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THE

BURMA LAW TIMES.

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PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

AFZUL-UN-NISSA .. .. .. APPELLANT.

vs.

ABDUL KARIM .. .. .. RESPONDENT.

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

For appellant—Mr. Dunne, K. C. and Mr. O'Gorman.
For respondent—Mr. Abdul Majid.

18th February, 1919.

Landlord and Tenant—no evidence of terms of tenancy—Inference from long possession—Permanent tenure—Enhancement of rent.

Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a pucca house on it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants, and of the tenure having been from time to time transferred by succession and purchase in which the landlord acquiesced, or of which he had knowledge, a court is justified in presuming that the tenure is of a permanent nature.

Once it is settled that the original bargain was for a permanent tenancy at a fixed rent no question of enhancement of rent can arise.

JUDGMENT.

LORD DUNEDIN.—The predecessors in title of the appellants in these consolidated appeals were plaintiffs in three suits of ejectment in respect of three parcels of land, held by the respondents respectively. Questions as to sufficiency of notice were raised, but

need not be alluded to. The real question at issue is raised by the defence of each of the respondents, which has been upheld by the courts below—namely that they are permanent tenants at a fixed rent which has admittedly been paid since the beginning of the tenancy, and as such cannot be evicted on the allegation that they are tenants-at-will.

The parcels of land in question are situated in a suburb of Delhi, and are covered by buildings of masonry occupied by the respondents. It is admitted that the respondents' predecessors in title were invited to occupy the land for building purposes by predecessors of the appellants in or about the year 1859. No document showing the terms of occupancy is extant, nor is there any reliable oral evidence of what passed at that time. But the facts found, and as to which indeed there is no dispute, are that from that time onwards a uniform and fixed rent has been paid, that in some of the receipts given by the landlord the term "permanent" as applied to the rents is used, that the respondents and their predecessors in title have erected substantial buildings without objection on the part of the landlord, that they have dealt with the properties by way of sale and mortgage, and that the properties have passed by succession. In these circumstances the learned judges of the courts below have held that the case is in substantially the same position as the case of Casperz *vs.* Kader Nath Sarbadhikari (1). The headnote of that case, which accurately represents what is decided, is in these terms. Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a pucca house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a court is justified in presuming that the tenure is of a permanent nature."

The learned counsel for the appellant was constrained to admit that if this case had been in Bengal, he could not contend that the judgment was not right, but argued that, though the inference was properly drawn in Bengal, it could not be properly drawn in the Punjab, on the ground that in Bengal there was a permanent settlement, whereas in the Punjab there was not how it is clear that an inference as to a fact to be drawn from facts depends on a mental process which is the same all the world over. The argument could, therefore, only be good if it could be shown that a permanent tenancy is a legal impossibility in the Punjab. Counsel candidly admitted that he had no direct authority for the proposition but argued that it followed from the difference of position as to the permanent settlement. It is not clear to their lordships why the position in a question with the government should alter the possibility of a bargain as between landlord and tenant. But it is not necessary to give any

(1) 28, C. 738.

opinion on this point, and it would be inexpedient to do so in face of the fact that the point was never taken in the pleadings, and was consequently not urged before nor noticed by, the learned judges in the courts below. It is therefore, out of the question to raise it before this board.

Their lordships may be also add that, quite apart from the ground on which the case was decided by the learned judges below, there is another valid ground of judgment. There were produced several sale deeds of superstucture houses on the ground by the plaintiffs, predecessors, in which there was a distinct acknowledgment that the houses themselves were held by the tenant in virtue of a permanent tenancy. This would be an estoppel as against the plaintiffs.

One other point must be noticed. The plaintiffs put forward an alternative demand for enhancement of rent. This was refused by the subordinate judge, but was allowed by the divisional judge to whom appeal was taken. The original judgment was restored by the learned judges of the Chief Court. It is not clear to their lordships upon what view as to jurisdiction the divisional judge pronounced the decree he did, but in any case the view of the Chief Court is clearly right that once it is settled that the original bargain was for a permanent tenancy at a fixed rent all question of enhancement is necessarily gone unless such a proceeding is authorized by statute.

Their lordships will therefore humbly advise His Majesty to dismiss all the appeals. In terms of the condition on which special leave to appeal was granted, the appellant will pay the costs of the respondents before this Board as between solicitor and client.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 109 OF 1919.

LE MAUNG .. .. APPELLANT.

vs.

MA KWE and one .. .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt., C. J. and Robinson, J.

For appellant—Mr. May Oung.
For respondents—Mr. Thein Maung.

21st July, 1919.

Burmese Buddhist Law—Inheritance—Rule against ascent of inheritance—Rights of a daughter of a divorced wife in estate of step brother—Maintaining filial relations.

The rule against ascent of inheritance applies in favour of brothers and sisters of the half blood as against parents when there are no full

brothers or sisters, but it is doubtful if the rule would apply in favour of a step child who had left the father's establishment, and become separately settled in life, and when the estate in dispute is that of a boy who has lived with, and was controlled and supported by his father up to the time of his death.

A daughter taken away by her mother on divorce loses her rights of inheritance in her natural father's family, especially if there has been a division at the time of the divorce, and the father and daughter have not resumed filial relations. The severance of the tie binding her to her father involves the severance of the tie connecting her with his son by an earlier marriage.

Ma Hnin Bwin *vs.* U Shwe Gon, 7 B. L. T. 105 explained and followed.

JUDGMENT.

TWOMEY, C. J.—The appellant-defendant Maung Le Maung was twice married, first to Ma E Nyun who died four or five years before this suit was filed leaving a son Maung Ba Wan. After Ma E Nyun's death, Maung Le Maung married Ma Me Pu and by her had a daughter Ma Kwe, born in January 1913. In July 1915 Le Maung and Ma Me Pu effected a divorce by mutual consent before the village elders and Ma Me Pu received property worth Rs. 10000/- on leaving Le Maung's house. She took with her her infant daughter Ma Kwe, and she has since married another husband. Le Maung did not marry again. Ba Wan continued living with his father Le Maung until he died of plague in January 1918. About three years before his death he had inherited a sum of Rs. 9400/- as his share of the estate of his mother Ma E Nyun's father U Sin, and he had also received certain jewelry from U Sin in the latter's lifetime.

The minor Ma Kwe, through her mother Ma Me Pu as next friend sued her father Le Maung for the property left by her step-brother Ba Wan claiming to be Ba Wan's sole heir under the Buddhist law of inheritance. Le Maung in defence pleaded that he is the sole heir of his son.

The district court held that the case was governed by the decision of the Privy Council in Ma Hnin Bwin *vs.* U Shwe Gon (1) and that Ma Kwe should succeed to her step-brother's estate in preference to his father the defendant. The learned district judge considered that although Ma Kwe is only a step sister she is entitled to succeed to the whole estate in the absence of a brother or sister of the whole blood. He also considered that as Ma Kwe was an infant at the time of her mother's divorce, the fact that she was taken away by her mother at that time must not debar her from inheriting her brother Ba Wan's estate, and he cited Ma Thet *vs.* Ma San On (2) in support of this view. The suit was therefore decreed in favour of the plaintiff. The defendant Le Maung appeals.

(1) 7, B. L. T. 105; 8, L. B. R. 1. (2) 2, L. B. R. 85.

The learned district judge is probably right in holding that the ruling in Ma Hnin Bwin's case (1) may properly be applied in favour of brothers and sisters of the half blood when there are no full brothers or sisters. This would be in accordance with "the fundamental principle that inheritance should not ascend if it can be helped" Vide Ma Gun Bon vs. Maung Po Kwe (3).

The district judge has however not considered the limitations which their lordships put upon their decision in Ma Hnin Bwin's case.(1) The balance of authority in the Dhammathats was found to be upon the side of sisters and brothers of the deceased being preferred to to the parents (according to the general rule laid down in the extract from Manukye in sec. 311 of the digest). But while adopting this general rule and applying it to the case before them, their lordships pointed out as a salient feature in that case that the deceased and her sister Ma Hnin Bwin had for years lived a life separate from and independent of their father, and their lordships desired that Ma Hnin Bwin's case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. They referred to the traditional patriarchal powers of Burmese parents over their households and suggested that a consideration of these powers may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life." It is clear that their lordships meant to leave us unfettered in disposing of such a case as the present where the estate in dispute is that of a boy who lived with and was controlled and supported by his father up to the time of his death at the early age of thirteen. The texts indicating the wide extent of parental authority are cited in the judgments of the appellate Bench of this court in Ma Hnin Bwin's case(4). But the principle that inheritance if possible should not ascend is of general application and the rule of succession deduced by their lordships from the Dhammathats is wide enough to cover all cases. No actual textual authority has been cited to us which would warrant special differentiation in favour of parents with whom the deceased child has lived, and I doubt if we can differentiate merely by inference from the texts showing the power of parents over their children in former times. These texts appear to be more in the nature of moral precepts than positive rules and none of them touch the question of inheritance.

It is however unnecessary for us to pronounce definitely in the present case on the point discussed above, for the plaintiff respondent Ma Kwe's suit must fail on another ground namely—because she ceased to be a member of her father the appellant's family at the time of her mother's divorce. Here we are on surer ground. It is a well established rule of Buddhist Law in both Upper and Lower Burma that a daughter taken away by her mother on divorce loses her rights of inheritance as a member of her natural father's family. Ma Thaik *vs.* Maung Tu (5), Ma Gywe *vs.* Ma Thi Da (6), Ma Sein

(3) U. B. R. 1897-01, 66 at p. 73.
(4) 5, L. B. R. 23 at p. 26.
(5) S. J. 184.
(6) U. B. R. 1892-96, 194.

Nyo *vs.* Ma Kywe (7), Ma Pon vs. Po Chan (8). The rule was relaxed in Ma Thet *vs.* Ma San On(2) (the case cited by the district judge) because in that case there had been no division of property at the time of the divorce and it was shown moreover that filial relations between father and daughter had been resumed and continued for many years after the separation. In the case of Maung Pe *vs.* Ma Myitta (9) the learned judicial commissioner (Sir Herbert White) was loth to press the rule against a child of tender years who had no opportunity of exercising a reasonable choice at the time of her mother's divorce. But can we assume that the choice of continuing or resuming filial relations would rest with the daughter rather than the father, if the girl were of mature understanding? There also, though the parents were divorced there was evidence that the deceased was on very affectionate terms with his daughter, that she had been to stay with him, and that she had never been regarded as cut off from his family. In another Upper Burma case Mi Nyo *vs.* Mi Nyein Tha (10) it was pointed out that notwithstanding the general rule, children taken away by a divorced wife would succeed to their father's estate in the absence of all other heirs i. e. on the principle that descendants who would otherwise be disqualified are allowed to share in inheritance in default of a better heir. Vide Manukye, Richardson's edition p. 316. And so in the present case, if it were a question of inheriting from Maung Le Maung, we might properly consider the claims of Ma Kwe if she were the only surviving descendant by blood. But this is not the question. Ma Kwe is a possible heir to Maung Le Maung if she survives him and especially if filial relations are in the meantime resumed between them. But her present position is that she is a member of her mother's new family and not a member of her father's family at all. The severance of the tie binding her to her father necessarily involves severance also of the tie connnecting her with her father's son by his earlier marriage. It is clear that she could not supplant her father in the succession to his son Ba Wan's estate even if we were to regard the Privy Council ruling in Ma Hnin Bwin's case as of universal application.

On these grounds I would set aside the decree of the district court and dismiss the plaintiff's suit with costs in both courts.

ROBINSON, J.—I concur.

IN THE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA.

CIVIL APPEAL No. 294 OF 1919.

MA NGWE GAING .. .. APPELLANT.

vs.

TUN YA .. .. RESPONDENT.

(7) U. B. R. 1892-96, 159.
(8) U. B. R. 1897-01, 116.
(9) 2, Chan Toon L. C. 220.
(10) U. B. R. 1904-06, Buddhist Law Inheritance 15.

Before H. S. Pratt, Esq. Off. J. C.

For appellant—Mr. D. Dutt.
For respondent—Mr. N. M. Mukerji.

12th February, 1920.

Breach of Promise of marriage, measure of damages—Burmese Buddhist Law, damages for seduction.

In an action for damages for breach of promise of marriage, the fact that there was seduction must be taken into account in measuring damages.

Under Burmese Buddhist Law an action did lie for damages for seduction. The ancient law on this point is approved by public opinion, and is in accordance with present customs and practice, but as seduction is not a question relating to marriage, suits relating to seduction cannot under section 13 of the Burma Laws Act be decided according to Buddhist Law.

JUDGMENT.

PRATT, OFF. J. C.—Appellant Ma Ngwe Gaing sued for damages for breach of promise of marriage and seduction and obtained a decree for Rs. 60/- in the township court. On appeal the district court found that there was no reliable evidence of promise of marriage and set aside the decree of the township court. The case was somewhat complicated by the fact that the parents were parties in the court of first instance. The girl and her lover were not minors and are now the only parties to the appeal. There was not it is true much evidence of a promise of marriage besides the sworn evidence of Ma Ngwe Gaing, but the circumstantial evidence pointed to an implied promise at least. It seems clear that the defendant's mother was willing at one time to consent to a marriage but changed her mind. One witness deposed to defendant Maung Tun Ya coming to his house, telling him he was in love with Ma Ngwe Gaing but that his mother objected to the match, and asking him to persuade his mother to arrange the wedding. It is significant that defendant Maung Tun Ya did not come in the witness box to deny the alleged promise of marriage, a fact which the learned district judge appears to have overlooked. In the absence of a denial on oath by the defendant I consider the evidence as to the promise was sufficient to justify a decree and the damages awarded are moderate. Seduction was fully proved.

It has been ruled in this court that seduction can be considered in awarding damages in a breach of promise suit but that seduction *per se* is not actionable.

In Ma Yon *vs.* Maung Po Lu (1) it was held that an action for seduction apart from a breach of promise of marriage by a

(1) U. B. R. 97-01, II 499.

Burmese woman will not lie and the Lower Burma cases of Mi Kin *vs.* Myin Gyi (2) Po Thaik *vs.* Mi Hnin Zan (3) and Maung Hmaing *vs.* Ma Pwa Me (4) were cited with approval. In Po Thaik's case (3) the learned judicial commissioner held that section 1, book VII of the Manukye seemed to give a right of suit but considered that the real meaning of the *Dhammathats* was that fornication was a criminal offence to be punished. He did not consider it in accordance with the principles of justice, equity, and good conscience to apply the English theory of a cause of action based on loss of services.

In Maung Hmaing's case (4) the special court held that where a breach of promise was proved the fact of seduction might be taken into account in estimating the amount of damages and Agnew J. pointed out that in Book VI sections 26 to 30 of the Manukye provision is made for damages for seduction.

The extract from the Manukye in section 143 of the Kinwun Mingyi's digest clearly makes seduction actionable *per se*. In his book on Burman Buddhist Matrimonial Law (p. 29) May Oung sees no reason why the courts in Burma should not decree compensation at the suit of a parent or guardian. He points out (p. 27) that the ancient rule of Buddhist law gave the woman herself a right to compensation against her seducer.

In "Conflict of Authority in Buddhist Law" Tha Gywe (p. 38) also points out that the Burmese law allowed damages for seduction and admits that the sentiments are still in force amongst the people who "think that, if a man seduces a girl, even without promising to marry her he ought to pay damages unless he make her his wife". Seduction is not a matter of marriage and therefore the Burmese Buddhist Law does not apply.

Under section 13 of the Burma Laws Act the deciding factor is to be justice, equity and good conscience. I must confess I find a difficulty in seeing how an action by a Burmese Buddhist woman for damages for seduction is opposed to justice, equity, and good conscience.

The main argument against conceding a right of suit in such cases is that it would conduce to immorality, but I am not sure that this contention is sound. Presumably what is meant is that women would be more ready to allow themselves to be led astray, if they knew that there was a possibility of obtaining damages for seduction. There is to my mind much more weight in the view that if men were liable to be mulcted in damages for seduction, the knowledge of this liability would be likely to deter them from taking undue advantage of their *inamoratas*.

The Buddhist Law admittedly sanctioned damages for seduction. The ancient law on that point is approved by public opinion and is

(2) S. J. 114.
(3) S. J. 235.
(4) S. J. 533.

in accordance with the present customs. As Tha Gywe points out in his book (p. 38) the texts regarding damages for seduction are still followed by the village elders to whom the question of damages is often referred for decision in such cases. He also takes the view (with which I agree) that there is nothing immoral in such arrangements for payment of damages. I am inclined to the opinion that a Burmese Buddhist woman ought to be allowed a right of suit for damages for seduction. In the present appeal, however, I have held that a breach of promise of marriage is proved and it is not therefore necessary to rule definitely on the question of whether an action for seduction *per se* is maintainable.

The appeal will be allowed. The decree of the district court is reversed so far as the present parties are concerned and the plaintiff Ma Ngwe Gaing will be given a decree for Rs. 60/- damages against Maung Tun Ya with all costs. Ma Ngwe I against whom the appeal has been withdrawn has incurred no separate costs in this court and I am not inclined to make any order for costs in her favour.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 65 OF 1919.

MA SI and others .. .. .. APPELLANTS.

vs.

HOKE HU .. .. RESPONDENT.

Before Sir Daniel Twomey Kt. C. J. and Robinson J.

For appellants—Mr. Ginwala.
For respondent—Mr. Villa.

10th December, 1919.

Chinese Buddhist Law—Inheritance—widow's share in deceased husband's property—Alienation by guardian of minor's property.

Questions of inheritance amongst Chinese Buddhists are to be decided according to Chinese customary law, and in the absence of any definite authority as to Chinese customary law according to justice, equity, and good conscience.

In the absence of any evidence as to customary law in China, a Chinese Buddhist widow is entitled to one third share in her deceased husband's estate.

Ma Thein Shin *vs.* Ah Shein, 7, B. L. T. 246 followed.

A sale by a Chinese Buddhist mother as guardian of her minor children's estate is valid only to the extent of her interest in the estate.

JUDGMENT.

TWOMEY, C. J.—Hoke Kun who was the owner of the piece of land (measuring about five acres) in dispute died in 1903 leaving a widow Ma Si the first defendant appellant and three children who are still minors. On the 9th July 1910, Ma Si executed a conveyance of the land to her brothers-in-law, Hoke Shaung and Hoke Shin, brothers of the deceased Hoke Kun, the consideration stated in the document being a debt of Rs. 4000/- contracted by Ma Si jointly with her late husband Hoke Kun together with interest on that debt. Subsequently on the 29th July 1910 Hoke Shaung applied for letters of administration to the estate of his brother Hoke Kun, and in the schedule attached to that application he showed the garden land in suit as the property of the deceased Hoke Kun. The widow Ma Si consented to the application, and it was granted. When Hoke Shaung as administrator applied in September 1910 for permission to sell the property the widow Ma Si filed a petition consenting to the sale and the court granted permission. Hoke Shaung however did not sell the land until 1st July 1916 when he sold it, as administrator to Swe Ya the third defendant appellant. Hoke Shin who was the joint purchaser of the land under Ma Si's conveyance of the 5th July 1910 had died in 1912, before the conveyance to Swe Ya.

This suit was brought in November 1916 by Hoke Hu, another brother of Hoke Shaung, Hoke Shin and Hoke Kun. He sued the purchaser of 1st July 1916, Swe Ya, joining as defendants Ma Si (the widow of Hoke Kun), Hoke Shaung (the administrator of Hoke Kun's estate)' and the other heirs of Hoke Shin. He claimed a share of the garden land as being one of the heirs of Hoke Shin who had bought the land jointly with Hoke Shaung in 1910 from Ma Si. The district court found that the parties are Chinese Buddhists, that the questions of inheritance arising in the case should be decided in accordance with the customary law of China, but in the absence of any definite authority as to the share of a widow under Chinese customary law, the learned judge following the ruling of this court in Ma Thein Shin *vs.* Ah Shin (1) applied the rule of justice, equity, and good conscience, and decided that Ma Si as widow was entitled to one third share of her deceased husband Hoke Kun's estate. He also held that the parents brothers and sisters of Hoke Shin (who died childless) should share equally in Hoke Shin's estate, and as there were eleven shares including the plaintiff, the plaintiff was awarded one eleventh of Hoke Shin's estate. The judge further held that the transfer made in 1910 by Ma Si to Hoke Shaung and Hoke Shin was valid only to the extent of her one third share in the property of Hoke Kun, and to that extent only, the transfer should prevail against the subsequent transfer by Hoke Shaung as administrator in 1916 to Swe ya. A decree was therefore granted in favour of the plaintiff for one thirtythird share of the garden land in suit. This was clearly a clerical error for

(1) 7, B. L. T. 246.

one sixty-sixth, the judge having held that the plaintiff was entitled only to one-eleventh of the joint purchaser Hoke Shin's half of Ma Si's one third share in the property.

On appeal to the divisional court this decree was modified by allowing the plaintiff one twenty-second instead of one sixty-sixth of the property in dispute. The learned divisional judge considering that Ma Si must be held to have transferred the whole of the garden, *i. e.* not only her own one third share, but also the two thirds share belonging to her minor children. He relied on the Madras case of T. V. Esup *vs.* Kotusseri (2) according to which an unauthorized sale of a Mahomedan minor's property by the *de facto* guardian is not necessarily void, but is only voidable by the minor after he attains his majority.

The appellants in the divisional court were Ma Si (widow of Hoke Kun), Hoke Shaung (the administrator), Swe Ya (the purchaser from the administrator), and Ma Ya, one of the heirs of Hoke Shin. The same parties appeal jointly to this court under section 30 of the Lower Burma Courts Act. The only ground of appeal is that the divisional court ought to have held the transfer of 1910 valid only to the extent of Ma Si's own share *viz.* one third, and therefore that the plaintiff was entitled only to one eleventh of one third of Hoke Shins half share *i. e* one sixty-sixth of the whole garden. In other words the appellants are in the curious position of asking this court to restore the decree of the district court, although they appealed against that decree to the divisional court.

Having regard to the memorandum of appeal and the course of the arguments in this court it is unnecessary for us to deal with several contentious matters which the lower courts have considered and decided. We may therefore accept for the purposes of this appeal the lower court's decision (1) that Ma Si was entitled to one third share of her husband Hoke Kun's property, (2) that the conveyance of the property by Ma Ma Si to Hoke Shaung and Hoke Shin in 1910 was a genuine transaction, (3) that this grant was unaffected by the subsequent grant of letters of administration to Hoke Shaung and by Hoke Shaung's subsequent sale of the whole property to Swe Ya, and (4) that the plaintiff is entitled to an eleventh share in the estate of his brother Hoke Shin. We have to deal only with the question whether the sale of 1910 by Ma Si to her two brothers-in-law was valid only to the extent of Ma Si's third share in the property sold, as held by the district judge, or whether, as the divisional judge held, that sale was valid as to the whole of the property.

Ma Si's minor children were not represented in the suit or in the appellate court, and it is incumbent on the court to see as far as possible that their interests are not adversely affected by the decision in this case. The general rule of law applicable to persons other than Hindus and Mahomedans does not permit guardians ex-

(2) 12, M. L. T. 147.

cept those appointed by the court, or those having power given to them by the instrument appointing them, to sell or charge the immoveable property of their wards. See Trevelyan's Law relating to Minors (5th edition) page 167. The case cited by the learned divisional judge was a case in which the parties were Mahomedans. The decision in that case recognized that according to Mahomedan law the *de facto* guardian can alienate his ward's property in case of urgent and imperative necessity where it is for the benefit of the minors. But this exceptional provision cannot be applied in the present case where the parties are Chinese Buddhists. Moreover, it may be noted that there is no proof in the present case that the sale by Ma Si to her brothers-in-law was effected for urgent and imperative necessity or that it was for the benefit of the minors. Ma Si herself in her written statement in this case stated that the conveyance was executed without consideration and *benami* though she admitted at a subsequent stage of the case that there was consideration. I would therefore hold that the decision of the district court on this point was correct, *viz* that the conveyance of 1910 was valid only to the extent of Ma Si's own one-third share, and therefore that the plaintiff respondent as one of the eleven heirs of the joint purchaser Hoke Shin is entitled only to one sixty-sixth of the property in dispute. I would set aside the decree of the divisional court and restore that of the district court substituting however the correct fraction one sixty-sixth for one thirty-third which was entered by mistake in the judgment and decree of the district court.

Seeing that the appellants are merely restored to the position in which they were placed by the district court's decree against which they appealed to the divisional court, I do not think that they should get their costs in either the divisional court or in this court.

ROBINSON, J.—I concur.

IN THE COURT OF THE JUDICIAL COMMISSIONER OF UPPER BURMA.

CIVIL REVISION No. 162 B OF 1918.

MAUNG GAW YA .. .. .. APPLICANT.

vs.

MAUNG TALOK and others .. .. RESPONDENT.

Before B. H. Heald, Esq. Add. J. C.

For applicant—Mr. Mukherji.
For respondents—Mr. Mitter.

23rd January, 1919.

Usufructuary mortgage—Redemption—Mortgagee's right to growings crops.

A usufructuary mortgagee or his tenant in Burma has a right to the crops growing on the land at the time of redemption, and to free ingress and egress to gather and carry them if the crops were sown by the mortgagee or his tenant without notice of the intended redemption, but the mortgagee, or the tenants if parties to the suit on the mortgage, must apply for the right to the crops to be expressly reserved in the decree.

JUDGMENT.

HEALD, A. J. C.—It is clear that the fundamental question in controversy between the parties is "who was entitled to crops which were growing on the mortgaged land at the time when the mortgage was redeemed."

