no objection, and only looked frightened. Dr. Goudie corroborated this. About two months later respondent was sent to the Dufferin Hospital where she was delivered of a daughter. The petitioner did not turn his wife out immediately on the discovery of her pregnancy, because she was very ill and absolutely bed ridden. Dr. Goudie says it would not have been humane to turn her out then. Petitioner says it was because the woman was in such a helpless state that he allowed her to stay on in his house. He swears that he had not any sexual intercourse with her from the time of their separation, and that the child born at the Dufferin Hospital could not be his. He has made enquiries as to who the guilty man was but though he had his suspicions, he could not bring the offence home to the suspect. He had been an excise officer since the marriage, and for some time after the birth of the child; he is now an officer in the Indian Army Reserve. As an excise officer he was constantly out on duty, day and night, and if the woman was so minded, she had plenty of opportunity of committing adultery. I thought it was curious that a man should consent to live with his wife under the same roof, after they had separated, with the condition that they were to have no marital connection. I therefore asked him why he consented to live as he says he did. He replied that he had an illegitimate daughter by her before the marriage. The girl was about seven years of age, and as he was fond of the child he decided to live with his wife under the same roof.

If the petitioner could prove nothing more I think there would be some difficulty in his getting a decree in spite of the fact that to Dr. Goudie he said that he did not know of the pregnancy, and might have appeared sincere in his assertion. But we have much more. On the 6th of September, 1917, petitioner received a letter Exhibit I through the post. The post mark on the cover is dated Rangoon the 5th September, 1917. He says the letter was received at the Royal Hotel where he was living in the presence of Mr. A. S. Gale an excise inspector who was a friend of his. On the cover being opened it was found to contain a letter in Burmese, and Mr. Gale being somewhat of a Burmese scholar read it for the petitioner. It turned out to be a letter from the respondent in the course of which she said that she had wronged him and committed adultery more than once and asked to be forgiven. She referred to an episode which she called "the last of getting a child by another man," and says that she had repented after that event. * * * Upon this the petitioner instructed, Mr. Villa to write to the respondent and Exhibit G was the result. In it what had happened was recounted, and the petitioner refused to live with her again and threatened to take legal proceedings against her. She instructed Mr. Jordan to reply to Exhibit G, and Mr. Jordan

wrote Exhibit H to Mr. Villa. In that letter it was stated that in view of the admission made by the respondent in her letter it was not possible to deny the allegations made by the petitioner against her. The advocate asked that some provision might be made for her maintenance, and threatened to put him into the criminal courts for maintenance. On the 14th September, Mr. Villa replied by letter Exhibit J refusing to make any provision for the respondent and informing her that divorce proceedings would be taken against her. Mr. Gale corroborates petitioner as to the receipt of a letter in Burmese at the Royal Hotel, and his reading it to the petitioner, and identifies Exhibit D as being that letter. He also says he was a friend of the couple and was on visiting terms with them, and that after the birth of the child at the Dufferin Hospital the respondent came to him and asked him to tell her husband to take her back. He says she then confessed that she had committed "a wrong as regards the child born at the hospital." I think there is no reason to doubt the veracity of the petitioner. His evidence taken in conjunction with that of Dr. Goudie shows that he was sincere in his asseverations as to his not being the father of the child, and as to his having been away from his wife for about eighteen months. I see no reason to believe that there is any collusion between him and his wife. Reading her letter carefully I think there is no doubt of the genuineness and sincerity of her admissions. Further she had her admissions subsequently confirmed through her advocate Mr. Jordan.

There is a stream of cases viz. *Robinson vs. Robinson and Lane* (1), *Getty vs. Getty* (2), *Weinberg vs. Weinberg* (3), *Collins vs. Collins and Deal* (4), and *Arnold vs. Arnold* (5) all of which are authorities showing that the confession of the alleged guilty party may be acted upon without any corroboration evidence, if the court is satisfied as to its truth.

Under the circumstances of the case as stated above I think there is no escape from the conclusion that the child born at the Dufferin Hospital was the result of an adulterous intercourse. I would therefore pass a decree nisi for the dissolution of the marriage.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 98 OF 1916.

U THET APPELLANT.

TOLA RAM RESPONDENT.

(1) 29, L. J. P. and M. 178.

(2) 1907, P. D. 334.

(3) 27, T. L. R. 9.

(4) 33, T. L. R. 12, 13.

(5) 38, C. 907.

Before Mr. Justice Rigg.

For appellant—Mr. Doctor.

For respondent—Mr. Ray.

13th November, 1917.

General Clauses Act (X of 1897) s. 3 (25)—Immoveable property. Pugmill.

A pugmill is immoveable property within the meaning of section 3 (25) of the General Clauses Act.

Miller *vs.* Brindabun 4, C. 946 followed.

JUDGMENT.

RIGG, J.—The facts of this case are fully set out in the judgment of the lower appellate court.

It is contended in second appeal that it has been wrongly decided by that court that a pugmill is moveable property, and that even if this contention is unsound, the judge should have applied article 49 of the Limitation Act and passed a decree for the value of the mill. Immoveable property is defined in the General Clauses Act X of 1897 as including things attached to the earth. Before a pugmill can be worked, its posts have to be inbedded in the earth in order to keep it stationary, and unless it was fixed in this manner, it would be of no use. In *Miller vs. Brindabun* (1) it was held that things such as steam engines and boilers seized in execution of a decree were fixtures and not goods and chattels. In *Hobson vs. Gorrings* (2) it was decided that a gas engine affixed to the freehold by bolts and screws to prevent it from rocking, was sufficiently annexed to the earth to become a fixture. The learned judge thinks that there is no distinction between the affixing of a pugmill to the land and that of a tent or a plane table. In the case of a plane table, there does not seem to me to be any difficulty in drawing a distinction, as any one using it has no attention of attaching it to the earth. Whether a tent could be said to be attached to the earth would, I think, depend on the circumstances of the case. But here the pugmill is erected and affixed to the earth for the purpose of making a quantity of bricks, and I have no doubt that it should be regarded as immoveable property. It is conceded that if the pugmill is immoveable property, the suit is in time. The only other question for decision is the amount of damages to be awarded for wrongful attachment. The plaintiff valued the pugmill at Rs. 150, which is about the cost when the mill is new. The mill had been in use for some time before its attachment, and the claim for its full value is excessive. Mr. Doctor agrees to my estimating the value at any figure I think proper. I allow Rs. 75 for the pugmill. Mr. Doctor also waives the claim for attending fees, and there is no proof that the plaintiff spent Rs. 41-4-0 in attending court in connection with the proceedings for the removal of attachment. I accord-

(1) 4, C. 946; 2, Ind. Dec. (N. S.) 598.

(2) (1897) Ch. 82; 68, L. J. Ch. 114; 45, W. R. 656.

ingly set aside the decree of the lower appellate court and pass a decree for Rs. 75 - plus Rs. 120-2-0 costs ordered in Civil Miscellaneous Case No. 20 of 1914 of the Sub-divisional court, Pyu. The defendant-respondent will pay two-thirds of the costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION NO. 133 B OF VTVG.

A. S. SHAIK DAWOOD APPLICANT.

vs.

A. M. EBRAHIM RESPONDENT.

Before Mr. Justice Maung Kin.

8th August, 1917.

Criminal Procedure Code (Act V of 1898) s. 250.—Frivolous or vexatious accusation.

The words "frivolous or vexatious accusation" in section 250 of the Code of Criminal Procedure include a false accusation, and a magistrate can award compensation to an accused person if he finds the case is false.

ORDER.

MAUNG KIN, J.—The applicant has under section 250 of the Criminal Procedure Code been ordered to pay Rs. 50 compensation to the respondent for bringing a frivolous and vexatious accusation against the latter. The application is made for a revision of that order.

The learned magistrate classes the case as "false," and I was referred to the case of Emperor *vs.* Asha (1), which rules that the provisions of section 250 under consideration apply only in the case where the charge is frivolous or vexatious but not where the charge is false. A similar ruling was come to in Parsi Hajra *vs.* Bandhi Dhanuk (2), but both these cases were dissented from in Emperor *vs.* Bai Asha (3), where the Full Bench ruling of the Calcutta High Court in Beni Madhub Kurmi *vs.* Kumud Kumar Biswas (4) was followed. In the latter case it was held per curiam, Prinsep, C. J., dissenting, that there is no reason why a case in which the accusation is false should be considered as being outside the scope of the section.

For the above reasons I am of opinion that the order of the court below is justified, and this application is dismissed.

(1) 4, Bom. L. R. 645.

(2) 28, C. 251.

(3) 5, Bom. L. R. 128.

(4) 30, C. 123; 6, C. W. N. 799.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 89B OF 1917.

KADIR PAKIRI APPLICANT.

vs.

EMPEROR RESPONDENT.

Before Mr. Justice Maung Kin.

1st June, 1917.

Criminal Procedure Code (Act V of 1898) ss. 360 and 476. Deposition not read over to witness. Sanction to prosecute for perjury.—Evidence Act (I of 1872) ss. 80 and 91.—Evidence or statement taken in accordance with law—Exclusion of oral evidence.

A prosecution for perjury cannot be based on statements which have not been read over to the witness as required by section 360 of the Code of Criminal Procedure.

Under section 80 of the Evidence Act a document purporting to be the evidence of a witness can be presumed to be genuine only if it is taken in accordance with law, and section 91 excludes any other evidence.

Nga San Myin *vs.* Emperor, U. B. R. 1912, I, 123 followed.

ORDER.

MAUNG KIN, J.—In this case there was an enquiry under section 476 of the Criminal Procedure Code resulting in the order for the prosecution of the applicant for perjury under section 193, Indian Penal Code, in respect of certain statements made by him in Criminal Regular No. 128 of 1916 of the second additional magistrate's court, Moulmein. The statements were made in the course of a deposition which was not read over to the applicant in the presence of the accused or his pleader. The learned sessions judge has on the authority of Nga San Myin *vs.* Emperor (1) recommended that the magistrate's order directing the prosecution of the applicant be set aside.

The case cited is supported by Mohendra Nath Misser *vs.* Emperor (2), which followed Kamachinathan Chetty *vs.* Emperor (3) and Jyotish Chandra Mukerjee *vs.* Emperor (4). In the last case, Jenkins, C. J., in dealing with the argument that the section 360 was directory and not obligatory, observed: "Such a departure from the terms of the Criminal Procedure Code might lead to considerable embarrassment, and place a serious impediment in the proper administration of justice, for there are cases in which it has been held that, for the purposes of a prosecution on the ground of perjury, deposi-

(1) U. B. R. 1912, I, 123.

(3) 28, M. 308.

(2) 12, C. W. N. 855.

(4) 4, Ind. Cas. 416; 36, C. 955.

tions to which the procedure laid down in section 360 has not been applied, cannot be properly used."

There is a contrary view expressed by Miller, J. in *In re Bogra* (5) where the Madras case cited above was disapproved. The disapproval was expressed in these words:—"When the deposition has been read over to the witness and he has admitted it to be correct, there seems to be no good reason why that admission should not, so far as he is concerned, be regarded as a proof of its correctness. I cannot see why a deposition irregularly recorded is necessarily to be treated as a nullity for all purposes even as against the man who made it and who has admitted that it represents what he said." The difficulty in following Miller, J., lies in the facts that under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made, and that, under section 80 of the same Act it is admissible only when it was taken in accordance with law. As stated in the judgment of the Upper Burma case above cited, it is from this point of view that the illegality arises.

I am of opinion with due deference that Miller J's view cannot be adopted. The Upper Burma case, supported by Calcutta and Madras as shown above, should therefore be followed. I, therefore, accept the sessions judge's recommendation and set aside the magistrate's order directing the prosecution of the applicant for perjury.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 75B OF 1917.

MAUNG THEIN WUN APPLICANT.

vs.

STEEL BROTHERS & CO. RESPONDENT.

Before Mr. Justice Parlett.

For applicant—Mr. R. N. Burjorji.

For respondent—Mr. Lentaigue.

4th May, 1917.

Workmen's Breach of Contract Act (XIII of 1859) s. 2. Order for payment of court-fees and other costs.—Order of imprisonment—Applicability of the Act, artificer, labourer or workman—Contractor

No order for payment of court fees or other costs can be made in cases under the Workmen's Breach of Contract Act.

An order of imprisonment under the Act cannot be made till after expiry of time fixed for repayment of the money.

The Act applies only to artificers, labourers and workmen, not to contractors unless they are themselves either artificers, labourers, or workmen as well.

(5) 7, Ind. Cas. 414, 11, Cr. L. J. 482.

A contractor for the supply of men and beasts to drag timber is not within the purview of the Act unless he has contracted to work as a labourer himself.

JUDGMENT.

PARLETT, J.—The petitioner has been ordered to repay Rs. 698, balance of an advance made to him, together with costs amounting to Rs. 68-8-0 under section 2 of the Workmen's Breach of Contract Act, XIII of 1859, and has done so. Objection was taken to the order to pay costs being Rs. 4-8-0 court fees and process-fees, and Rs. 6½-advocate's fees. There is no provision in the Act for ordering payment of costs and it has been several times held that payment of court-fees cannot be ordered. *Emperor vs. Dhondu* (1), and *Queen Empress vs. Budhu* (2), and it appears to me obvious that a complainant who avails himself of the simple and summary manner of recovering his money provided by this Act is not entitled to recover large fees for an advocate. This part of the order was certainly wrong. The magistrate also erred in passing an order of imprisonment simultaneously with that for payment of the money, and has been repeatedly ruled and as the wording of section 2 of the Act clearly shows.

The petitioner however has from the outset contended that he is not an artificer, workman or labourer, and therefore the act does not apply to him at all. The complainant firm says the petitioner entered into a written agreement to personally work for them as their contractor from the 1st December, 1915 to the 31st October, 1916 "to get labour for them and to personally supervise the taking of their teak timber felled by them in the Mewaing Forests to the Mewaing stream Bank."

The agreement was filed, and clause 22 is relied on by complainants. It runs:—"The contractor shall not sublet this contract, or any part of it without the consent of the company and shall devote the whole of his time to the work to be done by him under the agreement, and shall personally supervise such work." The nature of the work is not specified. There is nothing to show that it was anything more than supervision. The magistrate purported to follow *Sein Yin vs. Ah Moon Shoke* (3) and held petitioner was a labourer within the Act. He appears to me to have misunderstood that ruling. The respondent there was a carpenter i. e. an artificer, and it was held that he came under the Act in respect of an advance for carpenter's work which he contracted to get done, though his part was limited to supervision: The decision rested upon the fact that he was himself a carpenter. If he had not been the case would have been different. As pointed out in *Asgar Ali vs. Swami* (4) the Act does not apply to a contract which is made by a person who is not himself an artificer, workman or labourer. The present petitioner is not an artificer, nor is he shown to be a workman or labourer. He describes himself and is described by the complainant as a contractor, and his contract was

(1) 6, Bom. L. R. 255.

(2) Ratanlal Unrep C. C. 534.

(3) 7, L. B. R. 82.

(4) 1, U. B. R. 1902-03, 3.

for the supply of men and beasts to drag the timber to the stream under his personal supervision. There is no evidence that his duties under the contract extended to anything more than that, that he ever in fact handled the timber or drove the animals. It appears to me that he is not a workman or labourer within the meaning of Act XIII of 1859 and that proceedings could not properly be instituted against him. The order is reversed and the fine Rs. 766-8-0 will be refunded to the petitioner.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL NO. 873 AND 874 OF 1917.

PO NYEIN and one APPELLANTS.

vs.

EMPEROR RESPONDENT.

Before Mr. Justice Rigg.

7th December, 1917.

Penal Code (Act XLV of 1860) ss. 75 and 379. Previous Conviction. Enhanced sentence.—Criminal Procedure Code, s. 221.

A sentence should never be heavier than is necessary to deter the criminal from committing the offence again.

The object of enhanced punishment after previous convictions is to protect society from habitual rogues. But a large number of men who commit offences more than once do not live by crime, and are not professional criminals. On the other hand a man with no previous conviction against him may be a dangerous criminal deserving a long sentence.

In the case of men with previous convictions regard should be had to their career, and to the time that has elapsed since the previous conviction.

JUDGMENT.

RIGG, J.—The appellants have been rightly convicted of the theft of a hauktu boat, worth 8 rupees on the 2nd August, and another similar boat, worth Rs. 15/- on the 12th August.

Nga Po Nyein, who had a previous conviction proved against him, was sentenced to two consecutive terms of three and a half years rigorous imprisonment or to seven years in all, whilst Po Tin who has no previous convictions was sentenced to consecutive sentences of two years rigorous imprisonment, or to four years in all. The sentence passed on Po Tin for the theft of two boats of little value is an example of that want of discrimination and thought that is shown in some of the sentences passed in these cases. The magistrate proba-

bly had in mind the ruling in *Q. E. vs. Nga San* (1) in which Aston, J. C. said "The reason why boat thefts and cattle thefts call ordinarily for a sentence of two years imprisonment is twofold. They for the most part are committed by professional thieves, or by persons ready to join the ranks of professional thieves, and the injury inflicted on the owner is not measured by the intrinsic value of the property stolen, but is usually far beyond that value when the owners are deprived of their means of livelihood by the loss of their cattle or boats."

The proper sentence to be passed in cattle theft cases was again considered in *Q. E. vs. Nga Ni and Nga Shwe Pi* (2) in which Birks, J. C. said that where there are no extenuating circumstances, a sentence of two years rigorous imprisonment is not unsuitable. These pronouncements have unfortunately been sometimes interpreted as laying down a hard and fast rule that a sentence of two years rigorous imprisonment must be passed in all cattle and boat cases, without regard to the value, and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. When Mr. Aston spoke of cattle thefts being committed for the most part by professional thieves, he was probably thinking of the type prevalent in India, whereas in Burma many of the thefts are committed by young men, who are tempted to steal either by the careless way in which cattle are tended, or by motives of bravado. It is undesirable to send young men to jail if they can be suitably punished otherwise, and in many cases I think that a whipping would be a more appropriate sentence than imprisonment. Each case should be considered on its merits, and if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Sections, 75 Indian Penal Code and 221, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. But there is a large number of men who commit offences more than once, but do not seek to live by crime. These seem to me to stand on a different footing from the professional criminal. On the other hand, a man may have few if any previous convictions and may yet be a dangerous criminal whose powers of mischief need curtailment by a long sentence. I think that a magistrate or judge should make some enquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. This could be done after the evidence has been heard and the court has come to a decision about his guilt. The police officer in charge of the station within the juris-

(1) P. J. L. B. 198.