It is ordinarily recognized as contrary to common justice to allow a man to "reap where he has not sown, and gather what he has not strewed," or generally to enjoy the fruits of another man's lawful labour. This principle is expressly recognized in sections 51 and 108 of the Transfer of Property Act, which provides that where crops were going on land when a lease of uncertain duration is determined otherwise than by the fault of the lessee, or where a person who believed himself to be owner, is ousted from possession by a person who establishes a better title, the person who planted the crops, and is ousted from the land is entitled to the crops and is entitled also to free ingress and egress to gather them, annual crops being considered not as part of immoveable property, but as ordinarily belonging to the tenant who has grown them. This right to crops, which is known in English law as the right to emblements, is recognized in English law on the termination of the tenure of a tenant for life, or for another's life, and on the termination of a tenancy at will otherwise than by the fault of the tenant, and in certain other cases, but it is not, I understand, recognized in the case of mortgages because in an English mortgage, the mortgagor theoretically conveys away his entire legal estate, and although be ordinarily remains in possession, he is in the absence of any covenant to the contrary supposed to be liable to be ejected at any moment without notice, and without any claim to rent which may be due, or to crops which may be growing on the land at the time when he is ejected. He has in theory conveyed away all his rights, title and interest and has nothing left but a bare equity of redemption, that is an equitable right to have the estate reconveyed to him on payment of the mortgage debt. The Transfer of Property Act is mainly based on English law, and the fact that the right to emblements is not recognized in English law in respect of mortgages, while it is recognized in respect of leases of uncertain duration which are determined otherwise than by the fault of the lessee, and in respect of persons who under certain circumstances plant crops believing themselves to be owners, but are evicted because the land turns out to be long to somebody else, probably accounts for the recognition of the right in sections 51 and 108 of the Act, and its non-recognition in respect of mortgages. But although there is no recognition of the right to crops in the Transfer of Property Act so far as the redemp-

tion of mortgages is concerned, there is, so far as I know nothing in that or in any other law which prevents its application in cases where such application is in accordance with justice, equity, and good conscience, and prima facie, a principle which is recognized as equitable in the case of the determination of a lease of uncertain duration would seem to be equally equitable in the case of a usufructuary mortgage which is similarly of uncertain duration. If crops could be regarded as "separable accessions" coming under the provisions of section 63 of the Transfer of Property Act there would be no difficulty, but they have never been so regarded, and it would seem that just as a right to compensation for improvements made by a mortgagee has been recognized in India in spite of the fact that the Transfer of Property Act makes no express provision for such compensation, so a mortgagee's right to crops might be recognized in spite of the fact that it not recognized in England for technical reasons which do not apply to the kinds of mortgages which are usual in India.

The case law on the subject is surprisingly meagre. There are two leading cases, which are always cited by the commentators when the question of the right to growing crops on the determination of a mortgage is considered, namely the old Bombay case of the Land Mortgage Bank of India *vs.* Vishnu Govind Patankar (1) which was decided over forty years ago, before the Transfer of Property Act was enacted, and the Madras case of Ramalinga *vs.* Samiappa (2) which was decided thirty years ago.

In the Bombay case the mortgagee of certain lands brought them to sale in execution of a mortgage decree against his mortgagor who was in possession and having purchased them himself, was held entitled as against a creditor of the mortgagor to the share of produce due as rent by the mortgagor's tenants whose crops were growing on the land at the time of the sale. I do not think that that decision throws much light on the question of the ownership of the crops on the determination of the mortgage, since under the ordinary rule the crops would belong to the tenants who would be bound to pay the share due as rent to the owner that is, to the mortgagee who had purchased the land from the original landlord, so that there would be nothing left for the mortgagor which his creditor could possibly attach. In the Madras case it was held that a mortgagee in possession (not a usufructuary mortgagee) who while there were crops planted by himself growing on the land, brought the mortgaged property to sale under a mortgage decree against his mortgagor could not recover from the auction purchaser the value of the crops, because what he had brought to sale was not only the interest of the mortgagor, but also his own interest as mortgagee and because at the time of the sale the right to the standing crops was not reserved. It is clear that in such a case the mortgagee could have little if any claim to a right to emblements since his tenure was determined by his own act, and I do not think that that case can be taken as authority for the proposition that crops growing on land on the determination of a

(1) 2, B. 670. (2) 13, M. 15.

mortgage do not ordinarily belong to the person who planted them and whose lawful tenure of the lands came to an end by reason of the determination of the mortgage.

In the Allahabad case of Deo Dat *vs.* Ram Autar (3) which was a case in which lands were mortgaged by conditional sale and a pre-emptor was held entitled to recover them from the mortgagee, the lower courts entered in the decree a condition that the preemptor should not be entitled to possession until the mortgagee had gathered the crops which he had sown, but the High Court applying to the case the rule of section 51 of the Transfer of Property Act, held that the decree should not have postponed the preemptor's right to possession, but should have provided that the mortgagee was entitled as against the preemptor to the crops sown by him and to free ingress and egress to gather and carry them. That case is however no clear authority for the proposition that the mortgagee has a right to crops as against a redeeming mortgagor.

There is a more recent Madras case K. E. Narayanan *vs.* M. K. Krishna Patter (4) in which it was held that where in a suit to redeem a "Kanom" mortgage the decree directs the mortgagor to deposit the decretal amount within six months from the date of the decree, the mortgagee thus directed to be redeemed must be deemed to hold the mortgaged property under a lease of uncertain duration and is therefore entitled under the provisions of section 108 (1) of the Transfer of property Act to cut and carry away the crops grown by him before the decretal amount was deposited. The decision proceeds on the special circumstances of "Kanom" mortgages which in addition to being mortgages are said to partake of the nature of leases, and therefore it could not be generally applied.

In the Lower Burma case of Aung Baw *vs.* Tun Aung (5) a mortgagor got a decree for redemption and was put into possesion of the mortgaged property under the provisions of section 263 of the code of civil procedure 1882 while there were crops grown by the mortgagee standing on the land. The mortgagee subsequently applied to the court for permission to reap the crops which he had sown, and the court held that he ought to have applied for his right to the crops to be reserved before the decree was passed, and that because he had failed to do so, he, being bound by the decree which as passed did not reserve his right to the crops, had lost any right he might have had in respect of the crops. It might reasonably be inferred from this judgment that a mortgagee whose crops might be growing on the mortgaged land at the time of redemption could not assert any right to those crops unless that right was established in the redemption suit, and recognized in the decree, but it cannot be inferred that the mortgagee, or the mortgagee's tenant who might not be bound by the decree, has no right to the crops.

(3) 8, A. 502.
(4) 22, I. C. 515.
(5) 3, L. B. R. 129.

There is a case in this court Nyan Gyi *vs.* Kyaw Nya (6) in which it was held that the tenant of a usufructuary mortgagee whose mortgage had been redeemed after the tenancy agreement had been made but before the tenant had planted any crops, was not entitled by virtue of his tenancy agreement to keep the mortgagor out of possession, and was liable in damages for having done so. No question of any right to crops arose in that case, but the question whether it is equitable that the mortgagor should be permitted to oust the tenant at any time of the year without letting him gather his crops was considered and was decided in the affirmative, and therefore it is necessary to consider that ruling. The grounds of the decision were that a lessor cannot transfer a larger estate than he himself has, and that, if the lessor's interest is dependent on any contingency, the lessee's interest cannot enure beyond the termination of his lessor's interest by the happening of that contingency. The learned judicial commissioner said practically what was said in the Bombay case cited above, namely that the contingency of redemption is one which the mortgagee must reckon with, and provide against, but it seems to me that the only way in which the mortgagee in such a case could, in the absence of an express covenant about the crops which is unusual in this country, safeguard himself against loss would be by refraining from cultivating the land himself, or letting it out to a tenant, since if he did either, he would run the risk of losing either the crops or their value. The result of this view of the law would, it seems to me, be either that no reasonably cautious mortgagee would cultivate mortgaged lands, or that if he did cultivate them or have them cultivated, the mortgagor would wait until the crops were ready for harvest, and then redeem, getting the crops for nothing, and causing wrongful loss to either the mortgagee or the tenant, to say nothing of the litigation between the mortgagee and his tenant which would be almost certain to result. It is said that the mortgagor in an English mortgage takes that risk without inconvenience, but I do not think that the facts would warrant that assertion. It is true that in theory an English mortgagor is supposed to take the risk of losing any crops he may plant on the land, but in fact he takes practically no such risk, because the theory has been modified both by practice and by statute. The Judicature Act of 1873 for instance, recognized the right of a mortgagor in possession to take rents and profits of the mortgaged land, unless he had notice of the mortgagee's intention to take possession of the property or to enter into receipt of the rents and profits, and the Conveyancing and Law of Property Act of 1881 gave to the person in possession, whether mortgagor or mortgagee, power under certain conditions, and in the absence of a convenant to the contrary to make leases binding on the other party to the mortgage. Again the Tenants Compensation Act of 1890, gave an occupier of mortgaged lands a right to recorder from a mortgagee taking possession compensation in respect of crops, so that although the occupier might lose the actual crops, he did not lose the entire fruits of his labour. Further the conditions of an English

(6) I. U. B. R. 1910-13, 14.

mortgage are entirely different from those of the ordinary usufructuary mortgage in Burma. In an English mortgage the date of redemption is fixed, but in the ordinary mortgage in this country no date for redemption is fixed, and the mortgage runs on indefintely. As the learned judicial commissioner said in Nyan Gyi *vs.* Kyaw Nya (6) "the ordinary usufructuary mortgagee of Upper Burma takes the profits towards interest, and has no accounts to render. The contract is that he restores the land on payment of the principal mortgage money. A mortgage of this kind, kept alive by further advances, often lasts much longer them sixty years, and the mortgaged property is handed down by inheritance in the family of the mortgagee. The mortgagee therefore, enjoys all the advantages of an owner, except that he must allow redemption if the mortgagor pays the mortgage money within limitation. Where he has the land he deals with it practically in the same way as he would deal with land of his own, and he very frequently leases it to tenants." The learned judicial commissioner also want on to say "my experience in this court affords some indication of a custom, at least in parts, by which land is redeemed only at certain seasons of the year so as not to deprive the tenant or mortgagee of his crops," and I may says that my experience is the same, and that I have within the last week dealt with a somewhat similar case in which that custom was admitted by both the parties. All this seems to me to show that the claim of the mortgagee or his tenant to reap the crop which he has sown has been recognized both judicially and generally as being in accordance with justice, equity, and good conscience, and that any argument based on the inconvenience of the contrary view, that the mortgagee or his tenant must be held to take the risk of losing his crops, is not met by the ascertion that under an English mortgage the mortgagor without inconvenience takes exactly the same risks. The unfairness and inconvenience of the view that the mortgagor on redemption becomes owner of any crops which may be growing on the land at that time was expressly recognized in the Lower Burma case of Maung Mo Gale *vs.* Ma Sa U (7) where the learned judge directed that the date fixed for redemption should in the case of cultivated land be so fixed hat the partly who has sown the crop shall have the benefit of it and in the Madras case Ramalinga *vs.* Sami Appa (2) where the court said "it was open to the mortgagee to have asked the court to postpone the sale so as to enable him to take the standing crop."

Such devices as those suggested in those two cases for safeguarding interests which the courts recognize as equitable are unsatisfactory, and, as the experience of the present case shows, inadequate, and I do not think that the view of the law which necessitates them is sound. It is of course true as a general rule that when an interest is determined, all rights arising in respect of that interest ordinarily come to an end, but what may be called the "residual rights" recognized in setions 51 and 108 of the Transfer of Property Act are

(7) 1, L. B. R. 186.

equitable exceptions to that rule and if a similar right is recognized in respect of usufructuary mortgages which are usual in this country, and are in my opinion exactly analogous to leases of uncertain duration, such devices become unnecessary.

I have already said, that so far as I am aware there is no enactment in force in India which prevents such recognition, and on grounds of justice, equity, and good conscience as well as of practical convenience, I consider it expedient that the right of the ordinary usufructuary mortgagee in his country or his tenants to the crops growing on the land at the time of redemption should be recognized provided, of course, that such crops were sown or planted before the person who grew them had notice of the intended redumption. I hold therefore that in the present case the tenant Gaw Ya was entitled as against the mortgagors who redeemed, that is against Maung Talok and Ma Kaing to all the crops planted or sown by him on the land which were growing thereon at the time of redemption, and to free ingress and egress to gather and carry them.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 17 OF 1919.

MAUNG KWAI .. .. .. APPELLANT.

YEO CHOO YONE .. .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt. C. J. and Robinson, J.

For appellant—Mr. Rahman.
For respondent—Mr. Ah Yain.

19th November, 1919.

Chinese Buddhist Law—Testamentary power.

The law applicable to succession amongst Chinese Buddhists is Chinese Customary Law, which allows disposition of property by will.

Hong Ku *vs.* Ma Thin, S. J. 135 and Fone Lan *ve,* Ma Gyi 2 L. B. R. 95 followed.

Alabaster's Notes and Commentaries on Chinese Criminal Law, Jernigan's China in Law and Commerce, and Sir George Staunton's traslation of Ta Tsin Leu Lee referred to.

JUDGMENT.

TWOMEY, C. J. AND ROBINSON, J.—The only question in this appeal is whether a Chinese Buddhist can make a will. The point was really settled in Hong Ku and one *vs.* Ma Thin (1) in which

(1) S. J. 135.

was set out the opinion of the Supreme Court at Hong Kong to the effect that a Chinaman can, under the laws of China, make a will subject to a vague control by the family or clan. Appendix VI, Lower Burma Courts Manual Vol: II contains a memorandum on the case of Wills among Chinese. The author was His Brittanic Majesty's Consul General at Canton and he records that, while the Chinese statutes took no notice of wills, the Chinese constantly resort to this mode of distributing their property and the courts take notice of such dispositions. In Alabaster's Notes and Commentaries on Chinese Criminal Law at page 580 a case decided by a Chinese magistrate is given in which a will was set aside because female heirs had been preferred to male heirs.

In Jernigan's "China in Law and Commerce" page 144 it is mentioned that it is not unusual for parents to leave written instructions as to their wishes for the distribution of their property. There is another passage on page 133 on which reliance has been placed by the appellant's learned counsel. It refers to the 78th Section of the Chinese Criminal Code as almost entirely restricting the disposal of land by will. We have referred to the trarslation of the Ta Tsing Len Lee by Sir George Staunton (edition of 1810) and section 78 contains nothing to support Jernigan's dictum. Moreover, Jernigan was probably referring to ancestral land which must in the ordinary course descend to male heirs and could not therefore be devised to strangers by will. It is sufficiently clear that the Chinese customary law contemplates the disposition of property by will, and as held in Fone Lan *vs.* Ma Gyi (2) the law of succession applicable to Chinese Buddhists is the customary law. The appeal is dismissed with costs; advocate's fee three gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION No. 39 OF 1919.

M. KHEMKA .. .. APPLICANT.

vs.

M. BOGLA and one .. .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Robinson, J.

For applicant—Mr. Das.

2nd December, 1919.

Civil Procedure Code (Act V of 1908) s.s. 10, 11 and 13, stay of suit, res judicata.. Court having jurisdiction to grant the relief claimed, court competent to try the subsequent suit, court of competent jurisdiction.

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(2) 2, L. B. R. 95.

The words "court having jurisdiction to grant the relief claimed" in section 10 of the code of civil procedure have a wider application than the words, "court competent to try the subsequent suit" in section 11, and "court of competent jurisdiction" in section 13. The words, "court competent to try the subsequent suit" in section 11, and "court of competent jurisdiction" in section 13 apply only to courts having both pecuniary and territorial jurisdiction.

The rule as to stay of suit though based on principles similar to those underlying the doctrine of *res judicata* is not part of the rule of *res judicata*.

JUDGMENT.

TWOMEY, C. J. AND ROBINSON, J.—The main ground of this application is that in our decision in Civil Revision No. 29 of 1919 (1) the construction put upon the words "any other court in British India having jurisdiction to grant the relief claimed" in section 10 of the civil procedure code is erroneous. We held that for the purposes of section 10 the Calcutta High Court has such jurisdiction to grant the relief claimed in the later Moulmein suit, in the sense that the Calcutta High Court has unlimited jurisdiction as regards the kind of suit or its pecuniary value, although it has not jurisdiction to grant the particular relief claimed in the Moulmein suit, namely, a mortgage decree in respect of immoveable property in Moulmein. It is argued that we should construe the words referred to in the same sense as the words "a court competent to try such subsequent suit" in the next following section 11 and as the words "a court of competent jurisdiction" in section 13. The learned counsel for the applicant has called our attention to authorities from which it clearly appears that the rule of *res judicata* is applicable only when the two courts in question have concurrent jurisdiction not only as regards pecuniary limits and the kind of suit, but also territorially. But as pointed out in Balkishan *vs.* Kishan Lal (2) the rule as to stay of a suit "forms no part of the rule of *res judicata* though the reason upon which it is based is in some respect similar in principle to the doctrine of *res judicata.*" The difference of wording in section 10 on the one hand and sections 11 and 13 on the other is sufficient to indicate that a wider application was contemplated for the former section and this view is strongly supported by the change effected in the wording of section 10 by the new Code of 1908 as already mentioned in our orders in the revision case. Mr. Das can cite no authority in support of his contention that as regards jurisdiction we should apply the same construction to section 10 as to sections 11 and 13. He urges that though the expressions used are different it could never have been intended to stay a suit during the pendency of an earlier suit unless where the decision in the earlier suit would operate as *res judicata* in the later. It is not necessary for us to consider how for the decision in the Calcutta suit will operate as *res judicata* in the Moulmein suit. For we think it plain that the stay of a suit during

(1) 12, B. L. T. 203. (2) 11, A. 148.

the pendency of another connected suit between the same party may be highly desirable apart from the question whether the decision of the earlier suit will operate as *res judicata* or not. It is obviously inconvenient that parties should conduct parallel litigation in two courts relating to the same issue and probably requiring the same witnesses and documents to be porduced and the inconvenience is not lessened when the two courts are situated far apart from one another as in the present case.

The above remarks relate chiefly to paragraph 2 of the application but they dispose also of the first paragraph. We did not overlook S. P. S. Chokappa Chetty *vs.* S. P. S. R. M. Raman Chetty (3). At the hearing our attention was called to that ruling on section 13 of the Civil Procedure Code and it was duly considered.

The only remaining ground is that the parties in the two suits are not the same. The parties to the Moulmein suit are also arrayed against one another as parties in the Calcutta suit. The mere fact that the minor Madan Gopal was added as a co-defendent in the Calcutta Suit does not in our opinion prevent the application of section 10 as between the parties in the Calcutta suit who are parties also in the Moulmein suit. The application is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 39 OF 1918.

M. M. K. K. CHETTY .. .. .. APPELLANT.

vs.

PALANIAPPA CHETTY and others .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Robinson, J.

For appellant—Mr. Das.
For respondent—Mr. Burjorji and Mr. Aiyer.

6th January, 1920.

Thavanai account—Limitation Act (IX of 1908) First schedule articles 57, 59 and 60, suit for money lent, suit for money deposited under an agreement that it shall be payable on demand—meaning of "on demand" in articles 59 and 60, popular and legal meaning.

A *thavanai* account is a fixed deposit account. Money deposited on *thavanai* account is not repayable until the end of the period of deposit. If it is not with drawn at the end of the period of deposit, it remains on deposit in current account, and is repayable *"on demand"* in the legal sense of the term *i e.* forthwith and without demand.

Article 57 of the Limitation Act applies to suits for money deposited on current account.

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(3) 11, B. L. T. 194; 9 L B. R. 103.

Articles 57 and 59 of the Limitation Act seem to overlap. Both apply to suits for money payable "*on demand*" in the legal sense of the term *i. e.* forthwith and without demand, the former being applicable to cases where there is no special agreement to repay forthwith, and the latter to cases where there is a special agreement to repay forthwith.

Article 60 of the Limitation Act applies to cases of money deposited under an agreement that it shall be repayable "*on demand*" in the popular sense of the term *i. e.* after demand is made.

V. Balakrishnudu *vs.* Narayanasawmy 37, M. 175 explained and followed.

A *thavanai* account being a fixed deposit account, a suit to recover money deposited on a *thavaani* account is governed by article 60 of the first schedule to the Limitation Act, and must be brought within three years from the time when the demand is made.

Annamalai Chetty *vs.* M. L. R. M. Lutchman Chetty 10, B. L. T. 53; 8, L. B. R. 526 overruled.

JUDGMENT.

TWOMEY, C. J.—This suit was brought by M. M. K. Kottayan Chetty against the A. V. P. P. Chetty firm of Pa-an for the recovery of Rs. 33,439-4-0 with costs and interest to date. The plaintiff's case as stated in his first plaint dated the 1st May 1911 was that he lent defendant firm Rs. 27,305-7-0 on 2nd May, 1908, repayable with interest at the prevailing chetties' rate of interest after two months. But in a subsequent amended plaint dated the 13th November, 1912, his case was stated differently. He then gave particulars of various deposits beginning on the 1st November, 1904, and ending on the 4th September, 1906, all bearing interest which was to be compounded after every two months and the total of these deposits amounted on the 4th September, 1906, to Rs. 16,206/. He made a separate deposit of Rs. 14,000/- on 1st May, 1906, on the same terms, and after withdrawing Rs. 7,500/- of these deposits there was a balance of Rs. 6,958-12-0 in his favour on the 3rd September, 1906, which sum was credited to his account. Subsequently there was a settlement of account on 2nd May, 1907. Particulars of this settlement are not stated; but it is alleged that there was a further settlement a year later on the 2nd May, 1908, when Rs. 27,305-3-0 was found to be due to him. The difference between Rs. 27,305-3-0 and Rs. 33,439-4-0 Rs. 6,134-1-0 represents interest for three years from the 2nd May, 1908, to the date of the suit. It is not explained how this sum of Rs. 6,134-1-0 is calculated. It works out to ten annas per cent per mensem for the whole period of three years.

The district court held that the suit was barred by limitation. The learned judge construed paragraph 8 of the plaint as meaning that the last renewal of the two monthly *thavanai* loan accounts was on

3rd September, 1906, and referring to Annamalai Chetty and others *vs.* M. L. R. M. Lutchman Chetty and others (1) he treated the period of limitation as running from that date under article 57, Limitation Act.

The plaintiff's case is that the *thavanai* arrangement continued till the date of settlement on 2nd May, 1907, and even after that date, and that limitation did not begin to run against him even when the *thavanai* arrangement had ceased because the case is governed by article 60 and no demand was made for repayment until within about two years of the suit. It is urged for the plaintiff that assuming the *thavanai* arrangement to have ceased on 2nd May, 1907, or even on the 3rd September, 1906, the money was still money deposited by a customer in the hands of his banker as contemplated in article 60.

It is evident from the statements of the plaintiff's own witnesses that there was no *thavanai* contract after May, 1907. A. V. P. A. R. Arunachellam Chetty the plaintiff's agent stated that after the settlement the balances were left with the A. V. P. P. Firm "On the same *thavanai* account." But there is nothing to support this statement and the proved facts are all against it. If on the expiry of a *thavanai* account the depositor does not withdraw his money, the depositee would write a letter to the depositor telling him the money had been taken on a further *thavanai* account (evidence of the plaintiff's witness, Meyappa Chetty). It is admitted that no such letter was written to the plaintiff in 1907. Arunachellam states that on the expiry of the *thavanai* period he returned the receipts embodying the contract. He asked the third defendant for a fresh receipt but alleges that he was content with the reply that it was not necessary. He trusted the third defendant as he was his cousin. These allegations are not credible. A ledger, exhibit G, of the M. M. K. plaintiff's firm was produced showing *thavanai* account entries from the 4th September, 1906, to 2nd May, 1908, but no cash book of the firm was produced and the ledger entries cannot be held to be genuine. Defendants' case is that all the money was transferred in April, 1907, under plaintiff's instructions to another firm, C. V. C. T. and this is supported by the defendants' books. These books do not support the plaintiff's claim that the money was held by the defendant firm as *thavanai* loan as late as May, 1907. It is noteworthy that the rate of interest averaging ten annas per cent per mensem claimed by the plaintiff for the three years preceding the suit is very much less than the rates, varying from Rs. 1-9-0 to Rs. 2-11-0 for *thavanai* loans as entered in exhibit G.

The plaintiff cannot be held to have proved that the *thavanai* loan renewals continued even up to May, 1907. We will assume however that the money was held by the defendant on *thavanai* terms for the plaintiff up to the 2nd May, 1907. As no fresh *thavanai* contract was made after that date the money would be held by the defendant on the ordinary terms applicable to a customer's deposit in the hands of a native banker. In the absence of any special agreement, such as an agreement for a fixed deposit the relation between a banker and

(1) 10, B. L. T. 53; 8, L. B. R. 526.

a customer who deposits money with him is the ordinary relation of debtor and creditor and the money is repayable "on demand," in the legal sense, *i. e.*, it is payable at once without demand. Article 60 applies only in cases where an express demand is necessary to render the money repayable. The history of article 60 is fully discussed in Sir John Wallis's judgment in V. Balakrishnudu *vs.* Narayanasawmy Chetty (2) where it is shown that article 60 in its present shape was enacted to provide a special starting point for limitation in the case of loans made where repayment of the money is contemplated only after express demand. In such cases article 60 provides that time shall run only from the date when the demand is actually made. It is evident therefore that the words "on demand" in article 60 are not used in the legal sense of "at once, without demand" but in the popular sense of "on express demand being made." One of us joined in the Bench ruling of this court in Annamalai Chetty's case (1) above referred to in which it was held that the words "on demand" in article 60 are used in the legal sense (i. e., at once or forthwith.) But after the fuller consideration given to the subject in the present case we are constrained to hold that the view taken by the Bench in that case is not correct and that "on demand" in article 60 must be read as "on express demand being made." According to the view taken in Annamalai Chetty's case (1) limitation would begin to run against a lender even before his right of action accrues and the obvious injustice of such an arrangement was pointed out by Sir Richard Garth, C. J. in Rameshwar Mandal *vs.* Ram Chand Roy and another (3).

Article 57 applies to ordinary loans where no special agreement having been made as to the time of repayment, the money is repayable at once i. e. "on demand" in the legal sense and a suit can be filed without any demand being made.

Article 59 applies to cases where there is a special agreement that the money shall be repayable at once i. e. "on demand" in the legal sense. Article 59 appears to be superfluous as the cases which come under it are already provided for in article 57.

Article 60 applies to cases where a demand is necessary to make the money repayable and before a suit can be filed. The word "deposit" in this article is used in the popular sense of depositing money in a bank whether in a current account or on a fixed deposit. This is shown by the words inserted in the article by the Limitation Act of 1908, which gave effect to the view of the learned judges in Ishur Chunder Bahduri *vs.* Jibun Kumari (4). But in applying article 60 to money of a customer in the hands of his banker it is essential to give full force to the words "so payable" at the end of the article. Thus the article is not concerned with *all* money so deposited, but only with a certain class of deposit, viz, money deposited under an agreement that it shall be payable on demand, the words "on demand" here having as explained above the popular meaning

(2) 37, M. 175.
(3) 10, C. 1033.
(4) 16, C. 25.

of "on express demand being made" and not the ordinary legal meaning of "forthwith" or "without demand."

It is unfortunate that the term "on demand" should be used in one sense (the legal sense of "at once" or "without demand" or "forthwith") in article 59, and should have another meaning (the popular meaning of "on express demand being made") in article 60. But it is impossible otherwise to construe article 60 in a reasonable manner.

Money on current deposit with a Chetty banker is payable at once. No demand is necessary to render it payable. A right of action accrues at once without previous demand. Consequently article 60 does not apply to such deposits.

For these reasons I think it must be held that the deposit in this case, which presumably became an ordinary current account or in banker's language "a current deposit" from the date in May, 1907, when the last *thavanai* period expired, then became payable forthwith without demand (*i. e.* "on demand" in the legel sense) and the article of the Limitation Act schedule to be applied to such a case is article 57. The period of limitation expired in May 1910 at latest and the suit was not filed till May 1911.

The district court has therefore in my opinion decided rightly, though on different grounds, that the suit is barred by limitation and I would dismiss this appeal with costs.

ROBINSON, J.—I agree that in this case the monies, which were originally deposited on *thavanai* terms as to interest, from the 2nd May 1907, became a mere current account deposit repayable forthwith without any demand for repayment having to be first made.

As to limitation the articles to be considered are articles 57, 59 and 60. The history of these articles is given in Balakrishnudu *vs.* Narayanasawmy Chetty (1) and with the views therein expressed as to them I entirely agree. Articles 57 and 59 appear to me to overlap. Both deal with ordinary loans repayable forthwith from the date on which the loan is made, the former being applicable where there is no special agreement as to repayment, and the latter where there is a special agreement that they shall be repayable forthwith without the necessity of making any prior demand.

The expression "payable on demand" in article 59 is used in its legal signification, that is, "at once" or "forthwith".

In article 60 the same expression is unfortunately used and has led to some confusion. The words in this article are, in my opinion, used in their popular sense. This is clear from the history of the article and the language of the column for the time from which the period begins to run. The injustice that might result from limitation running from a date prior to that on which a plaintiff could

(1) 37, M. 175.

sue to recover his money was obvious and it was to remedy this possible injustice that the legislature enacted a different starting point for limitation in the case of monies that were not recoverable until after demand for repayment had been made. This is the real point of difference between articles 59 and 60 to which emphasis must be accorded. I agree therefore that the decision in Annamalay Chetty *vs.* Lutchman Chetty (2) cannot be supported on this point. There are authorities which would emphasize the different wording in these two articles in that the former refers to "money lent" and the latter to "money deposited" but with these I am unable tc agree. The expression "money deposited" has not I think any technical or legal meaning. The words are used in their popular sense as they are used commonly by bankers who speak of "current deposit accounts". It is settled law in England that the relation between a banker and his customer who pays money into his bank is the ordinary relation of debtor and creditor, Foley *vs.* Hill (3) and does not import anything more than a mere loan.

That the important point of distinction between articles 59 and 60 lies in the question whether the money is repayable forthwith, or, only after demand is made, was further emphasized in 1908 when words were added to article 60 and the important words in that addition are the words "so payable" that is, only payable after demand made.

In this case the monies were originally deposited on *thavanai* terms and it is not necessary to consider whether on the expiry of a term the money became repayable forthwith or whether a demand was necessary. The money still remained a deposit but the character of the deposit account repayable forthwith. In my opinion therefore article 57 applies and the suit is barred by limitation.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 228 OF 1918.

P. A. L. SOMASUNDRAM CHETTY ... APPELLANT.

vs.

SHWE BWA and others ... ... RESPONDENTS.

Before Mr. Justice Maung Kin.

For appellant—Mr. Doctor.
For respondent—Mr. Ba U.

9th June, 1919.

(2) 10, B. L. T. 53; 8, L. B. R. 526. (3) 2, H. L. C. 28.

Transfer of Property Act (IV of 1882). s. 54—sale of immoveable property, price promised or part paid and part promised—s. 55 (4) (b) rights of unpaid venetor.

The mere fact of non-payment of the purchase money does not render a sale of immoveable property invalid, or prevent the passing of the ownership to the purchaser.

The purchaser can notwithstanding non-payment of the purchase money maintain a suit for possession, and the only remedy of the unpaid vendor under section 55 (4) (b) of the Transfer of Property Act is a suit for the unpaid purchase money.

JUDGMENT.

MAUNG KIN, J.—P. A. L. (now L. S. M.) Chetty firm sued Maung Shwe Bwa, Maung Po Tok and Ko Tun Baw for possession of a one-third portion of holding No. 30, measuring about 56 acres and for partition. The admitted facts are: the land belonged to Po Sin alias Nanda, Mutu, and Panda. The plaintiff firm bought from Nanda his one-third interest in the land on the 9th June, 1915. These three owners had on the 22nd May 1912 mortgaged the land to Maung Shwe Bwa, and Maung Po Toke for Rs. 800/-. The latter (mortgagees) obtained a decree for interest due on the mortgage in Civil Regular No. 81 of 1915 and in execution of the decree a certain specified portion of the land, measuring 16 acres was sold, the buyer being Maung Tun Baw. This was in 1916. On the 5th May, 1918, Mutu and Panda conveyed the holding to their mortgagees, viz:, Maung Shwe Bwa and Maung Po Toke for the ostensible consideration of Rs. 1449/- supposed to be made up of the principal and the interest remaining due on the mortgage.

The defence was that the conveyance to the plaintiff was not good in law, because he had not subsequently obtained possession of the subject matter of the purchase and that Nanda had no right to sell his interest to the plaintiff firm before the property was divided and the share of each co-owner allocated On the pleadings there was no defence at all, unless it could be proved that the conveyance was not good in law.

The court of first instance dismissed the suit for reasons which are not good. The lower appellate court found that as the plaintiff firm had not paid the consideration for the conveyance, no title had passed to them. It is not raised on the pleadings that no consideration had passed. There is nothing in the judgment of the court of first instance touching that question. Nanda in giving evidence incidentally said that the consideration of Rs. 400/- had not been paid at the time the conveyance was executed and registered and that the plaintiff promised to pay the amount on his return to the village but had not so far fulfilled his promise and had not up to the date of giving evidence paid the consideration. Upon this evidence as corroborated by another witness, Maung Pyu, the learned judge of the lower court held that the conveyance was invalid. The learned judge was obviously wrong. The learned counsel for the respondents is not able to sup-

port him. In Baijnath Singh *vs* Paltu and others.(1) it was held following Shib Lal *vs.* Bhagwan Das (2), Umedmal Motiram *vs.* Davubin Dhondiba (3) and Sagaji *vs.* Namdev (4) that in a sale of immoveable property even non-payment of the purchase money does not prevent the the passing of the ownership of the purchased property from the vendor to the purchaser and that the purchaser can notwithstanding such non-payment maintain a suit for possession of the property and that the only remedy of the vendor is a suit for the recovery of the purchase-money. The defendants have not raised the plea that the mortgage of 22nd May 1912 is still subsisting and has not been extinguished. For these reasons, this appeal is allowed with costs throughout, and there will be a decree in favour of the plaintiff firm as prayed for in their plaint.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT MADRAS.

POOSATHURAI .. .. .. APPELLANT.

vs.

KANAPPA CHETTIAR and others .. RESPONDENTS.

Before Lord Shaw of Dunfermline, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

For appellant—Sir Erle Richards, K. C. and Mr. Dube.
For respondents—Mr. DeGruyther, K. C. and Mr. K. Brown.

18th November, 1919.

Contract Act (IX of 1872) s. 16. Undue influence.—Burden of proof.

In a suit to set aside a contract on the ground of undue influence, the plaintiff must prove not only that the other party was in a position to dominate his will, but also that he used that position to obtain an unfair advantage over him.

If however the position of influence is proved, and the transaction appears, on the face of it, or on the evidence, to be unconscionable subsection 3 of section 16 of the Contract Act applies, and the burden is on the defendant of proving that the contract was not induced by undue influence.

JUDGMENT.

LORD SHAW OF DUNFERMLINE.—This suit has been brought by the present appellant for the cancellation of a deed of sale executed by him on the 17th March 1906. Cancellation was decreed by the sub-

(1) 30, A. 125. (3) 2, B. 547.
(2) 11, A. 244. (4) 23, B. 525.

ordinate judge, and the decision was reversed by decree of the High Court of Judicature at Madras.

The real and only point at issue between the parties is whether the deed in question should be cancelled on the ground of undue influence. In the court of the subordinate judge this point did not clearly appear from the issues which were framed. But an examination of the proceedings and evidence shows that it is to an issue of this kind that the plaintiff was throughout groping. The High Court properly discerned that; and the learned counsel for the appellant properly presented the case from that point of view.

It is not necessary to speculate whether the provisions of the Indian Contract Act differ in any particulars from the doctrines of the English law upon the subject. For no such differences are suggested to have any bearing on the issue between these parties. The issue in the present suit is an issue of fact, and there does not appear to the Board to be any sufficient reason for doubting that the judgment arrived at in the High Court is sound.

The Indian Contract Act by section 14 provides that "consent is said to be free if it is not caused by.....undue influence as defined by section 16." By section 16 subsection 1 "the contract is said to be induced by undue influence where the relations existing between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other." Subsection 3 of the same section may also be referred to. It provides that "where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."

It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the law of India, or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue." It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

When the relation of influence, as above set forth, has been established, and the second thing is also made clear, namely, that the bargain is with the "influencer," and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the

transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent.

These general principles are mentioned because, if laid alongside of the facts of the present case, then it appears that one vital element —perhaps not sufficiently relied on in the court below, and yet essential to the plaintiff's case—is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue.

The subject of the sale, to mention only one particular, was not the two villages mentioned in the plaint, but the property in the villages burdened with usufructuary mortgages which did not expire for eighteen years. These mortgages amounted to Rs. 51,000/-. The crucial enquiry on the point of sufficiency of consideration accordingly was, what, on the date of the sale, was the *de presenti* value of the plaintiff's right of property, in these villages? Beyond a loose reference to a lakh of rupees, without any specification as to whether this referred to the present value or to deferred value, or to value of the property, the evidence is entirely silent. Nothing has been brought in argument before the Board to satisfy their Lordship's minds that the price of Rs. 6.000/-, even coupled with the demand for the wiping off of a debt of about Rs. 3,000/- incurred for litigation and for the honouring by the plaintiff of a promissory note executed by him for another Rs. 3,000/- was not a fair consideration for the transaction. Their Lordships think it unnecessary to enter into the further grounds stated by the learned judges of the High Court for their decision, although they express no disagreement with these grounds in themselves.

The true contradictor in the issue was the party to the transaction, the vendee. But the plaintiff endeavoured to strengthen the case for cancellation by convening also as defendants his two uncles, now, also, his fathers-in-law. Their lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. But they think it right to say that no proof has been given of any such conspiracy or agency in the present case.

When it is added that the consideration paid was in part actually defrayed to cover expenses incurred by the plaintiff on the occasion of his marriages to the two daughters of his uncles, the first and second defendants, and that these marriages took place, it would require fairly strong evidence to induce any court to give countenance to the suggestion that his uncles and fathers-in-law had conspired with the third defendant to subject the plaintiff to unconscionable loss. To this element weight is properly attached in the court below.

Their lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

RAGHUBAR DAYAL .. .. .. APPELLANT.

vs.

BANK OF UPPER INDIA, LTD. (in liquidation) .. RESPONDENT.

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

For appellant—Mr. De Gruyther, K. C. and Mr. Dube.
For respondent—Mr. Dunne, K. C. and Mr. O'Gorman.

31st January, 1919.

Indian Companies Act (VII of 1913) s. 153. Compromise with creditors—sanction by court—Date from which it takes effect.

When a compromise or arrangement between a company or its creditors has been agreed to by a majority representing three-fourths in value of the creditors or members, and has been sanctioned by the court, it becomes binding on all the creditors and members or liquidator as the case may be from the date on which it was made, and not from the date of sanction by the court.

JUDGMENT.

VISCOUNT HALDANE.—If this was a difficult case their lordships would take time before formulating their report; but the case appears to them to be one of no difficulty.

Section 153 of the Indian Companies Act provides that "where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on an application in a summary way of the company or of any creditor, or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting of the creditors, or of the members of the company, or class of members as the case may be, to be called, held, and conducted in such a manner as the court directs.

Then by the second part of the section: "If a majority in number representing three fourths in value of the creditors, or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or agreement shall, if sanctioned by the court, be binding on all the creditors, or the class of creditors, or on all members, or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, the liquidator and contributories of the company."

In this case the Bank of Upper India closed its doors. The appellant was a customer of the bank who had a fixed deposit with it,

which became repayable by the bank on November, 1914. Before that date, on October, 8, the bank had suspended payment. The appellant, on December 19, began a suit for his money, and on April 19, 1915, he got a decree for payment. The amount was over Rs. 25,000/-. So much for the proceedings of the appellant.

Now we turn to what happened in connection with the bank in order to see how section 153 comes into operation. On December 15, an extraordinary meeting of the shareholders formulated a scheme of arrangement, and on December 21, there was an application to the High Court for an order under section 153. On December 23, two days after, an order was made directing the creditors to meet and consider the scheme, and on March 4, 1915, they did meet, and they passed a resolution sanctioning the scheme by the requisite majority. A little later, on June 2, of the same year, the court gave its sanction. It will be observed therefore that the plaintiff's decree on April 19, was granted to him before the order confirming the resolution, but after the meeting at which the resolution and the scheme to which it related had been agreed on.

The question is whether under section 153 (which is a section in familiar language, practically identical with the corresponding section of the English Companies Act) the creditor was bound. The court of the judicial commissioner, agreeing with the judge who heard the case in the first instance, says that it was so, and it is obvious that it is convenient that it should be so. Otherwise with the uncertainty as to what the ultimate rule of the court may be, when a decision has finally been obtained, the door would be open for a race between creditors and persons concerned in administering the affairs of the bank. The court of the judicial commissioner put it very well in its judgment when it said this: "If it had been the intention of the legislature that such an agrcement should not be binding until the arrangement had been sanctioned by the court, instead of the words "if sanctioned by the court" the words "when it has been sanctioned by the court" would ordinarily have been used. The agreement becomes binding from the date when it is arrived at, subject to subsequent sanction by the court. If that sanction be refused, the agreement is without effect. But it is not the case that the agreement is to take effect from the date of sanction. It takes effect from the date when it is made. Such is our interpretation of the words of the section."

When regard is had to the latter part of section 153 it appears that this is so, because the words there are that if the compromise or arrangement, which is the compromise or arrangement sanctioned by a majority of the meeting, is passed, then the compromise or arrangement, if sanctioned by the court is to be binding. It is the proceeding of the meeting that is to be binding, provided only that it does not fail to be subsequently sanctioned. Therefore, not only convenience, but the literal language of the section, is in favour of the view to which the court below adhered, and their lordships will humbly advise His Majesty that that view should be affirmed, and that the appeal should be dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 353 OF 1919.

S. A. MUDALIAR .. .. .. PLAINTIFF.

vs.

ABDUL RAHMAN BROTHERS & CO. .. DEFENDANTS.

Before Mr. Justice Rigg.

For plaintiff—Mr. N. M. Cowasji.
For defendants—Mr. Leach.

27th January, 1920.

Civil Procedure Code (Act V of 1908) O. XXVI r, 4 —Persons for whose examination commission may issue, commission for examination of plaintiff.

The evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons.

The case of a defendant is different, because the defendant has not chosen the forum.

JUDGMENT.

RIGG, J.—In this case the plaintiff is suing his agents for Rs. 32,000 damages arising from loss of freight, and the detention of the vessel which damages he asserts arose from the gross negligence of the defendants in not informing him of the time limit in the charter party. The defendants arranged for the plaintiff's sailing vessel to take cargo from Moulmein with Messrs. Steel Brothers. The ship arrived late and the contract was cancelled. In their statement the defendants state that the late arrival of the sailing vessel was due to the plaintiff's failure to despatch it, and they deny that they are liable for the damages claimed. The plaintiff applies for a commission to issue to Jaffna court for his examination as a witness in the case. The application is opposed by defendants' counsel on the ground that the general rule is not to permit examination of a plaintiff by commission except for very strong reasons.

In Amrith Nath Jha *vs.* Dhunput Singh Bahadur (1) Phear, J. refused an application by a party to a suit to have his servants examined on commission unless it was shown that the witnesses could not be brought before the court by their master to give evidence *viva voce*. He remarked;—"the difference between the examination of a witness on commission, and the examination of the same person *viva voce* in court is so great, to the disadvantage almost invariably of the opposite side, that the court ought very jealously to enquire into the reasons why a plaintiff in particular should desire to keep his servants away from the actual trial." This is the only authority in India that has been cited on this question. The leading case in the English courts is that of Ross *vs.* Woodford (2). In that case there was an application to take the evidence

(1) 20 W. R. 253. (2) 1894, 1, Ch. 38.

of a defendant resident in the Transvaal on commission. Chitty, J. said "There are many cases where the court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself: so too with regard to the case of a plaintiff asking for a commission to examine himself, the court has full discretion, but it exercises, that discretion strictly, and does not grant the application unless a very strong case has been made out; but the case is entirely different when it is the defendant's application." Permission to examine the defendant on commission was given in that case. Permission was also given in the case of New *vs.* Burns (3) to examine a defendant in Canada. In that case the plaintiff had been fortunate enough to serve the defendant with a writ when he happened to be in England. Lindley, L. J. remarked that there was a material difference between a foreign plaintiff and a foreign defendant in a case when the granting of a commission to take evidence abroad is concerned. In Keeley *vs.* Wakley (4) which was the case of an American medical man resident in Chicago against the editor of the "Lancet" the court refused to grant a commission for his examination on the ground that the main question would be one of damages which must depend on the evidence of the plaintiff which ought to be before a jury. It remarked that the inconvenience of attending a trial in England might be reduced to a minimum. Permission to examine the plaintiff by commission was refused. Generally speaking mere distance from the forum of the trial or mere inconvenience seems to be regarded as an insufficient ground for granting a commission to examine a plaintiff. The present suit is a very substantial one, and questions of the conduct of the plaintiff and also of his earnings by way of freight in chartering ships and possibly cross-examination about his books and other accounts may be necessary.

I do not think sufficient grounds have been made out for departing from the ordinary rule in the present instance. The application is rejected with costs—one gold mohur.

IN THE CHIEF COURT OF LOWER BURMA.

FIRST CIVIL APPEAL No. 118 OF 1919.

SHWE HPAN and one .. .. .. APPELLANTS.

vs.

MA CHIT NYEIN .. .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt. C. J. and Robinson J.

For appellant—Mr. Naidu.

(3) W. N. 1894, 196. (4) 9, T. L. R. 571.

15th August 1919.

Civil Procedure Code (Act V of 1908) second schedule paragraph 16 (2) appeal from decree on award—suit to set aside award.

There is no appeal from a decree passed on an award except in so far as the decree is in excess of, or not in accordance with the award of the arbitrators.

No suit can be brought to set aside an award which has been followed by a decree.

JUDGMENT.

TWOMEY, C. J. and ROBINSON, J.—The appellants were parties to two awards made by an arbitrator appointed by the district court, Moulmein. Being dissatisfied with the awards they applied under paragraph 16 of the second shedule to the Civil Procedure Code to set aside the awards, but their application was refused and the court pronounced judgment and passed decree in accordance with the awards. Under paragraph 16(2) no appeal lies against the decrees. But the appellants sought to re-open the matters in dispute by suing to set aside the awards. The district court held that such a suit will not lie.

No case has been cited in which such a suit has been entertained, and such a suit appears to be contrary to the plain intention of the law. Article 158 of the second shedule to the Limitation Act allows a period of ten days for an application to set aside an award submitted to the court. No further appeal is allowed except in so far as the decree passed by the court may be in excess of or not in accordance with the award, which is not the case here. As Lord Macnaghton observes in Ghulam Jilani *vs.* Mahomed Hussain (1) large powers are given to the court with the view of making the award in such cases as this complete, operative, and final and it would render these provisions of the law nugatory to permit a party to go behind the decree of the court and bring a suit to set aside the award on which the decree is based and which is merged in the decree. The appeal is therefore dismissed under Order XLI, rule 1.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 219 OF 1919.

S. P. M. PALANIAPPA CHETTY .. .. APPELLANT.

vs.

MA TU .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

(1) 4, Bom, L, R, 161.

For appellant—Mr. Anklesaria.
For respondent—Mr. Maung Kyaw.

2nd June, 1919.

Burmese Buddhist Law—lettetpwa and hnapazone property—interest of husband or wife in property acquired during marriage—rule of nissayo and nissito.

Property acquired by the husband or wife by inheritance during marriage is *lettetpwa* property not *hnapazone*.

Both husband and wife have a vested interest in property acquired by either of them by inheritance after marriage, and when they are living together. The rule of *nissayo* and *Nissito* applies to such property, and a wife is entitled to one third share in the property inherited by her husband during marriage.

JUDGMENT.

MAUNG KIN, J.—Plaintiff appellant sued for possession of a piece of garden land and buildings thereon alleging as follows:—The property in dispute was inherited by Maung Dwe, his brother Maung Hman and his sister Ma Paing from their parents At that time Maung Dwe was married to Ma Tu who is still his wife. Maung Dwe subsequently transferred his interest in the property to Maung Hman and Ma Paing, both of whom subsequently sold the property to plaintiff. The suit was against Maung Dwe, Maung Hman, Ma Paing and Ma Tu. Maung Dwe and Ma Paing did not appear. Maung Hman appeared and admitted the claim.

In her written statement Ma Tu alleged that she and her husband took over the property by paying Rs. 1,000/- to Maung Hman and Ma Paing. Subsequently Maung Dwe without her knowledge or consent sold the property to Maung Hman and Ma Paing who in turn sold it to plaintiff.

Plaintiff got a decree as prayed in the district court. Ma Tu appealed to the divisional court which gave a decree to plaintiff for possession of eight-ninths of the property or its value, or to the possession of the whole on payment of the value of the remaining one-ninth to Ma Tu. It held that Ma Tu had a vested interest in one-third of her husband's share i. e. in one-ninth of the entire property. Plaintiff appeals on these grounds (1) that the divisional court was wrong in holding that Ma Tu had a vested interest in her husband's share, (2) that the divisional court should have held that Ma Tu was estopped from claiming any right in the property, and (3) that it erred in holding that Ma Tu was entitled to a ninth share in the property. So, for the purpose of this appeal the property must be held to be still the undivided property of Maung Dwe, Maung Hman and Ma Paing, each having a one-third share in it.

It is settled law that the husband or wife has an interest in the property acquired by the other by inheritance after marriage, when they are living together and helping each other, and that the pro-

perty is not *hnapazone* i. e. property acquired by the joint industry of the husband and wife during the marriage, but merely *lettetpwa* i. e. property acquired during the marriage. The well-known principle of *Nissayo* and *Nissito* applies to such a case. See Maung Po Sein *vs.* Ma Pwa (1). It has been held by Twomey, J. in Maung Lo *vs.* Maung Pyaung (2) that either party has an interest in such property. I see no reason to differ from this ruling. This disposes of the first and third grounds of this appeal. The second ground does not arise on the pleadings, and it was not in issue in either of the lower courts. It has not been pressed before me, and there are no materials to decide it on. The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

INSOLVENCY CASE No. 58 OF 1919.

In the matter of T. A. R. A. R. M. CHETTY .. INSOLVENT.

S. E. SOLOMON .. .. .. PETITIONER.

Before Mr. Justice Maung Kin.

For petitioner—Mr. A. B. Banerji.

24th July, 1919.

Negotiable Instruments Act (XXVI of 1881*) s.* 48*, Negotiation by endorsement—Transfer of Property Act (IV of* 1882*) ss.* 130 *and* 132*. Transfer of actionable claims, s.* 132*, liability of transferee.*

A negotiable instrument payable to a specified person or order is negotiable only by endorsement and delivery under section 48 of the Negotiable Instruments Act, but it can also be transferred or assigned by an assignment in writing as an actionable claim under section 130 of the Transfer of Property Act.

If it is negotiated by endorsement and delivery the endorsee has all the rights of a holder in due course.

If it is transferred by an assignment in writing the transferee is vested with all the rights and remedies of the transferor, and is also subject to all the liabilities and equities to which the transferor was subject at the date of the transfer.

A promissory note cannot be transferred or negotiated by mere delivery.

JUDGMENT.

MAUNG KIN, J.—One Mahomed Hashim Ariff executed the promissory note in question in favour of T. A. R. A. R. M. Chetty firm for

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(1) P. J. 403. (2) 3, B. L. T. 149.

Rs. 2,500/- and made it payable to that firm or order. T. A. R. A. R. M. firm borrowed money from S. R. M. C. T. Chetty firm and delivered the promissory note as security for the loan. There was no endorsement of the promissory note. S. R. M. C. T. firm in their turn transferred the debt and the promissory note to E. Solomon. The transfer was verbal and the promissory note was not endorsed. T. A. R. A. R. M. firm became insolvent and the official assignee as their representative sued the maker Mahomed Hashim Ariff and obtained a decree. Solomon handed the promissory note over to the official assignee for this purpose. The judgment-debtor has paid into court and the official assignee has received Rs. 2,269-15-6 and the judgment-debtor has also paid Rs. 1,500/-, to Solomon out of court. Solomon now asks for an order to the official assignee to pay to him the amount in the hands of that officer less his usual commission.

It is clear that the promissory note is a chose in action or actionable claim, as the expression is, as used in the Transfer of Property Act. Section 130 of that Act requires transfers of actionable claims to be in writing accompanied by certain other formalities. Therefore as transfer of an actionable claim, the delivery of the promissory note to Solomon would not be valid. But it is claimed that section 137 of the same Act excepts *inter alia.* from the operation of section 130, instruments which are for the time being, by law or custom, negotiable. The instrument in question is a negotiable instrument as it is payable to a specified person or order. See section 13 of the Negotiable Instruments Act. But it is contended that, it is an actionable claim all the same. This proposition is quite correct. Upon this assumption it is contended that, treated as an actionable claim, it may be transferred otherwise than by writing as required by section 130 of the Transfer of Property Act, for instance, verbally, as it has been in this case, inasmuch as this sort of actionable claim is excepted out of the operation of that section. It is, however, admitted that, as a negotiable instrument made payable to a specified person or order, it is negotiable by endorsement and delivery only. See section 46 of the Negotiable Instruments Act.

The point raised is,can it be transferred otherwise than by endorsement and delivery or by assignment in writing?