(2) P. J. L. B. 563.

diction of which the prisoner resides, or the headman of the village would be able to supply the necessary information.

Po Nyein must have had previous convictions before the one now set out against him, as he was sentenced to four years under section 379. He was released from jail in 1915, and has again committed two thefts in August 1917. His appeal is dismissed. The boats stolen by Po Tin was not of much value, but as it is in evidence that the country side near the landing place from which they were removed, is one vast sheet of water, the thefts probably caused great inconvenience, if not loss to the owners. His sentence is reduced to one of six months rigorous imprisonment on each charge to run consecutively.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 204 OF 1917.

RAMANATHA PANDARAM APPLICANT.

vs.

V. K. THEVAR.. .. . RESPONDENT.

Before Sir Daniel Twomey, C. J.

28th October, 1917.

Workmen's Breach of Contract Act (XIII of 1859)—Proceedings under the Act—Meaning of "Workman."

Proceedings under Workmen's Breach of Contract Act are judicial proceedings, and the workman is in the position of an accused person. He cannot be compelled to make a thumb impression in court for the purpose of comparison.

Maung Po Nyun *vs.* Muthu Karpen Chetty, 10 B. L. T. 32 approved.

A person who undertakes to supply coolies and to work with them himself is a workman within the meaning of the Act.

JUDGMENT.

TWOMEY, C. J.—The magistrate erred in requiring the accused to make his thumb-impressions in court when his advocate objected. Cases under the Workmen's Breach of Contract Act are judicial proceedings and the workman is in the position of an accused. The remarks of Mr. Justice Parlett in *Maung Po Nyun vs. Muthu Karpen Chetty* (1) apply *mutatis mutandis* to this case also. The finger expert's evidence must, therefore, be disregarded as inadmissible.

But apart from the finger print evidence, I think Exhibit A was proved by the complainant's sworn statement taken together with the

1) 35, Ind. Cas. 492; 10, Bur. L. T. 32.

admissions of the accused that he did borrow money from the complainant and did sign such a document, though he contends that it was at an earlier date than the date of Exhibit A. The document Exhibit A, bears date 5th May, 1916. The accused says that he borrowed Rs. 750 in 1914 and that the balance which remained due out of the sum was paid off for him in 1915 by Subramonian and his clerk. But the receipt 1, does not show what money was paid off by Subramonian and the signature on it is denied by the complainant. The genuineness of the receipt has not been established beyond doubt. Subramonian and his clerk say that the original documents signed by the accused and the other persons mentioned in exhibit 1 were not given up at the time, as the complainant professed to have lost them. The magistrate was justified in rejecting his explanation, not only because it is prima facie improbable but also because Subramonian's cross-examination showed him to be any thing but an impartial witness and the document exhibit II which he produced showed that the accused is heavily indebted to him. I cannot find that the magistrate was wrong in deciding that the accused really took Rs. 700 as an advance in May, 1916, and that he then executed exhibit A.

Nor can I accept the view that the accused does not fall within the category of workman in the Act. The term of the two contracts exhibit A and 1, indicate that he has to work himself with the coolies that he undertook to supply. The fact that he was under two similar contracts during the same period is not sufficient to take him out of the category of workman. The application is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 282B OF 1916.

S. C. PAUL ACCUSED. APPLICANT.

vs.

EMPEROR RESPONDENT.

Before Mr. Justice Parlett.

For the Crown—Mr. Higinbotham.

1st March, 1917.

Burma Municipal Act (Burma Act III of 1898) s. 142. Pawn-brokers' licenses—Ultra vires.

Section 142 of the Burma Municipal Act empowers the municipal committee to frame byelaws rendering licenses necessary for pawnbrokers, and for determining the conditions on which the licenses shall be granted.

It is not ultra vires for a municipal committee to impose conditions on pawnbrokers limiting the rates of interest, and otherwise modifying the right of freedom of contract.

JUDGMENT.

PARLETT, J.—Applicant has been convicted of disobeying a bye-law made by the Rangoon Municipal Committee, by carrying on the business of a pawnbroker within the municipality without a license from the committee. There is no doubt upon the evidence that he was in the habit of taking goods and cattle in pawn for loans of money of small amount, and that he did carry on the business of a pawnbroker as defined in the bye-laws, though that may not have been the only description of business which he carried on. Admittedly he had no license. The case put forward for him is that the committee had no power to make the byelaws for breach of which he has been convicted.

Section 142 of the Burma Municipal Act empowers the committee to make bye laws, among other purposes, "for rendering licenses necessary for pawnbrokers and determining . . . the conditions subject to which they shall be granted." It is perfectly clear, therefore, that the committee has been expressly empowered to make a byelaw that no one shall carry on the business of a pawnbroker within the municipality without a license from the committee. It has also been expressly empowered to make byelaws determining the conditions subject to which such licenses shall be granted and may be revoked. These conditions are embodied in byelaw 6, which also provides that the license may be revoked for breach of any of those conditions. It was argued that the committee had no power to impose certain of these conditions as they conflicted with the provisions of the Indian Contract Act. The conditions objected to are V, IV, and X. The first limits the rate of interest chargeable on loans; the other two are as follows:—IV. That the licensee shall not sell any pledge before the expiration of the time agreed upon for the redemption thereof, or otherwise than in accordance with these conditions. X. That the licensee shall deliver all articles pledged for sums exceeding Rs. 20, and unredeemed at the time agreed upon for redemption thereof, to an auctioneer appointed by the committee for sale; and shall not sell the same except through such auctioneer. It is objected that these two conditions give the pawnee a right of sale of unredeemed pledges which is not accorded to him by section 176 of the Contract Act. Mr. Higinbotham, for the Crown, contends that the byelaws leave the Contract Act untouched and give no further right of sale than does that Act viz., a right of sale after giving the pawner reasonable notice. It may be doubted if that was the intention of the framers of the byelaws, but it appears to me unnecessary to decide whether or not the byelaws as they stand do give a power of sale with notice, for two reasons; first, because it does not lie in the mouth of a licensee to object to the terms of a license which gives him rights and privileges which he would not enjoy without such license, and secondly, because in the view I take of the matter it is immaterial whether the conditions of the license prescribed by the byelaws do or do not modify the general laws of contract.

Condition V, limiting the rate of interest chargeable, does modify and restrict the law which allows freedom of contract, but I do not

think it is on that account ultra vires of the committee. Clause (6) of section 142 of the Burma Municipal Act empowers the committee to make byelaws for the rates which may be demanded for hire of any conveyance hired for a period not exceeding 24 hours. It has not been, I do not think it could be, contended that byelaws thus limiting the rates, though interfering with freedom of contract, would be ultra vires, since the Act gives express power to frame them. In the case of pawnbrokers' licenses though power to limit the rate of interest is not expressly given, I think it is reasonably implied in the power to determine the conditions of such licenses. Moreover, the committee have clearly power to forbid the carrying on the business of a pawnbroker without a license and to determine the conditions of the license. Any one who wishes to carry on that business within the municipality must have a license and must carry on his business in conformity with the conditions of that license, whether or not they modify the law under which businesses for which no licenses are required are carried on. This disposes of the other objection to condition X that it limits the right of sale to sale through the auctioneer appointed by the committee.

In my opinion the committee was right and I dismiss this application.

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PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT BOMBAY.

BHAGVANDAS NAROTAMDAS APPELLANT.

vs.

BURJORJI RATANJI RESPONDENT.

Before Lord Buckmaster, Sir John Edge, Sir Walter Phillimore Bart
and Sir Lawrence Jenkins.

For Appellant—Sir W. Garth.

26th November, 1917.

Contract Act (1 of 1872) s. 30. Wager—Unilateral intention to wager.

Speculation does not necessarily involve a wagering contract and to constitute a wagering contract it is necessary that there should be an intention to wager on the part of both the parties.

Where a person instructed his agent to sell goods for future delivery and the agent made contracts in his own name for sale of the goods to various buyers, and there was no agreement express or implied between the principal and agent that the goods were not to be delivered.

Held that the transaction was not a wagering contract even if the agent did not expect his principal to deliver the goods, and the agent could recover damages from the principal for failure to deliver according to the contract.

JUDGMENT.

SIR LAWRENCE JENKINS.—This appeal arises out of a suit for recovery of money. Many defences have been pleaded, but only one need now be noticed; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed and the third was in these terms: "Whether the transactions mentioned in the plaint are not wagering transactions, and whether the plaintiffs were not aware of the defendant's intention to deal in differences only?"

The trial judge sitting on the original side of the High Court at Bombay found all the issues in plaintiffs' favour, and passed a decree for the amount claimed. On appeal the appellate bench of the High Court agreed with the findings of the trial judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit. It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as *pakka adatias*. The defendant, on the other hand, was a young man without any regular business, who, with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market. In June and July, 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to four thousand tons for September delivery. On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to thirty nine buyers, the plaintiffs acted throughout as *pakka adatias*, and to secure them against loss, sums amounting in the aggregate to Rs. 61,000/- were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorize them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty nine buyers by delivering three hundred tons, and by making cross-contracts and paying differences as to the balance of the linseed. The result was that after giving the defendant credit for the Rs. 61,000/- deposited as margin money and a sum of Rs. 5,804/- due to him on another account there was due to the plaintiffs Rs. 90,763/-, unless the plea of wagering is an answer to the claim. To determine whether this plea is applicable it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the courts on the footing that the plaintiffs were employed by the defendant and acted as *pakka adatias*, and the description in *Bhagvandas vs. Canji* (1) of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an upcountry constituent.

The plaintiffs therefore acted in conformity with the terms of their employment when they made the contracts with the thirty nine buyers. And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer the defendant, against the consequences of the acts done by them unless those acts

(1) 30 B 205.

were unlawful. There is no suggestion that the acts of a pakka adatia as such are unlawful; on the contrary pakki adati dealings are well established as a legitimate mode of conducting business in the Bombay market.

No doubt the contract of a pakka adatia as that of any one else, may be by way of wager, but can it be said that the employment of the plaintiffs by the defendant was of this description? It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, that the defendant was a speculator, who never intended to give delivery and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. No such intention has been proved.

Under the sales to the thirty nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as pakka adatias of the defendant the rise or fall of the market was a matter of no concern to them except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment. The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims, cannot alone vitiate the transactions.

The learned judges in appeal were evidently impressed by the statement ascribed to the plaintiffs' munim that the delivery of three hundred tons was made for the purpose of court proceedings, and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram & Co. Their Lordships, however, attribute no importance to either of these matters. Even if the munim's statement be regarded as proved—a point on which their Lordships are, in the circumstances far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships therefore hold that there was no ground for setting aside the decree of the court of first instance, and they will therefore humbly advise His Majesty to restore it, and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has

been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 97 OF 1917.

DHARSEE NANJEE & CO. APPLICANTS.

vs.

OOMERSI RAISI & CO. RESPONDENTS.

Before Mr. Justice Maung Kin.

For applicants—Mr. Doctor.

For respondents—Mr. Munshi.

2nd March, 1918.

Contract for sale of rice—Liability of vendor for bags supplied to miller.

When bags are sent by the purchaser of rice to the miller to take delivery of the rice as agreed with the vendor, the vendor is liable for the value of the bags, although the bags were delivered to the miller direct and not to the vendor.

Haji Vally Mahomed *vs.* Ahmed Ebrahim, 5, Bur. L. R. 16 followed.

JUDGMENT.

MAUNG KIN, J.—The petitioners were defendants and the respondents were plaintiffs in the lower court. On the 30th May, 1916, the defendants agreed to sell to plaintiffs 500 bags of rice to be delivered in May delivery to be taken ex hopper from the Mecca Rice Mills under milling notice Exhibit A; gunnies and twine to be supplied by the buyers. Plaintiffs accordingly sent gunnies and twine to the Mecca Rice Mill. The miller Mahomed Nazim who was sued as first defendant granted a receipt for them. Rice was milled into the gunnies but Dharsee Nanjee failed to deliver the rice within time, and the contract was accordingly cancelled. Ko Tun Maung Gyi who was the original owner of the rice and from whom the defendants had bought it before they agreed to sell it to plaintiffs disposed of the rice and bags. These facts are admitted.

The question is who is liable in law to return the gunnies and twine to plaintiffs—defendants or the miller who actually received them and granted a receipt. The lower court has held that the defendants were liable and not the miller on the ground that the gunnies were supplied to the miller as the agent of Ko Tun Maung Gyi by plaintiffs on behalf of the defendants.

It has been argued that the miller was bailee for plaintiffs and as such was liable to return the gunnies to his bailors. Under the circumstances of the case I do not think he can be looked upon as bailee for the plaintiffs. Ko Tun Maung Gyi was owner of the rice. He sold it to defendants on the understanding that delivery was to be taken ex hopper in May, 1916. On getting the milling notice and before the time for delivery came, he resold the rice to plaintiffs and tendered the milling notice to them. By this defendants in effect told plaintiff to take delivery of the rice by taking or sending the necessary gunnies and twine to the mill. Plaintiffs must therefore be held to have sent the gunnies in virtue of the tacit arrangement thus arrived at and the gunnies so sent must be taken to have been sent on behalf of their vendors. It would be impossible to do any business in the rice trade if the last buyer has to send the gunnies to his immediate seller, so that they may be passed on to the miller through all the intermediate buyers. Exactly the same question arose in *Hajee Valley Mahomed Hoosein vs. Ahmed Ebrahim Soorma* (1). The Recorder Mr. Bigge said that as judge of the small causes court he had decided a similar case and that he had not the slightest ground for revising the remarks he had made in that case: They were as follows:—“The gunnies in question were sent by the plaintiff in accordance with his contract with the defendants, such sending being one of the factors required before he had done everything necessary in order to take delivery, and in the course of business they were sent to the miller instead of to the defendants the vendors. Had they been sent to the latter, there could not have been a doubt as to their liability, which I do not think is shifted because the bags were delivered at once to the millers, instead of reaching them through the series of sub-purchasers that intervened between them and the plaintiff.” I would therefore hold that the lower court was right. The application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 3 OF 1918.

KATHLEEN M. KERWICK APPELLANT.

vs.

FRED. J. R. KERWICK RESPONDENT.

Before Justices Maung Kin and Rigg.

For appellant—Mr. Giles and Mr. Ginwala.

For respondent—Mr. Higinbothan.

19th June, 1918.

Trusts Act (II of 1882) ss. 81 and 82. Transfer in wife's name for consideration paid by husband—Presumption of advancement. Burma Laws Act (XIII of 1898) s. 12(2)—Law applicable to parties who are English.

(1) 5, Bur. L. Rep. 16.

The rule of English Law that property held by a husband in the name of his wife should be presumed to be for the benefit of the wife applies to persons of British nationality in India, and the fact that the husband has managed the property and collected the rents is not sufficient to rebut the presumption.

Under section 13 (2) of the Burma Laws Act all questions arising in civil cases instituted in Rangoon between parties who are of British nationality are to be determined according to English Law.

JUDGMENT.

Rigg, J.—The parties in this case were married in 1901. They have two children, Dagmar, aged about fourteen and Terence aged about ten. The husband is an assistant engineer in the Public Works Department, whose pay with allowances does not now exceed Rs. 500 a month. In 1907 he bought a piece of land from Dr. Pedley for Rs. 10,000, and built a house, which he called Kildare, on it at a cost of about Rs. 16,000. He made out a cheque for Rs. 9,000 to his wife who endorsed it over to the vendor. The deed of sale of the land was registered in her name. In 1908 he again bought another piece of land and built Kerry on it. This land was similarly registered in his wife's name. In 1915 the parties separated after a quarrel. The question for decision in this suit is whether these two houses and pieces of land were intended as a gift to the wife or whether there is a resulting trust in favour of the husband on the ground that they were merely placed in her name benami in order to evade a supposed rule prohibiting government servants from speculating in landed property. The learned judge on the original side found that there was no advancement and decreed the plaintiff's suit for a declaration that the properties were his and should be transferred to his name. The first point for consideration is whether the English Law relating to the presumption to be made from the investment of property by a husband in his wife's name is to be applied to the parties or not. The trial judge describes the parties as English, but thought that because they had spent most of their lives in India, the presumption that would be made by an English Court should not be drawn in view of the fact that the husband paid for the property, managed it and took the receipts. He treated the case on the same footing as a purchase by a Hindu or Mohammadan, and presumed that the transaction in the circumstances was a benami one. Mr. Higinbotham states that he is not prepared either to affirm or deny that the parties are English, but I am of opinion that there is not the slightest reason for supposing that they are not of British nationality. It is inconceivable that if they were not, plaintiff would not have said so and thereby cut away at once one of the main foundations of the defendant's case. By virtue of section 13 (2) of Burma Laws Act, the law to be administered on the original side of this court is the same as would be administered by the Calcutta High Court, and in the present case that would be the common law of England. Mr. Higinbotham contends that sections 81 and 82 of the Trust Act 1882 (which is in force in Rangoon) govern the case. He admits that the

burden of proof lay on his client in the first instance, as the tenor of the documents was adverse to his claim. But he contends that as soon as he proved the source of the funds for the purchase of the property, and his client's receipt of the rents, the burden shifts. Section 81 of the 'Trusts Act is as follows:—"Where the owner of the property transfers or bequeaths it and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative." Illustration (d) to that section deals with the case of a gift from a husband to a wife, and says that the presumption in such a case is that she takes the beneficial interest. The presumption is an inference from the relationship of the parties. I do not think that the enactment of this section was intended to abolish any presumption arising from the personal law of the parties. The question still remains whether the attendant or surrounding circumstances of the case are inconsistent with such a presumption.

In *Gopeekrist Gosain vs. Gungaperoud Gosain* (1) their Lordships of the Privy Council declined to import the presumption that a purchase of property by a Hindu father in favour of his son was an advancement; but they did not do so on the ground that such a presumption could in no case be made in India, but that it was one that could not properly be applied to Hindus, and that its incorporation would be foreign to and objectionable in a system of law that recognizes the purchase by one man in the name of another to be for the benefit of the real purchaser. For similar reasons, their Lordships have declined to import the English presumption in the case of gifts by Mahommadans. On the other hand, the English doctrine of advancement was recognised in *Krishen Koomar Moitro vs. Mrs. M. S. Stevenson* (2). The learned judges said:—"As between the father and daughter, both of English extraction, and living under the English Law, why should the doctrine of advancement not be considered applicable? If by English Law certain rights are secured to a child by the doctrine of advancement, why should the child by living with its parents in this country be deprived of that right? Had litigation arisen between French and his daughter that would have been governed by English Law and the doctrine of advancement might have been effectually pleaded by the daughter." The doctrine was assumed to apply in the case of *McGregor vs. McGregor* (3) which was decided by the Recorder of Rangoon in 1898. In section 39 of Transfer of Property Act there is a reference to a provision for advancement and such an expression could only apply to persons of British nationality. The mere fact that the parties have been educated or have chiefly resided in India cannot affect their personal law, and in my opinion the burden of proving that the registration of the land on which Kerry and Kildare are built in the name of Mrs. Kerwick was not intended as an advancement lies upon the plaintiff.

(1) 6, M. L. A. 53 at page 75; 19, E. R. 20.

(2) 2, W. R. 141.

(3) 4, Bur. L. R. 88.

The parties lived happily together until January 1915. With the exception of the parties themselves, there is very little evidence of facts antecedent to or contemporaneous with the purchase to show whether the intention of the plaintiff was to create a trust or an advancement, Mrs. Kerwick says that she and her husband were on very good terms and that he told her he intended to make provision for her. In paragraph 5 of the plaint Kerwick states that he purchased the properties with the object of making provision for his children. In cross-examination he said that he wished the property to benefit his children not after their death, but to help in their education and he intended to give it to them when they reached a reasonable age. He took out three insurance policies one of which was intended for Terence and in 1912 he bought Kenmare which he admits was intended for Dagmar. Apart, therefore, from Kildare and Kerry, he did make provision for his children, which makes it the less unlikely that he made some provision for his wife, and the more probable that the property in her name was intended for that purpose.

It is argued that if Kerwick's intention was to benefit his wife, he would not have entered into so wild a speculation as house building on borrowed capital. But the same argument would apply with reference to his intention to benefit his children, and it is clear from his own statements that he did not make the purchases as a speculation but as provision for his family. It is also urged that it is improbable that he would borrow money from his sister to benefit his wife.

There is, however, no more improbability in his borrowing from a wealthy sister to benefit his wife, than to benefit his children who were very young at the time. On any view of the case Kerwick's financial proceedings are somewhat remarkable.

* * * * *

It is common ground that Kerwick managed the properties, collected the rents and paid them into his own banking account. This, however may have been merely an arrangement to suit the convenience of the parties. Mrs. Kerwick was in England much longer periods than her husband, who remitted her £20 a month for the expenses of herself the two children and a niece. In *Grey vs. Grey* (4) the fact that a father received the profits of an estate for his adult son for twenty years built much and provided materials for buildings, and treated for the sale of an estate, was not held sufficient to rebut the presumption of an advancement arising from the purchase of the property in the son's name. In the case of English people resident in India, the arrangement would probably be determined to some extent by considerations of convenience, and I do not think the management of the estate by Kerwick is conclusive evidence that the registration of it in his wife's name was a trust only.

* * * * *

The evidence relating to Kerwick's intention is somewhat meagre, but the onus of proof lay upon him and in my judgment he failed to

(4) 1, Ch. Ca. 296; 19, R. R. 150; 26, R. R. 742.

discharge it. I think that the probability is that he intended to make provision for Mrs. Kerwick, just as he was making provision for his children. The letter, Exhibit 1, from which the most reasonable inference would be that it was written to the owner of the property, cannot be explained away as a mere *jeu d'esprit*. It is not until the deed of separation has been signed that Kerwick suggested that the property was not Mrs. Kerwick's and then so far as admissible evidence on the record goes, not until the suit is about to be filed. I have already stated my reasons for believing that Kerwick's explanation that the property was transferred to his wife benami is untrue. There is practically nothing left in plaintiff's favour, except his management of the property, and this is inconclusive evidence of ownership in a case such as this. I would allow the appeal and dismiss the plaintiff's suit with costs in both courts.

MAUNG KIN, J.—I concur in holding that the onus is on the plaintiff of rebutting the presumption that the purchases were by way of advancement in favour of his wife, the defendant.

The Indian Law on the subject of advancement is contained in section 82 of the Indian Trusts Act, which has been made applicable to Rangoon. The section provides:—"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such another person did not intend to pay or provide such consideration for ~~the~~ benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

It will be seen that on the subject of any presumption arising in the case of the transferee being the wife or the child of the person paying the consideration, nothing is stated in the section. The question of advancement or no advancement is left as one of intention, which will have to be proved according to the law of evidence. The same is the case in English Law. So, in this case the question would be. "Did the husband intend that his wife should hold the property purchased as trustee for him or that she was to have the beneficial interest therein?"

On whom then does the onus lie as to the intention of the husband? In England it is easy to answer the question, because a presumption in favour of an advancement to the wife is allowed.

In India there is at first sight some difficulty, for we have decisions between Hindus as well as between Mahomedans to the effect that the English presumption of advancement cannot be recognised. The reason assigned in the case of Hindus is their inveterate practice of holding land in the name of another. The principle of the decisions in Hindu cases has been extended to those of Mahomedans, because as observed by their Lordships of the Privy Council in *Moulvie Sayyud Uzhur Ali vs. Musammad Bebee Ultaf Fatima* (5), though we cannot apply to the decision of a case between Mahomedans... any reasons drawn exclusively from the Hindu Law... it is perfectly

(5) 13, M. I. A. 232.

clear, that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among the Mahomedans as among the Hindus." And as regards the Burmans we have the case of *Moyappa Chetty vs. Maung Ba Bu* (6) where the principle was extended by a Bench composed of Sir Charles Fox, C. J., and Parlett, J. The learned chief judge observed in his judgment. "Neither court had in mind the long line of decisions referred to at pages 531 and 627 of Ameer Ali and Woodroffe's Evidence Act as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation. As far back as 1854 it was decided by the Privy Council that the presumption made in English Law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made, does not apply in India, and that the presumption in India is that the purchase is benami and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property." It does not appear that the learned Chief Judge grounds his decision on the same reason as did the Privy Council in the Mahomedan case above cited.

It has now come to be stated in text books and judicial decisions that in India a purchase by a husband in his wife's name creates no presumption of gift to her or of advancement for her benefit. I venture to think that the proposition stated in this form is far too wide and embraces cases of persons who were not in view, when the judicial decisions against the presumption of advancement were given. The case of persons of British nationality was clearly never under consideration. The presumption allowed by English Law is not a presumption *juris et de jure* but is one of fact, and I consider that this presumption is made in English Law not only because the wife is found to be invested with one of the principal incidents of ownership, but also because the husband in putting the property in her name must have had some intention regarding the transaction and the probabilities are that the intention is to confer a benefit upon the wife. I am unable to see why such a presumption cannot be drawn in the present case. Under section 114 of the Indian Evidence Act courts may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. There can be no doubt that in the case of persons of British nationality residing in India it cannot be said that they have the inveterate habit of holding property in the name of others. I, would therefore, hold that the English presumption of advancement should in this case be drawn in favour of the defendant.

As regards the facts also I am entirely of the same opinion as my learned colleague.

(6) 3, B. L. T. 62.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 106 OF 1917.

MA NGWE U APPELLANT.

MAUNG THAN RESPONDENT.

Before Justices Ormond and Pratt.

For appellant—Mr. May Oung.

For respondent—Mr. Bomanji.

27th March, 1918.

Burmese Buddhist Law—Inheritance—Share of an apatittha child.

The rule of partition between the *apatittha* child and the other heirs is contained in section 198 of the Digest and is as follows:

If there are natural or adopted children of the deceased the *apatittha* child gets nothing. In the absence of natural or adopted children the *apatittha* child shares equally with the other heirs of the deceased.

JUDGMENT.

ORMOND AND PRATT, J.J.—The plaintiff a minor by his guardian ad litem sued for his share in the estate of Ko San Htu and Ma Ni. The defendant who is the daughter of Ma Ni by a former husband is in possession of the estate. The plaintiff's case is that he is the son of a *Kittima* daughter of the deceased couple and he claims a seven-eighth share of the estate. The district judge has found that the plaintiff's mother was an *apatittha* child of the old couple and has given him a decree for a five-elevenths share of the estate upon the authorities of the *dhammathats* cited in section 190 of the Digest.

The defendant appeals and her case is that the plaintiff's mother was not an *apatittha* child, that the plaintiff is not entitled to any share, and that in any event he is not entitled to so great a share as five-elevenths. Mr. May Oung for the appellant withdraws the first two grounds of appeal. It is therefore conceded that the plaintiff's mother was an *apatittha* child of the deceased couple.

It is difficult to see the reason why the plaintiff was given five-elevenths. There is no judicial authority to show what the share of the plaintiff would be, but section 198 of the Digest would show that an *apatittha* child takes half the estate in the absence of any natural or *kittima* children equally with the coheirs of the adoptive parents. As regards Ma Ni's estate the defendant being the daughter of Ma Ni, the plaintiff's mother as an *apatittha* child of Ma Ni would take nothing. As regards San Htu's estate, the defendant would be an heir of San Htu as she is his stepchild, therefore the *apatittha* child would be entitled to half his estate. Mr. Bomanji for the respondent

and Mr. May Oung for the appellant both agree that this would be an equitable way of deciding the case, and it is in accordance with section 198 of the Digest. It has also been agreed that the estate shall be considered as to half as being the estate of Ma Ni and the other half as the estate of San Htu. There will therefore be a decree for the plaintiff for one-fourth share in the whole estate. San Htu survived his wife by one year and it is not alleged that he spent or squandered the estate of Ma Ni. There is some evidence to show that Ma Ni brought to her marriage with San Htu one plot of land which was sold during the continuance of the marriage. The case has virtually been compromised, and we are of opinion that such result is for the benefit of the plaintiff minor. The plaintiff asked for certain accounts to be taken against the administratrix, but the plaintiff's case is not for the administration of the estate by the court, and Mr. Bomanji drops these claims. The accounts of the administratrix can be taken when she files them as administratrix. The decree is therefore varied by giving the plaintiff a decree for one-fourth of the estate of San Htu and Ma Ni and for partition of the same. The costs of both parties in both courts will come out of the estate.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 363 OF 1917.

M. ARIFF PLAINTIFF.

vs.

RAHMAT BEE DEFENDANT.

Before Mr. Justice Young.

For plaintiff—Mr. Lambert and Mr. Xavier.

For defendant—Mr. N. M. Cowasji and Mr. Hay.

7th May, 1918.

Civil Procedure Code (Act V of 1908) O. 3, r. 3.—Several causes of action against the same defendants jointly.—R. 5 claims against executor as such and against him personally.

A person sued in different capacities is not the same defendant, but a separate person in respect of each of the capacities in which he is sued. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person, because each of such claims is based on a separate cause of action as against the particular estate.

Claims against several defendants cannot be joined in one suit unless all the defendants are jointly interested in the relief claimed.

Claims against separate estates may however be joined in one suit if they are based on the same instrument executed for one undivided consideration and affecting plaintiff's rights against both estates.

ORDER.

YOUNG, J.—In this suit the plaintiff sues (a) the administratrix of his father's estate (b) the administratrix of his brothers' estate (c) the executrix of his mother's estate and (d) his sister personally seeking the administration of the three first estates and his share in another sister's estate and asking that certain deeds by which he gave up his interest in all four estates may be declared invalid on the ground that they were obtained by fraud.

His sister whom he sues personally for his share in another sister's estate is also the representative of the other three estates, and the plaintiff *inter alia* relies upon this unity of personality as entitling him to seek for all these reliefs in one and the same suit.

In my opinion this first ground of justification has no merit, for a person sued in different capacities is not the same defendant. Woodroffe and Amir Ali Civil Procedure Code second edition p 615. Cf. also, The Duchess of Kingston's case (1). A verdict against a man suing in one capacity will not stop him when he sues in another district capacity, and, in fact, is a different person in law; also Legott *vs.* G. N. Railway Company (2) and Evidence Act Section 18.

The defendant Rahmat Bee must therefore in law be regarded as four different persons and the case dealt with accordingly. There are therefore four different defendants.

The next question is whether there are also several causes of action. A cause of action is defined in Read *vs.* Brown (3) as meaning everything which it is necessary for the plaintiff to prove to obtain judgment.

Here what he has to prove is that each of these four different defendants has not given him his rightful share in each of these four different estates. There seem to me to be four different causes of action. *Ex hypothesi* it assumes her sister had an estate of her own, and therefore the claim does not arise with reference to any of the estates held by Rahmat Bee in a representative capacity, and equally clearly the deceased persons whom she represents were not liable jointly with her in respect of it. Under Order 2, rule 5, therefore this claim must form the subject of a separate suit.

Similarly with respect to the mother's estate. The claim assumes she had an estate of her own, though the plaintiff does not seem to be certain upon the point: but if so how is the representative of the mother's estate interested in the fact that the representative of different estates have failed in their duty. It was the mother herself who in conjunction and possibly in conspiracy with Rahmat Bee personally tricked or is alleged to have tricked the plaintiff out of his

(1) 2, Smith L. C. 731, p. 759.

(3) 22, Q. B. D. 128, p. 131.

(2) 1, Q. B. D. 599.

father's and brothers' estates, and it was Rahmat Bee as executrix who eight years later and after her death tricked him out of his share in the mother's estate. Conspiracy or combination may possibly affect the matter as regards the brothers' and father's estates but I don't see how they can do so as regards the mother's, if for no other reason than that the executrix of the mother's estate was no party to the conspiracy though possibly Rahmat Bee was so personally. The ordinary rule therefore applies that where there are two defendants and one is not interested in the relief claimed against the other, there is multifariousness, and the court cannot if objection is taken at the right time allow them to be joined in one suit, and this claim must also form the subject of a separate suit.

Lastly I must consider the two remaining causes of action viz: that the plaintiff was tricked out of his share (a) in his father's (b) in his brothers' estate.

It is alleged that his mother who was administratrix of both these estates in collusion with Rahmat Bee fraudulently induced him to give up his share in both estates by the same deed and for one undivided consideration. If I separated the two causes of action and ordered two suits we should have exactly the same question viz: as to whether plaintiff's signature to this deed was or was not fraudulently procured tried twice over. This seems to me inconvenient to say the least of it, and it is also in my opinion unnecessary.

The plaintiff to succeed as against each estate must prove that his signature to this deed was procured fraudulently: it is therefore a part of his cause of action and each administratrix is interested in rebutting his contention. Their alleged fraud is one cause of action and not several causes and therefore in my opinion there is no misjoinder as regards the brothers' and fathers' estates, and the plaintiff can proceed against the defendants with regard to these, but must bring separate suits with regard to each of the other two estates and must elect as to which he will proceed with.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 16 OF 1918.

MA SHWE THIT APPELLANT.

MAUNG KYIN and one RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Patker.

For respondents—Mr. Ba U.

5th July, 1918.

Chinese Buddhist Law—Inheritance—Share of unmarried daughters. Burma Lawes Act (XIII of 1898) section 13 (1).

The customary law of Chinese Buddhists is the law applicable to questions of inheritance amongst Chinese Buddhists in Burma.

Ta Thein Shin *vs.* Ah Shein 7, B. L. T. 246 discussed.

Ma Pwa *vs.* Yu Lwai 9, B. L. T. 187 followed.

Under Chinese Buddhist Law unmarried daughters have the right of maintenance out of their father's estate. It is not clear whether the right is a right to a charge on the estate in the hands of the heirs, but the heirs are bound to maintain the unmarried daughters so long as the daughters continue to live with them.

JUDGMENT.

MAUNG KIN, J.—Ko Bvan Nan, a Chinaman married a Burman Buddhist Ma Min Yin and had four children by her, two sons and two daughters. Their names are Ma Shwe Thit, Maung Tin, Ma Mya Nit and Maung Kyin. Ko Bvan Nan died first, then Ma Min Yin. The four children survived their parents. Later Ma Mya Nit died leaving a daughter by name Ma Kyi. Two years before the present suit Maung Tin as the elder son divided the estate of Ko Bvan Nan and Ma Min Yin into two equal parts of which he took one, while the other half was given to Ma Shwe Thit, Ma Mya Nit and Maung Kyin. Some time later while still a minor Maung Kyin by his next friend Maung Tin sued Ma Shwe Thit and Ma Kyi for the half which remained after Maung Tin took his share. As he was a minor the division was not binding on him and in this suit he denies that his sister and niece have any claim by way of inheritance. In the trial court evidence was tendered as to Chinese customary law of inheritance between sons and daughters, because it was agreed between the parties that Ko Bvan Nan died a Buddhist. The evidence clearly shows that sons exclude daughters.

This is also in accordance with the law as stated in Jernigan's "China in Law and Commerce" at page 145 where the rules of succession to landed property are stated. "Male issue" it is there stated "shall be admitted before the female." In this view of the law defendant Ma Kyi also would have no claim by way of inheritance. But the trial court while accepting the law as stated above considered that the first defendant Ma Shwe Thit being an unmarried daughter had a right to maintenance from the estate. The judge said it was not clear what portion should be retained for unmarried daughters and decided on the analogy of *Ma Thein Shin vs. Ah Shein* (1) that the principle of the Succession Act would apply and gave the plaintiff Maung Kyin a decree for one-third only of the entire estate left by the deceased. The learned divisional judge explained the effect of the case cited as follows:—"In that case the widow had

(1) 7, B. L. T. 246.

to be considered, and there was evidence that she had a right to inherit, but the witnesses were unable to state definitely what her share would be. In the absence of definite evidence on this point she was given a third share which was the share she would have received had the Indian Succession Act been the law applicable."