In Ramachandra Rao *vs.* Abeeb Rowthan (1) Shephard and Moore, JJ., held that there was nothing in the Negotiable Instruments Act to restric the transfer of negotiable instruments of transfer by endorsement only, and that such choses in action may be otherwise assigned, and that an assignee under an assignment of the latter class may sue in his own name. This was followed in Muhammad Khumarali *vs.* Runga Rao (2). In Muthar Sahib Maraikar *vs.* Kadir Sahib Maraikar, (3) the learned judges accepted the above rulings and after quoting a passage from Story on "Promissory notes," (7th edition 120, page 153), held that endorsement is not the only mode by which negotiable instruments may be transferred; they may be otherwise assigned

(1) 24, M. 657, (note). (2) 24, M. 654.

and the assignee may sue in his own name; he will however have only the right, title and interest of the assignor while the endorsee of a negotiable instrument will have all the rights of a holder in due course. Later, in 1907 the exact point before me arose in the Madras High Court in Arunachella Reddi *vs.* Subba Reddi (4). There the suit was on a promissory note which had not been endorsed to the plaintiff and and the plaintiff was not entitled to sue on it, *qua* promissory note as had been held in Subba Narayana Vathiyar *vs.* Ramasawmi Aiyar (5). It was however, contended on the authority of Muhammed Khumarali's case (2) above cited that the note had been verbally assigned to the plaintiff and that he could sue on it under the assignment, as section 130 of the Transfer of Property Act did not apply and the Negotiable Instruments Act did not prohibit the assignment of a negotiable instrument. Benson and Wallis, JJ., observed:—"Assuming that the plaintiff would be entitled to sue on the chose in action if the note were assigned to him otherwise than by endorsement, he could not, in our opinion, when so suing, be regarded as suing on a negotiable instrument and therefore would not come within the exceptions in section 137 of the Transfer of Property Act. Consequently the assignment of the chose in action on which he relies is bad on want of writing under section 130 of the Transfer of Property Act." The meaning of these observations appears to me to be as follows:—"If you treat a negotiable promissory note as a chose in action, the transfer must be in compliance with section 130 of the Negotiable instrument Act. It you treat it as a negotiable instrument, the transfer must be by endorsement and delivery as required by section 48 of the Negotiable Instruments Act." Upon the ruling of Benson and Wallis, JJ., the verbal assignment in the present case will be no effect. Apart from this ruling it seems to me to be clear that, in enacting section 137 of the Transfer of Property Act, the intention of the legislature was to make a distinct differentiation between the instruments mentioned in section 137 of the Transfer of Property Act, which are also actionable claims as defined by that Act, and other actionable claims inasmuch as the former are regulated by special Acts of the legislature as to their transfers. Thus, the law is plain that in the case of those instruments section 130 will not apply and the question of the legality or otherwise of their transfers must be tested by the provisions of the law relating to them. The fact that a negotiable instrument is also a chose in action is immaterial and does not indicate that a third method of transfer, for instance, a verbal assignment, is recognized by the law. For these reasons I would hold that the transfer of the promissory note to Solomon was not valid and the property in it was not thereby transferred to him. The result is that Solomon is not entitled to any portion of the amount of the decree obtained by the official assignee. Solomon's application is, therefore, dismissed.

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(3) 28, M. 544.
(4) 3, M. L. T. 7.
(5) 30, M. 88.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 299 OF 1919.

U. KONMA .. .. PLAINTIFF.

vs.

U. EINDA .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. Tha Din Gyi.
For defendant—Mr. Barnabas.

20th January, 1920.

Suit for possession of a Kyaung or other Sanghika property.—Court Fees Act (VII of 1870) s. 7 (V) value of the subject matter. Schedule II cl. 17. sub. cl. VI. suit where it is not possible to estimate at a money value the subject-matter in dispute.

The amount of fee payable for a suit for possession of a kyaung or other sanghika property is to be computed under section 7 (V) according to the value of the subject matter.

As such property cannot be transferred by sale, mortgage or gift, it has no market value, and the plaint should be stamped under schedule II, clause 17, sub-clause VI which provides a fee of ten rupees.

U Thi Ha *vs.* U Thudatthana, U. B. R. 1907, Buddhist Law Ecclesiastical 5, discussed.

JUDGMENT.

RIGG, J.—In this case U Konma a hpongyi sues U Einda another hpongyi for an crder from this court to confirm a decision of two of the trustees of Thayettaw Kyaungdaik that he is entitled to possession of the aforesaid kyaung. The decision of the trustees purports to have been made under the authority of clause 8, sub-clause (b) of the scheme of settlement for the management of this kyaung daik in Civil Appeal No. 129 of 1913. Paragraph 10 of the plaint sets out that "the subject matter of the suit being religious property has no value for the purpose of court fees, and the suit is valued at Rs. 100/-." Objection is taken by the defendant hpongyi that as the suit is one for the specific performance of an award the stamp duty should be assessed according to the amount or value of the property in dispute under section 7 sub-clause 9 (d) of the Courtfees Act. That section in laying down the amount of fees payable in suits for possession of land, houses and gardens provides that they should be assessed according to the value of the subject matter and in the cases of houses or gardens such value is declared to be the market value of the house or garden. A similar point to the one now under consideration was decided by the judicial commissioner of Upper Burma in the case of U Thi Ha *vs.* U Thudatthana and others (1)

(1) U. B. R. 1907, Buddhist Law. Ecclesiastical 5.

where it was held that a decision given under the authority of the thathanabaing and his council was an award and ought to be stamped under section 7 cl. IX (d) of the Courtfees Act. That decision however does not indicate in what may the subject matter is to be calculated. The property in dispute is a poggalika kyaung and the hpongyi to whom the dedication is made has a life interest in the kyaung entitling him to occupation so long as he remains a hpongyi and entitling him also to put another hpongyi in possession of the kyaung. He is not however entitled to dispose of the kyaung by sale or by mortgage or by gift to any layman. It was held in Maung On Gaing *vs.* U Pandisa (2) that a gift made with a view to a future existence, whether poggalika or sangika always retains it religious character, and cannot be claimed back for secular uses. The ordinary rule is that on the death of a hpongyi to whom a kyaung has been given poggalika, the kyaung becomes the property of the *sangha* and the Manukye and other texts cited in the section 398 of the Digest of the Kinwin Mingyi lay down the rule that a layman cannot inherit the property because laymen are not the heirs of *rahans*. It is necessary to consider the question whether on the death of the hpongyi the original donor has power to revoke the gift. A full Bench of this court held in the case of Shwe Ton *vs.* Tun Lin (3) that a hpongyi could not inherit property from his relatives, and that by entering the priesthood he died to the world. If therefore the kyaung cannot be transferred by a sale or by a mortgage or by a gift it is difficult to see in what way it can have any market value in the ordinary acceptation of that term. I am of opinion that the plaint should be stamped under schedule 2, clause 17, sub-clause 6 which provides a fee of ten rupees for other suits where it is not possible to estimate the money value of the subject matter in dispute. Plaintiff is directed to furnish an additional stamp of Rs. 2-8.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 234 B OF 1919.

C. SOORAYA .. .. APPLICANT.

vs.

SHWE BWIN .. .. RESPONDENT.

Before Mr. Justice Robinson.

11th August, 1919.

Stay of criminal proceedings pending civil suit.

The question whether criminal proceedings should be stayed pending the disposal of a civil suit relating to the same subject matter

(2) P. J. 614. (3) 11, B. L. T. 161; 9, L. B. R. 220.

is a matter primarily for the discretion of the magistrate before whom the criminal proceedings are pending, and his discretion must not be lightly interfered with.

In the excercise of his discretion the magistrate ought to have regard to such facts as that (a) the prosecution was a private prosecution, and not one ordered by a court acting in the interests of justice (b) the parties have had large dealings with one another for some time (c) the questions involved or some of them are such as could only be decided by a civil court.

Dwarka Nath *vs.* Emperor 31 C. 858 followed.

JUDGMENT.

ROBINSON, J.—Complainant and accused were partners in paddy transactions and disputes arose between them as to the settlement of their accounts. Accused had sold fifty baskets of paddy which he claimed were his separate property but which complainant alleged belonged to the partnership and had been entrusted to accused to keep. He accordingly laid a complaint of cheating or theft or criminal mis appropriation against the accused. The latter has filed a civil suit for dissolution of partnership and accounts and complainant is filling a cross suit. The accused moved the magistrate to stay proceeding in the charge, but this has been refused, and the district magistrate has referred the matter with the opinion that the criminal proceedings should have been stayed.

The question whether criminal proceedings should be stayed is primarily a matter for the discretion of the magistrate before whom they are pending, and this court is not prone to interfere lightly with exercise of this discretion.

The grounds on which the magistrate refused to stay are that the criminal charge had been pending for some months, that the issues involved in the two cases were not substantially the same, and that the decisions of neither court could affect the decision of the other. Now the question whether the fifty baskets were the private property of the accused or belonged to the partnership is one of the questions in both proceedings and this must be decided in thee civil suit. What the magistrate has not also realized is that the matter is purely a civil matter and more likely to be fully and adequately dealt with in civil proceedings. He has not taken into consideration that the prosecution is a private prosecution initiated possibly not so much from a desire to bring an offender to justice as to satisfy private spite or to bring pressure to bear. Had the prosecution been ordered by a court the position would have been different. The dealings between the parties amounted to nearly Rs. 30000/- while the presecution is only in respect of fifty baskets. All these are matters which should have been weighed and apparently and were not, and therefore there need be no hesitation in interfering with the exerceise of the magistrate's discretion. The matter is purely a civil dispute which could and should form

the basis of civil, and not of criminal proceedings and the magistrate might well have referred the complainant to the civil courts. I agree with the views set out in Dwarka Nath Rai Chowdry *vs.* Emperor (1) and the cases cited therein. I therefore direct that proceedings be stayed until the decision of the civil suit pending between the parties.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 208 B OF 1919.

MAHOMED HOSAIN .. .. .. APPLICANT.

vs.

MA PWA HNIT .. .. RESPONDENT.

Before Sir Daniel Twomey Kt. C. J.

For applicant—Mr. Rahman.
For respondent—Mr. Vakharia.

25th August, 1919.

Criminal Procedure Code (Act V of 1890) s. 488, Maintenance of wife—Mahomedan Law, effect of divorce after order of maintenance, iddat.

An order for the maintenance of a wife under section 488 of the code of criminal procedure becomes inoperative in the case of Mahomedans on the expiry of the period of iddat if there is a divorce between the parties after the passing of the order.

JUDGMENT.

TWOMEY C. J.—The applicant Mahomed Hosain was ordered on the 17th November 1917 to pay Rs. 25/- a month for the maintenance of his wife Ma Pwa Hint, and Rs. 15/- for the maintenance of his three children by her. Pwa Hnit applied to the magistrate for the recovery of arrears of maintenance money on the above order. On the 3rd September 1918 the applicant filed a petition pleading that he had divorced her on the 19th July 1918 and therefore that he was no longer bound to pay for her maintenance. The magistrate held that there was no valid divorce and he dismissed the applicant's petition. The applicant then filed a petition in the sessions court in revision and the learned sessions judge has submitted the proceedings to this court with his opinion that the appellant divorced the respondent according to Mahomedan Law on the 19th July 1918 and that he was entitled to have the maintenance order cancelled on the expiry of three months from that date, *i. e.*, the expiry of the period of *iddat*.

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(1) 31, C. 858.

Both parties were represented by counsel at the hearing of the case in this court. For the respondent it is not now urged that the divorce is invalid, but it is urged that the wife was not cognizant of the talak which was pronounced in her absence, and secondly, that the respondent was not shown to be in a state of "purity" at the time of its pronouncement.

The applicant's case was that although the talak was pronounced in the respondent's absence she was informed of the divorce by letter. She denies receiving any letter about it, and it cannot be held that she did receive such a letter. The law is clear that the repudiation to be effective must come to the wife's knowledge, and it cannot be held in this case that she became cognizant of it till the 3rd September 1918 when the applicant filed his petition against the continuance of the maintenance order.

The condition as to "purity" appears to be essential in the case of Shiahs, but not in the case of Mahomedans governed by the Hanafi School of Law (vide Amir Ali's Mahomedan Law, fourth edition, Volume II, page 561). The parties in this case are said to be Sunnis, *i. e.*, belonging to the Hanafi school. But, in any case, it has never been pleaded by the respondent that she was not in a state of "purity" at the time of the divorce. It is a matter specially within her own knowledge, and in the absence of any plea to the contrary I think it is right to assume that she was in a state of "purity".

According to the ruling in the Allahabad case of Din Mahomed (1) which was followed in Maung Ba Shwe *vs.* Ma Nyun (2) the order of maintenance does not become inoperative until the expiration of the divorced wife's *iddat* or term of probation. In the present case the *iddat* should not be deemed to have expired until the expiry of three months from the date on which Ma Pwa Hnit was made cognizant of the divorce, *viz.* three months from the 3rd September 1918. Her maintenance is therefore payable by the applicant up to the 3rd December 1918.

The order of the first additional magistrate, Wakema dated 24th February 1919 in Criminal Miscellaneous Case No. 48 of 1918 is modified accordingly; that is to say, the applicant must continue to pay his wife's maintenance up to 3rd December 1918. The payment of Rs. 25/- for the wife should cease from that date, the original order for maintenance continuing only as regards the monthly payment of Rs. 15/- for the three children.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 350 OF 1919.

PO YA .. .. APPELLANT.

vs.

EMPEROR .. .. RESPONDENT.

(1) 5, A. 226. (4) 4, B. L. T. 13.

Before Sir Daniel Twomey, Kt., C. J. and Maung Kin, J.

For appellant—Mr. Thein Maung.

30th July, 1919.

Penal Code (Act XLV of 1860), s. 34. Acts done by several persons in furtherance of common intention, s. 107 and 111. Abetment when one act is abetted and a different act is done.

Section 34 of the Penal Code Applies only to acts done by several persons with a common intention. It has no application to a case of several persons starting with a common intention to commit an offence, where only one of them commits the intended offence. In such a case the rest of the confederates are guilty of abetting the offence committed by one of them.

If the offence committed is different from the offence abetted the abettor is liable for the offence committed, if, it was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid and in pursuance of the conspiracy.

JUDGMENT.

TWOMEY, C. J.—The appellant Nga Po Ya has been convicted of murder and sentenced to death. He has also been found guilty of an offence under section Indian Penal Code 326 voluntarily causing grievous hurt with a dangerous weapon, and for that offence he has been sentenced to rigorous imprisonment for five years. Between 10 and 11 a. m. on the 27th December last, according to the prosecution case, Maung Lu Pe headman of Letpan village in Thayetmyo district was driving a borrowed bullock cart—an open cart—back to Letpan from another village Yalin, about a mile to the south, when he was held up and assaulted by two men one armed with a *da* and the other with a solid bamboo stick about six feet long. The man with the *da* was in front and he stopped the cart. The man with the stick at a signal from the man in front struck at Lu Pe from behind, but the blow hit him only on the side of the head and the main force of the blow fell on the head of a little boy of eight named Po Myit, son of the owner of the cart, who was sitting beside Lu Pe, or behind him on the cart and the blow fractured Po Myit's skull. Then the man in front, who is alleged to have been the appellant Po Ya, came to the side of the cart and slashed Lu Pe with his *da* causing two severe incised wounds on the forehead. Lu Pe was again struck by the other man and fell out of the cart. Then the assailants ran away. Po Myit died about 8 p. m. the cause of death being compression of the brain substance resulting from the fracture. Lu Pe was in hospital for nineteen days. The injuries to his forehead have left permanent scars which presumably are sufficient to cause some disfigurement.

Pa Ya and Ba Tin, both residents of Lu Pe's village Letpan, were tried jointly for this crime. Ba Tin succeeded in establishing an *alibi* and the learned judge did not feel sure that Lu Pe had not gone beyond the evidence of his senses in denouncing Ba Tin as the man

with a bamboo stick who struck from behind the cart. Ba Tin was therefore acquitted. The learned sessions judge held however that Po Ya's participation in the crime was proved beyond doubt, that the common intention of the two men was to kill the village headman, and therefore, applying sections 34 and 301 Indian Penal Code, he found Po Ya guilty of murder, although he had not actually struck the fatal blow and although the person killed was not the person whom Po Ya's confederate intended to kill.

* * * * *

There can be no doubt that Lu Pe was attacked on his way from Yelin to Letpan and I think we must find that he saw at least one of his assailants. If that assailant was a person unknown to him he had no reason for falsely denouncing Po Ya. Nor, as already noted, is there any reason to believe that he could have mistaken another man for Po Ya, seeing that Po Ya is a man who lives in his own village and is intimately known to him. I would therefore accept the session judge's finding that Po Ya took part in the assault.

We have next to consider what offence he committed. It appears to me that there are no sufficient grounds for rejecting Lu Pe's statements that it was Po Ya who inflicted the wounds on Lu Pe's forehead with a dha, and that the injury to the child Po Myit's head was caused by a blow with a stick delivered by the other assailant. But I think the learned sessions judge has erred in holding that there was a common intention on the part of the two assailants to kill Lu Pe. The reason given for this assumption is that Po Ya who was well known to the village headman could not escape punishment without killing the village headman. If this reasoning were correct it would follow that anyone assaulting another man wro knows him should be credited with the intention of causing his death. It is hardly necessary to point out that there are several ways of escaping punishment without proceeding to the extremity of killing off the man who is attacked. For example the assailant may contrive to evade arrest as Po Ya in part did in this case for a long time, or he may rely on suborning false evidence to prove an *alibi*. I think it is clear from the injuries actually inflicted by Po Ya that he had no intention of killing Lu Pe and the two assailants cannot be assumed to have had any more heinous intention than that of causing grievous hurt.

But in my opinion section 34 of the Indian Penal Code cannot be applied in this case at all in relation to the killing of the boy Po Myit. When Po Ya's confederate struck the blow which fractured the child's skull Po Ya's himself, according to Lu Pe's account, had done nothing beyond instigating his confederate to strike Lu Pe. Thus at this stage Po Ya was only in the position of an abettor and it is as an abettor that we should regard him in considering his responsibility for his confederate's act in killing the boy. There was a subsequent stage in which Po Ya joined in and cut Lu Pe with his dah while his confederate struck him again with the stick. The provisions of section 34 would begin to operate then, for it was only then that there was an act or series of acts done by more than one person with a common intention. But as regards the earlier stage,

when the boy Po Myit was struck on the head, the case appears to but that contemplated in section 111 of the Indian Penal Code, where an act is abetted and a different act is done. Po Ya undoubtedly abetted his confederate's attack on Lu Pe, but he could be held liable for the injury caused to Po Myit only, if, the act which caused the injury was a probable consequence of the abetment. And it is clear that it was not. If I instigate A to strike B it is by no means a probable concequence that A will strike somebody else who happens to be close by at the time. Po Ya can therefore be held liable only for what he and his confederate did to Lu Pe in pursuance of their common intention of causing grievous hurt to him. As a matter of fact Po Ya's confederate did not cause grievous hurt to Lu Pe but Po Ya himself did.

I would set aside the conviction and sentence for murder and direct the acquittal of the appellant on this charge. I would not interfere with the conviction under section 326 of the Indian Penal Code. The outrage on the village headman was a very serious offence and deserves severe punishment, but as Lu Pe was not dangerously wounded I think that a sentence of rigorous imprisonment for three years would be sufficient and I would therefore reduce the sentence of five years rigorous imprisonment to one of three years rigorous imprisonment.

MAUNG KIN, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 512, 513, 514, 515, and 516 OF 1919.

SHWE ON and others .. .. .. APPELLANTS.

vs.

EMPEROR .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt., C. J. and Maung Kin, J.

3rd October, 1919.

Penal Code (Act XLV of 1860) s. 34. Acts done by several persons in furtherance of common intention.—ss. 97, 300 exception 2, and 304. Exceeding the right of private defence, culpable homicide not amounting to murder.

When a criminal act or a series of criminal acts is committed by several persons in combination, it is necessary to consider first the common intention of all, and secondly the individual intention of each of the accused as disclosed by the circumstances of the case. It cannot be assumed that the common intention of all was to cause death, or bodily injury sufficient in the ordinary course of nature to cause death from the bare fact that death has resulted.

Po Sein vs. King Emperor 1 L. B. R. 233 doubted.

If death results from acts done in excess of the right of private defence, the offender is guilty of culpable homicide not amounting to murder under section 300 exception 2.

JUDGMENT.

TWOMEY, C. J.—This case is somewhat difficult. Five persons (1) Shwe On,(2) Po Tun, father and son, and three brothers named (3) Nga Nyun,(4) Tun Tha and (5) Han Gale, have been convicted of the murder of Maung E Lun. The first and second appellants have been sentenced to death and the remaining three appellants to transportation for life.

In summing up the case against the appellants the learned sessions judge came to the conclusion that Tun Tha, Nga Nyun and Po Tun being enraged at being ordered away by E Lun went off and got Shwe On and Han Gale to join them in luring E Lun out to fight and that each of the appellants armed himself with a lethal weapon for the purpose of attacking E Lun. He decided that first and second appellants Shwe On and Po Tun must have intended to cause injury sufficient in the ordinary course of nature to cause death and held that they were guilty of murder. With regard to the remaining appellants three, four and five he found that all three of them armed themselves with lethal weapons and went out with the deliberate intention of provoking E Lun into a fight. He inferred that there was a common intention on the part of these three appellants to cause very serious if not fatal injury to E Lun and relying upon the interpretatrion of section 34 Indian Penal Code in the case of Po Sein and others *vs.* King-Emperor (1) he held that all the appellants combined in injuring E Lun in such manner that each of them must have known that the result of such injury would probably cause death, and as the acts of the combination proved fatal not only the first and second appellants but also the third, fourth and fifth appellants who took part in such combination were all guilty of murder.

There is no proof that the appellants conspired to lure out E Lun for the purpose of attacking him. It was Tun Tha alone who abused him on the last occasion and this was apparently in retaliation for the filthy abuse which E Lun had shouted at Tun Tha not long before. E Lun who is admitted by his own relatives to have been a notorious bully came out spoiling for a fight and went to the cross-roads a distance of 100 to 150 yards from his house, and then was about to set upon Nga Nyun when Shwe On intervened and speared him. Subsequently the appellants Po Tun, Tun Tha and Han Gale cut him with das.

Shwe On first appellant clearly intended to cause injury sufficient in the ordinary course of nature to cause death and unless he comes under one of the exceptions to section 300 Indian Penal Code his conviction for murder must be upheld. But I think in considering Shwe

(1) I.L. B. R., 233.

On's offence we must have regard to the provisions of section 97 of the Penal Code for it seems clear that he intervened to prevent E Lun from striking Nga Nyun. He would thus be entitled to the benefit of exception 2 to section 300. The right of private defence did not extend to causing death (though it might have if E Lun had been armed with a da) and it is clear that Shwe On grossly exceeded the right which he had under 97 by inflicting a fatal wound on E Lun with his first spear thrust and exceeded it still more grossly by spearing him again after he had collapsed. I would find him guilty of culpable homicide not amounting to murder under section 304, 1st part.

As regards the appellants two, four and five the judgments in the case cited by the learned Sessions judge Po Sein and others *vs.* King-Emperor (1) no doubt support the view that these three appellants who combined with the first appellant in causing bodily injury to the deceased may each be held responsible for all the acts of the combination even though none of the three intended to cause death or bodily injury sufficient in the ordinary course of nature to cause death. But it may be doubted whether the judgments in Po Sein's case express correctly the effect of section 34 of the Indian Penal Code. The judgments appear to me to lay insufficient stress on the factor of common intention. The importance of this factor is explained in the ruling of the Madras High court in Queen Empress *vs.* Duma Baidya (2) which is cited in Po Sein's case. The Madras judges did not mention section 34 in their judgment but they were no doubt guided by the provisions of that section which is cited at the head of the printed report. Attention is invited to the extract from the Madras High Court's judgment which is printed in Po Sein's case at page 236. It is essential in cases of this kind, where a criminal act or series of acts is done by several persons in combination, to consider, first, the common intention of all, and secondly, the individual intention of each of the accused as disclosed by the circumstances. In the present case it cannot be assumed that the common intention of all the appellants was to cause death or bodily injury sufficient in the ordinary course of nature to cause death. Seeing that the second, fourth and fifth appellants used das it may rightly be inferred that there was a common intention of causing grievous hurt to the deceased. But in the absence of any satisfactory evidence showing which of these three appellants inflicted the fatal da-cut wound it is not permissible to hold that any of them is guilty of murder. For the offence which has been brought home to them, however, they deserve to be severely punished, because they attacked the deceased after he had already been disabled by the first appellant's spear-thrust.

For the reasons already given I would set aside the conviction and sentence passed in the case of the third appellant, Nga Nyun and direct his acquittal. I would alter the conviction of first appellant Shwe On to section 304, 1st part and alter the sentence to one of

(2) 19, M. 483.

rigorous imprisonment for ten years. I would alter the convictions of the second, fourth and fifth appellants, Po Tun, Tun Tha, and Han Gale to convictions for the offence of voluntarily causing grievous hurt with a dangerous weapon under section 325, Indian Penal Code, and would sentence each of these three appellants to be rigorously imprisoned for five years.

MAUNG KIN, J.—I concur.

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IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS No. 174 OF 1918.

B. COWASJI and others .. .. PETITIONERS.

vs.

NATH SINGH OIL COMPANY LTD. .. RESPONDENTS.

Before Mr. Justice Rutledge.

For petitioners—Mr. Giles and Mr. Burjorji.
For respondents—Mr. Lentaigne and Mr. N. M. Cowasji.

22nd July, 1919.

Companies Act (VII of 1913) s. 162. Winding up by court—clause 6. Interpretation, doctrine of ejusdem generis—jurisdiction to interfere in internal affairs of a company—Grounds for winding up.

Clause 6 of section 162 of the Companies Act is not to be construed as being *ejusdem generis* with clauses one to five, but gives the court power to order the winding up of a company if it is of opinion that such order would be just and equitable.

A court has no jurisdiction to interfere with the internal management of a company acting within its powers.

Burland *vs.* Earle, L. R. 1902, A. C. 83 referred to.

Winding up a company is an extraordinary remedy to be resorted to only in extreme cases. Internal fraud, or unconscientious conduct of the directors in managing the affairs of the company is no ground for a winding up order at the instance of a minority of the shareholders.

JUDGMENT.

RUTLEDGE, J.—This is a petition by fifteen shareholders in the Nath Singh Oil Company, Limited for an order winding up the company by the court under section 162 Clauses V and VI of the Indian Companies Act 1913.

Previous to the hearing petitioners' advocates wrote to the respondents' advocates (exhibit A) that they did not intend to proceed with the ground under clause V, but wished to amend their petition by adding a new paragraph 93. At the hearing, petitioners' advocate submitted that the proposed amendment should be allowed.

The amendment was opposed by the respondents' advocate on the ground that it was contradictory to the allegations contained in the petition, and that it converted what was a subsidiary ground into the main ground, and that the respondents would be prejudiced in the conduct of the case, if the amendment were allowed. In my opinion the amendment is not contradictory of the allegations in the petition, as it is quite possible that a company might be unable to pay its debts, and yet have very valuable assets to realise. Also the bulk of the allegations in the petition in no way relate to the financial position of the company, but to the conduct of Baij Nath Singh the predominant shareholder, which if relevant at all, could only be relevant under clause VI of section 162. Without the amendment it would be impossible for the court to try the real issue between the parties. It would not be in the interests of justice to dismiss the petition on such a technical ground only to have the same presented afresh with the consequent delay and expense. I accordingly allowed the amendment. As amended it is submitted that none of the allegations in the petition would justify the court in making the order, as clause VI must be read *ejusdem generis* with clauses I to V. If clause VI must be so read I agree; for it cannot be contended that any of these allegations are of a similar nature to that given in any of these first five clauses. In support of this objection it is argued that the words of clause VI of section 162 are identical with those of section 79 of the English Companies Act of 1862, and section 129 of the English Act of 1908, and this court should follow the English decisions on the subject.