With these observations I entirely agree. It appears that at the time that case was decided Jernigan's book had not been brought to the notice of the court and the court had to decide the matter according to equity, justice and good conscience in the absence of any definite statement of the law on the subject either by witnesses or by authoritative writers. And now we have the case of *Ma Pwa vs. Yu Lwai* (2) where it was held that a widow has no right of inheritance, but only a claim to maintenance. I therefore think that if that case had come up to day the decision would have been different. It is not clear how the daughter's right to maintenance should be recognized, or the remedy for enforcing it given, and so far as we are able to ascertain there is no provision for setting aside the income of a portion of the estate for the benefit of the daughter or daughters. And as observed by the learned divisional judge "probably this was considered unnecessary as in China the unmarried daughters would continue to live with the elder brother as a member of the household, and he will stand in loco parentis to her till her marriage." Probably the Chinese do not contemplate the case of a daughter having good reason for leaving her father's household, and that is why we do not find any provision fixing what would be a reasonable amount to be paid to the average unmarried Chinese woman by way of maintenance by her brother who has made it impossible for her to live under the same roof with him. In the present case the estate has been divided; one part has gone to the elder brother, and the other part is now going to the younger brother; and the claim to maintenance can only be against the entire estate. It is difficult to say what amount would be sufficient for the maintenance of the sister. The plaintiff in this case has expressed his willingness to support his sister if she lives with him. This must be considered a reasonable offer because I think the Chinese Law contemplates that a sister should live under the control of her brother until she is married. If she accepts her brother's offer and lives with him she will get such support as would be usual to a person of her station in life. If ever she has good reasons for leaving him, it may become necessary to fix the amount of money to be payable to her for her maintenance. Probably the daughter's right to maintenance is not a legal right, but only a moral obligation on the part of her male relatives. Such being the state of the case as regards the question of maintenance, I do not think it would be proper to charge the estate with maintenance in favour of the sister. The question of maintenance must be left to the parties to settle amongst themselves amicably or by a separate suit.

I would confirm the decree of the divisional court by giving the plaintiff Maung Kyin a half of the estate he sues for, subject, how-

(2) 9, B. L. T. 187.

ever to any claim for maintenance that his sister Ma Shwe Thit may have against the estate. As regards costs I think the defendant Ma Shwe Thit must pay them in all courts. The suit was in forma pauperis and the orders of the divisional court as regards court fees will stand.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 6 OF 1917.

MA THEIN KYU APPLICANT.

vs.

BA THEIN (alias John Carew) RESPONDENT.

Before Sir Daniel Twomey, C. J. and Justices Ormond and Pratt.

For applicant—Mr. Shaw.

16th May, 1918.

Divorce Act (IV of 1869) s. 10. Suit for dissolution of marriage—Cruelty and Adultery—Matrimonial offence after judicial separation.

A woman who has obtained judicial separation on the ground of her husband's adultery is entitled to a decree for dissolution of marriage on proof of adultery and cruelty after separation.

Green vs. Green 3, P. 121 followed.

JUDGMENT.

TWOMEY, C. J. AND ORMOND, J.—The petitioner and respondent are both American Baptist Christians. The petitioner Ma Thin Kyu applied in 1914 for dissolution of her marriage with her husband Maung Ba Thain alias John Carew on the ground of his adultery and desertion. Desertion was not proved and the court, therefore, granted only a decree for judicial separation. Subsequently the petitioner applied to the magistrate for a maintenance order under the criminal procedure code and the respondent was ordered to pay her rupees twentyfive a month. She has received only fiftynine rupees in all under that order. The petitioner's attempts to recover the amount due to her were thwarted by the respondent who resigned the salaried appointment that he had. Not content with that, the respondent went repeatedly to the petitioner's house, and abused her and threatened to kill her, his object being to prevent her from enforcing the maintenance order. The evidence shows that the respondent's conduct has seriously affected the petitioner's health and has caused a nervous breakdown. In consequence of the respondent's conduct the petitioner applied again for a dissolution of her marriage on the ground of his continued adultery coupled with cruelty. It is shown that the respondent has continued to live in adultery with another woman since

the time of the judicial separation, and as regards the alleged cruelty subsequent to the separation the learned judge's finding is that although no physical violence was used the respondent's conduct amounted to legal cruelty. The divisional judge, therefore, has granted a decree for dissolution of the marriage, and this decree now comes before us for consideration.

The respondent did not oppose the petition in the divisional court and does not appear in this court, though he has been served with notice. There is no reason to suspect collusion.

We see no reason to differ from the divisional judge with regard to the facts of the case. The continued adultery and the cruelty subsequent to the separation are well established. The only question that arises is one of law, namely, whether a wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation, and has in addition been guilty of cruelty to her after her separation. The nearest English case that we can find is that of *Green vs. Green* (1) in which a wife who had obtained a judicial separation on the ground of her husband's adultery obtained a decree nisi five years later on proof of further adultery subsequent to the judicial separation coupled with cruelty before the separation. The wife in her first petition in that case had not pleaded the cruelty and she asked only for a judicial separation in the first instance because she hoped that her husband would reform. Afterwards she abandoned the hope of his reformation, and asked for a dissolution of the marriage, and the court then allowed her to revive the cruelty which she condoned in the first instance. Sir James Hannen remarked. "The husband by his adultery subsequent to the former decree has committed a fresh matrimonial offence, (for the decree of judicial separation is not to be considered as a license to commit adultery for the future) and for this offence, aggravated by the previous cruelty, the wife has had no redress. If the failure of the petitioner to charge her husband with cruelty be regarded as equivalent to a forgiveness of it, still cruelty condoned is revived by subsequent adultery, and I can see no reason why the husband should be in a better position because he has already been guilty of a wrong which entitled the wife to relief."

The present case differs from the above inasmuch as there was no cruelty before the decree for judicial separation, and it is open to argument that the cruelty contemplated in the divorce law is cruelty committed while the wife is actually living with the husband, and that cruelty cannot be regarded as a matrimonial offence when they are living apart from one another under a decree of judicial separation. There is however no express authority to this effect, and we are at liberty as in the English case above cited to treat the cruelty of the husband after the judicial separation as an aggravation of the fresh matrimonial offence involved in the husband's continual adultery.

(1) 3, P. 121.

We therefore, confirm the decree of the divisional court under section 17, Indian Divorce Act 1869.

PRATT, J.—I agree that the decree should be confirmed. It seems to me the facts of the present case are even stronger than in *Green vs. Green* (1). Here there is not merely continued adultery after judicial separation, but subsequent cruelty as well. I do not consider that adultery or cruelty on the part of the husband, when living away from his wife under judicial separation, can be held not to be a matrimonial offence. To take this view would be practically to place the wife in a worse position after she has obtained a decree of judicial separation on the ground of her husband's misconduct, that she was before.

IN THE COURT OF THE JUDICIAL COMMISSIONER
OF UPPER BURMA.

CIVIL SECOND APPEAL No. 356 OF 1916.

MA TOK and others	..	..	..	APPELLANTS.
		<i>vs.</i>		
MA CHIT	..	..	..	RESPONDENT.

Before A. E. Rigg, Esq., A. J. C.

For appellants—Mr. Pillay.

For respondent—Mr. Maung Su.

30th May, 1917.

Burmese Buddhist Law—Inheritance. Children of divorced wife—Maintaining filial relations—Gift, evidence of possession. Probate and Administration Act (V of 1881), s. 98—inventory and account. Civil Procedure Code (Act. V of 1908), s. 100. Findings of fact.

The children of a divorced wife who live with the mother, and do not maintain any filial relations with the father are not entitled to a share in his estate when there has been a partition on divorce.

Maintaining filial relations means more than casually visiting; it means living, working and planning with the parents.

Ma Shwe Ge vs. Maung Lan, S. J. L. B. 296 followed.

Delivery of possession being necessary to give validity to a gift must be proved by unimpeachable evidence.

Section 98 of the Probate and Administration Act does not prevent an heir whose right is denied by the administrator from bringing a suit to enforce the right.

A finding of fact can be set aside in second appeal if it is arrived at under an error or defect in procedure.

JUDGMENT.

RIGG, J. C.—The plaintiff, Ma Chit, is the daughter of Maung Kyaw Din by his first wife Ma On Be. Maung Kyaw Din and Ma On Be were divorced when the plaintiff was about ten years of age. Maung Kyaw Din then married Ma Tok, and the second, third and fourth defendants are the children of that marriage.

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

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

But apart from this, Ma Chit claims that the house and the site are not part of the deceased's estate at all, but are her own property of which she has been dispossessed by Ma Tok. There is no reason why she should not file a suit for its recovery on the basis of such a claim. If her claim as heir was denied by the administratrix, she could have filed a suit for its administration by the court. The ruling in *Ma Hmyin vs. Ma On Gaing* (1) only lays down that where an administrator is engaged in the administration of an estate, a suit by a coheir for partition is premature as interfering with the due administration of the estate. It does not lay down that the fact that section 98 of the Probate and Administration Act gives an administrator six months within which to file an inventory and one year within which to file an account, is a bar to a person claiming an interest in the estate taking legal measures to enforce his claim when that claim

(1) U. B. R. (1902-3, II, Probate and Administration 1.

is denied. The objection that the suit did not lie is, therefore, overruled.

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

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

The advocate for the respondent contends that as this is a second appeal under section 100 of the Code of Civil Procedure, this court is bound by the findings of the fact by the lower court that there had been delivery of possession and a valid gift. It is not, however, every finding of fact by the lower court which precludes this court in second appeal from a consideration of the evidence. Their Lordships of the Privy Council have pointed out within what limits interference in second appeal with findings of facts is permitted. In *Masummat Durga Chowdhri vs. Jewahir Singh Chowdhri* (2) Lord Macnaghten said; "It is enough to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate court is final, if that court had before it evidence proper for its consideration in support of the finding." And in *Shivabasava vs. Sangappa* (3) their Lordships cited with approval the rule laid down in *Anangamanjari Chowdhri vs. Tripura Sundari Chowdhri* (4) that it is within the jurisdiction of the judges of second appeal to dismiss the case if they are satisfied that there was, as an English lawyer would express it, no evidence to go to the jury because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the judge. It is, therefore, clearly permissible for this court to examine the evidence in order to see whether there is any evidence on which the findings of the lower appellate court could properly be based.

The gift in the present case was a verbal one and it is admitted that delivery of possession is essential to its validity. In *Sibendrapada Banerjee vs. Secretary of State for India* (5), the learned judges remarked: "The essence of a transfer by delivery of the property is that possession is changed." In the case of a gift the

(2) 17, I. A. 122 at page 127; 18, C. 23.

(4) 14, I. A. 101.

(3) 31, I. A. 154.

(5) 34, C. 207.

donor must put the donee in such relation to the land as he himself occupies. Now what are the facts found proved by the lower appellate court? They are as follows:—

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

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

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

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

On these findings the divisional judge thought that it was proved that Ma Chit was in possession of the house and he cited the decision in *Gura vs. San Tun Baw* (6) as authority for the proposition that because the house was rented in Ma Chit's name it was her property. No such proposition, however, was laid down in *Gura's* case. The judicial commissioner remarked that if land was rented on behalf of a person and rent was received by that person for the land, it would be reasonable to hold that he was in possession of it. The evidence in the present case, however, proves that the house was not rented in Ma Chit's name but in Maung Kyaw Din's. She herself says that as she was so young her grandfather allowed her father to enter into a written agreement with Sit Hon about renting the house.

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

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

Maung Tha Han, third witness for the plaintiff, says he paid rent for means stored in the premises to Maung Kyaw Din, who charged

(6) P. J. L. B. 504.

(7) U. B. R., (1897-01) II, 59.

him an exorbitant rate. Further Maung Kyaw Din paid the municipal taxes. The title-deeds of the property were with Ma Tok, and Ma Chit's explanation that she handed them back to her father a month before his death is neither plausible nor credible.

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

I now come to the second branch of Ma Chit's claim. It is admitted that at the time of her father's divorce with her mother there was a partition of property, and it was quite clear that afterwards she lived with her mother and not with her father. The general rule governing such a case is laid down in *Ma Pon vs. Maung Po Chan* (8), where it was held that the children of a divorced wife, who live with their mother and do not maintain filial relations with the father are not entitled to share in his estate where there has been a division of property at the time of divorce. This case was followed in the Lower Burma case of *Ma Paw vs. Ma Mon* (9) where all the authorities were again considered, and was approved of in *Ma Yi vs. Ma Gale* (10) and may be regarded as settled law.

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

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

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

The evidence adduced by the plaintiff to show that Maung Kyaw Din and Ma Tok kept their estates entirely separate and never work-

(8) U. B. R. (1897-01) II, 116.

(10) 6, B. L. T. 75.

(9) 4, B. L. T. 236.

(11) S. J. L. B. 296.

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

In my opinion it has not been shown that Ma Tok should be excluded from inheriting her husband's property on the ground stated by the district judge. I accordingly reverse the judgments and decrees of the lower courts, and direct that the suit be dismissed with costs in both courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 154 OF 1916.

MA YU APPELLANT.

vs.

PO THAUNG and others RESPONDENT.

Before Sir Daniel Twomey, C. J. and Maung Kin, J.

For appellant—Mr. May Oung.

For respondents—Mr. Doctor.

18th February, 1918.

Burmese Buddhist Law—Deathbed gifts—Disposition of property contrary to personal law.

A Burman Buddhist cannot make a deathbed gift of his property. To recognize such gifts as valid would be practically recognizing the power of making wills which is entirely foreign to Burmese Buddhist Law.

A man cannot by the interposition of a trustee make a disposition of property which his personal law prevents him from making by means of a direct gift.

JUDGMENT.

TWOMEY, C. J. AND MAUNG KIN, J.—In these two cases, Civil First Appeal No. 154 of 1916 and No. 11 of 1917, Ma Yu, widow of U. Kyin U and administratrix of his estate sued for possession of two paddy holdings measuring respectively 32.75 acres and 19.02 acres which U Kyin U a few days before his death, when on his deathbed, transferred by two registered documents to his nephew Po Thaung. The deeds of gift contain a clause as follows:—"When, hereafter, the paddy land herein given is sold, the proceeds shall not be devoted to any other purpose, as the gift is made for religious offerings in connection with the Buddha and Sangha." According to Po Thaung himself, U Kyin U said that if he recovered from his illness the property would remain as his own, in other words, the gift was to take effect in the event of his death. The deeds of gift were executed on the 12th June, 1910 and U Kyin U, according to the finding of the district court, died on the 16th June, 1910. Po Thaung sold the smaller holding the next day after U Kyin U's death to Maung Pan Gaing for Rs. 950/-. The larger holding was sold by Po Thaung to Lu Hla for Rs. 1,500/- on the 16th October, 1912, and Lu Hla sold it to N. P. Servai on the 23rd April, 1914, for Rs. 400/-. The plaintiff produced evidence that Lu Hla and N. P. Servai were warned by her not to buy the land and this evidence has not been rebutted. Pan Gaing admittedly had full notice of the circumstances by which his vendor Po Thaung obtained possession of the land, for he was present when the deeds of gift were executed.

Ma Yu pleaded that the gifts were invalid as U. Kyin U was unconscious at the time of execution of the documents. It was held by the district court however that execution was duly proved and both suits were dismissed. An issue was framed whether the gifts were valid according to the Buddhist Law. The district court does not appear to have considered this question, nor did the court consider the further questions whether Ma Yu as wife of the donor had an interest in the property and whether the deeds of gift to which she was not a party could operate to transfer that interest to the donee.

Ma Yu appeals to this court both on the question of fact as to the donor's mental capacity at the time of the gifts and on the question of their validity under the Buddhist Law of inheritance.

We have not found it necessary to hear counsel on the question of fact, because the gifts appear to us to be clearly invalid according to the Buddhist Law.

In *Ma Pwa Swe vs. Ma Tin Nyo* (1), the judicial commissioner, Upper Burma, held that a registered deed of gift made on a deathbed by her husband to his wife without delivery of possession was invalid as such a gift would enable a Buddhist to defeat his own personal law, and practically to dispose of his property by a method which would be in all essentials, equivalent to a will." It was pointed out

(1) 2, U. B. R., (1902-03) Buddhist Law-Gift, 1.

that the question of validity of a deathbed gift must be regarded as a question of inheritance, to which Buddhist Law is applicable. This decision was followed in Lower Burma in *Maung Ba Aung vs. Ma Pa U*, (2) and no reason has been advanced in the present case for dissenting from it.

Mr. Doctor for the respondents urges that the principle should be limited to cases in which the donee is an heir of the donor but it is clear that the principle of the ruling applies even with greater force where the donor seeks to evade the law of inheritance altogether by disposing of his property in favour of a person who would not be an heir. Nor can we find any ground for making any exception where the gift is made with the object of procuring spiritual benefit for the donor.

In the present case Maung Po Thaung to whom the lands were transferred was given no beneficial interest in them and was in the position of a trustee for carrying out the wishes of the donor after his death. But it is a well established principle of law that a man cannot by the interposition of a trustee make a disposition of property which his personal law prevents him from making by means of a direct gift.

The decrees of the district court in both suits are set aside and there will be decrees in favour of the plaintiff Ma Yu for possession of the two holdings with costs throughout.

The issue as to mesne profits has still to be determined in both cases and the cases are remanded to the district court for that purpose and for final disposal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 1 OF 1918.

In re MAUNG HME APPELLANT.

vs.

MA SEIN RESPONDENT.

Before Sir Daniel Twomey, C. J. and Justices Ormond,
Maung Kin and Rigg.

For appellant—Mr. Ko Ko Gyi.

For respondent—Mr. May Oung.

27th March, 1918.

Burmese Buddhist Law—Divorce on the ground that husband has taken a lesser wife—Partition.

Subject to the exceptions contained in sections 219, 232, 265, 267 and 311 of the Digest the chief wife of a Burman Buddhist may claim a divorce if the husband takes a second wife without her consent.

On a divorce on the ground that the husband has taken a second wife the division of property should in the absence of a contract to the contrary be made as if the divorce were by mutual consent.

ORDER OF REFERENCE.

3rd January, 1918.

RIGG, J.—The parties in this case were husband and wife. In August 1914, Ma Sein sued for divorce, alleging that her husband accused her of the theft of Rs. 50/- and caught her by the throat and beat her. Her suit was dismissed and she did not appeal. She refused to return to him and in November of the same year, he took another wife. In June, 1915, she instituted the present suit for divorce and partition of the joint property, which was valued at Rs. 1,925/-. The value of the property is not in dispute. She stated in her plaint that she had been falsely accused of theft in May 1914, and in consequence of this and previous illtreatment left him. She claimed that she was entitled to divorce as the period of one year had elapsed since she left her husband, and that this coupled with the second marriage of Maung Hme are acts of volition that dissolved the marriage. The trial court held that her desertion of her husband was an act of mere caprice and should not be the foundation for a divorce. This judgment was reversed on appeal, on the ground that the second marriage was an act of volition on the part of Maung Hme and indicated his consent to the dissolution of the marriage. The learned judge treated the case as one of divorce by mutual consent and granted Ma Sein a decree for half the joint property.

It is clear that Ma Sein's reason for leaving her husband was annoyance at his false assertion that she had stolen Rs. 50/-. He asked her to return to him, but she refused. He gave her no maintenance and took a second wife before the year had expired from the time of her desertion. Ma Sein then went to the headman to ask a divorce to which Maung Hme said he would agree if she took none of the joint property.

In *Thein Pe vs. U Pet* (1) a Full Bench of this court held that desertion of the husband by the wife did not *ipso facto* dissolve the marriage tie without some further act of volition on the part of either party to the marriage. But desertion by either party to the marriage only renders the marriage voidable at the option of the deserted party. This is clear from the ruling in *Aung Byu and one vs. Thet Hnin* (2) which followed the Upper Burma case of *Ma Thin vs. Maung Kyaw Ya* (3). The divisional judge thought that such an act of volition was manifested by Maung Hme when he took a second wife. Maung

(1) 3, L. B. R. 175.

(3) U. B. R. 92-96 II, 56.

(2) 7, B. L. T. 280; 8, L. B. R. 50.

Hme however wanted Ma Sein to come back to him, and it is by no means clear that he wished to dissolve his first marriage when he married Ma Pye. The evidence of Maung In only proves that he was willing to grant her a divorce upon his own conditions about the division of property. Polygamy is not unlawful amongst Burmese Buddhists and the mere fact that a man has taken a lesser wife is no indication that he desires to put away his chief wife.

There is authority, however, for the position that even if the chief wife deserts her husband, he is bound to wait a year before he marries again, and that if he does not do so, the chief wife has the option of divorcing him. In Chapter V, section 17, Manugye the law is laid down as follows:—If the wife not having affection for the husband shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetable or one stick of firewood let each have the right of taking another husband of wife; they shall not claim each other as husband and wife. . . . If when the wife has left the house, and within one year the husband shall take another wife, of the property of both, what was brought at marriage and that which belongs to both, . . . let all the property be demanded and taken from the person who failed in his or her duty." In section 312 of U Gaung's Digest, the Dhamma Rajabala and Manu penalise a husband who marries before the prescribed period, by the loss of all the property. The paramount authority of the Manugye has been pointed out by their Lordships of the Privy Council in *Ma Hnin Bwin vs. U Shwe Gon* (4) and it was said that where this Dhammathat is not ambiguous, other Dhammathats do not require examination. I think that there is no reason to doubt that if these Dhammathats are followed, a second marriage by a husband during the prescribed period not only gives the chief wife a right to obtain a divorce, but also imposes a penalty upon him. But it was held in *Ma In Than's case* (5) that a man who takes a second wife in the lifetime of his first does not commit a fault against her. This was stated to be the rule by Moore, J. In *Ma Ein vs. Te Naung* (6) and on appeal Parlett, J. decided that *Ma In Than's case* had not been overruled. The correctness of that decision was doubted by Birks, J. in *Ma So vs. Maung Shwe Ka* (7) and in *Ma Ka U vs. Po Saw*, (8) Hartnoll, J. said that he was unable to agree with the decision, and that a man who took a lesser wife without the consent of his first wife, committed a serious fault against her. The latter decision was referred to in *Ma Ein's case* (6) in a passage that I confess I do not quite understand. In Upper Burma, in *Maung Kauk vs. Ma Han* (9) Mr. Burgess said that before the ruling in *Ma In Than's case* (5) should be applied to Upper Burma, the authorities ought to be examined and he cited section 132 of the Wunnana and section 43 of Chapter XII of the Manugye. In *Ma Shwe Ma vs. Ma Hlaing* (10) Mr. Burgess remarked that the whole scheme of inheritance is drawn

(4) 7, B. L. T. 105; S. L. B. R. 12. (8) 2, B. L. T. 61; 4, L. B. R. 340.

(5) S. J. 103.

(9) U. B. R. 1892-96 II, 48.

(6) 5, L. B. R. 87.

(10) U. B. R. 1892-96 II, 149.

(7) 7, L. B. R. 47.

up on the basis of a man having but one wife at a time, and he expressed the opinion that the reference in section 48, Chapter III and section 37, Chapter X, Manugye, and in other Dhammathats to a plurality of wives relate to Hindu rather than Buddhist law. In *Maung Kyaik vs. Ma Gyi*, (11) Mr. Burgess said that it was doubtful whether any but the chief wife could be properly so called. Turning now to the Digest of U Gaung, I find that in section 256 the mere taking of another wife by the husband is regarded in six out of the eight Dhammathats as a ground for a divorce. Section 208 describes the five duties of a husband towards his wife, and in all three Dhammathats fidelity to her is one of them. In the Dhammathatkyaw quoted in section 214, a husband is exhorted not to make his wife jealous by being unfaithful to her. Section 397 makes the penalty for taking a lesser wife without the chief wife's consent expulsion from the house and loss of all the property. In sections 393 and 394 of the *Atthasankepa* a divorce is contemplated if the husband takes a lesser wife. As against these authorities, there are three texts in section 253, Digest but none of the Dhammathats cited are of great importance. It seems to be only under certain conditions that a wife may be put away and a second one taken (see section 219, Digest). I think there are sufficient reasons for reconsidering the decision in *Ma In Than's* case. (5) It would be illogical to allow a wife who had deserted her husband to claim the right of divorce because he remarried within one year, if a chief wife without fault is debarred from the same privilege.

I therefore refer to a Full Bench or otherwise as the learned Chief Judge may direct, the following question:—

“Is the chief wife of a Burmese Buddhist entitled to divorce her husband, if he takes a lesser wife without her consent?”

The opinion of the Full Bench was delivered in the following

JUDGMENTS.

RIGG, J.—The question referred for decision in this case is whether the chief wife of a Burmese Buddhist is entitled to divorce her husband if he takes a lesser wife without her consent.

It will be convenient first to examine the course of decisions on this point or related points.

The earliest case is that of *Ma In Than vs. Maung Saw Hla* (1) in which the Special Court held in 1881 that the chief wife had no right of objection. The ruling was declared to be still good law in 1909 in *Ma Ein vs. Te Naung* (2), but doubts as to its correctness had been expressed in various cases both in Upper and Lower Burma. In

(11) U. B. R. 1897-1901 II, 48.

(1) S. J. 103.

(2) 5, L. B. R. 87.

Mg. Kauk vs. Ma Han (3) Mr. Burgess said that before accepting the rule in *Ma In Than's* case, (1) it would be necessary to examine the authorities, as there was much to be said on the other side. In 1893, the same learned judge said in *Ma Shwe Ma vs. Ma Hlaing* (4) "Polygamy is said to be lawful by Buddhist law, but it may be doubted whether this conveys a correct impression unless it is understood in a special or limited sense. The leading principle of Buddhism in this respect is monogamy rather than polygamy." He went on to express the opinion that allusion to a plurality of wives in most of the *Dhammathats* referred to Hindu Law and customs rather than Buddhist Law. The precise point in issue in this reference has however never been decided in Upper Burma.

The decision in *Ma In Than's* case (1) has been questioned in three reported cases since the constitution of the Chief Court in 1900.

In *Ma San Shwe vs. Po Thaik* (5) Birks, J. discussed this ruling but did not come to any definite conclusion. In *Ma Ka U vs. Po Saw* (6) a Full Bench of this court held that a chief wife could refuse to live in the same house as a lesser wife. Hartnoll, J. dissented from the opinion expressed in *Ma In Than's* case, (1) and said that a husband who took another wife without his first wife's consent committed a serious matrimonial fault against her; but he did not come to a finding whether this fault would justify a claim to divorce, as it was not necessary to the decision of the matter in issue. In *Ma Wun Di vs. Ma Kin and others* (7). Adamson, J. said "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 do 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 pamphlet appear to me rather to throw doubt on the ruling of the Special Court in *Ma In Than's* case (1) . . . than to prove the broader proposition that a second marriage under these circumstances is null and void."

There is no doubt that polygamy is legal in Burma. In *Ma In Than's* case, (1) Jardine, J. C. held that in spite of the existence of some texts of the religious law books, the custom of polygamy is so fully established that it lay upon the objector to show that this custom was limited in its application. He further said that even if the religious law was expressly opposed to polygamy, he would hesitate to suppress by judicial decision an institution which is part of the life of the people. He thought that the whole tenour of the *Manugye* was in accordance with the custom of polygamous marriages, and should not be set aside on account of the existence of isolated texts. There are indications however that the learned judge was inclined subsequently to modify the decided opinion he had expressed in *Ma In Than's* case. (1) After that decision, the *Manu Wunnana* was

(3) U. B. R. 1892-96 II, 48.

(4) U. B. R. 1892-96 II, 149.

(5) *Chan Toon II*, 165.

(6) 2, B. L. T. 61; 4, L. B. R. 340.

(7) 1, B. L. T. 125; 4, L. B. R. 175.

translated, and at page 30 of his Notes on Buddhist law Mr. Jardine observes that sections 173 and 132 throw some doubt on the right of polygamy. In paragraph 32 of his second note he says "Throughout the Dhammathat (Manugve) polygamy is treated as lawful but with a feeling that it is a grievance to the first wife. Captan Forbes says:—"Even where polygamy is indulged in, the general feeling may be said to be against it. The supersession of the first by the second wife is a serious matter." In *Q. E. vs. Nga E U* (8) Mr. Jardine said "I am aware that some Burmans think that a man who has a wife may not marry a second time in her lifetime without her consent. The 173rd section of the Wunnana is in favour of this view; but it was not pointed out to the Special Court who held the contrary in *Ma In Than's* case." In *Ma Wun Di's* case, (7) their Lordships of the Privy Council quoted with approval the following observations of the learned C. J.:—"It is not forbidden to a Burman Buddhist to have two wives at the time, but it is universally conceded that the leading principle of Buddhism is monogamy rather than polygamy, that polygamy is rare and is considered disrespectful." There can be no doubt that in Lower Burma the position is that polygamy is tolerated but regarded with disfavour, and there has always been a body of opinion that it is only allowed if the first wife consents. Assuming that the Dhammathats only allow it under certain conditions or penalties, I am unable to see why the fact that these penalties have never been enforced in practice or that it is not possible to point to instances of such enforcement, should preclude this court from declaring that they exist and can be claimed by the wronged wife. The law to be administered is the Burmese Buddhist Law as laid down in the Dhammathats unless such law has been clearly modified by custom or is repugnant to equity, justice or good conscience. In *Bhagwan Singh vs. Bhagwan Singh* (9) their Lordships of the Privy Council pointed out that the judgment in the *Collector of Madura vs. Mootoo Ramalinga* (10) gives no countenance to the conclusion that in order to bring a case under the rule of any law, laid down for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to the law regulate their lives, by it. At page 423 of the same judgment their Lordships said that the general law should be ascertained by reference to authoritative text books and judicial opinion and that when the general law has been established, any one living where such law prevails and is applicable must be taken to fall under the general law, unless he can show some valid local, tribal, or family custom to the contrary. The mere fact that the limitations to the licence of having more than one wife have not been observed is insufficient to justify the courts in holding that the law has been abrogated by custom, especially in a country like Burma where as Sir John Jardine himself observes (*Notes on Buddhist law: Marriage and Divorce*) the system of compromise based on consent and acquiescence almost supersedes custom *p. I.* So far had this system of compromise been carried that when British judges first attempted to ascertain what

(8) S. J. 202.

(10) 12, M. I. A. 397.

(9) 21A, 412 at p. 422.

the Buddhist Law was on any subject, they sometimes found great difficulty in obtaining any information on which a decision could properly be based. It appears to me therefore that there is no proof of any custom regarding polygamy, which custom overrides the general law laid down in the Dhammathats or precludes us from examining that law with a view to ascertain its scope and provisions. It is true that in Hindu Law, to which to some extent the Dhammathats are indebted for their rules, there is no restriction against polygamy. But in Hindu Law, the texts restricting polygamy have been held to be merely directory and not mandatory. See Cowell, Lectures on Hindu law, part I, page 164; Mayne, Hindu law paragraph 92, Sarkar's Lecture page 54. They seem to be of the nature of counsels of perfection rather than absolute prohibitions coupled with a penalty in case of disobedience. But whatever may be the extent to which the Dhammathats are indebted to Hindu Law, there can be no doubt that the Hindu Law regarding marriage and divorce has been profoundly modified by Buddhism: although the compilers of the Dhammathats have in some cases not attempted to distinguish the two systems. Thus the division of the people into castes is recognised by the Dhammathats although such a distinction is unknown to Burmans. The courts have always endeavoured to interpret conflicting passages in the Dhammathats in such a manner as to conform with the existing sentiments and practice of Burmese society, so far as it is possible so to do without usurping the functions of the legislature. If on examination of the texts, it is found that there is a strong preponderance in favour of restrictions being placed on polygamy, we shall, I think, be taking a proper course in giving effect to those texts in harmony with the prevailing sentiments of the people. I do not attach much importance to the fact that polygamy is recognised in the Dhammathats and that much of their matter is occupied with rules for the division of property between various kinds of wives and their children. Such rules are necessary in view of the structure of society existing then and existing now. They are not necessarily inconsistent with rules tending to discourage polygamy.

In *Ma Hnin Bwin vs. U Shwe Gon* (11) their Lordships of the Privy Council said that where the Manugye was not ambiguous, it should be followed. There is however no clear pronouncement in that Dhammathat on the subject of the chief wife's right to object to her husband taking a second wife without her consent. Section 43, volume XII, deals with the five kinds of wives who may be put away, but it is explained that by putting away is only meant that the husband has the right to take another wife and his first wife is not entitled to oppose him. Section 24, volume V refers to a right of separation when the wife has taken a paramour or the husband a lesser wife, the division of property in such cases being made as in the case of a divorce by mutual consent. In section 17 of the same chapter a husband whose wife has left him is enjoined to wait for one year before he takes another wife, under penalty of loss of the property brought to the marriage and the joint property.

(1) 7, B. L. T. 105; 8, L. B. R. 1.

But the right of the chief wife to demand a divorce is rather a matter of inference than a clear statement of the existence of such a right. Turning now to the Digest of the Kinwun Mingyi, I find that in section 208 three Dhammathats are cited which lay down fidelity to the first wife as one of the duties of a husband, but these texts are only directory. In the passage from the Dhammathatkyaw cited in section 214 there is a similar admonition to husbands not to be unfaithful. In two of the three Dhammathats cited in section 230, adultery on the part of the husband is placed on the same level as a repugnant disease and gives the wife a right of divorce. The most important section is no 256, which contains extracts from eight Dhammathats and in no less than six of these, a second marriage without the chief wife's consent gives the latter the right to divorce and to retain the whole of the property. These texts seem to me to be very clear and to admit of no doubt as to their construction. In the passage from the Manugye cited in section 303, divorce is permitted if cruelty is coupled with the taking of a lesser wife, but no argument against the right of a chief wife to obtain a divorce on the ground of a second marriage can be founded on this passage, as most of the other Dhammathats quoted in that section give her the right of divorce on the ground of cruelty alone and this right has been affirmed in *Po Han vs. Ma Talok*. (12) In section 397, the penalty imposed on a husband for taking a lesser wife is expulsion from the house after being compelled to leave behind even his clothes. In section 259, an extract is quoted from the *Addasankepa Venna* of the rule relating to husbands and wives who have been previously married. Here too the wife is said to have the right of divorce if the husband takes a lesser wife, and the husband forfeits all claim to the jointly acquired property.

As against these authorities, the learned advocate for the appellant has been able to cite only section 253, which is headed "a man may marry as many wives as he pleases." But this section does not deal with the case of a man marrying when his first wife objects, and there is no doubt that if she consents, there is no impediment to his taking other wives. The other arguments addressed to us were founded on the existence of the custom of polygamy and its recognition in the Dhammathats in the shape of rules for the division of property between more than one wife. These arguments have already been considered in an earlier portion of this judgment.

I think that it is clear that the general rule is that the chief wife may object to her husband taking a second wife and may claim a divorce if he does so. Her right is however subject to certain exceptions. These are found in sections 219, 232, 265-267, and 311 of the Digest. The husband is allowed to take a second wife when the first wife is barren or had borne only female children or is suffering from certain diseases. In Burmese society a higher value is attached to the begetting of sons than daughters. There is also nothing unreasonable in the exception based on the first wife becoming insane or a leper,

(12) 6, B. L. T. 134; 7, L. B. k. 79.

maimed, blind or paralysed, and thus becoming unable to fulfil the duties of her position. I would therefore answer the reference as follows:—Subject to exceptions of the kind mentioned in section 219, 232, 265-267, and 311 of the Digest, if a Burmese Buddhist takes a second wife without his first wife's consent, she has the right to divorce him.

I may add that if she decides to claim the right of divorce, I think that the division of property should in the absence of any contract to the contrary be made as if the divorce were one by mutual consent. This is the rule if the husband commits adultery (section 230), and is the rule given in Manugye where the husband has not only taken a lesser wife but has been cruel (section 303). In section 256, a severer penalty is to be imposed according to some of the Dhammathats, which are however not consistent regarding the penalty.

TWOMEY, C. J.—The question referred does not arise directly in the case which was before our learned colleague. But it does arise indirectly. Under the Special Court ruling in *Ma In Than vs. Saw Hla* (1) a head wife has no remedy if her husband takes a lesser wife without her consent. So long as this ruling is in force it would be inconsistent to give effect to the provisions of Manukye V section 17 and let a deserting wife claim a divorce on her husband remarrying within a year.