The *ejusdem generis* doctrine laid down by Lord Cottenham in the Agricultural Cattle Insurance Company's case (1) in construing similar words in the Joint Stock Companies Winding up Act of 1848 has been followed by Lord Cairns in the Suburban Hotel Company's case (2) in dealing with a petition to wind up under the fifth head of section 79 of the Companies Act of 1862. It is a decision of the Court of Appeal in which Turner, L. J. concurred with the conclusion and the reasons, though he died before judgment was delivered. Lord Cairns was prepared to admit a kind of exception to the rule in cases where the whole substratum of the company had gone. I have been referred by both sides to a great number of decisions, and I think the trend of the decisions is an attempt to get away from the *ejusdem generis* doctrine which was found to act as a fetter on the discretion which the "just and equitable" clause gave to the court. The fact that long ago the English Courts were compelled to recognise exceptions to the strict rule in cases where the substratum of the company had gone, or where it was impossible

(1) 84, R. R. 41., 1, M. and G. 170.
(2) L. R. 2, Ch. Ap. 737.

to carry on the business of the company by reason of a deadlock shows that almost from the first statement of the *ejusdem generis* doctrine the courts were prepared to refuse to be bound by it, for it cannot be contended that either of the two exceptions cited were of the same nature as the grounds previously specified in the section. The modern view of the English Courts is in my opinion accurately stated by the late Master of the Rolls, Lord Cozens Hardy in the Yenidje Tobacco Company, Limited, (3). "It has been urged upon us that, although it is admitted that the 'just and equitable' clause is not to be limited to cases *ejusdem generis,* it has nevertheless been held, according to the authorities not to apply except where the substratum of the company has gone, or where there is a complete deadlock. These are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the just and equitable clause." A perusal of recent decisions *In re* Bleriot Manufacturing Aircraft Company, Limited, (4), American Pioneer Leather Company, Limited (5), and the Newbridge Sanitary Steam Laundry, Limited (6), leads me to the conclusion that the courts of the United Kingdom have ceased to observe the *ejusdem generis* rule or have so widened it, that it has ceased as such to be a fetter upon the discretion of the court. The Indian Companies Act of 1882 by section 128 clause (e) gave the *ejusdem generis* doctrine the force of law in India by adding the words "whenever for any reason of a like nature." These words are omitted from section 162 clause VI of the Indian Companies Act 1913, which follows the words of the English Acts. And in refusing to read clause VI *ejusdem generis* with the preceding five clauses I am supported by the decisions of the courts of the United Kingdom to which I have already referred. Though the court is not in my opinion bound to construe clause VI as only covering grounds of a like nature with those previously specified, a perusal of the cases brought under the "just and equitable" clause shows that it has always required grounds of a like magnitude, and that it is only in extreme cases that it will at the suggestion of the minority disregard the wishes of the domestic forum, and condemn the company to extinction.

The grounds relied on by the petitioners have been ranged under eleven heads viz:

(1) Juggling with shares so as to render the provision limiting the voting of vendor's shares abortive.

(2) Juggling with the constitution and personnel of the board of directors, so as to remove any director who showed independent tendencies.

(3) Vendor's conduct as regards the managing directorship.

(4) Corrupt return to the vendor of 17 well sites in 1916 which he had agreed to sell to the company.

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(3) 1916, L. R. 2, Ch. 426, at p. 432.
(4) 32, T. L. R. 253.
(5) 1918, L. R. 1, Ch. 556.
(6) 1917, Ir. R. 67, Cur. Dig. 1917, p. 100.

(5) Abuse by the vendor of position as managing director and company's agent to gain personal advantage at the expense of the company by using the company's tools and materials.

(6) The carrying on by the vendor of a separate oil-mining business in breach of his agreement.

(7) Breach of undertaking by the vendor to protect the company's interests in regard to 12 oil well sites transferred by the vendor to the company, and active opposition by vendor to the company's interests in regard to such sites.

(8) Wrongful substitution of well site No. 38 for No. 46.

(9) Efforts of vendor to get rid of the managing agents in order to have a free hand.

(10) Efforts to remove the registered office of the company to Yenangyaung for the same purpose.

(11) Wrongful withholding from the board of directors and the managing agents of accounts of stores since 1st June, 1918.

It is not alleged that each of these grounds is sufficient in itself. The substantive charge is the fourth relating to the 17 well sites. The fifth and sixth directly spring from it. Most of the other grounds are rather facts qualifying this main charge than distinctive substantive charges. It is necessary to examine the matter of the 17 well sites with some detail.

Five days before the registration of the company the vendor Baij Nath Singh entered into an agreement with the first petitioner B. Cowasji as trustee for the company. A certified copy of the agreement is attached to the petition on the file. It is dated 25th May, 1908. It recites that the vendor has (a) a number of oil wells some of which he has worked, and others are lying idle for want of capital, and (b) certain well sites about which there are revenue proceedings. He agrees *inter alia* to sell 44 oil wells, 13 oil well sites, the numbers and locality of which are stated in the first schedule, and 1 well site subject to Revenue Case No. 150 of 1903 of Yenangyaung, that is, in all 58 wells and sites. He covenants to give a good title. The consideration is to be Rs. 51,720/- for each well or site when duly transferred to the company to be satisfied by allotment to vendor of 5172 fully paid shares of rupees ten each. Vendor was to retain possession until incorporation, and adoption of the agreement. The vendor further agreed to transfer the 12 well sites mentioned in the second schedule as the subject of litigation with the Burma Oil Company in Revenue proceedings without getting any shares in payment. There are referred to for short as the 12 free sites and are the subject of the 7th ground of complaint. The Nath Singh Oil Company was incorporated on the 30th May, 1908. The memorandum of association specifies as the first object of the company, to adopt, carry into effect and seal the agreements mentioned in Article 3 of the articles of association. The capital of the company is stated to be Rs. 40,00,000 divided into 4,00,000 shares of Rs. 10/- each. The

chief object of the company is stated to be to acquire and develope Baij Nath Singh's properties in Yenangyaung consisting of 58 valuable oil wells and well sites.

For some reason the vendor did not transfer the 58 wells and sites as agreed but only 36 in 1908, for which he was allotted 1,86,192 shares by way of payment. Shares to the extent of 51,931 were allotted to various applicants in 1908, and since then no allotment has been made. Of the proceeds of those cash shares one lakh went to the vendor under the agreement of 25th May, 1908, and the balance of over four lakhs constituted the working capital of the company. The agreement was adopted without modification at the first directors' meeting on 30th June, 1908. The reason of the vendor's failure to convey the balance of 22 well sites to the company is not explained; but I think we may take it that the correct reason is as stated by Mr. Paton at the directors' meeting on 29th November, 1911, (exhibit F 2) that "the transfer of the sites referred to has all this time been excused on the allegation that they were resumed sites, and could not be transferred to the company on that account." At the same meeting the vendor stated that he had transferred 24 well sites to the company's name on the 8th December, 1911, that they were all resumed sites, and that the resumption was revoked about September, 1911, that as to the sites not yet transferred, all were in dispute except one No. 38 settled in his favour, but he expected four named ones to be decided by the 12th January, 1912, and that as regards the remaining five sites, he could not say if he ever could tender them, but would do so if he obtained them. This is an important statement. He tells the board that there are five sites which he may never be able to transfer. He has already had 24 sites put into the company's name, and in these 24 are included 12 which had been awarded to him by the revenue officer in the litigation with the Burma Oil Company. The board resolved to accept 12 of the tendered 24 sites as satisfaction in respect of the 12 free sites, but declined to accept the other 12 sites until (a) the date of resumption, (b) the validity of the title, and (c) the present value were ascertained. In ascertaining the present value the board stipulated that due regard was to be had to the comparative value of the sites which the vendor was unable to deliver. The vendor objected to any enquiry as to the value, but agreed to other parts of the resolution. The board at this time consisted of Messrs. Cowasjee and Paton, representatives of the cash shareholders, and the vendor, and it is noteworthy that they do not suggest that they would be justified in refusing to take delivery of the well sites by reason of the delay of over three years, thus leading one to infer that the delay was due to causes beyond the vendor's control. At the end of 1911, the board was increased to five, Messrs. Desai and Pandia coming on as additional members and Mr. Turner taking the place of Mr. Paton.

In the latter part of 1911, Mr. Desai (afterwards a director) and Mr. Warren of the managing agents' firm visited Yenangyaung and made a report, part of which is put in as exhibit 4 A. In this report Messrs. Desai and Warren state "The company's manager and field

manager besides others at Yenangyaung well acquainted with the field are of opinion that out of the 24 sites said to be transferred by Mr. Nath Singh on the 8th December, 1911, only Nos. 2911, 3404, 3408 and 3438 (one of the 12 free well sites) are of any value, a value which is rather doubtful. The rest are of no value at all." This information was no doubt in the minds of Messrs. Cowasji and Paton when they resolved as we have seen in exhibit F 2, and also explains why the board seems to have taken no steps to carry out that resolution, and dispose of this question during 1912. Their failure in this respect is mainly responsible for much of the confusion and irregularity that subsequently ensued.

Both sides agree that differences arose in the year 1912 between Mr. Cowasji and the vendor. Mr. Cowasji is the largest of the cash shareholders having invested nearly a lakh of rupees in the company's shares. He was active in the formation of the company, and acted as chairman of the board of directors from the first. He was guarantor of the vendor's account with the Bank of Bengal to the extent of some two and a half lakhs. Mr. Cowasji withdrew his guarantee, with the result that the bank required payment, and the vendor was in financial straits and had to borrow at high interest from Mr. Abba and a Mr. Jamal. Mr. Cowasji may have been perfectly justified in withdrawing his guarantee, but the vendor who attributed his financial difficulties to Mr. Cowasji's action, not unnaturally determined to get rid of him and the other directors who supported him. I should add that although the vendor had a vast predominance in shares, by clause 2 of the basic agreement, for voting purposes the vendor's shares only carried one vote for ten shares whilst in the hands of the vendor. This provision gave the cash shareholders a substantial majority in voting power over the vendor. The result of the vendor's financial difficulties was that some 30,000 shares found their way into Abba's name on the register, and by the latter's help the vendor got the company in general meeting to increase the number of directors to ten, and to select as new directors five of his nominees including Mr. S. S. Halkar, who seems from the minutes, and the court records in the Abba and Jamal litigation, to have acted for some time as the vendor's legal adviser. From May 1913, the control of the company passed out of the hands of the cash shareholders to the nominees of the vendor. The next step of the vendor's party was to reduce the board of directors from ten to five, and eliminate their opponents. This was done about July 1913. The vendor finally ejected Mr. Cowasji from the board in February 1914.

Though the vendor had thus got rid of all representatives of the cash shareholders, he still found himself in the toils of his creditors Messrs. Abba and Jamal, both of whom by this time he had placed on the board of directors. It is admitted that he entered into an agreement purporting to sell his shares to them at a rupee a share, and that in 1916 litigation was going on between them, the vendor contending that the transaction was one of mortgage, and not a sale. The vendor became managing director under article 72 from the beginning, but ceased in November 1911, when his mortgage shares

ceased to be registered in his name, and he did not again become managing director till 4th June, 1913.

Though the board refused to accept transfer of the balance of the 12 well sites in 1911 and 1912, drilling on this sites started early in 1913 with the company's materials and tools and at their expense. The vendor says this was done at the instance of the field manager, and it is pointed out that he was not then managing director. He was however the only director resident at Yenangyaung and I have no doubt that the work was done at the vendor's instance, and under his directions. This drilling seems to have gone on during 1914 and 1915 with the result that on 9th December, 1915, it was brought to the board's notice that a number of the unaccepted well sites had not only been drilled, but were producing. All this has an important bearing on the new board's action in dealing with the 17 well sites. We have seen that the vendor was anxious to transfer the well sites and get his shares in 1911-12. I am asked to believe that he was equally anxious in 1916. This I cannot accept. Vendor's agreement with Abba and Jamal made it unsafe and impolitic for him to get any fresh shares until the question of the agreement was finally decided. Abba and Jamal were naturally keen to have the well sites accepted and the shares issued to the vendor. The question was postponed by the board on the 6th January, 1916. (vide exhibit B 2). Vendor's brothers put in their claim that the well sites were joint Hindu family property on the 11th January, 1916, (exhibit B 3). It was brought up by vendor asking that shares be issued to him for the 17 well sites, at the board meeting of 29th January, 1916. This I think he did in pursuance of his agreement (exhibit F in Civil Regular No. 62 of 1916) with Abba and Jamal, but it is not material whether he was obliged to do so or not. Messrs. Abba and Jamal voted in favour of this being done. Messrs. Halkar and Naikwara voted against it, and by Mr. Halkar's casting vote it was decided that the 17 well sites be not accepted, and that operations on them be suspended. I am asked to hold that in doing so Messrs. Halker and Naikwara were merely carrying out the policy of the earlier board, and opposing the interests of the vendor on behalf of the company. But some of the sites had now been proved to be valuable as they were drilled and producing. If these two directors who were elected as nominees of the vendor in this important matter were acting contrary to the wishes of the vendor, we would expect that they would meet with the fate of Mr. Cowasji and his friends at the next meeting for the election of directors. But this fate did not overtake them. They were duly elected. Messrs. Abba and Jamal brought up the question again on the 29th February, 1916 (exhibit C 2), but they are again worsted by Mr. Halkar's casting vote. At the board meeting of 18th May 1916, by his casting vote Mr. Halker secured the reelection of the vendor as managing director, and at the meeting of 29th May 1916, the vendor repaid the compliment by seconding Mr. Naikwara's motion that Mr. Halker be chairman of the company for the ensuing year. At the annual general meeting of 20th May 1916, we find Mr. Halkar as chairman ruling that Messrs. Abba and Jamal cannot vote in respect of shares registered in their names,

because there is litigation over those shares, and thus he prevented the control of the company passing from the vendor's hands to those of Messrs. Abba and Jamal. At the same meeting, Mr. Naikwara is reelected a director on the proposal of Mr. Halkar, seconded by the vendor. From all this it seems clear that in rejecting the well sites and refusing to issue shares Messrs. Halker and Naikwara were carrying out the wishes of the vendor, and were primarily concerned in assisting him in his struggle with Messrs. Abba and Jamal. At the board meeting on 24th May, 1916, (exhibit C 7), Messrs. Naikwara and Halkar by means of Halkar's casting vote decided that the 17 well sites, and those still to be tendered be not accepted at the price specified in the principal agreement, and on 1st July, 1916, by a like vote they caused the title deeds of the 17 well sites to be returned to vendor's advocates Messrs. Cowasji and Das with the intimation that the company did not relinquish possession. The meaning of this curious provision is explained in Mr. Halkar's first resolution (exhibit C 9) at the meeting of 9th September, 1916, as a lien for expenditure on the sites till settlement of accounts.

In consequence of the board's rejection of the well sites and their return of the grants to the vendor, the vendor applied for their transfer before the Warden of the Oilfields from the company's name to the vendor's, and the field manager Willes consented to this being done on behalf of the company. * * * It does not seem that even now the petitioners are willing that the 17 well sites should be taken over. That being so, it is difficult to hold that the vendor has committed such a breach of the original agreement in this respect, as would justify the court in winding up the company. Prior to May 1913, while the petitioners controlled the company they had refused to take over the sites, and failed to take any steps to get the price lowered on any ground of delay, in the belief that the sites were of little or no value. Subsequently when vendor got control of the company, and the sites were proved to be of value, the vendor got his nominees to adopt the same policy, and to refuse to take the sites. Finally he got the company after the petition was filed to endorse this action at the general meeting of 19th August 1918, (exhibit E 3). However improper and reprehensible the action of the vendor may have been in many respects throughout the transaction, I do not consider that it constitutes an adequate ground for winding up the company under section 162 clause VI. This is the main ground in the petition.

The fifth ground charges the vendor with abuse of his position as managing director and company's agent to gain personal advantage at the expense of the company by using the company's materials and tools to drill and equip the wells which are now his property. I have already held that the drilling was done at the instance of the vendor, and under his directions as he was the only director resident at Yenangyaung. I do not see anything wrong or adverse to the company's interests in demonstrating the value of these properties. At this time there is no indication that the vendor had formed the design of drilling the wells at the company's expense, and then getting the

company to reject them so that he could carry on an oil business independent of the company. He does not dispute his liability to pay for the materials and tools used, but claims that the company has got more than the value of these in the oil won before 19th July, 1916. This is a matter of accounts, and not a ground for winding up. It is argued for the respondent B. N. Singh that he has committed no breach of clause V of the principal agreement as there is a necessary inference that carrying on business has no reference to the well sites named therein. I can discover no such inference in the agreement, and the words of the clause are in no way ambiguous. It is further urged that as the company failed to take the wells tendered, the vendor was forced to work the wells to save serious loss, pending settlement of the question. This might be important, if I were assessing the damages. On the facts before me, there seems to be a substantial breach of clause V, but such a breach in my opinion does not justify a winding up order under section 162 clause VI.

The seventh ground relates to vendor's action in regard to the 12 free sites which we have seen were accepted with the concurrence of vendor on the 29th December, 1911. (Exhibit F. 2.) Vendor obtained from the board the titledeeds of these well sites for the purpose of protecting the company's interests in certain litigation with the Burmah Oil Company, Limited. Vendor claimed the wells as his own in his written statement, and endeavoured to get the warden to transfer the wells to his name. It is pleaded for respondent that his claim in the written statement was a *ruse de querre* to defeat the claim of the Burma Oil Company. This explanation might be of some weight if the vendor had offered it to the directors at the meeting of the 17th March 1917, (exhibit C. 26), but instead he states that his undertaking was to make over these 12 well sites on the company taking over and issuing shares for all the wells. With justice the vendor is accused of the grossest breach of faith in this matter. But at most it is a fraud that did not succeed, and as such it is not a ground for winding up the company under section162 clause VI.

The eighth ground relates to the substitution of well No. 38 for No. 46. A great number of exhibits has been put in regarding this question and the time spent on it was out of proportion to its importance. Both wells are specified in schedule 1 of the principal agreement, but well No. 46 was delivered to the company, and the vendor got 5172 shares in payment in 1908. One Po Ya claimed a half share in this well, and filed a suit early in 1910 which vendor compromised in May 1910. The well was given to Po Ya, and he was to pay vendor Rs. 22,500/-. Vendor said nothing to the board about the well till August 1920, when he mentioned that there was a claim by a Burman to this well, but said nothing about the compromise as he certainly should have done. Mr. Paton, a director, heard about the compromise in March 1917, and no doubt was not favourably impressed by the conduct of his co-director. Vendor offered either to buy out Po Ya, or to present another well in lieu of No. 46 (exhibit 3 C). Mr. Cowasji was for accepting one or other alternative,

but Mr. Paton was not satisfied. I need not go in details into the board's attempts to deal with the cancellation of the shares issued in respect of No. 46 which do not seem to have been very successful. They resolved to charge him interest on the face value of the shares *viz.* Rs. 51,720. This they probably would have been entitled to do, if they had resolved that the issue of 5172 vendor's shares in respect of well No. 46 was for no consideration, or for a consideration that had totally failed, and must consequently be charged for like other cash shares. Ultimately the new board (Halkar's) agreed to accept well No. 38 in lieu of No. 46 and abandoned the claim for interest from the vendor. There is nothing before me to show that well No. 38 is less valuable than well No. 46. If vendor had, like an honest man, informed the board of the claim brought in 1910, no one could have taken serious exception to the substitution of one well for another. But neither this nor the vendor's concealment of the Burman's claim, and the compromise constitutes a ground for winding up under clause VI of section 162.

As regards the ninth and tenth grounds, the managing agents since the formation of the company have been Messrs. Wightman & Co, who also act as secretary to the company. One of the first directors Mr. Paton, was a member of this firm and two of the petitioners Messrs. Nuding & Lock are members of the firm. The vendor regards the managing agents as hostile to him, and has used his best endeavours to have them removed. His direct efforts having failed, he carried a resolution removing the registered office of the company from Rangoon to Yenangyaung. But as this involves an alteration in the memorandum of association, it is inoperative without the sanction of the court, which has not yet been asked for. However ill-advised the vendor's actions may have been asked for. these respects they do not seem to be going beyond his legal rights as the predominant shareholder and as such controller of the company.

As regards the eleventh ground, the vendor having failed directly to rid himself of the managing agents has forced them to give notice of resignation by reducing the Rangoon office to a nullity. It is alleged by the petitioners that since 1st June, 1917 no stores account has been furnished to the managing agents, and since 1st June 1918 no account of cash transactions has been furnished. The facts are not denied by the respondent, and to my mind constitute one of the most serious charges against the vendor. Whether he likes it or not, Rangoon is the headquarters of the company where the board of directors, meets, and where the secretariat office of the company is situated. To cut off the head office from all sources of information regarding the assets and expenditure of the company, is so indefensible that if only the vendor's interests were concerned I should be inclined to direct that the company be wound up, as the legal remedy for this flagrant abuse of power is not very clear, and probably not very effective. There are however a large body of shareholders unconnected with the vendor who do not ask for the extinction of the company. Under the circumstances to extinguish a flourishing company would require the most abundant justification.

And bad as the vendor's conduct in this respect is admitted to be, I do not think that it is sufficient.

I shall deal very briefly with the first three grounds as it is not seriously argued that by themselves they would justify an order for winding up.

As regards the juggling with shares it is pointed out that the vendor has placed 1,01,000 shares in his wife's name and 8,500 in his brother's name in order to evade the limitation in voting power on vendor's shares held by vendor. Vendor was restricted from alienating shares for the first three years after incorporation. After the lapse of this period he could transfer shares without restriction. And it is pointed out that the vendor and his family hold more shares in the company to-day than at the time of incorporation. This strongly points to his confidence in the company, as well as the fact that he has not sought to make money out of the public after the usual manner of the unscrupulous large vendor shareholder. I am asked to hold that the wife and brother are *benami* holders of these shares for Baij Nath Singh, the real holder. If this were an application to decide what voting power the wife's and brother's shares carried, I would decide the question. But I decline to do so in the present proceedings, as the vendor was not acting unlawfully in transferring his shares at the time that he did, and the question cannot affect the application now made.

As regards juggling with the board of directors it is admitted that vendor used his influence to increase and decrease the number of the board, to outvote, and get rid of directors who did not vote according to his wishes, and that he caused 500 of his shares to be registered in the name of one of his nominee directors. I was asked to infer that the same thing had happened as regards Halkar's and Naikwara's shares. With regard to the latter, after a reference to the transfer register, and the several different periods when shares were registered in their names, or transferred by them, I am unable to draw any such inference. I am referred to vendor's conduct in making Willes, the field manager, a director after he had been dismissed by the board for alleged misconduct, and in making Mahabir Singh a director while occupying the relatively menial position of a store-keeper at the oil fields. All this might justify a Rangoon shareholder losing confidence in the vendor's intelligence or business integrity. But the court has no more disciplinary powers over a shareholder in exercising his right of electing directors, than over parliamentary electors in choosing members of the legislature. In both instances, they may be swayed by unworthy motives, and may not choose fit and proper representatives, but for such action there is no legal redress. In my opinion the facts proved in connection with the second charge form no ground for winding up. There is nothing in his acting as managing director when his period of office had expired, on in his acts as managing director apart from those already considered which would justify an order for winding up.

I am asked by the petitioner's advocate to consider the cumulative effect of all the charges admitted or proved, which if too weak singly are sufficient when taken together. It is also urged that if recourse is had to suits, some eight suits would be necessary to obtain the redress claimed. Reference has been made to Lord Davey's judgment in Burland *vs.* Earle (7) and it is argued that internal fraud such as unconscientious conduct of the directors in conducting the company's business would not give a right of action to the petitioners who are minority shareholders, and consequently if they cannot invoke section 162 clause VI, they have no remedy. But what Lord Davey had in mind in fixing the limits of the dissentient shareholders' rights to sue was that all other questions had to be settled by the domestic forum. He was not contemplating that conduct which though not fraudulent enough or unconscientious enough to justify a separate suit would be enough to justify the much more drastic and extraordinary remedy of extinguishing the company. None of the cases cited in which orders for winding up have been granted on the petition of minority shareholders bears any resemblance to the present.

Lack of precedent is not a reason for refusing to act, but it suggests greater care before acting. Associations with limited liability have been constantly growing in number and power in the commercial life of the United Kingdom during the past eighty years. If facts similar to those in the present case constituted adequate ground for winding up a company, we should certainly expect to find many such cases reported. That there are not such cases is because winding up is an extraordinary remedy to be resorted to in extreme cases to put an end to an intolerable situation.

Taking all the facts into consideration, I am not satisfied that it would be just and equitable to hold that the Nath Singh Company, Limited be wound up. The petition is accordingly dismissed. But the conduct of Baij Nath Singh in connection with a great many of the matters in issue has been so improper and unconscientious that I depart from the ordinary rule that costs folllow the event, and I direct that each party bear their own costs. Mr. Clay's costs are to be paid by the company.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 322 OF 1918.

BURMA RAILWAYS COMPANY, LIMITED and others, PLAINTIFFS.

vs.

RANGOON MUNICIPAL COMMITTEE .. DEFENDANT.

(7) L. R. 1902, A. C. 83.

Before Mr. Justice Robinson.

For defendant—Mr. Lentaigne.
For plaintiffs—Mr. Giles.

19th June, 1919.

Nuisance—Statutory authority.—Injunction.—Compensation in damages.

Burma Municipal Act (Burma Act III of 1898) section 98 (2). Provision of sites for the deposit of refuse, rubbish and offensive in matter.—Section 146. Compensation out of municipal funds. Costs—Expert's fees.

The burden of proving that the legislature intended to take away the rights of individuals lies on the party asserting such intention.

Metropolitan Asylum District *vs.* Hill 1880, L. R. 6, A. C. 163 followed.

Where the legislature imperatively directs that a thing shall be done the doing of which if authorized by the legislature, would entitle any one to an action, the right of action is taken away.

Hanmersmith and City Railway Company *vs.* Brand L. R. 4, H. L. 171 followed.

A party seeking to justify a nuisance on the ground of statutory authority must show (a) imperative orders of the legislature, and (b) that the orders could not possibly be carried out without infringing private rights, and committing the nuisance complained of, so that the legislature may be held either expressly or by necessary implication to have authorized the commission of the nuisance.

A plaintiff who has established that his common law rights have been violated is entitled to an injunction to prevent a recurrence of that violation, and damages may be given in substitution for an injunction only if (1) the injury to the plaintiff's right (a) is small (b) is capable of being estimated in money, (c) can be adequately compensated by a small money payment, and (2) it would be oppressive to the defendant to grant the injunction.