The learned judges of the Special Court who decided *Ma In Than's* case (1) apparently considered that the provisions of the Manukye debar the courts from sanctioning any restriction on polygamy among Burmese Buddhists. The preeminent authority of this Dhammathat is still recognised, but its provisions have binding force only where they are free from ambiguity. As Rigg, J. points out, the Manukye in addition to the provisions which seem to contemplate unqualified polygamy contains also various passages from which it may reasonably be inferred that the Buddhist Law recognises a head-wife's right to demand a divorce if her husband takes another wife without her consent. We are therefore justified in turning for guidance to the other Dhammathats cited in the Kinwun Mingyi's Digest and to the same learned author's *Atthathankepa* which is the most recent Dhammathat of all. These other Dhammathats are not shown to leave no room for doubt as to the head wife's right in question. Most of the texts became available only after *Ma In Than's* case (1) was decided.

The Special Court regarded the restriction on the taking of lesser wives as a doctrine which was not shown to be "popularly accepted so as to extinguish the custom," i. e. the custom of polygamy. The existence of a custom of *unrestricted* polygamy was not shown in that case. The fuller investigation of the Dhammathats which has now been carried out makes it clear that the restriction in question is an incident of polygamy as established among the Burmese Buddhists and in these circumstances the question of popular acceptance does not appear to arise.

The texts of the Buddhist Law on the subject of polygamy are undoubtedly inconsistent. The Manukye contains various provisions (cited in Ma In Than's case) which take for granted a plurality of wives, while other provisions clearly contemplate that a man should have but one wife at a time. The explanation is that the Burmese Buddhist Law is largely of Hindu origin. Coming from a country in which polygamy flourished without restriction the law had to be adapted to a non-Indian race which followed the Buddhist religion and in which the position of the wife was essentially different from that of the Hindu wife. Thus the texts in the Manukye and the other Dhammathats which deal with a plurality of wives are probably imported from the ancient Hindu Law. Mr. Burgess in *Ma Shwe Ma vs. Ma Hlaing* (*) remarked as follows:—"It is a remarkable thing that in the 81 sections of the chapter on inheritance, X of Manukye, the only provisions regarding contemporaneous wives and their children should be those in sections 37 and 38 which seem to have special reference to Hindu usages."

Ma In Than's case has been the law in Lower Burma since 1881. But it has not been followed in Upper Burma; and it is doubtful whether even in Lower Burma husbands have availed themselves to any large extent of the additional license given to them by the ruling of the Special Court. A plurality of wives is becoming more and more a rarity and is regarded socially with disfavour. The tendency towards monogamy has no doubt been accelerated by the annexation of Upper Burma. Before that event polygamy was encouraged by the example of the Burmese Kings and many of the higher officials.

In expressing our dissent from the ruling in Ma In Than's case and declaring the headwife's right to a divorce if her husband takes another wife without her consent, it is clear that we are only expounding an integral part of the Buddhist Law as laid down in the Dhammathats and we need not fear that we are running counter to any cherished custom of the Burmese people.

I concur in answering the reference in the terms proposed by my learned colleague Mr. Justice Rigg. I agree with him also in holding that the property should be partitioned as in the case of a divorce by mutual consent (in the absence of any contract to the contrary). It would be illogical to exact from the husband who takes a lesser wife a more severe penalty than is provided in the Dhammathats for a husband who commits adultery or who, in addition to taking a lesser wife, treats his head wife with cruelty.

MAUNG KIN, J.—I concur and have very little to add. Unlimited polygamy is expressly allowed only by three Dhammathats, namely, *Kāingzā*, *Kandaw* and *Pānam*. See section 253 of U Gaung's Digest, Volume II. They are, however, not of much authority. Other Dhammathats speak of polygamy being allowable under certain conditions and penalties and as regard the *Manukye* in particular I agree with Mr. Jardine that, although it treats polygamy as lawful, it does so with a feeling that it is a grievance to the first wife. In addition to the six Dhammathats, cited in section 256 of the Digest, which

lay down the rule that a second marriage without the first wife's consent gives the latter the right to divorce, we have extracts from three other Dhammathats, namely, *Vilasa*, *Dhammathatkyaw* and *Manuvannanā* cited in section 397 of the same Digest laying down the same rule. Those six Dhammathats and these three others are well-known legal works. The other Dhammathats cited in section 256 couple the taking of a lesser wife with habitual illtreatment as grounds for a divorce at the instance of the aggrieved first wife. The passage cited from *Manukye* in section 303 of the Digest would appear to support these Dhammathats. But I do not think that in deciding the point under reference any importance can be attached to the fact that the taking of a lesser wife is thus coupled with cruelty, inasmuch as the Dhammathats agree in allowing a divorce on the ground of habitual cruelty alone. It seems clear that in the passage cited from *Manukye* in section 303 of the Digest, the stress is on the husband's cruelty rather than on his incontinence. I am therefore of opinion that the taking of a lesser wife must be regarded as an additional ground for a divorce at the instance of the existing wife. As regards the question of partition of property I would treat the divorce as if it were one by mutual consent for the reason stated by the learned chief judge, unless there has been a contract to the contrary.

ORMOND, J.—I concur in the judgments that have been delivered.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 100 OF 1916.

MAUNG THA SO and one..	..	..	APPELLANTS.
	vs.		
LU PE	..	..	RESPONDENT.

Before Mr. Justice Maung Kin.

For appellants—Mr. Sin Hla Aung.

For respondent—Mr. Maung Thin.

13th June, 1917.

Burmese Buddhist Law.—Kittima and Apatittha adoption—Civil Procedure Code (Act V of 1908) O. VI. r. 17. Amendment of pleadings—alternative claim in appeal.

The *kittima* and the *apatittha* are two distinct forms of adoption to which entirely different considerations apply.

A suit based on *kittima* adoption cannot be amended so as to convert it into one based on an *apatittha* adoption as such amendment would alter the nature of the suit.

A plaintiff who sued as a *kittima* son, but made no alternative claim as an *apatittha* cannot be allowed to make the alternative claim for the first time in appeal.

JUDGMENT.

MAUNG KIN, J.—The plaintiff sued for inheritance as the *kittima* son and sole heir of the deceased. The trial court held that the alleged adoption was not proved. On appeal the lower appellate judge was of the same opinion and held that “the utmost that the evidence can be held to establish in favour of the plaintiff is that the deceased Ma Kayut used to speak of him as her son and sometimes even told people that he was her adopted son (*mwe za the tha*) and that it was generally understood that he was her adopted son.” But there was another ground taken in the memorandum of appeal viz., that the lower court should at least have held that the plaintiff was an *apatittha* son. The learned judge considered the question whether the plaintiff should be allowed in appeal to put forward such an alternative claim and came to the conclusion that he should be, and then proceeded to hold that he was the *apatittha* son of the deceased and that the fact that at the time of the death of the deceased he was living separately from her was immaterial inasmuch as the plaintiff was a blood relation, a nephew of her. The case was accordingly remanded to the trial court with the direction that it be determined afresh. I understand this direction to be that the trial court should try the question as to what share the plaintiff would be entitled to as against the deceased's next of kin, as the learned judge before giving the direction had come to the conclusion that “it is only necessary for me to decide as I do that he is entitled to some share.”

Before me the defendant urges that the lower appellate court was wrong in allowing the plaintiff to make the alternative claim for the first time in appeal.

So far as I can see there is absolutely no authority to justify the permission granted by the lower appellate court.

I *Ma Sa Yi vs. Ma Me Gale* (1), which was a case of alleged *kittima* adoption, the question arose before this court as to whether an alternative claim as an *apatittha* child should be allowed in appeal, inasmuch as the *apatittha* adoption was an adoption of a different character to that of the *kittima* form. Birks, J., pointed out that in *Maung Aing vs. Ma Kin* (2) the judicial commissioner of Upper Burma expressed an opinion that such a procedure was questionable. The question, however, did not arise in that case. Without deciding the point Birks, J., said that assuming that there was sufficient evidence of an *apatittha* adoption, the fact that the claimant was living separately from the alleged adoptive mother for eleven years of her life before the latter's death was sufficient to debar her from claiming any share. But, Fox, J., as the claimant made no alternative claim

(1) 7, Bur. L. R. 295.

(2) C. B. R. (1892-96) II, Buddhist Law 22.

on the basis of her being an *apatittha* daughter, did not think it necessary to consider what her rights to share in the inheritance possibly might be, if she had made such a claim.

In *Ma Mya Me vs. Maung Ba Dun* (3) it was held that an alternative claim may be made, but the point did not arise. The learned judge held that the evidence justified the view that Ma Mya Me was an adoptee, whether she was a *kittima* or *apatittha* it was unnecessary to determine, as the fact that she was an adopted child was sufficient for holding that it was preferable to grant her letters of administration to the estate than the opposite party who was adjudged to be unfit, though he was the natural and only son of the deceased. The case was not a regular suit but was one in which both the parties applied for letters of administration and the court had to choose between the two to grant letters.

In my judgment the lower appellate court was wrong in allowing the alternative claim to be made in appeal. We are certain as to what a *kittima* adoption is, but as regards the *apatittha* form it is really difficult to say what it is exactly, but it is certain that it is different from the *kittima* form. In section 16 of Kinwun Mingyi's Digest the term *apatittha* is described in various ways: In *Tet Tun vs. Ma Shwe Chein* (4) Hartnoll, J., after noticing the section came to the conclusion that the principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one, which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents or some such similar cause. I have been referred to Mr. May Oung's book on Buddhist Law in which he submits that these views of Hartnoll, J., are not correct and gives his views at pages 122, 123 and 129 of the book.

Whichever view is correct, totally different considerations will have to be applied in the case of an *apatittha* adoption to those which have to be applied in the case of a *kittima* adoption. The two forms are entirely different. Therefore in allowing the alternative claim to be made the court will be contravening the rule that an amendment should not be allowed where it would have the effect of converting the suit as originally laid into a suit of a different character. Although Order VI, rule 17, which relates to amendment of pleadings is very wide in its terms, it is clearly understood that an amendment may not in general be allowed, if it changes the suit into one of a substantially different character which would more conveniently be the subject of a fresh action.

I am, therefore, of opinion that the alternative claim should not have been allowed to be made. In this view it is unnecessary to decide whether on the evidence the plaintiff is an *apatittha* child of the deceased or not.

The appeal is allowed with costs throughout.

(3) 2, L. B. R. 224.

(4) 4, B. L. T. 7.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 91 OF 1915.

M. COWASJI and others PLAINTIFFS.

vs.

BELLA and one DEFENDANTS.

Before Mr. Justice Young.

For plaintiffs—Mr. Connell and Mr. N. M. Cowasji.

For defendants—Mr. Giles.

11th September, 1915.

Public Charities—Suit for trespass—Civil Procedure Code (Act V of 1908) Order XXXI, r. 1.—Suit concerning property vested in trustees or executors. Section 92—consent of the advocate-general.—Interpretation of statutes—Right to exclusive worship—Suit in representative capacity.

The plaintiff in an action for trespass must be either the owner of the property, or the person in possession, and the beneficiaries of a public charity not being in possession cannot maintain an action for trespass without joining the trustees of the charity as parties.

Under Order XXXI, rule 1 of the civil procedure code in all suits between beneficiaries of property vested in trustees or executors and third parties the beneficiaries must be represented by the trustees or executors.

The consent of the advocate-general is necessary only to suits claiming the reliefs specified in subsection (1) of section 92 and to suits asking the directions of the court for administration of the trust.

Section 92 of the code of civil procedure being a provision debar-
ring persons from unrestricted access to the courts must be strictly construed.

A suit to restrain an interference with plaintiffs' right to exclusive worship is not within section 92, and can be brought by any persons claiming such right without joining the trustees as parties, and without the consent of the advocate-general.

The plaintiffs in such a suit sue on behalf of all persons interested in the right, and any decree in the suit would bind all such persons.

ORDER.

YOUNG, J.—In this suit the plaintiffs seek redress from the first and second defendants in that on the 21st March, 1915, when a certain Zoroastrian ceremony was being performed in the Parsee Fire Temple the second defendant introduced the first defendant a lady whom the plaintiffs declare not to be a Parsee into the said Fire Temple and thereby as they allege committed a trespass and furthermore desecrated the temple and infringed their right of exclusive

worship i. e. their right to worship alone and undisturbed by the presence of persons not belonging to their religious community. It is urged that the suit is not maintainable. The matter may as it seems to me be regarded (1) as an ordinary trespass by the defendant on land not belonging to her (2) as a trespass into the temple erected on such land (3) an interference with the petitioners' right to exclusive worship. So far as the first two causes of action are concerned O. XXXI, rule 1 which provides that in all suits concerning property vested in a trustee when the contention is between the persons beneficially interested in such property and a third person, the trustee shall represent the persons so interested, as well as the ordinary principles requiring ownership or possession on the part of a plaintiff suing for trespass seem to negative the idea that these four plaintiffs could sue even though they sued on behalf of the general body of beneficiaries. It is true that in England under the very similar terms of Order 16, rule 8 the courts have allowed *cestuisque trustent* to sue when the trustees have refused to sue, *cf. Gandy vs. Gandy* (1) and *Mildrum vs. Scorer* (2). But in both these cases the trustees were made parties, which has not been done here, and more important still—in this suit the plaintiffs plunged into litigation without waiting to see whether the trustee would or would not take action. The trespass occurred on the 21st March and the plaintiffs wrote a letter of complaint the same day to the trustee and filed their suit on the 31st without waiting for his answer. Moreover I am not sure that his letter of 6th April though it disclaimed any intention on his part to take any active steps could be construed as a refusal to become even a nominal plaintiff, so as to enable me to follow the English decision already referred to, though I may say that I should not have felt precluded from doing so by the fact that the English order is in form permissive while the Indian order is mandatory. It is well known that in certain cases "may" virtually becomes mandatory and I should have considered that the difference in language of the two rules would not have precluded me from following the principle of the English decisions. But, for the reasons above stated, and if the case had rested there, I should have held that the beneficiaries had not made out a case for suing in their own name at the date of institution of the suit, so far as the suit is one for mere trespass by an alleged stranger to the trust on to the land or into the temple belonging to the trust. The High Courts of India seem generally agreed that the suit if brought by the trustee would not fall within the purview of section 92 of the code of civil procedure. See *Ayatunessa Bibi vs. Kulfa Khalifa* (3) a decision of 1914, *Mahomed vs. Ahmed* (4) a decision of 1913, and *Malhar Bhavant vs. Narasinha* (5) a decision of 1912 and I should so have held for the reasons given in these cases, but as the case stands and for the reasons already given I must hold that the suit so far as it relates to these two causes of action could not be brought by the present plaintiffs.

(1) 30, Ch. D. 57.

(4) 35, A. 459.

(2) 56, L. T. 471.

(5) 37, B. 95.

(3) 41, C. 749.

There is however an additional cause of action namely the interference with the plaintiffs' alleged exclusive right of worship. The plaintiffs allege this right and its infringement, and it is a right that has constantly been upheld by our courts, cf. *Anandrao Bhekaji vs. Shankur Daji* (6) *Venkatachalapati vs. Subbaya* (7) *Jawakra vs. Akbar Husain* (8) *Vengamuthu vs. Pandaveswara* (9) and *Iyer on Religious Endowments* p. CCLXXX. (10) It is either a personal or a collective right.

In my opinion it is the former, as I fail to see how an aggregation of ciphers can form a unit, but the point is immaterial as here the plaintiffs are suing on behalf of themselves and all persons interested in the Rangoon Parsee Fire Temple. The right claimed does not appear to me to be in any way vested in the trustee so as to make it necessary for him to be a party. The plaintiffs may or may not have this exclusive right. But they allege its existence and its infringement and I am unable to see that section 92 debars them from proving their claims unless they first obtain the sanction of the government advocate.

I think that the plaintiffs if they had so chosen might have claimed that this was a matter on which the directions of the court were required for the administration of the trust and framed the suit accordingly, suing the trustee; but though I think they could have joined the present defendants under the present code, it is not absolutely clear. As regards the old code see *Budree Dass vs. Choonilal* (11). But they have not chosen to sue the trustee and I cannot see how they can be forced to do so, especially as the course might be dangerous, or how they can be treated as though they have one what they have not done and what they were under no obligation to do.

Section 92 in my opinion requires the presence of a trustee on the record either as plaintiff or as defendant. It was enacted primarily I think with the object of preventing such officers from being harrassed by trivial and unnecessary suits and therefore the consent of the advocate-general and government advocate is required as a condition of their initiation.

The second subsection cannot apply in as much as none of the reliefs specified in the first subsection are claimed in the suit.

A provision debarring persons from unrestricted access to the courts should in my opinion be construed strictly. The subsection provides that save as provided by the Religious Endowments Act no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that subsection. I cannot read the words "No suit claiming any of the reliefs specified in subsection (1) " as equivalent to the words "no suit involving the consideration

(6) 7, B. 324.

(9) 6, M. 151.

(7) 13, M. 293.

(10) Second edition p. 757. (Editor B. L. T.)

(8) 7, A. 173.

(11) 33, C. 789, p. 805.

of any such trust as is referred to in subsection (1) " which is practically what the defendants ask me to do, and I have some doubt as to whether the term "specified" can be construed as equivalent to "referred to" so as to include in addition to those reliefs which are distinctly specified in the subsection other reliefs which are distinctly not specified but only vaguely described as such further and other relief as the nature of the case may require. It was argued that if such a suit as the present could be brought there would be no finality and the defendants might be ruined by innumerable suits brought by aggrieved individuals. This is not so; the plaintiffs are suing on behalf of themselves and all others interested and so the decree will be binding on all persons interested in the fire temple and the chimaera raised by the defendants can be left to be dealt with when, and if, it ever arises, and I do not think it would be difficult to do so. The issue must therefore be decided in the plaintiffs' favour. Costs four gold mohurs to be costs in the cause.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 203 OF 1915.

MI SO MA SHWE APPELLANT.

vs.

CHIT MA U and another.. .. . RESPONDENTS.

Before Mr. Justice Maung Kin.

For appellant—Mr. Ba Dun.

For respondents—Mr. Bose.

22nd June, 1917.