Shelfer *vs.* City of London Electric Lighting Company, 1895, L. R. 1 Ch. 287, followed.

The fact that the legislature has provided for the payment of compensation for damage caused by the exercise of statutory powers does not of itself take away the right to an injunction.

The words "refuse, rubbish, and offensive matter," in section 98 (2) of the Burma Municipal Act include nightsoil.

Section 98 (2) of the Burma Municipal Act imposes on the municipal committee an imperative duty of providing sites and places for the deposit and disposal of nightsoil.

The general provision in section 146 of the Burma Municipal Act for payment of compensation does not take away the right to an injunction.

An expert witness who has conducted elaborate and technical experiments and investigations ought to be allowed special expert's fees as parts of the costs in the case.

JUDGMENT.

ROBINSON, J.—The defendant committee have since 1890 occupied a plot of land in the angle between Strand Road and First Street and in 1891 they established thereon a nightsoil depot. The plaintiff railway company occupy a plot of land the other side of First Street to this depot and they have erected thereon jamadars' and clerks' quarters for occupation by members of their staff. The second and third plaintiffs are goods clerks in the employ of the railway company living in these quarters which abut on First Street. The quarters were erected some two years after the nightsoil depot.

Early in 1908 the railway company began to complain of the smell from the depot and on the 3rd February, 1908, wrote to the health officer saying that the smell had been actually getting worse and had latterly increased to such an extent that the clerks had vacated their quarters and men could not be induced to live there. On the 11th February the health officer replied that there is bound to be a certain amount of nuisance in connection with a nightsoil depot; he admitted that the nuisance had been worse on two or three occasions recently because of blockages having occurred, but said his department was doing its very best to diminish the nuisance complained of. On the 29th May, 1908, the railway company again wrote to him that the stench was reported to be unbearable when the nightsoil carts were being emptied as the prevailing wind blows from the receiver towards the quarters; that it had also been reported that during the last year or so there had been a considerable increase of sickness, especially bowel complaints in this area which was put down to the smell. It was stated that the chief medical officer of the railway was of opinion that the present state of affairs was not merely a nuisance, but dangerous to the health of the surrounding community, and it was asked that the municipality should take active measures to abate the nuisance. On the 8th June the health officer replied that the problem of disposing of the nightsoil of a very large area with the least possible amount of nuisance was obviously a difficult one, and that its solution was likely to be expensive. He said that the engineer was preparing plans and estimates for such a reconstruction of the depot as would probably greatly diminish the nuisance complained of.

There the matter seems to have rested for the time being, but on the 12th December, 1910, the railway company wrote forwarding a letter from their chief medical officer and asking that active measures to abate the nuisance complained of might be take at an early date. The chief medical officer, who stated that he had visited the depot while operations were being carried on, expressed the opinion that it amounted to a nuisance which rendered the quarters uninhabitable: that the nuisance has not in any way diminished, and that if the nightsoil depot continues to be used that portion of the railway land

should not be used for railway quarters. The health officer replied on the 23rd December, 1910, that from their nature it was impossible to render nightsoil depots entirely free from offence but the chief engineer had recommended alterations which it was hoped would be shortly carried out and should considerably minimise the nuisance. There again in the matter was allowed to rest, but on the 23rd March, 1914, the railway company wrote to the president of the municipality calling his attention to the previous correspondence by which they had been endeavouring to get something done to improve the state of affairs and saying that each time they had been put off with promises. They stated that their chief medical officer had again reported that nothing whatever had been done to do away with the nuisance which was a very serious one, and rendered the quarters uninhabitable, and asked what the committee proposed to do in the matter. On the 4th April the secretary of the municipality replied that the municipality had made several costly experiments at another depot with the object of mitigating the nuisance but that the results had so far disappointed expectations: that further experiments were being tried: that if they proved successful they would be introduced at the depot at Keighley Street: that in the meantime very strict supervision was kept over the work carried out at the depot, and that everything that could be done to reduce the nuisance was being done. On the 8th May the railway company again wrote that the matter seemed to be no nearer solution than when it was first raised and reiterated that the depot was a nuisance and rendered the quarters uninhabitable, and that if the nuisance could not be mitigated within three months it would be necessary to appeal to higher authorities against further use of the site as a depot for dumping the nightsoil. On the 3rd December, 1914, the railway company forwarded another report from their chief medical officer and asked if the committee wished to make any remarks on the subject before the matter was placed in the hands of their lawyers. On the 7th December the committee replied that they could not admit that the condition at the depot were as bad as represented, or that it was indifferent with regard to effecting any reasonable improvement that may be suggested. It was said that it had been decided to repave the depot with stone setts which would result in a considerable abatement of the nuisance and that until some practical alternative to a nightsoil depot, was suggested the municipality was not in a position to dispense with them. On the 16th March, 1918, the railway wrote giving notice of suit under section 42 of the Burma Municipal Act for an injunction to restrain the nuisance and for damages by way of compensation.

The plaint sets out the existence of this depot for the purpose of transferring nightsoil from carts to the municipal drains. It alleges that such transfer takes place every night and gives rise to an intolerable stench and noxious vapour which spread themselves over the lands of the plaintiffs, corrupting the air and rendering the quarters unfit for human habitation. It alleges that the cause of action is a continuing cause and prays for an injunction restraining the defendant committee from so maintaining and conducting such depot as to constitute a nuisance: such further and other relief as on the premises shall

seem just, and for the costs of the suit. The municipal committee in their written statement deny the allegations of fact as to the stench and noxious vapours; deny entirely that the quarters are rendered unfit for human habitation; allege that every care is taken that no unreasonable smell shall arise. They admit that the railway company had called upon them to abate the nuisance and, they plead that the plaintiffs are not entitled to succeed by reason of their acquiescence and delay in taking action and by the fact that they are barred by limitation. They plead that plairtiffs are not entitled to an injunction as the balance of public convenience requires that the operations complained of shall be carried out and by reason of the fact that no more suitable place exists in Rangoon for transfer of sewage from the nightsoil carts to the sewer. They plead that no cause of action lies against them by reason of statutory authority given for the provision of the said site for disposal of sewage. Lastly they plead that the operations have been carried out lawfully, in good faith, and with due care and attention, and that therefore, no suit is maintainable.

I framed issues as to whether a nuisance was committed, as to whether the defendant committee were exempted by statutory authority from being sued, as to the question of the balance of public convenience, and as to whether section 42 A of the Act justified the plea that no suit was maintainable.

I will first deal with the question of statutory authority as given by the Burma Municipal Act and whether the defendant committee is therefore not liable to be sued for an injunction. The defendant committee claims that the Act imperatively requires them to provide for the disposal of offensive matter: that to do so is not possible without creating some nuisance and that this must have been realized by the legislature which therefore when enacting this provision must have contemplated interference with private rights. It urges that its operations are not for gain, but solely for the public benefit, and that in respect of nightsoil their duty is so obviously imperative, that the rights of individuals must be subordinated to the advantage of the community as a whole. The general principle on which this claim to exemption rests is well recognized and has frequently received judicial expression. In respect of Acts giving powers to construct a railway it is pointed out by Lord Halsbury, Lord Chancellor, at the end of his judgment in the London and Brighton and South Coast Railway Co. *vs.* Truman (1) that "they were assumed to establish the proposition that the railway might be made aud used whether a nuisance were created or not." And this is so although the railway company work for the gain of its shareholders as a commercial adventure. There is next the case where powers are given to companies, such as, gas and electric lighting companies. In respect to them no such assumption can be made. It is true their operations may result in great convenience to the public at large, but they are carried out primarily for the pecuniary advantage of the shareholders, and it is for them to prove affirmatively the exception they may claim. Lastly

(1) 1886, L. R. 11, A. C, 45.

we have the case of corporations and public bodies not working for private gain but primarily for the public good. In the case of the last class, amongst which a municipal committee is included, no right to create a nuisance, or to interfere with private rights is to be assumed, and it must be proved that they are entitled to exemption from an action to restrain them. The onus of proving this is on them, and it cannot be claimed that they come without proof within the rule allowed in the case of Railway Acts. To establish this it is sufficient to refer to passages in the judgments in the Metropolitam Asylum District *vs.* Hill (2) where Lord Blackburn says " It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears," and Lord Watson says, " The onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature, lies upon the persons seeking to justify the nuisance." As to the law applicable to the claim to exemption that is made, it is set out clearly in this authority and I need not refer to the other cases in which it has also been laid down. Lord Selborne, lord chancellor, deals with the Act then under consideration and he says, " If express words, or necessary implication and intendment, must be shown, in order to authorize the Poor Law Board, or any managers of an asylum, to create a nuisance, in the exercise of the discretionary powers given to them, I can find none in this statute. The result is; (1) that this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance: (2) that as to those things which may or may not be done under it, there is no evidence on the face of the Act that the legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance: and (3) that the legislature has manifested no intention that any of these optional powers, as to asylum, should be exercised at the expense of, or so as to interfere with, any man's private rights " and again " If the legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from smallpox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like Rex *vs.* Pease (3) and the Hammersmith and City Railway Company *vs.* Brand (4). No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the statute authorized was a legal nuisance to himself, or in itself an actionable

(2) 1880, L. R. 6, A. C. 193.
(3) 4, B. and Ad. 30., 2, L. J. M. C. 26.
(4) 38, L. J. Q. B. 265., L. R. 4, H. L. 171.

wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place or limit of space, is defined within which the establishment of such an asylum is made lawful." Lord Blackburn says, "I think that the case of The Hammersmith and City Railway *vs.* Brand (4) in your Lordship's House, settles, beyond controversy, that where the legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the legislature, would entitle any one to an action, the right of action is taken away. * * * * The legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured: and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was not that the thing should be done at all events, but only that it should be done, without injury to others. What was the intention of the legislature in any particular Act is a question of the construction of the Act" Lord Watson, after pointing out that it was not asserted that express power or authority to that effect had been given by the Act but that the contention has been that, having regard to the nature of the public duties laid upon the appellants, and the necessities of the case, it must, on a fair construction of the Act, he held that legislature did intend them to exercise, and authorize them to exercise, such powers, says, "I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a statute, that the legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accomodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the legislature at the time when the Act was passed. On the other hand, I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be used without occasioning a nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result." Then after dealing with the question of onus he continues: "Their justification depends upon their making good these two propositions; in the first place, that such are the imperative orders of the legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights."

I will next consider the provisions of the Burma Municipal Act to see whether they are such as justify the claim of the defendant committee in the light of these expositions of the law applicable. Section 98 of the Act provides for special conservancy in certain towns and lays down that the committee of any municipality to which the local government may apply the provisions of the section shall provide for the cleansing of all street-drains and public places within the limits of the municipality, and the removal therefrom of all refuse and rubbish and shall provide for the removal of all house refuse. Subsection 2 enacts—"The Committee shall provide, within the limits of the municipality, sites and places for the collection, deposit, or disposal of all refuse, rubbish, and offensive matter: Provided that the local government may require the said committee, in lieu of, or in addition to, such sites and places, to provide sites and places for such deposit and disposal beyond such limits." Subsection 3 empowers the committee to require owners or occupiers of premises to provide proper receptacles for collecting and keeping refuse, rubbish, and offensive matter prior to removal. This section was applied to the municipality of Rangoon on the 1st July, 1908. Subsection 2 is clearly imperative in its terms and the committee is left no option. It has to provide sites and places for the disposal of effensive matter. A discretion is given to the committee as to the exact location of such sites and places, but, they must be within the limits of the municipality. The provision shows that it was recognised that it might become necessary to require the committee to provide such sites and places beyond municipal limits in lieu of one or more of those provided within those limits.

Mr. Giles argues that this section does not deal with nightsoil at all: that it and section 97 are joined under the one subheading "Deposit of offensive matter" and that both sections refer to refuse and rubbish from streets and houses. He argues that nightsoil is not dealt with as offensive matter but as sewage and provided for in section 112.

"Sewage" is defined in section 2 (9) as meaning nightsoil and other proper contents of water-closets, etc." and the expression offensive matter is not used in the definition. "Sewerage-connection" is defined in section 2 (11) as including "(a) any sewer between any water-closet, etc. on the one hand, and any sewer set apart by a committee for sewage and other offensive matter on the other hand." Section 150 speaks of "the water of any sink, sewer or cesspool or any other offensive matter," and section 151 speaks of "nightsoil or filth or any noxious or offensive matter." It is not used in the sections as something different from nightsoil and the like, but, as a general term *ex majori cautela* to cover possible omissions. It is urged that there are many provisions relating to sewage, latrines, cesspools, nightsoil, and the like; and that he include it here with house refuse and rubbish which might become offensive is at least strange. It may be that the drafting of the Act is open to criticism. In fact, it has been criticised by both sides in this case, but I see no reason to doubt that in this section,

which would not apply to all municipalities, it was used as a general term to cover all offensive matter and that it does cover nightsoil. It is said that it is already provided for in section 112, but that section is permissive and deals with removal from buildings, lands, or receptacles and is intended to provide a right of entry for this purpose. It does not deal with the disposal of the matter removed. Before a committee can impose a scavenging tax it has to make provision for removal, and disposal; but it may remove without imposing a tax. I must therefore hold that section 98 (2) does apply to the matter is dispute and it imposes an imperative duty on the committee to provide sites and places for the disposal of nightsoil.

The Act clearly does not permit a nuisance to be committed in the disposal of nightsoil in express terms, and the next question is whether the nuisance was so certain a consequence that it must be assumed that the legislature realized, when passing the Act, that the imperative duty imposed could not be performed without creating a nuisance, that is, without interfering with private rights. Lord Blackburn said in the Metropolitan Asylum District *vs.* Hill (2). "If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the consideration of the legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well-regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of the owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation." And so in this case if it is established, or can be held that the depot cannot be used without causing nuisance it may well be that the legislature held that the public advantage so far exceeded the injury to private individuals that the latter must give way.

For the defendant committee it is argued that the imperative duty imposed is to dispose of offensive matter, that is, matter which remains, of necessity, offensive, and therefore a potential source of nuisance until finally disposed of: that the evidence, and especially the experiments made, show that it cannot be disposed of by any known method, and the exercise of every care and precaution without causing a nuisance: that there is no provision such as there is in many Acts, that no nuisance shall be caused: that the legislature must have contemplated the extension of the town, and it has provided for compulsory compensation in cases where the person injured is not in default.

It is not lightly to be assumed that the legislature intended to take away private rights even in the case of a body acting solely for the benefit of the community as a whole. It is to be noted that section 98 (2) required the provision of "sites and places" for the

disposal of this offensive matter, and therefore it is no doubt the case that some such method of removal and disposal as is in use was contemplated and not a disposal by a sewer system. Even in the area dealt with by this depot there is a portion that is within the sewered area of Rangoon, but in that portion no less than 580 latrines exist, the contents of which are disposed of at this depot. It is no doubt right to assume that the possibility of the extension of the residential area of the town was present to the mind of the legislature and that a depot so situated when first fixed as not to be a nuisance might later become a source of nuisance; but there I think the argument must stop. It cannot be carried further to show that therefore the probability of a nuisance was such that it must be assumed that it was the intention to take away the right of action. The proviso to section 98 (2), in my opinion, establishes the contrary inference for it retains a power in the local government, when the necessity arises to require the committee to fix a site or place outside municipal limits in lieu of one or more of such depots. This makes it all the more essential for the committee to establish affirmatively that private rights were deliberately taken away.

As to compensation section 146 is relied on. It provides that the committee may make compensation out of the municipal fund to any person sustaining any damage by reason of the exercise of any of its powers and that it shall make such compensation where the person sustaining the damage was not himself in default. It goes on to provide that any dispute as to the amount of any compensation shall be settled in such manner as the parties may agree upon, or in default of agreement in the manner provided by the Land Acquisition Act so far as the provisions of that Act can be made applicable.

Mr. Giles urges that this section is only intended to enact the fund out of which compensation, allowed by the Act in various other sections, is to be paid. He refers to sections 91, 94, 118, 119, 120, 123 and 132 and argues that any other interpretation makes it superfluous. I do not think the argument can be accepted. General provisions for compensation are not unusual and there is no such necessity for specifying the fund out of which compensation is to be paid as to account for its enactment for that purpose alone. There is no doubt a mandatory provision for payment of compensation where the person injured is not in default, and it would cover the present case but it is not enacted particularly for this matter. Provision for the payment of compensation is undoubtedly an important factor to be weighed in deciding the question now under consideration. It has frequently been held that the absence of a provision for compensation would make it most difficult to establish the proposition contended for. But it has never been held that the presence of such a provision *ipso facto* established the intention to take away private rights. It is said that the provision for acquiring the land shows that the legislature contemplated a nuisance. The provision is a general one intended to apply to many and varied instances and may not therefore I think be so used. The result of acquiring the railway land would only dispose of one out of many possible claimants, and might well

result in the committee having to acquire, at great cost, lands it did not require, under penalty of closing the depot, moving the local government and then acquiring sites outside the municipality.

We have then an imperative duty, and a general provision for compensation which does not carry as much weight as a special provision to meet the particular case.

Next there is the allegation that these depots cannot be carried on without creating a nuisance. It is said that every effort has been made to abate the nuisance but that no method has been found, or is known to exist by which a nuisance can be avoided. The method employed is as follows. Nightsoil is collected and removed to the depot in carts. At the depot there is an alley way running due east and west from First Street on the one side to Strand Road on the other. The alley way has walls about four feet high on each side, and in the middle, and about twenty-five feet from First Street, there is a manhole connecting with the end of one of the main disposal sewers of Rangoon. The walls at this manhole are raised eleven feet and are surmounted by a water tank to which are attached two hoses. Over the manhole is a horizontal grid with narrow parallel bars, and lower down there are two more and nearly vertical grids. The carts come up the alley way and stand over the first grid, the top is opened, and a hose pipe inserted which carries water into the cart to wash the contents out through an opening in the bottom of the cart. The second hose plays on the matter falling on the grid to wash it down through the grid without delay. Carts coming from native bustis contain various extraneous matter besides nightsoil such as sticks, broken stones, grass and broken bottles which cannot be allowed into the sewer and the grids are intended to hold them up. To separate them from the nightsoil they are played on by a strong current of water. When cleansed they are removed to an ordinary day conservancy cart standing outside the wall. The cart is then throughly washed down, and an antiseptic used, and then passes on.

The shaking up of the nightsoil in the carts on their way to the depot generates a quantity of noxious gas which is released when the lid is opened. This is blown by the wind and is said to cause a very foul smell which is an intolerable nuisance to those residing to windward of the depot. It is also said that the procedure described causes a vast quantity of bacteria to be wafted into the air which are carried about and are a source of grave potential danger to the health of the neighbourhood. To remedy this nuisance experiments have been made. A telescopic tube was provided which could be connected with the opening at the bottom of the cart so that the contents might be carried under ground before being released. This method was abandoned because the extraneous matter often blocked the opening in the cart, and had to be forced through by bamboos. It also blocked the pipe and could not be moved without opening the lid or disconnecting the pipe so that the smells were let loose It does not seem that these difficulties should have been insurmountable.

The next experiment was an enclosed chamber with a tall chimney and a fan to create an indraught. It had doors at each end 10 feet

by 8 feet for the ingress and egress of the carts, and were opened only for that purpose. It was found that when the doors were opened the noxious vapour got out and the smell was as bad as ever. The failure was due to the indraught not being strong enough and to the doors being too large apparently. It was tried for four months. Here again it would seem as if there was not sufficient cause to abandon the experiment without further effort.

It is claimed that every effort has been made to avoid a nuisance but that it is impossible. However the question is whether it was so clearly impossible that it must be assumed that the legislature was aware of this, and nevertheless imposed the imperative duty. It may be taken that it was known that carts would be used, but these carts need not be a nuisance. If the lids are properly fixed down the only smell from the cart would be from matter carelessly spilt when filling the cart. As to the disposal at the depot it is clear that no method was laid down and that the matter was left entirely to the committee. I cannot hold it has been established that the legislature intended to sanction the method then in use, or to control the committee in any way. Nor can I find any sufficient ground for holding that the disposal by carts at a depot was so certain to result in a nuisance that it must have been in the contemplation of the legislature. Lord Hatherley, L. C., in the Attorney General *vs.* Leeds Corporation (5) in dealing with the case of a sewer said, "Yet the legislature may have thought that the thing could be done (and, for aught I know, it is not impossible it can be done) without creating a nuisance." In my opinion that is exactly the position here. In Jordeson *vs.* The Sutton Southcoates and Drypool Gas Company (6) North J. held that "to make out their case the company must show that they cannot without interference with the plaintiffs' rights, do something they are bound to do. They have not shown that in this case, and I must therefore hold that this suit will lie against them."

Before leaving this matter I think I ought to refer to the case of Muhamed Mohidin Sait *vs.* The Municipal Commissioners for the City of Madras (7) which was strongly relied on by the defendant committee. It dealt with the use of a burial and burning ground. By their Act the commissioners were under a statutory obligation to open burning grounds and provision was made for compensation. A power to acquire compulsorily land for such burning ground was also provided. It was held that no suit would lie and that the case was governed by the principle enunciated in Truman's case (1). The fact which distinguishes that case from the present one, in my opinion is that no allegation was made of any negligence whatever in the manner of using the burning ground, and further the method in which the imperative duty was to be performed was not open to question but was settled by long established custom and the habits and feelings of the community.

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(5) L. R. 5, Ch. Ap. 583.
(6) 1898, L. R. 2, Ch. D. 614.
(7) 25, M. 118.

I will next deal with the other issue relating to the maintainability of this suit.

It is said that by long acquiescence and delay plaintiffs are barred. I do not think there is any proof of either on the part of plaintiffs. Objection was taken as long ago as 1908 and the committee promised an abatement of the nuisance. This was repeated from time to time. The nuisance, if it is a nuisance, is a continuing nuisance and recurs every night. In the Attorney General *vs.* Leeds Corporation (5) it was held that though the sewer had been completed and in operation 16 years before proceedings were taken the court would interfere at the suit of the landowners and that was partly based on the fact that it was a continually increasing evil. Again in Ogston *vs.* The Aberdeen District Tramways Company (8) the nuisance began in 1880, it got acute in 1886, and proceedings were not taken till 1895.

As regards the argument based on the balance of public convenience that is not of itself any ground on which to hold that a suit would not lie. It is a matter which, under certain circumstances, might possibly be taken into consideration, in dealing with the intention, to be attributed to the legislature, and this I have already pointed out and have dealt with.

As to section 42A of the Act, that section bars a suit in connection with acts lawfully done in good faith and with due care and attention. If the defendant committee was authorized to do what is complained of in the manner they have done, the suit fails but if they have been and are committing a nuisance not legalized, the section is clearly no bar.

I have then to decide whether they have committed a nuisance. The nuisance alleged is twofold:—(1) by reason of the unbearable smells, and (2) on the ground of the potential danger to the health of those residing in the quarters.

As to the former it is not denied that at certain seasons of the year and when the wind is in the direction of the quarters there is a bad smell. But it is said the resulting nuisance is very much exaggerated and that such nuisance as there may be is only occasional and does not amount to a nuisance at law. The evidence is strangely divergent. The chief engineer and Dr. Blake the officer in charge of the conservancy cannot deny that in the hot weather and when the wind is in the southwest the smell is very bad. Any resident of Rangoon who has the misfortune to meet one of the nightsoil carts knows the almost overpowering stench that emanates from them. Dr. Blake admits that one must become aware of it long before you meet the cart and remain aware of it, something like twenty yards after the cart has passed. By the churning up of the contents, a large quantity of noxious gas is evolved, and this when let loose at the depot must give rise to an intolerable stench. It may be that it is somewhat less in the cold season, but that in Rangoon is a very short period. Dr.

(8) 1897, L. R. A. C. 111.

Spence paid a visit at the end of December to the depot and says there was no smell to speak of. In fact, he implies that even to windward of the dump you had to seek for it to become aware of it. But he went once only and under the most favourable circumstances. He and all the other witnesses agreed that they would not live there by reason of the smell. On the other side we have the reiterated opinion of the chief medical officer that the smell was unbearable and made the quarters unfit for human habitation. Major Whitmore and Dr. Haynes described it as "overpowering" and "horrible." They went there in May and June which are said to be the worst months. The second plaintiff deposed that he had to shut his windows to try and keep the smell out, and that it was so bad as to cause him and his family at time to vomit. It is a very great hardship to have to shut out the breeze on hot weather nights and in the rains. Major Whitmore's evidence shows that when the wind is towards the quarters there is an overpowering smell in First Street on which they abut. When it is from the northeast or away from them, there is not much smell in First Street. He expresses the opinion that the smell alone must interfere with the comfort of those living in the quarters and was a great nuisance to them. Dr. Haynes's evidence shows the smell was very bad, and at times horrible and it varied in intensity on different occasions. He considers that at night the depot made comfort impossible for the inhabitants of the quarters. He also considers that the area available there is far too small to avoid causing a nuisance. In reply to this Dr. Blake says the smell gets less the further you go from the grid and there is no smell in the day time. The smell is worst when the lid is first opened, and decreases and is less in wet weather. If the wind is from the northeast there would be no smell at the quarters. He has to admit that the smell is a nuisance when the wind is towards the quarters. He admits the smell from a passing cart is often sickening. If so, what must it be when at its worst when the lid is first opened? Carts waiting their turn would wait in the road and those approaching from the First Street side would stand practically outside the quarters, and that would be unpleasant for those in the quarters. Even in the cold weather he admits there is sometimes a smell at the quarters.

The evidence establishes, in my opinion, that there is a an unbearable smell from the depot and when the wind is towards or even partially towards the quarters, the smell must be a substantial, and indeed a grievous interference with the comfort of those living in the quarters. A smell which can properly and only be described as sickening or unbearable or overpowering or horrible is not a matter which can be allowed to be a nuisance at one time and not at another. It cannot be argued that the disposal must so certainly result in a nuisance, that the fact must have been in the contemplation of the legislature for the purposes of the statutory exemption, but is not one in fact. The fact that there may be and possibly are days or seasons of the year, when by reason of the direction of the wind little smell is perceptible at the quarters and that there is no smell in the daytime is not sufficient and I held that the depot is by reason of the

smell complained of a nuisance in law to the inhabitants of the quarters.

I do not propose to go deeply into the second ground pleaded. The experts differ. Major Whitmore while admitting that a large number of experiments would be preferable, holds that those he made justify an inference as to the likelihood of the dump causing bacterial infection. He considers it established that there is a material increase in the number of bacteria in the air owing to the dump. Colonel Pearce on the other hand considers there are not sufficient data to form any opinion and he is not prepared to admit that the increase of the bacteria can be said to be caused by the dump and not come from anywhere else. It may be that the most obviously probable source is the dump, and that there are more bacteria to be found to windward of the dump than upwind from the dump. Major Whitmore considers that the dump is a source of potential danger to the health of the persons living in the quarters. It may be so, but I can come, on the evidence before me, to no definite conclusion. If it is such a source of danger it is all the more a nuisance, but even if that be held not established it is still a unisance.