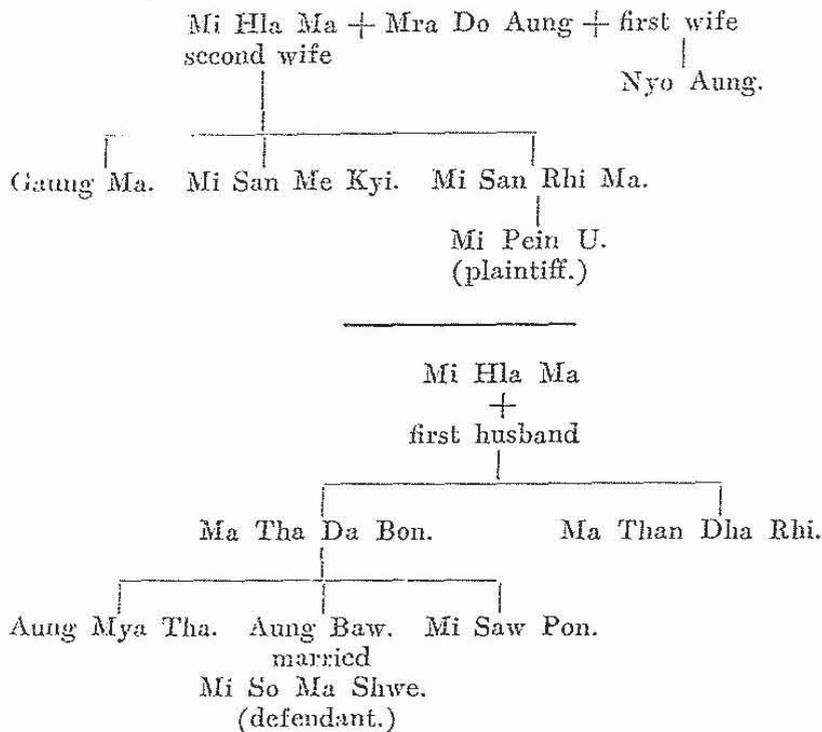
Burmese Buddhist Law. Inheritance—Shares of children by different marriages—Limitation Act (IX of 1908) s. 10. Suits against express trustees.

On a partition between children of three different marriages of the parents, the children of the marriage during which the property was acquired get two out of four shares and the children of each of the other two marriages take one share per stirpes.

There is no limitation in favour of an express trustee sued as such.

JUDGMENT.

MAUNG KIN, J.—The following genealogical tables will show the relationship between the parties:—



It will be seen that both Mra Do Aung and Mi Hla Ma now dead were *cindaunggis* before they married each other. Mra Do Aung had by his former wife a son, Nyo Aung, who is said to be alive. Mi Hla Ma had by her former husband two daughters, Ma Than Da Bon and Ma Than Dha Rhi, of whom the former died before the suit leaving three children of whom Aung Baw was one. He married Mi So Ma Shwe, the defendant. He too died before the suit leaving Mi So Ma Shwe his widow. Mra Do Aung and Mi Hla Ma got three children of whom Gaung Ma and San Me Kyi died before the suit, also Mi San Rhi Ma, but the latter left Mi Pein U a daughter, who is the plaintiff. According to the defence Gaung Me and San Me Kyi left children of their own but we are not concerned with them in this suit.

The land in suit was jointly acquired property of Mra Do Aung and Mi Hla Ma.

The plaintiff Mi Pein U claimed to have a threefifth share in it as the surviving granddaughter of Mra Do Aung and Mi Hla Ma and sued to redeem that share for Rs. 42/- from Mi So Ma, who was in possession. The ground of the suit appears from the following allegation:—Mra Do Aung and Mi Hla Ma mortgaged the whole land in suit for Rs. 70/- to Shwe Eik Ke and Mi Ah Nyo, husband and wife respectively. After their deaths Mi Than Da Bon and Mi Than

Dha Rhi, daughter of Mi Hla Ma by her former husband, redeemed the property for the mortgage amount with the consent of the other heirs of Mra Do Aung and Mi Hla Ma. What the plaintiff meant by this last allegation was that those two sisters took over the mortgage from the original mortgagees and came to stand in their shoes and their interests in the property came to be those of the mortgagees under that mortgage. After this so-called redemption the two sisters entrusted the land into the possession of Aung Baw, a son of Mi Tha Da Bon. Aung Baw died possessed of it and his widow the defendant is now in possession. The plaintiff as the sole surviving granddaughter of Mra Do Aung and Mi Hla Ma by their daughter, Mi San Rhi Ma now sued Mi So Ma Shwe for redemption of what she claimed to be her share in the ancestral property, namely, three-fifths.

Mi So Ma Shwe, the defendant's case was that her husband, Aung Baw, and she bought the property from Shwe Eik Ke about thirty years before the suit and that the suit was barred by limitation.

The first point to consider is whether there was a mortgage of the property by Mra Do Aung and Mi Hla Ma to Shwe Eik Ke and his wife. I have no doubt in my mind that the evidence of Mi Than Dha Rhi and of Maung Hla Pyu, son of Shwe Eik Ko, who is himself sixtyseven years old proves conclusively that Mra Do Aung and his wife did mortgage it, and that it is not true that they sold it.

The next point is whether Mi Than Da Bon and Mi Than Dha Rhi took over the mortgage from Shwe Eik Ke and his wife. Here again Mi Than Dha Rhi's evidence makes it clear that she and her sister did do so.

The third point for consideration is, how the land got into the possession of Aung Baw. Mi Than Dha Rhi says that she and her sister entrusted the land into the possession of Aung Baw. There is no reason why this old lady should not be believed. This evidence creates at least a prima facie case against the defence. There being no evidence to the contrary on the side of the defence, the prima facie case so proved must be accepted. I shall therefore, accept it.

In these views the suit cannot be barred by limitation, for when it is treated as a suit for redemption of the mortgage, it is well within time. When it is treated as a suit for redemption from the mortgagee's trustee, there is no question of limitation. The possession of the defendant does not count as it was of very recent origin.

The only other question left for consideration is whether the plaintiff can claim three-fifths of the property. The property is of one marriage, and the plaintiff belongs to that marriage. There are those who belonged to the other two marriages. The division has to be between the children of these three different marriages. Counsel for both sides have agreed, and it is correct, that the children of the marriage during which the property was acquired should get two out of four shares and the children of the other two marriages one each lot. The plaintiff as representing the offspring of the marriage during

which the property in suit was acquired will be entitled to sue for redemption of half of the property.

The decree passed by the district court is varied to the effect that the plaintiff is allowed to redeem only half of the land in suit. There will be no order as to costs in this court, as both parties have been successful partially. But the appellant will pay costs in the lower courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 98 OF 1917.

T. P. NAIDU APPLICANT.

vs.

A. S. MUDALIAR RESPONDENT.

Before Mr. Justice Maung Kin.

For applicant—Mr. Dhar.

For respondent—Mr. Hamlyn.

29th March, 1918.

Companies Act (VII of 1913) s. 4. Meaning of "Association," legal relation creating joint and mutual rights necessary—Chitfund.

To constitute an association with the meaning of section 4 of the Companies Act it is absolutely necessary that there should be between the persons so associated a legal relation giving rise to joint and mutual rights and obligations.

The agreement known as "chit fund" under which more than twenty persons contract with the manager of the fund to pay their subscriptions for a fixed period, and draw the amount by lots creates rights as between the manager and the other parties to the agreement, but it creates no legal relations between the other parties *inter se* and is therefore not an association within the meaning of section 4 of the Companies Act.

The manager of a "chit fund" can sue and be sued although the chit fund is not registered under the Companies Act.

JUDGMENT.

MAUNG KIN, J.—This is an application for revision of the decree of the court of small causes, Rangoon passed in Civil Regular No. 8348 of 1916. The suit was on a promissory note for the recovery of principal and interest due. The defendant admits execution but sets up the defence that the promissory note was executed in furtherance of the objects of an illegal association within the meaning of section 4 (2) of the Indian Companies' Act of 1913 and that therefore the suit does not lie.

The case for the defence is fully explained in the following passage from the judgment of the lower court:—The plaintiff ran what is known as a chit fund, which consisted of twentyone members and which was to last for twentytwo month from January 1915 to the end of October 1916; the monthly subscription was Rs. 25|- and the total value of the chit fund was Rs. 550|-; every month one of the members drew the whole amount of the chit fund by lot, and at the same time executed a promissory note for an amount calculated on the basis of Rs. 25|- for each remaining month during which the chit fund had still to run. The defendant's allegation is that the promissory note in suit was so executed by him in favour of the plaintiff, and he contends that the association of twentyone members constituted for such a purpose had for its object the acquisition of gain and being unregistered was an illegal association.

The lower court found that there was such an association with a membership of twentyone members and that the promissory note in suit was executed by the defendant upon his drawing the chit fund, and as security for the due payment by him of the remaining monthly subscriptions, but that the members of this chit fund were not members of an association such as is required to be registered under the Companies Act.

This application is made on the ground that the chit fund was an illegal association within the provisions of the Companies Act in as much as it was not registered.

There are three Madras decisions bearing on this point, viz. *Ramasami vs. Nagendrayan* (1) *Panchena M. Nayar vs. G. K. P. Nayar* (2) and *Neelamega Sastri vs. Appiah Sastri* (3). The first is in favour of the defendant, but it has been dissented from in the second, while the third which is a Full Bench case approves the second. The first is not distinguishable from the second, as they are in direct conflict. It was held in the last case that in order to constitute an association within the meaning of the Companies Act the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. In the present case we have not the requisites there pointed out as necessary to constitute such an association. The only legal relation that exists is between the manager of the chit fund and each member who draws it. The other members have no claim against the member who draws the chit fund or the manager. Nobody but the manager has any right to collect the subscriptions. The amount collected is paid by the manager to the person entitled each month. The member who draws the chit fund has to execute a promissory note in favour of the manager as security for the total amount of the subscriptions which he has still to pay. Applying the test laid down in the Full Bench case from Madras above cited this chit fund is not illegal by reason of want of registration. The result is the defend-

(1) 19, M. 31.

(3) 29, M. 477.

(2) 20, M. 68.

and's plea fails and he is liable to the money due on the promissory note. The application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 92 of 1917.

TRIBENI APPLICANT.

vs.

SAHU RESPONDENT.

Before Mr. Justice Rigg.

For applicant—Mr. Anklesaria.

For respondent—Mr. Bose.

2nd January, 1918.

Stamp Act (II of 1899) ss. 14 and 15—Second instrument on same stamp—unstamped instrument—section 35 admissibility in evidence.

Any material alteration in an instrument even with the consent of the parties vacates the original instrument and makes it a new instrument liable to a fresh stamp duty unless the alteration was made before issue, or in order to correct a mistake, or to supply an omission, and in furtherance of the original intention of the parties.

If it is not stamped again on alteration it is an unstamped instrument within the meaning of section 15 of the Stamp Act, and is inadmissible in evidence except as provided in section 35.

JUDGMENT.

Rigg, J.—The facts as found by the courts below are that the defendant Sahu executed a promote for Rs. 90/- in favour of Tribeni, the space for interest being left blank. About two or three months after this, they went to Sutaria and agreed that interest at six per cent should be charged and an insertion of this rate was made by Sutaria. The lower appellate court held that this was a material alteration of the original note and required a fresh stamp. On the authority of *Maung Ba Kywan vs. Ma Kyi Kyee* (1) which he was bound to follow, he held that the promissory note was inadmissible in evidence and could not be acted upon. He therefore reversed the decree of the trial court and dismissed the plaintiff's suit.

The plaintiff applies to this court in revision. The powers of this court in revision are defined in section 115 Civil Procedure Code. In *Amir Hassan vs. Sheo Baksh Singh* (2) their lordships of the Privy Council laid it down that where a court has jurisdiction to decide a case and in fact decides the question before it, it cannot be said that

(1) 2, L. B. R. 103.

(2) 11, I. A. 237.

it is acting illegally or with material irregularity, because its decision is erroneous whether on a point of law or of fact. In *Sheo Prasad vs. Ramchunder* (3) Jenkins, C. J. said that section 115 can only be called in when the failure of justice has been due to one or other of the faults of procedure indicated in the section. Now the first objection to the judgment of the district court is that he has made out for the defendant a case that was not pleaded. The point on which the judgment proceeded was not even mentioned in the grounds of appeal, but was argued by leave of the judge. There can however be no doubt that an objection to a suit on the ground that there is a fatal defect in the suit, and that the court has no jurisdiction to pass a decree in the case, may be taken on appeal. The case put before the district judge on appeal was that on the plaintiff's own showing the document on which he relied was inadmissible, and the suit being framed on it must be dismissed. There is nothing irregular in the proceedings of the judge simply because he considered the question for the first time in appeal. Even if the decision was wrong in law, this court could not interfere in revision. In my opinion the decision that the promissory note was not properly stamped was correct.

The insertion of a rate of interest not agreed upon by the parties when the note was first made was a material alteration of the document. The rule is stated at page 305 of *Byles on Bills* (17th edition) as follows: But even if the consent of all parties has been obtained to an alteration in a material part such alteration avoids the bill under the stamp laws; for it has become a new and a different instrument and therefore requires a new stamp. . . . There are however two cases in which an alteration though in a material part, will not vacate the instrument: first when such an alteration is made before the bill is issued; and secondly where the bill is altered to correct a mistake or supply an omission and in furtherance of the original intention of the parties. In the present case it is quite clear that the insertion of the rate of interest was an afterthought and was not part of the original contract. A new promissory note ought therefore to have been executed.

The evidence however disclosed another case that the plaintiff might have set up. He might have sued upon the original consideration for which the note was merely a receipt. The lower appellate court might have granted him leave to amend, but no such leave was asked for.

The application is dismissed with costs in this court.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION No. 198 OF 1918.

In the estate of U Po Khin deceased.

(3) 41, C. 323.

Before Mr. Justice Young.

For applicant—Mr. A. B. Banerji.

25th November, 1918.

Burmese Buddhist Law—Inheritance. Court Fees Act (VII of 1870) Schedule I, article 11—Court fees payable on probate of a will or letters of administration.

The estate of a Burman Buddhist dying in the lifetime of his wife includes only half the property he died possessed of, the other half being his wife's property during their joint lives.

The court fee payable on probate or letters of administration to the estate of a Burman Buddhist dying in the lifetime of his wife is to be calculated on half the property he dies possessed of.

ORDER.

YOUNG, J.—In this case Mr. Banerji applies for letters of administration to the estate of U Po Khin deceased to be granted to his widow. He claims that the court fee is payable only on a half of the estate. He claims that the widow was the owner of an undivided half share during his life, and it is not right that she should have to pay upon the whole after her husband's death. The deputy registrar has some doubt in the matter and has referred it to the court. In *Ma Sein Ton vs. Ma Ton* (1) Twomey, J. laid down as follows:—The real principle appears to be that the widow who owned half of the joint property in her husband's life time inherits his half as her own when he dies. In another Bench ruling *Ma Nyo vs. Ma Yauk* (2). Fox, C. J. similarly laid down that the widow was entitled to a half share of the joint property during the joint lives of herself and her husband and naturally that share remains hers after his death." On these authorities it seems to me that Mr. Banerji's contention is correct, and that the widow has only to pay court fees on what she takes as administratrix namely on what was her husband's half share. The application will be allowed so far as this point is concerned.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 153 OF 1916.

U ZAYANTA APPELLANT.

vs.

U NAGA RESPONDENT.

(1) 8, B. L. T. 203; at p. 212; 8, L. B. R. 501 at p. 513.

(2) 4, L. B. R. 256 at p. 259.

The overrules the decision in *Ah Foon vs. Mi Anyo E.* S. J. L. B. 402—Editor B. L. T.

Before Sir Daniel Twomey, C. J. and Ormond, J.

For appellant—Mr. May Oung.

For respondent—Mr. Villa.

12th February, 1918.

Burmese Buddhist Law—Religious gifts. Transfer of Property Act (IV of 1882) s. 123.—Accession to monastery land—Dwīthantaka ceremony.

Burmese Buddhist religious gifts are not exempt from the operation of section 123 of the Transfer of Property Act, and must be made by registered instrument.

A *Kyaung* built on land belonging to a monastery is an accession to the monastery property, and the head monk of the monastery is entitled to possession.

The *Dwīthantaka* ceremony cannot operate as a valid gift of property, in places to which the Transfer of Property Act has been extended.

JUDGMENT.

TWOMEY, C. J.—This was a suit for possession of a certain pucca *Kyaung* and site forming part of a *Kyaungtaik* at Moulmein. In paragraph one of the plaint the plaintiff claimed that the whole *Kyaungtaik* within the specified boundaries, known as *Damayon Kyaungtaik*, belonged to him according to the Buddhist Ecclesiastical Law, in other words he claimed the property as presiding *Pongyi* (*Taik-ok* or *Kyaung-daing*) in succession to the former *Pongyi* U Eindasara who is referred to in the proceedings as the leper *Pongyi*. U Eindasara died from seven to twelve years before the suit which was filed in July 1915. The plaintiff was a pupil of U Eindasara and states that in 1263 B. E., that is about 1901, U Eindasara went through the ceremony known as *Dwīthantaka* with him. The effect of this ceremony was to admit the plaintiff to joint ownership to the *Kyaungtaik* with U Eindasara so that on U Eindasara's death the plaintiff would become the sole *Taik ok*. The plaintiff states that after he had succeeded U Eindasara on the latter's death he in turn admitted another *Pongyi* U Wunna to joint ownership with him by the *Dwīthantaka* method. He afterwards left U Wunna in sole charge and went to Rangoon to study. During his absence the pucca *Kyaung* building which had been begun in Eindasara's time was completed by the lay donors and these laymen dedicated it to U Wunna in the plaintiff's absence. Subsequently while the plaintiff was still absent from Moulmein, U Wunna discarded the yellow robe and went into the world, but just before doing so he made over the newly built pucca *Kyaung* to another *Pongyi*, namely, his uncle U Naga the defendant. When the plaintiff came back and tried to eject U Naga the latter instituted proceedings under the criminal procedure code and successfully resisted the plaintiff who thereupon brought this suit against him for possession of the brick *Kyaung*.

Plaintiff's first witness U Athaba gives evidence as to the *Dwithantaka* ceremony between Eindasara and the plaintiff Zayanta. The second and third witnesses give evidence as to the later *Dwithantaka* ceremony between Zayanta and Wunna.

The evidence shows that Eindasara presided over the *Kyaungtaik* up to his death. The actual *Kyaung* that he occupied first by himself and afterwards with Zayanta, was a wooden building on the site of the site of the pucca building now in dispute and this wooden building has been removed and re-erected at another spot within the *Kyaungdaik*. The plaintiff says that this wooden building had been given to Eindasara by another *Pongyi* by a document but there is no other evidence on this point. Ma Hlaing (P. W. 4) an aged woman who was one of the supporters of the *Kyaungtaik* states that when Eindasara died the supporters telegraphed to Zayanta the plaintiff who was then absent in Mandalay; that Zayanta then came and presided over the *Kyaungtaik* in succession to Eindasara and that no one raised any objection, but as Zayanta wanted to go away temporarily to continue his studies he invited another *pongyi* (Wunna) to take charge of the *Kyaungtaik* in his absence. The defendant Naga's witness U Zarita also says that Eindasara was head *Pongyi* i. e. *Taikok* and that afterwards the plaintiff "invited Wunna to come to the small *Kyaung*, (i. e. the old wooden *Kyaung*) and then went away." Subsequently when the new brick *Kyaung* was about to be dedicated "U Wunna went to Rangoon to call the plaintiff (i. e. presumably for the purpose of receiving the dedication) but he refused to come." This witness admits having heard that Eindasara and the plaintiff had performed the *Dwithantaka* ceremony and the defendant's witness No. 3 Maung Po Te also states that Eindasara presided in the *Kyaungtaik* and that plaintiff presided after Eindasara's death.

The evidence as to the *Dwithantaka* ceremony between Eindasara and Zayanta is not rebutted and there is no reason to disbelieve it except that it was not relied upon by Zayanta or mentioned by him in the criminal proceedings under section 145, code of criminal procedure. But even apart from that alleged ceremony the fact that Zayanta succeeded Eindasara as presiding *Pongyi* of the *Kyaungtaik* appears even from the evidence of the defendant's own witnesses. It is shown by this evidence also that the defendant Naga's donor Wunna had originally come to the *Kyaungtaik* on the invitation of the plaintiff Zayanta and there is therefore all the more reason for believing the statements of the plaintiff and his witnesses as to the *Dwithantaka* ceremony between Zayanta and Wunna.

It is proved that the brick building in suit was dedicated to Wunna during Zayanta's absence without a registered document. The defendant Naga's claim rests on an unregistered document of transfer written by Wunna on the day he discarded the yellow robe. The transfer was invalid for want of a registered document. But though Naga's title is defective he is in possession and cannot be ejected unless the plaintiff is held to have proved his title. It is clear however that the plaintiff has proved it. Whatever may have been the effect of the

two *Dwithantaka* ceremonies the evidence establishes that Zayanta became presiding *Pongyi* or *Taik-ok* in succession to Eindasara and in that capacity he obtained control over the whole *Kyaungtaik*. The brick *Kyaung* built within the *Kyaungtaik* was dedicated to Wunna but Wunna was either subordinate to Zayanta as *Taik-ok*, or else he was joint owner with Zayanta by virtue of the *Dwithantaka* ceremony. Wunna on discarding the yellow robe disappeared and his evidence was not forthcoming. Even if we assume that Wunna himself in whose name the brick *Kyaung* was dedicated could have resisted a claim by Zayanta for possession, it must be held that the defendant Naga who merely claims under an invalid transfer from this *ex-pongyi* has no title to oppose the plaintiff's claim as presiding *Pongyi* of the whole *Kyaungtaik*. But it must be observed that the gift of the brick *Kyaung* to Wunna by the lay builders also appears to have been inoperative for want of a registered instrument under section 123 of the Transfer of Property Act, which was in force in Moulmein at the time of the dedication.

The district judge confused *Dwithantaka* with *Withathagaha* which has nothing in common with it except that they are both Pali words. He also lost sight of the fact that the plaintiff was claiming as presiding *Pongyi* of the whole *Kyaungtaik*, and he therefore attached undue importance to the fact that neither the plaintiff nor his predecessor Eindasara had ever lived in the new brick building in suit. He treated the gift of the brick *kyaung* to Wunna and the transfer by Wunna to the defendant Naga as valid transfers overlooking the absence in each case of a registered instrument. The district court's decision is clearly wrong and I would set it aside and grant the plaintiff a decree for possession as prayed with costs in both courts. The defendant should be ordered to pay to government Rs. 630½—namely the amount of court fees which would have been paid by the plaintiff appellant if he had not been permitted to sue and to appeal as a pauper.

ORMOND, J.—The evidence shows that the plaintiff was the head monk of the monastery after U Eindasara's death in 1907 or 1908. The *kyaung* in dispute was completed in 1908 or 1909, after the death of Eindasara, and was dedicated to U Wunna who was then acting as head monk during the plaintiff's absence in Rangoon, and who was joint head monk with the plaintiff.

The plaintiff claims possession of the *kyaung* by virtue of being the head monk and also under a *Dwithantaka* made between himself and U Wunna. The defendant's title rests upon a gift of the *kyaung* made to him by U Wunna in 1911 or 1912.

No gift of the *kyaung* could be made until the *kyaung* had been built. It was not completed until 1908 or 1909 i. e. after section 123 of the Transfer of Property had been extended to Moulmein. Burmese Buddhist religious gifts are not excepted from the operation of that section and as none of the alleged gifts of this *kyaung* were effected by a registered document, each of these gifts was void; namely,—the gift or dedication of the *kyaung* in favour of U Wunna

by the lay donors, the gift of a joint share in the *kyaung* by the plaintiff to U Wunna under the *Dwithantaka* and the gift of the *kyaung* by U Wunna to the defendant.

U Wunna therefore acquired no title to the *kyaung*, except as joint head monk with the plaintiff; and U Wunna had no right to hand over the *kyaung* to the defendant without the plaintiff's consent.

The *kyaung* having been built on monastery land, must be taken to be an addition to the monastery property and the plaintiff as head monk of the monastery is entitled to possession. I concur in the order passed by the learned Chief Judge.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 68 B OF 1918.

AH NGWE and others APPLICANTS.

vs.

KING-EMPEROR RESPONDENT.

Before Mr. Justice Pratt.

For applicants—Mr. Dawson.

For respondent—Mr. Giwala, Asst. Government Advocate.

17th May, 1918.

Gambling Act (Burma Act 1 of 1899) ss. 3, 6 and 7. Instruments of gaming.—Information given to the police or a magistrate—Presumption on instruments of gaming being found.—Summary trial.

White beans, cigarettes and cups not being articles devised or actually used for the purpose of gaming are not instruments of gaming.

King-Emperor vs. Nga Thu Daw, 2, L. B. R. 60 referred to.

Information given to a police officer or magistrate under section 6 of the Act is not evidence.

The presumption that a place is a common gaming house as defined in section 3 (1) of the Act does not arise unless the articles found therein are instruments of gaming as defined in the Act.

Cases that are of any importance should not be tried summarily as the accused ought to have an opportunity of appealing.

JUDGMENT.

PRATT, J.—A house used as a club and joss-house was raided under a warrant issued under section 6 of the Gambling Act.

A number of Chinamen were found in various parts of the building and on the persons of some of them was found a sum of money aggre-

gating Rs. 256-6-6. 159 white beans, a quantity of torn pieces of cigarette cartoons and a broken cup were found.

The magistrate convicted fourteen accused of gambling, because the arresting officer stated that he had information that the beans, pieces of paper and cup were used as gaming instruments. Information is not, however, evidence—a fact which the magistrate entirely overlooked.

Besides the articles specially set forth in the definition in section 3 of the Gambling Act, instruments of gaming is stated to mean and include articles devised or actually used for the purpose of gaming. White beans, pieces of cigarette cartoons, cups or money are neither devised as instruments of gaming nor ordinarily intended to be so used.

Evidence was therefore necessary to prove that the articles seized were actually used for the purpose of gaming before any presumption under section 7 could arise. Of such evidence there was none. It is quite natural that fragments of cigarette cartoons should be scattered about where Chinamen gather together. A broken cup is a very common article and white beans might be used for a variety of purposes unconnected with gambling.

In *King-Emperor vs. Nga Thu Daw* (1) it was laid down by a full bench of this court that coins found on the actual persons of gamblers are not necessarily instruments of gaming and are not liable to seizure and forfeiture unless there is evidence to show that they were actually used or intended to be used for the purpose of gaming. The sums found on the accused in the present instance were not unusually large and it is quite impossible to draw any presumption that they were intended to be used for gaming. There being no proof that the articles seized were used for the purpose of gaming the presumption that the house entered was a common gaming house did not arise.

I set aside the convictions and sentences.

I would point out that even had the conviction been correct the substantive sentence of imprisonment passed upon the second accused was quite unjustified. There was no evidence that he conducted the business of a common gaming house. The case being one of some importance the magistrate should have tried it regularly and not summarily. It was obviously desirable that the accused should have the opportunity of appealing.

(1) 2, L. B. R. 60.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 65 B OF 1910.

EMPEROR APPLICANT.

vs.

MAUNG KA and others RESPONDENTS.

Before Mr. Justice Twomey.

1st April, 1910.

(Gambling Act (Burma Act I of 1899) section 3 (1) common gaming house. (3) instruments of gaming—fighting birds—s. 10—place to which the public have access s. 12. Keeping a gaming house.

Fighting birds are not instruments of gaming within the meaning of Gambling Act, and it makes no difference that there was betting on the fights and commission was taken on the bets.

A common gaming enclosure is not a public place, and allowing cock fights in such a place is not an offence under section 10 of the Act.

A keeper of gaming enclosure is not a keeper of a common gaming house as defined in the Act.

JUDGMENT.

Twomey, J. Fighting birds are not "instruments of gaming" within the meaning of section 3 (3) of the Burma Gambling Act 1899 any more than they were "instruments of gaming" under the earlier Act (11 of 1867). On this point the ruling in *Queen-Empress vs. Huel Gyi* (1) has not been superseded or modified.

In the present case the Sessions Judge, Hanthawaddy refers for the orders of this court the convictions of certain persons who were fined under section 11 of the Gambling Act 1899 for "aiding and abetting the fighting of two cocks" in a "common gaming enclosure." It is alleged that there was betting at the cockfight and another accused named Maung Ka took commission on the bets. He was convicted and fined under section 12 for "keeping a common gaming house."

Whether there was betting or not the convictions were all illegal because the cockfighting was not carried on in a public place (i. e. in "a street or thoroughfare or place to which the public have access"). If it had been carried on in a public place the accused persons could have been dealt with under section 10 of the Act. The place in this case was a private enclosure.

The fact that cockfighting and betting were carried on in the enclosure does not suffice to make it a "common gaming house." For, the definition of "common gaming house" (section 2 (1) of the Act)

(1) S. J. L. B. 317.

requires that "instruments of gaming" should be kept or used therein and as explained at the beginning of this order fighting birds are not "instruments of gaming."

On these grounds the convictions in this case under sections 11 and 12 of the Gambling Act are set aside and the fines of Rs. 15/- paid by Maung Ka under section 12 and Rs. 5/- each paid by the remaining thirteen convicted persons under section 11 must be refunded.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 292 A OF 1918.

EMPEROR APPLICANT.

vs.

PO KYWE and others RESPONDENTS.

Before Mr. Justice Pratt.

12th July, 1918.

Gambling Act (Burma Act I of 1899) s. 3 (1) Common gaming house—ss. 10, 11, 12—Cockfighting—Betting—Penal Code (Act XIV of 1860) s. 65—Limit to imprisonment for non-payment of fine.

Setting birds to fight is an offence under the Gambling Act only if it is done in a public place.

The fact that there was betting and that a commission was charged by the stakeholder does not convert the scene of a cockfight into a common gaming house.

Betting is not illegal and is not an offence.

The maximum punishment of imprisonment to which an offender can be sentenced in default of payment of fine is one fourth of the maximum fixed for the offence.

JUDGMENT.

PRATT, J.—Maung Po Kywe has been fined Rs. 10/- or in default fourteen days rigorous imprisonment under section 12 of the Gambling Act for keeping a common gaming house, and Maung So Pe and sixteen others have been fined Rs. 7/- each or in default twelve days' rigorous imprisonment under section 11 for gaming in a common gaming house. It should be noted that for first offences the sentences in default were illegal under section 11.*

The facts of the case are that a cockfight took place in the garden of one Maung Tha Ye. There was betting on the fight and Maung Po Kywe took commission as stakeholder, whilst the remaining convicts bet.

* Cf. Indian Penal Code s. 65.—Editor B. L. T.

Cockfighting in a public place is made an offence under section 10 of the Gambling Act, but holding a cockfight on private premises, even if accompanied by wagering, will not render the place a common gaming house within the definition given in section 3.

As pointed out in *Emperor vs. Maung Ka and others* (1) fighting cocks are not instruments of gaming: Setting cocks to fight is not in itself an offence in Burma.

Similarly betting is not in itself illegal nor is it included in the definition of 'gaming' or 'playing' given in the Act. The mere fact that there was betting and that the stakeholder took commission thereon will not therefore render the scene of a cockfight a common gaming house.

I set aside the convictions and sentences.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 74 B OF 1918.

M. RAHMAN APPLICANT.

vs.

ABDUL SAMAD RESPONDENT.

Before Mr. Justice Maung Kin.

For applicant -Mr. Das and Mr. N. C. Sen.

For respondent--Mr. Dawson.

22nd May, 1918.

Criminal Procedure Code (Act V of 1898) s. 517—Order for disposal of property.

An order under section 517 of the code of criminal procedure does not decide the question of ownership of the property. It merely decides the question of the right to possession till a civil court has decided the question of ownership.

ORDER.

MAUNG KIN, J.—The applicant applies to be given possession of the logs, subject matter of Criminal Regular No. 86 of 1917 of the first additional magistrate of Rangoon. Applicant was the complainant in that case, and the respondent was the accused. The accused was convicted by the magistrate, but on appeal I acquitted him. There was one question of fact in that case which is relevant to this application namely whether one Anwar Ali was the real owner of the logs or not. In my judgment in appeal I found that Abdul Samad

(1) 11. B. L. T. 265.

did sell the logs to the present applicant and received the price for them in two sums, which he paid into the Bank of Bengal, and that Anwar Ali's claim, and what Abdul Samad said about it were false. I have to decide this application under section 517 of the Code of Criminal Procedure. Mr. Dawson contends that the logs should be handed over to Anwar Ali. He said that though Anwar Ali was not a party to this application, he was behind him instructing him. So in fact he appeared for Anwar Ali though nominally for Abdul Samad. In this matter I shall not be deciding any question of ownership by deciding who should get possession of the logs. I have to divide who shall have possession till a civil court decides the question of ownership. On the materials before me I do not believe that Anwar Ali has any claim to the logs, I believe Abdul Samad was the owner, and applicant has paid him for the logs. Obviously the applicant should have possession of the logs. I direct that the logs be made over to applicant. It is common ground that the logs were before the magistrate in as much as they were attached on the application of the complainant, and have since been in possession of the bailiff.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 539 B OF 1918.

YEE WAN APPLICANT.

vs.

EMPEROR RESPONDENT.

Before Sir Daniel Twomey, C. J.

For applicant—Mr. Po Thit.

3rd December, 1918.

Burma Excise Act (Burma Act V of 1817) s. 2 (a) Alcoholic liquor s. 12 (a) —manufacture of exciseable article. Ss. 16 and 30. Possession of exciseable articles—Financial Department Notification No. 70 clause (1).

Under Financial Department Notification No. 70 of the Government of Burma vinegar is an alcoholic liquor for the purposes of section 12 of Burma Excise Act, and manufacture of vinegar except under license is an offence under section 12 (a).

Vinegar not being an alcoholic liquor except for the purpose of section 12 of the Act, possession or import or export of vinegar in any quantity is not an offence.

ORDER.

TWOMEY, C. J.—The applicant, who is the manager of a Chinese restaurant, has a free license from the collector for the manufacture of vinegar and one of the conditions of the license is that he shall not

keep in his possession at any one time fermented liquor exceeding 60 reputed quart bottles and then for the purpose of vinegar manufacture only.

He was prosecuted by the excise authorities for being in illegal possession of 228 quarts of *Seinye*, an offence under section 30 (a), Burma Excise Act, 1917. He admitted that he was in possession of 228 quarts of vinegar. The excise inspector gave evidence that the liquid seized by him was in a state of fermentation i. e. it was *Seinye* that was in process of conversion into vinegar. It was not yet vinegar at the time of the seizure.

The magistrate did not deal with the case correctly. He ought to have determined whether the 228 quarts of liquor at the time of seizure had really become vinegar or not. If it had not become vinegar the accused would be guilty of the offence with which he was charged, for he was not authorized to have more than 60 quarts of *Seinye* at any one time in process of manufacture into vinegar.

Instead of deciding this point the magistrate disregarded the inspector's evidence altogether and went out of his way to convict the accused of a totally different offence, namely, doing an act in breach of the conditions of his license, under section 41 (c) of the Act, the breach attributed to him being the possession of more than 60 quarts of vinegar. But this is not a breach of the conditions at all. The licensee bound himself to use in his manufacture not more than 60 quarts of fermented liquor at a time—but he is not limited by the Act or Rules or by his license as to the quantity of completely manufactured vinegar that he may possess. It is true that vinegar has been declared (Financial Department Notification No. 70, dated the 18th September 1917)* to be "alcoholic liquor" for the purposes of section 12 of the Act and it is therefore an "exciseable article" for the purposes of section 12. But section 12 relates only to manufacture. Vinegar is not an "exciseable article" for the purposes of section 16 or section 30.

The conviction is wrong. It is set aside and the fine paid by the applicant will be refunded to him.

* FINANCIAL DEPARTMENT NOTIFICATION No. 70.

Rangoon, 18th September, 1917.

With reference to section 2 (a) and (d) of the Burma Excise Act 1917, the Local Government is pleased to declare:—

(1) Vinegar to be alcoholic liquor for the purposes of section 12 of the Act.

(2) All drugs, synthetic or other, having a physiological effect similar to that of cocaine, together with all preparations and derivatives of such drugs to be cocaine drugs.

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