Plaintiffs seek an injunction restraining the committee from committing this nuisance. The committee strenuously opposes the granting of an injunction, and mainly on the ground that it would result in such serious consequences to the community in general. It does not deny liability to compensate in damages. Indeed it refers to the express provision that damages shall be paid where the person injured is not in default. That provision is however a general one and not enacted for this particular matter. Plaintiffs have not asked for damages and cannot be compelled to accept them in lieu of an injunction if they have established their right to an injunction. In the case of the Attorney General *vs.* Leeds Corporation (5) to which I have already referred, an injunction was granted restraining the use of a sewer unless and until it was not a nuisance. The same argument as to the public necessity was used but was rejected, and Sir W. H. James, V. C. said "I am not much impressed, as several of my predecessors were not, by the danger to the health of the inhabitants of the town if I interfere with their sewage. I believe they will find means of removing the sewage without the danger to health that has been suggested: but at all events I think the people below the town have a right to say that a nuisance must not be created for them."

In Shelfer *vs.* the City of London Electric Lighting Coy. (9) the question whether an injunction should be granted was fully considered. Their Lordships concurred in the dictum of Lord Kingsdown in Imperial Gas Light and Coke Company *vs.* Broadbent (10) "but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the occurrence of the violation.".

(9) 1895, L. R. 1., Ch. 287.
(10) 7, H. L. C. 600., 115, R. R. 295.

It was said by Lord Lindley, L. J. "The court had always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrong doer was in some sense a public benefactor (e. g. a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed" Lord Justice A. L. Smith in this case laid it down as a good working rule that: "(1) if the injury to the plaintiff's legal rights is small, and (2) is one which is capable of being estimated in money, and (3) is one which can be adequately compensated by a small money payment, and (4) the case is one in which it would be oppressive to the defendant to grant an injunction: —then damages in substitution for an injunction may be given." Moreover it has never been allowed to a wrongdoer to force a neighbourhood to sell by persisting in continuing the wrong. This case does not fall under the rule enunciated by Lord Justice A. L. Smith, nor does it present any such special circumstances as would justify the refusal of the injunction to which the plaintiffs have established their right.

At the same time I am not unmindful of the possibility nor do I desire to minimize the fact that to prohibit the depot may result in serious inconvenience to the public at large and I trust that the order I propose to pass may render it possible, while supporting the plaintiff's right, to permit of a solution of the difficulty. If time is granted it may be that the plaintiff company may come to an arrangement whereby its land may be acquired without loss or the defendant committee may be able to provide that the depot be worked without causing the nuisance complained of or obtain legislation legalizing the nuisance, or if none of these be possible, the time will enable the orders of the local government to be obtained, and the depot to be removed to some place outside municipal limits without interference with the needs of the public.

I grant a decree that an injunction do issue prohibiting the defendant committee from so using this depot as to cause a nuisance to the plaintiff company and those dwelling on its land; and further that the said injunction be suspended for a term of six months from this date with liberty to the defendant committee to apply, for good and sufficient cause, for such further period as to the court may seem just. The defendant committee will pay the costs of the plaintiff company and in view of the complexicity of the case I fix advocates' fees at 10 gold mohurs a day for seven days.

Lastly I desire to record my appreciation of the care and skill that counsel have devoted to this important case, and to thank them for the great assistance they have given me. As to expert's fees I am not prepared to sanction them at present, as I believe the rules do not permit of their being given in the case of government officials; but I will reserve the point, and hear counsel both as to whether they can be and as to whether they should be allowed in this case.

3rd July, 1920.

I have now heard counsel. There is no objection to the grant of expert's fees to Major Whitmore as part of the costs.

Mr. Giles asks for Rs. 600/-. Counsel for defendants leaves the matter to the court. Major Whitmore went four times to the depot in the middle of the night. He conducted experiments which required previous preparation and subsequent examination of a laborious and technical character and I consider this amount reasonable. I allow Rs. 600/- as expert's fees.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 33 OF 1919.

ESTHER E. S. COHEN .. .. .. APPELLANT.

vs.

E. I. COHEN and one .. .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Young, J.

For appellant—Mr. Das and Mr. Campagnac.
For respondents—Mr. N. N. Burjorji.

20th January, 1920.

Marriage settlements—Children's portion,—Time of vesting.

In marriage settlements, and wills of parents there is presumption of law, subject to any express provisions to the contrary that the settlor or testator as the case may be, intended the portions should vest in the case of daughters, on their attaining majority or marriage, and in the case of sons on their attaining majority, whether the children do or do not survive their parents.

Swallow *vs.* Binns. 1. K. and J. 417 referred to.

JUDGMENT.

TWOMEY, C. J. AND YOUNG, J.—This is an appeal from a decision of Robinson J. on the original side dismissing a suit by a beneficiary to compel her trustees to carry out a trust. The trustees were her father and uncle; the trust sum was a fund of Rs. 11,000/- held under a marriage settlement. The terms of this settlement were (1) income to the wife for life, (2) income at her death to the husband for life, (3) at his death to apply the income for the maintenance, education, and support of the children till the youngest attained majority and then to divide the fund equally between all the children. The alleged breach was the payment of Rs. 5,000/- to one of the children. It was alleged by the trustees that this was done by consent of all the beneficiaries. The circumstances which it is alleged caused the consent were that the youngest daughter had reached marriageable age and the father was desirous of seeing her married. It was therefore necessary to provide her with a dower. The father

whose circumstances had become straitened could not do so, so he says and the trustees plead that the beneficiaries agreed that if the father would give up his life interest, and divide Rs. 6,000/- amongst them forthwith, they would on their part consent that the balance Rs. 5,000/- of the fund should be paid to the daughter for her dower. The girl admittedly became engaged, but the match was broken off. Then another suitor came forward and the proposal for dowering her out of the trust fund was again mooted. The father and three sons say that the plaintiff Esther Cohen consented. She denies it: she admittedly never signed the deed of consent. The onus is clearly upon the trustees to prove her consent.

The trustees and the beneficiaries who support them are to a certain extent interested, and possibly on this account it was alleged in the written statement that she had admitted in the presence of one E. J. Moses that she agreed to and accepted the proposal. Both the trustees in evidence also stated that Moses had told them this, but he is not called and no reason is given for the omission. He is the son-in-law of the uncle trustee who says he meets him two or three times a day. It seems incredible that both should have misunderstood him. The only inference to be drawn from the unexplained omission to call him is that his evidence would not be in their favour. Seeing that they thought his evidence so important that they specifically relied upon it in their written statement the omission to call him without assigning any reason precludes us from holding they have proved their case. Moreover the probabilities of the case are on the plaintiff's side. When she was asked to sign, her husband was absent in Calcutta, and she was admittedly unwilling to execute the instrument of release in her husband's absence. The defendants say that she promised to do so on his return, but it is far more likely that she would decline to bind herself without consulting her husband. Mr. Beale's evidence on which stress is laid by the learned judge does not show that when the plaintiff's husband returned from Calcutta she actually agreed to sign. He told Mr. Beale "that he would bring his wife to do so (*i.e.* to sign) a few days later on". But this may well mean that the plaintiff and her husband were considering the matter. It is far from an admission of consent. Plaintiff and her husband were not on good terms with the first defendant. There had been litigation between them concerning the plaintiff's dower and in 1915 the plaintiff had demanded her full share of the Rs. 11,000/- trust money. It appears unlikely that the plaintiff gave her consent. The result is that there has been a breach of trust.

The plaintiff says the whole sum of Rs. 11,000/- must be restored, because if her brothers and sisters predeceased their father, she would be entitled to the whole. This however assumes that her brothers and sisters had no vested interest. The mother is dead: the class therefore cannot be enlarged. In marriage settlements the presumption is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son unless there is anything in the deed to the contrary. Thus is Swallow *vs.* Binns (1)

(1) 1, K. and J. 417., 69, E. R. 522.

cited at p. 469 of Lewin on Trusts 12th Edition, Vice-Chancellor Wood stated that upon instruments of this nature (such as settlements and wills of parents) there is an implication of law arising upon the instrument itself, subject of course to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grand-children as the case may be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one years or (as is usually provided in the case of daughters) upon their attaining twenty-one or marriage: and that such portions shall then vest whether the children do or do not survive their parents, and Mr. Lewin cites it as a general rule that where a parent or person *in loco parentis* provides portions for children the strong presumption is that he means to provide portions for all such children as may live to require them *i. e.* for sons who may attain twenty-one and daughters who attain twenty-one or marry. If therefore the language of the instrument be uncertain, but is capable of the construction that sons at twenty-one and daughters at twenty-one or marriage shall take a vested interest the court will so decide it by force of the presumption.

There is nothing in the instrument in our opinion to prevent the application of this presumption and as all the children have attained twenty-one we consider that all their shares have vested. The period of division if the parents were dead as provided by the deed is when the youngest child attains twenty-one and there is nothing to prevent the father surrendering his life interest and the trustees dividing the fund amongst the children if the father so desires. The father so desires in the case of those children who are willing in return to contribute to their sister's dower. The other children are willing; the plaintiff is not. What she wants is her whole 1/8 or Rs. 1375. This the trustees canot be compelled, or even allowed, to give her unless with the father's consent. Unless he consents to surrender his life interest in this portion and give it to his daughter, he is entitled to enjoy its income during his life and she is entitled to nothing until he dies. The trustees still have the Rs. 750/- in hand and must make good the Rs. 625/-, and will then either hold the Rs. 1375/- in trust or give it to the plaintiff, as the father may decide.

The appeal is therefore allowed, but we consider that as the suit was really brought by the plaintiff to obtain Rs. 1375/- immediately, it is not a case in which she should have costs, and we leave each party to bear their own costs here and below.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 590 OF 1919.

G. H. PAUL .. .. APPLICANT.

vs.

T. THOMSON and others .. .. RESPONDENT.

Before Mr. Justice Rigg.

For applicant—Mr. Villa and McDonnell.
For the crown—Mr. Rutledge.
For respondent—Mr. C. Ray.

16th March, 1920.

Probate of will—Burden of proof. Suspicous circumstances attaching to will.

The burden of proving a will lies in every case on the party propounding it, and he must satisfy the court that the instrument so propounded is the last will of a free and capable testator.

When there are any suspicious circumstances attaching to a will, it is for the party propounding it to remove all suspicion, and to prove not only that the testator signed the will, but that he knew and approved of the contents of the will, and it is only when this is done that the burden is thrown on those who oppose the will to prove what they rely on to disprove the will.

Tyrrell *vs.* Painton, 1894, L. R. P. D. 151; and Lachho Bibi *vs.* Gopi Narayen 23A, 472 followed.

This was an application for administration with the will annexed of the estate of one T. M. T. Thomson deceased. The genuineness of the will was disputed by the respondent. As the deceased had left no heirs or next of kin, and there was a possibility of an escheat to the crown in the event of intestacy, the government advocate Mr. Rutledge intervened on behalf of the crown.

JUDGMENT.

RIGG, J.—The only question for decision is whether a will which is said to have been executed by T. M. T. Thomson on the 15th August, 1919, is or is not his will. The contention that the will may have been made under undue influence or at a time when Thompson was not of sound mind has been abandoned. Deceased who was of Canadian or American origin came to Burma about forty years ago, and was for some time a driver in the Burma Railways. He never returned to America, and died in Rangoon on the night of the 21st August, or the early morning of the 22nd. He was about eighty-nine years of age. After he left the Burma Railway Company's employment, he became a moneylender. About twenty years ago he went through the Burmese form of marriage with Ma Shin Hla at Leingon village, and lived there with her for some time. He came back to Rangoon, but seems to have left Ma Shin Hla behind at her village. Ma Shin Hla bore him one child, Thomas. She died when he was quite young. Thomson educated Thomas, and Ma Shin Hla's sister Ma E May. I think there is no doubt that Ma E May and her mother Ma Shwe Ma stayed with Thomson

extends to all cases in which circumstances exist which excite suspicion of the court, and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove the suspicion, and to prove affirmatively that the testator knew and approved of the contents of the documents, and it is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will." This dictum was referred to by their Lordships of the Privy Council in Shama Charn Kandu *vs.* Khettromoni Dasi, (6) and it was pointed out that the only suspicion in that case rested upon a conflict of evidence as to whether the testator was in an unconscious state at the time he was alleged to have made the will. The question therefore was merely which of two sets of witnesses ought to be believed. Their Lordships did not dissent from the dictum of Lindley, L. J. It was accepted as sound law by the learned judges of the Allahabad High Court in Lachho Bibi *vs.* Gopi Narain and others (7). The Indian Evidnce Act lays down that a fact is proved if after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act on the assumption that it exists.

The question for my decision therefore, is whether the circumstances in the present case are such as to excite suspicion sufficiently strong to raise a reasonable doubt as to whether the will was made by Thomson or not.

There are in my opinion grave doubts about the genuineness of this will. The estate, if regard is had to the station in life of those who are to be benefitted by the will is a large one. It has been left entirely to a lawer's clerk, who, beyond doing Thomson's business has failed to establish any claim on his generosity. It excludes from all benefits and makes no provision for the testator's only child, or for the Burmese girl to whom he had been making a monthly allowance for many years. Paul is a man whose record is not free from suspicion. He was tried in the Chief Court for serious offences in connection with the estate of Redmond, a former employer of his, and was convicted by a majority of the jury at the first trial, and unanimously acquitted at the second. He has been bankrupt twice. His witness Chapple has also been through the bankruptcy court, but he gave evidence against Paul in the criminal case, and it was through the application of Paul that he was forced into the bankruptcy proceedings. The other witness Ebrahim is another lawyer's clerk who happened to be in Chapple's office when Thomson came in, but did not succeed in the purpose for which he says he came. He is one of those casual witnesses of the unfulfilled purpose who are generally regarded with mistrust. Chapple owed Thomson some money which he had borrowed in 1912, and the choice of the two witnesses to the will is a curious one Gibbs who was a friend of

(6) 4, C. W. N. 501.
(7) 23, A. 472.

Thomson lived close to Chapple's school, and might easily have been called.

The execution of the will is said to have taken place about 10 a. m. Chapple states that Thomson came to his office alone, and walking; that he looked well and hearty, and went upstairs without any difficulty. Thomson lived about half a mile from Chapple's office. and if his physical condition was such as some of the witnesses depict it is impossible that he could have walked to Chapple's office.

I shall now consider the will. It begins: "This is the last will and testament of me T. M. T. Thomson of the town of Rangoon, and by religion a Christian, being by the mercy of God in sound mind and health." Mr. Rutledge contends that the fact that Thomson described himself as a Christian, and uses such an expression as "by by the mercy of God" is sufficient in itself to throw the most serious doubt on the will. The evidence about Thomson's religious belief is somewhat conflicting, but I have no doubt that he was never a Catholic, as Paul asserted, but in his later years was an unbeliever with strong leanings. towards Buddhism. I regard Paul's statement that Thomson advised him to go to church and went with him fairly frequently to the Roman Catholic Cathedral as absolutely false. The fact that he was sworn on the Bible when making affidavits proves nothing. Matthews has produced infidel books in court which no Catholic or Christian would care to keep or read, and which were ordered by Thomson from America. One of them is a violent attack on the doctrines of the Roman Catholic Church. Thomson refused to allow his son to be baptized. The evidence that Thomson was in his declining years not only not a Christian, but decidedly opposed to that religion is overwhelming. It is certainly a matter for great surprise that he should commence his will by a declaration of pious faith. Mr. Mcdonnell suggests that this paragraph of the will has been copied from some form of a will, but no stock form with such a declaration in it has been produced. It is remarkable that he should have inserted what is untrue in fact, and omitted to appoint an executor. The insertion and omission are explained if the will was the work of some one who did not know Thomson's opinions, or whom he would be likely to appoint executor.

The evidence regarding the finding of the will contains several discrepancies. Paul says he found the will in the drawer at 6 p. m. the evening after the death of Thomson in the presence of inspector Castor, Ahmed Meah and Thomas. Ahmed Meah lives below Thomson. He is one of Mr. Bose's clients, and is an undischarged bankrupt. Castor stated when first examined that the will was found in an almirah. At the next hearing he corrected this statement, and said that it was in a chest of drawers. At the first hearing he spoke of the finding of a gold watch in the drawer, and at the second of a revolver. He says the will was handed to him, and he read it casually and gave it back to Paul. At first Ahmed Meah stated that the will was in the drawer, and that the drawer was locked. He then said that the drawer was in a chest of drawers, and that nothing else was taken out of the drawer. He further stated that it was read out by

Paul and the inspector. In his second examination Ahmed Meah stated that the inspector took the will out of the drawer. Paul talked about jewellery in the drawer. Thomas denies that any will was found on the 22nd and says that the inspector went upstairs only to take charge of his father's revolver, which was lying underneath the chest of drawers. Thomson had a safe where he kept his valuable papers, and it is strange that he did not put his will there. But that safe could not be opened unless the key word was known. On the 26th, in the absence of any one to represent Thomas's interests, the safe was broken open by Sperrink in the presence of inspector Castor. Castor was not authorized to break open the safe, and it was a most improper proceeding in the absence of such authorization and of Thomas. It was quite unnecessary, and afforded Paul an opportunity of tampering with Thomson's private papers. The evidence about the discovery of the will, and the forcing of the safe throws grave suspicion on the conduct of Paul.

Thomson had his own typewriter, and used it. Castor states that the typewriter could not be manipulated, but I sent for the machine, and tried it. It can certainly be used; the ribbon gives a faint impression, but there is no difficulty in changing a ribbon. There is no good reason why Thomson should not have typed his own will, and had it witnessed by some of his friends.

The suspicions surrounding this will have not been removed, and I am of opinion that it is not proved. ' I dismiss the petition of Paul.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 471 OF 1919.

HAZARA BIBI .. .. PLAINTIFF.

vs.

SULEIMAN HAJI MAHOMED .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. B. Cowasji and Mr. Rutledge.
For defendant—Mr. Das.

27th April, 1920.

Mahomedan Law—Guardianship—Mother's right to custody of minor children, right of access to children.—Guardians and Wards Act (VIII of 1890) s. 8. Jurisdiction of court—Power to make a mandatory order.

Under Mahomedan Law, a mother's right to the custody of her children ceases on their completing their seventh year, but she still has a right of access to her children.

Under the Guardians and Wards Act, a court has no jurisdiction to make a mandatory order directing the father to allow the mother access to her minor children.

Except in the case of Chartered High Courts, the court's powers over minors are confined to those given by the Guardian and Wards Act.

Besant *vs.* Narayaniah 38 M, 820 and Sathi *vs.* Ramandi 42 M 647 followed.

JUDGMENT.

RIGG, J.—Plaintiff Hazara Bibi is the widow of Abdul Guffar, and the defendant Suleman Hajee Mohamed is his father. Mohamed Ariff, who was born in March 1911, is the child of Hazara Bibi and Abdul Guffar. In 1918, Hazara Bibi married again, and the defendant in consequence of her remarriage took away Mohamed Ariff from her custody and now refuses to allow her access to the boy. Plaintiff sues for a declaration that she is entitled to such access, and for orders as to the times and occasions on which such access is to be given. Defendant denies that he is under any legal obligation to allow Hazara Bibi to see her child, and asserts that there is no cause of action against him and that the court has no Jurisdiction to make the order desired by the plaintiff.

Two preliminary issues have been fixed, and counsel have addressed me on them. The first issue is whether the plaintiff is entitled to access to her son.

The parties are Sunni Mahomedans. It is admitted that according to the law binding on them, the defendant is entitled to the control and guardianship of Mohamed Ariff. Among the Hanifis the accepted doctrine is that the mother's *Hizanat* terminates when the son has completed seven years of age. In Hamilton's Hedaya (second edition page 139) it is laid down that a boy or girl who has passed the period of *Hizanat* has no option to be with one parent in preference to the other, but must remain in charge of the father. The opinion of Shafei to the contrary is not accepted, on the ground that in the instance given, the prophet gave the boy the choice of parents after prayer to God to direct him. The instances cited in sections 2 and 3 page 140 Tagore Law Lectures (1891-92) are also instances of choice made after special guidance. Mr. Rutledge relies upon the following passage in the Durr-ul-Mukhtar (Brij Mohan Dayal's translation, page 314) as authority for the mother's right of access to her child after her guardianship has ended.

"It is in the Sirajiah: when custody of the mother ceases, and the father takes the child, the father cannot be forced to send the child to her, but whenever she likes to see the child, she will not be prohibited from doing so. My master Shaik Ramli has held that the father can take the child on a journey after expiry of the period of tutelage, and that all agnates other than the father are like the father in this matter, . . . Ramification:—a father goes away with his child and

then divorces the mother, she demands the child. If the father took away the child with the mother's consent, he is not bound to take the child to her, but if he took it away without her consent, he is bound to do so."

The "Ramification" obviously applies to the case of a child still under the mother's custody, and Mr. Das argues that the previous portion of the Sirajiah should be restricted to children who have not passed out of the mother's control. The language of the passage seems to me to negative any such interpretation, and the reference in the very next sentence to the expiry of the period of tutelage seems to indicate that "ceases" means "when the period of her *hizanat* has terminated." In Neil and Bailey's Digest of Mohamedan law (second edition page 439) the rule regarding access is stated thus: "When a child is with one of its parents, the other is not to be prevented from seeing and visiting it." No other authority on this question has been quoted, nor have I been able to find any. The Durral Mukhtar is a great authority, and in the absence of any text to the contrary, the rule laid down must be accepted as binding. I think therefore that according to Sunni law, a mother has a right to visit and see her child after it has come under the control and guardianship of the father or his relatives.

It is argued that even if Mahomedan law does not confer this right, it is a right inherent in the mother; a natural right to which the court will give effect, according to principles of equity, justice and good conscience. As my decision on the mother's right under Mohamedan law is in her favour, it is perhaps not necessary to deal with this part of counsel's argument, but in view of the stress laid upon this view by Mr. Rutledge, I think it advisable to consider the point.

There is no doubt that this is a case in which if we were not in a court of law, but acted under the influence of feelings of natural indignation at the spite prompting the action of the boy's grandfather, we might be tempted to decide in the mother's favour from sympathy with her natural desire to see her child, and the ill-effects the deprivation is having on her health .But until the passing of Guardianship of Infants Act, 1886, even in England the rights of a father to the guardianship of his child were absolute. See *In re* A and B (Infants) (1). The history of the law on this subject and the principles on which the law was administered in the Chancery Court are discussed *in re* Agar Ellis (2). In that case the father put a retriction on the intercourse between his daughter, aged seventeen and her mother on the plea that he believed that the mother would alienate the daughter's affection from him. The court suggested modifications of the terms imposed by him, but he was not willing to accept any of them. In spite of his somewhat unreasonable attitude, the court declined to interfere. The "sacred rights" of the father were considered paramount, except in the utmost need and in the most extreme case. English case law seems to me to afford no foundation

(1) 1897, 1, Ch. 786.
(2) 1883, L. R. 24, Ch. 317.

for the contention that a mother has a natural and inherent right to access to her children. Nor can such a right be founded on "justice, equity, and good conscience." As their lordships of the privy council pointed out in Waghela Rajsanji *vs.* Shekh Masladin (3) equity, and good conscience are generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Untill 1886 there was no rule in English law recognising the mother's right of access; and if Hazara Bibi had no cause of action under her own law, I do not think such a cause can be conferred by an English statute altering the law relating to English mothers. In my opinion, her case so far as it is based on "natural and inherent rights" cannot be accepted. I answer the first issue by saying that Hazara Bibi has a right of across to her child under Mahomedan law, and as this right has been infringed, she has a cause of action. The next point is whether this court has jurisdiction to make the mandatory order for which she asks. In the Court of Chancery, jurisdiction was exercised over infants by the Lord Chancellor, probably by way of delegation from the crown as *parens patriae*. The way in which that jurisdiction was exercised was discussed by Cotton, L. J. *in re* Agar Ellis, (2) (p. 332). Special jurisdiction over infants has been conferred on the Indian High Courts by charter, and this jurisdiction is not affected by the Guardian and Wards Act (VIII of 1890). See section 3. But the Chief Court of Lower Burma seems to me to have no such special jurisdiction. It is not conferred by section 13 of the Burma Laws Act, of 1898 which merely provides for the law to be administered in certain cases, nor by the Lower Burma Courts Act of 1900. Unless this court has special jurisdiction, its powers are confined to those given under the Guardian and Wards Act, and are only those of a district court. See Besant *vs.* Narayaniah (4) and Sathi *vs.* Ramandi Pandaram, (5). The proceedings if competent at all, should have been by petition and not by suit *inter partes*. There does not however seem to be any machinery under the Guardians and Wards Act for working out what Hazara Bibi desires to obtain by the present suit. The suit is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 4 OF 1919.

KHALILAL RAHMAN .. .. .. APPELLANT.

vs.

MARIAN BIBI .. .. .. RESPONDENT.

Before Mr. Justice Robinson.

For appellant—Mr. Ba U.
For respondent—Mr. Thein Maung.

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(3) 14, I. A. 89 at p. 96.
(4) 38, M. 820.
(5) 42, M. 647.

12th January, 1920.

Mahomedan Law—Divorce, ante-nuptial agreement not be take second wife —Grounds on which a Mahomed an woman can get divorce.

An ante-nuptial agreement by a Mahomedan husband not to take another wife in the lifetime of the first is legal, and the wife is entitled either to divorce her husband under the agreement, or to apply to a court for divorce.

A Mahomedan wife can obtain a decree of divorce against her husband on the ground of habitual cruelty, or failure to perform the duties and obligations which in law result from marriage, or to fulfil engagements voluntarily entered into at the time of marriage.

Poonoo Bibee *vs.* Fyez 15 Ben. L. R. App. 5 followed.

JUDGMENT.

ROBINSON, J.—This was a suit for a divorce brought by a Mahomedan wife and has been decreed by both the original court and the court of appeal. The facts are that an ante-nuptial agreement was executed by the husband in which amongst other stipulations he gave his wife the power of divorcing him by saying *talak* three times under certain conditions and also undertook that he would not marry any other woman or keep a mistress. He lived with his wife in her parents' house for about six months and then left her for six months but returned and again lived with her for six months. After that he went away and has provided her with no maintenance. He never returned to her and he has married two other wives in breach of his agreement. It has been held also by both courts that he was guilty of cruelty and the plaintiff seeks divorce on the grounds of cruelty and desertion and for breach of the condition that he would not take another wife and failure to support her. It has been argued that the ante-nuptial bond is invalid as being immoral and opposed to public policy and void as being in restraint of marriage. Reliance is placed also on section 72 of Sir Roland Wilson's work in which he specified the only grounds on which a Mahomedan marriage may be dissolved by judicial decree. It has repeatedly been held that such conditions as appeared in this contract are neither immoral nor opposed to public policy and it has further been held that the condition to take no other wife is not void under section 26 of the Contract Act. No authority is given for the dictum in section 72 of Sir Roland Wilson's work. In Syed Ameer Ali's work on Mahomedan Law (fourth Edition) at page 369 it is pointed out that a condition in an ante-nuptial agreement that the husband should not contract a second marriage is legal, and reference is made to the case of Poonoo Bibee *vs.* Fyez Baksh (1) where this view was upheld. At page 581 of the same work it is laid down that when the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the

(1) 15, Ben. L. R. App. 5.

engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the kazi or judge and demanding a divorce from the court. The judge has the power of granting a divorce not only for habitual ill-treatment, for nonfulfilment of ante-nuptial engagements but for other reasons also. And the learned author proceeds to give various grounds on which divorce may be granted and amongst them are the following:— (1) when the husband leaves her without any means of subsistence, (2) when he quits without making any provision on her behalf, (3) when he persistently neglects to visit her, (4) when he treats her habitually in a cruel manner.

All these grounds have been held to exist in the present case. It is also urged that by the ante-nuptial agreement power is given to her to divorce him by *talak* and that she should have adopted that remedy instead of coming to the court. But I can find no authority for this, and the plaintiff cannot be deprived of her ordinary legal right to come to the court and to obtain a decree if she establishes grounds justifying it.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 180 OF 1919.

MAUNG PO THEIN and others .. .. APPELLANTS.

vs.

MA WAINC and one .. .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Robinson, J.

For apellants—Mr. Burjorji.
For respondents—Mr. Davies.

22nd March, 1920.

Civil Procedure Code (Act V of 1908). Section 145—surety bond for a receiver appointed by court—s. 47 appeal from order.

An order by a court requiring a surety for a receiver to pay up any money due under the surety bond can under section 145 of the code of civil procedure be executed against the surety in the manner provided for the execution of decrees, and an appeal lies from such order under section 47 of the code.

JUDGMENT.

TWOMEY, C. J. AND ROBINSON, J.—Ma Waing sued her husband Maung Shwe Tha for divorce and partition of property. On the 22nd March, 1915, Maung Shwe Tha was appointed receiver of most of the joint property to collect the rents and profits thereof. On the 22nd May, 1915, he and the present appellants executed a bond in

favour of the district judge of Hanthawaddy his successors and assigns. The condition of the bond was that if Maung Shwe Tha should duly account for all the joint property and for every sum and sums of money he should so receive on account of the rents and mesne profits of the properties at such periods as the court shall appoint, and should duly pay the balances as may be certified to be due from him as the court "hath directed or shall hereafter direct" then the obligation shall be void; otherwise it should remain in full force. The bond was in the sum of Rs. 20,000.

Mr. Chari was appointed commissioner to take the accounts *inter alia* in respect of what was due by Shwe Tha as receiver. He made a report in respect of the period up to the end of 1918 that Rs. 38,529-8-0 was due. Subsequently he reported that Rs. 11,008/- was due for three months of 1919. On the 4th April, 1919, Shwe Tha was removed from the receivership and Mr. Chari was appointed receiver. When Shwe Tha did not pay up the amounts held by the court to be due by him, Mr. Chari applied that the sureties should be called upon to pay the Rs. 20,000/- for which they had executed the bond. The sureites appeared and the court passed an order dated the 11th May, 1919. It was directed that as a matter of grace, and in order not to put the sureties to any avoidable loss Mr. Chari should sell such portions of Shwe Tha's share in the estate as are readily marketable and after deducting Shwe Tha's share of the joint debts credit seventy-five per cent of the balance of Shwe Tha as receiver, twenty-five per cent being held in suspense for contingencies. It was then ordered that if after this credit there remained any sum still due from Shwe Tha as receiver the proceedings against the sureties may be pressed.

This order was carried out and after the deductions had been made a sum of Rs. 17C22-5-2 was still due from Shwe Tha. This he has failed to make good. Then the court was moved to call upon the sureties and on the 12th September, 1919, notice was issued to them to show cause why they should not pay up the amount. They obtained a week's adjournment to file objections. On the date fixed they appeared and wanted a further adjournment for a fortnight to file their objections. This was refused and on the 31st October an order was passed that they must pay up the amount within one week. Later in the day Mr. Burorjee appeared and asked to be heard on a legal point. A date was fixed for this and notice issued to Mr. Chari. On the date fixed Mr. Dantra appeared and asked for an adjournment as Mr. Burjorjee was out of Rangoon. This was very naturally refused. An order was then passed that as the sureties had failed to pay the amount Mr. Chari can take any steps he may think proper. Mr. Chari then took out execution against the property of the sureties and this appeal was then filed. It is said to be an appeal against the order of the 31st October, 1919, by which it was ordered that the sureties must pay up within one week.

That order it is said is *ultra vires*, as on the failure of the sureties the only action open was to apply to the court to assign the bond on

which being done the assignee could bring a suit on the bond. If the order was passed under section 145 of the code of civil procedure an appeal will undoubtedly lie and the question therefore is whether such an order could be made under that section. It is urged that section 145 only applies when the surety has given his bond for a party to the suit. Here the bond is given for Shwe Tha *qua* receiver and not as being a party.

Under the previous code of 1882 the corresponding section applied only to decrees and where a person became liable as surety for the performance of the decree or any part thereof. In the present code the scope of the section has been much enlarged by the addition of clauses (b) and (c) and by the inclusion in it of orders in addition to decrees. Clause (c) applies where any person has become liable as surety for the payment of any money under an order of the court in any suit and the section provided that the order to pay may be executed against him to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The language is very wide and there is nothing to indicate that it is or was intended to be limited to sureties for parties to the suit in their capacity as parties. It is no doubt true that one method of proceeding against a surety is to obtain an assignment of the bond and bring a suit on it. The section does not prevent this course being adopted but provides a summary and more expeditious course. Had it been intended to limit its application it would have been clearly indicated. Instead of this we find the scope of the section extended and it is no longer confined to decrees and their performance, but covers orders also. An order appointed him receiver and called upon him to give security, and the sureties undertook their liability if he failed to pay at any time he might be ordered to do so.

It is further urged that the sureties have had no opportunity to contest the correctness of the amount for which Shwe Tha as receiver has been held liable and that if a suit was brought on the bond they would be able to raise this defence. They received notice to show cause why they should not be called upon to pay but chose to file no objections. They were twice given an adjournment to enable them heard to do so now. It is said that the commissioner charged commission after agreeing not to do so, but that is purely a matter of the terms of his appointment. Again it is urged that the twenty-five per cent should not have been held back. Should this amount be afterwards available towards Shwe Tha's liability they can recover any excess they may have held to pay. They bound themselves to make good any sum Shwe Tha might be ordered to pay at any time and here again they have failed to make out any case. We must therefore hold that the order to pay was one falling with the scope of section 145 and that it may be enforced in execution. So far as the possibility of the sum for which Shwe Tha is liable being reduced on appeal, their remedy lies by way of a stay of execution.

The appeal is therefore dismissed with costs—advocate's fees three gold mohurs.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

S. N. SEN and one .. .. .. APPELLANTS.

vs.

BANK OF BENGAL .. .. .. RESPONDENT.

Before Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

For appellants—Mr. DeGruyther, K. C. and Mr. Eddis.
For respondent—Sir Erle Richards, K. C. and Mr. Draper.

18th December, 1919.

Contract Act (IX of 1872) s. 129.—Continuing guarantee—Fidelity guarantee. s. 131—Revocation of continuing guarantee by surety's death.

An agreement with an employer to make good any loss arising from the carelessness or default of his servant is not a continuing guarantee within the meaning of section 129 of the Contract Act, and is not revoked by the death of the surety.

JUDGMENT.

LORD PHILLIMORE.—One Gnanamutu Stephen was khazanchee at the Rangoon branch of the Bank of Bengal, which bank is the defendant in the suit and respondent in the present appeal. Gnanamutu Stephen was also a moneylender carrying on business on his own account. He ceased to be khazanchee on the 27th January, 1903, on which event his son Edward was appointed in his stead. The bank required Edward to find security, and this security was found by his father for him upon the terms of a tripartite agreement dated the 5th February, 1903, to which the father, the son and the bank were parties.

On the 1st December, 1907, the father took his son Edward and another son, Andrew, into partnership, and the three traded for a short time under the name of G. Stephen & Sons. This did not last long, and the father died on the 27th January, 1908, leaving a will by which, subject to certain provisions for his wife and certain legacies, the residue of his property was bequeathed to his two sons in equal shares. David Rajh was one of the executors named in the will, and probate was granted to him. He is the second plaintiff in the suit, and the second appellant before the Board.

After the death of the father the partnership was continued between the sons, and an indenture of partnership was executed between them on the 27th April, 1908; but Andrew Stephen on the 1st June, exercised the power given to him by the partnership indenture of giving three months' notice to retire from the partnership, and did so on the 1st September. In March, 1909, Edward tendered to the bank his resignation of the office, and ceased to be khazanchee on the

18th June, 1909. On the 1st March, 1909, he was adjudicated insolvent, and S. N. Sen, an official receiver, is now the representative of his estate. Sen is the first plaintiff and the first appellant. When the accounts between the bank and Edward Stephen in his capacity of a customer came to be settled, he was found to be largely indebted to the bank. The figure as ultimately worked out is Rs. 184,548. The appellants, however, contend that this figure is wiped out because the bank holds certain promissory notes to the value of Rs. 195,000.

On the 3rd February, 1913, this action was brought for the purpose of recovering from the bank the security which the father had lodged for the son's faithful discharge of his duties as khazanchee, security, which being at the beginning of the value of Rs. 75,000, had been augmented by interest to Rs. 82,437. The case put forward by the plaintiffs was that all accounts between Edward in his capacity of khazanchee and the bank had been long since settled, that nothing was due from him in that capacity, that it was immaterial to a claim by the father's representative that money was due from Edward in his capacity as a customer, and that even if that were to be inquired into, the block of securities held by the bank was more than enough to wipe out the debit. The logical consequence of this would be that Rajh, as representing the father's estate, would be entitled to recover the securities which the father had deposited.

Sen's interest was a derivative one only as representing the son's share as legatee under his father's will, and he seems to have been an unnecessary party. However, no objection was taken. No doubt ultimately, success by the father's executor would inure to the benefit of the creditors of the legatee son, and it is not without some importance, in view of what happened, that Sen and Rajh should be found thus acting together.

The position taken by the bank was that Edward in his capacity as khazanchee had not been faithful, and that he had committed distinct breaches of the agreement of security by being fraudulent as a customer, and concealing these frauds from the bank though he was as an official bound to report upon the frauds of a customer or upon anything likely to affect the solvency of a customer, and that, therefore, the loss which the bank had sustained by reason of his account being in debt was properly attributable to his misconduct as khazanchee. The bank further said that, for reasons to be hereinafter mentioned, the block of securities though of the apparent nominal value of Rs. 195,000, either was of no value or was not such as the bank was bound to realise, while it had, in fact transferred the block for what it was worth to Sen acting on behalf of himself and Rajh. Part of the security deposited was a sum of Rs. 25,000 cash. During the course of the proceedings, and by arrangement, the other effects were realised, and it was agreed that the total sum thereby obtained amounted to Rs. 82,437.

When the case came on trial in the Chief Court of Lower Burma, Young, J. decided in favour of the plaintiffs, being of opinion that

the bank was not entitled to retain the security, and ordered it to re-pay to the plaintiffs the sum of Rs. 82,347 with costs. On appeal, the court, in its appellate jurisdiction, consisting of Ormond, O. C. J., and Parlett, J., reversed this decision and dismissed the suit with costs in both courts, hence the present appeal.

The first point made on behalf of the appellants was that the instrument of security was a continuing guarantee within the meaning of the Indian Contract Act, section 129, and as such was revoked by the death of the surety according to Section 131. It is to be gathered from the terms of the agreement of the 5th February, 1903, that the natural person to deposit security was Edward Stephen, the new khazanchee, and that by special arrangement the father was let in to deposit security in lieu of the son. There is no binding of the father in the agreement, but merely a pledging of the deposited security. In these circumstances it might be questioned whether there was any contract of guarantee within the meaning of section 124 of the same Act. But this view does not appear to have been presented to the courts in India, and their Lordships find it unnecessary to express an opinion upon it. Both courts treating the transaction as one of guarantee held that it was not a continuing guarantee, and their Lordships think rightly.

The words of the section are "A guarantee which extends to a series of transactions is called a continuing guarantee." There was no series of transactions here. It was one transaction, the appointment of Edward Stephen to a place of trust in the bank. So long as he continued in that place the guarantee remained and would not be revoked by the death of the guarantor. Any other view would have consequences very injurious to business. It would put the bank in the position of having either to get rid of an official forthwith upon the death of his guarantor, which might be most inconvenient, or to keep him without security for his good behaviour. Moreover, as the judges in the appeal court observe, Edward Stephen was entitled to three months' notice, and the bank could not get rid of him forthwith, and must take a risk for three months if the guarantee was revoked by the father's death. Their lordships deem it unnecessary to elaborate the argument on this point.

This point being disposed of, two other questions arise for their Lorships' determination; whether the loss, if any, which the bank has sustained by reason of the debit on Edward Stephen's account as a customer can be attributed to some misfeasance on the part of Edward Stephen as khazancheee, that is some misfeasance falling within the instrument of security, and secondly, whether having regard to the block of securities already mentioned as at one time in the possession of the bank, it is to be held that there is a true debit balance on the account of Edward Stephen as a customer which the bank cannot, or is not bound to, wipe out by the realisation of this block of securities.

It is now necessary to turn to the terms of the instrument of security. As already stated, it is a tripartite agreement, and it begins with the following recitals:—

"*Whereas* the said Edward Dawson Stephen (hereinafter called the khazanchee) has been appointed to and now holds the office of khazanchee for the Rangoon branch of the bank, and upon the said appointment being made it was agreed that he should furnish security to the Bank to the extent of Rs.75,000 for the due and faithful performance of the duties of his office. *And whereas* the said Gnanamathu Stephen has at the request of the khazanchee and with the concurrence of the Bank agreed to furnish the said security for the khazanchee in the manner hereinafter stated; namely by depositing with the Bank the sum of Rs. 25,000 in each, bearing interest at the rate of 5 per cent. per annum, payable at the Bank of Bengal Rangoon half-yearly, and a demand promissory note dated the 1st October, 1902, for Rs. 25,000, signed by S. N. Ramanathen Chetty and V. V. R. Chockalingum Chetty jointly and severally, in favour of Gnanamuthu Stephen, and by him endorsed to the Bank the said demand promissory note to be a continuing security for so long as the khazanchee shall be liable under this agreement to the Bank and by the mortgage herinafter recited to the Bank to secure the further sum of Rs. 25,000. *And whereas* in part performance of the said agreement the said Gnanamuthu Stephen has deposited with the Bank the said sum of Rs. 25,000 and also the said Promissory Note, particulars whereof are specified in the first schedule hereto. *And whereas* by an indenture bearing or intended to bear even date with, these presents and made between the said Gnanamuthu Stephen of the first part the khazanchee of the second part and the Bank of the third part, all that dwelling house and premises known as No. 11, Mission Road, Rangoon, more particularly specified in the second schedule hereto are in further pursuance of the said agreement mortgaged and charged to the Bank as security to the extent of the further sum of Rs. 25,000, for the due and faithful performance by the khazanchee of the duties of his said office. *And whereas* these presents are entered into for the purpose of defining generally, the duties, liablities and responsibilities of the said office of khazanchee."

The material clauses of the agreement are the following:—

1. That the khazanchee shall be and continue the khazanchee of the Rangoon Branch of the Bank from the date of these presents at a monthly salary of Rs. 350/- only, such service being determinable on either side by three calendar months' notice to that effect.

2. That the duties liabilities and responsibilities devolving upon the khazanchee as such khazanchee as aforesaid, shall be such as either by custom or contract usually devolve upon a khazanchee in the employ of the Bank including the duties liabilities and responsibilities hereinafter mentioned.

5. That the khazanchee shall enquire into and as far as possible ascertain and, if required to do so, truly and faithfully

report in writing upon the identity, credit, solvency and circumstances of all persons being Asiatic residents in India of Burma, who shall after the date hereof have dealings of any kind with the Bank through the agency of the khazanchee in the course of his employment as khazanchee, and shall make good to the Bank all losses and expenses by reason of any carelessness, or default or misrepresentation in any such enquiry or report made by the khazanchee during the course of his employment as khazanchee.

"8. That the said cash deposit and promissory note so deposited as aforesaid shall remain in the hands of the secretary and treasurer for the time being of the Bank as security for the faithful discharge by the khazanchee of the duties of his office, and also for the protection and security of the Bank, their successors or assigns against any such damages, losses, costs, charges and expenses as are hereinbefore set forth, and that the said securities shall not be claimed by or returned to the said Gnanamathu Stephen until all accounts between the khazanchee and the Bank, their successors or assigns have been finally closed and settled, and all balances if any, due by the khazanchee shall have been paid and discharged. . . .

"9. Until any such loss or damage shall happen, interest on the said cash deposit of Rs. 25,000/-, at the rate of 5 per cent. per annum, shall be paid by the Bank. . . . . "

It is admitted that the firm of which Edward Stephen was either a partner or sole member comes within the description of Asiatic residents in Burmah.

The account of Edward Stephen being generally overdrawn he was expected to furnish, and did furnish, security which varied from time to time. This security generally took the form of promissory notes by the Chetties engaged in financial transactions. These notes were endorsed and handed to the bank. From time to time the makers would pay off the notes, and then Edward Stephen would fetch them away from the bank and deposit, if the state of the account required it, some other promissory notes as security. Apparently he was to this extent trusted by the makers that they would pay him the money requiring the immediate production of the notes, and would leave it to Stephen to hand them back later.

The block of securities to which reference has been made consisted of six notes for large sums, three made in 1907 and three in 1908. At different dates in 1908 and 1909, all while Edward Stephen was khazanchee, the sum due on these notes was paid, in some cases by one payment, in some by instalments, to Edward Stephen by the makers. Edward Stephen did not inform the makers that the notes had been indorsed over, and were in the possession of the bank so that he could not give a good discharge without getting them from the bank; he did not inform the bank that they had been paid; and, though the sums paid by the makers found their way to Edward Stephen's account with the bank, and to that extent reduced his debit

to by the magistrate. If therefore the parties did not live together after the surrender of the girl to her parents, the question is whether the consent that he gave was such as would render the contract a marriage. It is clear that the respondent was only dragged there after much persuasion, and did not expect to find a number of people collected, and it is equally clear that he was rushed into giving his consent. Even the witnesses for the petitioner state that they did not think that he ever meant to carry out the contract. One of them went so far as to ask him wha was to be done, if he did not carry out the contract. He said "Do whatever you like."

Taking all the circumstances into consideration, I am of opinion that there is no valid marriage. The application is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 346 B OF 1919.

P. S. PILLAY .. .. APPLICANT.

vs.

MOULMEIN MUNICIPAL COMMITTEE .. RESPONDENT.

Before Mr. Justice Robinson.

For applicant—Messrs. Cowasji and Das.
For respondent—Mr. Ginwala.

15th January, 1920.

Municipal bodies—Validity of byelaws. Byelaws of bodies working for profit—Unreasonableness, illigality.
Burma Municipal Act (Burma Act III of 1898) section 142 (d)—byelaws for lodging-houses.—Ultra vires.

A court has no jurisdiction to interfere with the byelaws of municipal bodies unless they are either (a) *ultra vires* as exceeding the powers given by statute, or (b) invalid as being repugnant to the general principles of law, and should support them if possible by a benevolent interpretation, crediting those who have to administer them with an intention to do so in a reasonable manner.

Byelaws of public bodies working for profit are on a different footing from those of public representative bodies acting under statutory powers. The former may be disallowed if unreasonable.

A byelaw of a municipal body requiring keepers of lodging-houses to pay a license fee reckoned on the maximum number of lodgers authorized, although the actual number of lodgers in the house may be less than the authorized number is not illegal or *ultra vires*.

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(1) 9, B. L. T. 179; 8, L. B. R. 399.

JUDGEMENT.

ROBINSON, J.—The applicant P. S. Pillay has been convicted under section 180 of the Burma Municipal Act for keeping a lodging house without having the same registered and licensed and fined one rupee. He now comes to this court to test the validity of the bye-law under which the municipality acted. He is the owner of a tenement lodging house in Moulmein, and bye-laws had been made under section 142 clause D for fixing and varying the number of persons who may occupy a lodging house, for rendering licenses necessary and for fixing the fees payable for such licenses, and the conditions subject to which they shall be granted and may be revoked. The bye-laws provide that no person shall keep a tenement lodging house unless it has been registered and licensed, and that before the house is registered and licensed it shall be inspected by an officer generally or specially appointed in that behalf by the committee who is to report in writing to the committee whether the house is sufficiently ventilated and satisfies other requirements, and especially as to be number of lodgers that can be properly accomodated in the several rooms. It is then provided that any person wishing to have a lodging house registered and licensed shall make a written application in a form that is given. This form does not provide for a prayer as to the number of persons for which a license may be granted. Then the rules provide that no keeper of a lodging house shall at any one time receive or allow to be received into the house a greater number of lodgers than shall be fixed by the committee as the maximum number of lodgers authorized and specified in a certificate in the prescribed form. This form gives the maximum number of lodgers authorized. The last rule to which it is necessary to refer prescribes that the fee to be charged for the licensing of each lodging house shall be two rupees for every lodger authorized in the certificate, that is to say, twice as many rupees as the number of lodgers authorized. It had been the practice for applicants to specify in their applications the number of lodgers which they wish should be specified as the maximum number, and provided, that number was less than the maximum number which the assistant health officer had reported as being permissible licenses for a lesser number were issued and fees were charged according to that number. This practice continued even after the bye-laws assumed their present form, but it was brought to the notice of the committee that they were losing revenue, and it was decided in future to charge fees strictly in accordance with the present bye-laws. The applicant applied for a license for thirty lodgers in respect of a house held by the assistant health officer to be fit to contain thirty-nine lodgers. The municipality declined to issue a license unless fees were paid on thirty-nine, and this the applicant refused to do. As he took out no license, he has been prosecuted. It is urged that the whole object of the Act and the bye-laws made under it in respect of lodging houses is to insure the public health, and public decency; and that, and not the revenue must be the first consideration of the municipality in administering the powers that they have under the Act. The powers were given not to supply the municipality with a source of revenue,

balance, the manager of the bank was left in the belief that he still had these notes as good security, and consequently allowed from time to time larger overdrafts than he otherwise would have done. It was due to this circumstance that Edward Stephen was allowed to overdraw to so large an extent, and to be upon the final winding up so heavily indebted.

That these transactions were frauds upon the makers of the promissory notes there can be no question, nor can it, in their Lordships' opinion, be doubted that they were frauds upon the bank. It is true that the notes being negotiable instruments, and having been transferred to the bank for value, payment to Edward Stephen did not operate as a discharge to the several makers, and that the bank as holders in due course might possibly still sue upon them and compel the makers to pay over again. But in the first place the bank was entitled to hold these documents as unquestionable securities, and not securities which would almost necessarily involve litigation if they were to be realised. Secondly, the bank was entitled not to be put into the odious position which such litigation would put it in, a position extremely likely to injure its popularity and its custom, and thirdly, inasmuch as Edward Stephen filled a dual capacity it would be quite possible that a plausible case might be set up by each maker to the effect that he must be deemed to have paid to Edward Stephen in the capacity of an officer of the bank; that the bank had, in fact, through Edward, got the money, and therefore that it was inequitable to sue him to recover it over again. Thus while to the belief of the bank manager the paper remained as good a security as it was at the first, its value had at least seriously diminished; it was no longer an absolute, but at the best a questionable security.

Now was this fraud committed by Edward as a customer, and not revealed nor provided against by Edward as khazanchee, one of those acts or defaults for which the security deposited by his father could be made responsible? Clause 2 of the agreement defines the duties of a khazanchee as those which either by custom or contract usually devolve upon such an officer including, but not confind to, the duties, liabilities and responsibilities afterwards set out in detail. That an officer of the bank who has heard some rumour that a customer is or may be doing something fraudulent may be absolved from communicating his information to his superior is quite possible. This argument was forcibly brought before their Lordships by counsel for the appellants. But when it is no longer a question of rumour or probability, but the officer knows, and as he was himself the fraudulent person he knew, and when the fraud was of the kind which it was, it seems pretty plain that it would be a breach of duty not to communicate it. If evidence were wanted to prove that this was one of the duties which by custom or contract would devolve upon a khazanchee the evidence of Mr. William Mackintosh, acting agent of the Bank of Bengal, evidence unchallenged by cross-examination and uncontradicted, would be sufficient to prove this.

But the bank also relies upon clause 5 which makes it the duty

the credit, solvency and circumstances of Asiatic residents who have dealings with the bank through his agency and in the course of his employment. It is true that in the same clause occurs the phrase that he is to report in writing when required and that he was not required. But if it is his duty to enquire and ascertain, and the result of the ascertainment is such as would lead the manager of the bank to close the customer's account there needs no requirement to make a report necessary; the ascertainment would be idle if it was not followed by the proper result, that is a report. In their Lordships' opinion the court of appeal put the right construction upon these clauses, and therefore the effects deposited as security for the faithful discharge of the duties of his office and for the protection and security of the bank against such losses as are set forth in the instrument may be retained by the bank until all such losses have been discharged.

There remains the question whether the bank has sustained any loss, in other words, whether the bank was bound to realize the promissory notes, obtain payment of them over again, and apply the sums received to wipe out the debit balance. As to this it appears that the bank did make application to each of the makers, and received for answer in each case that the makers had, as in fact they had, paid the money to Edward Stephen in the belief that he was the holder of the notes. Afterwards, and during the course of much discussion and correspondence, the bank, as already stated, passed the notes to Sen. It may well be that in his hands they were valueless because he represents Edward, but if there were any value to be got out of them at all it could be just as well got by his co-plaintiff, Rajh,as by the bank.

In their Lordships' opinion the bank was not bound to sue these makers and compel them to pay over again. It may be doubted whether, in any event, the bank would be bound to sue upon the notes, but in the particular circumstances it would put an intolerable burden upon the bank. The bank was probably bound (if so required) to hand the notes over to the father's representative, so that he might make what he could out of them, at any rate to the extent of the value of the security which he had deposited. But in substance that is what was done when the notes were transferred to Sen. If the bank either could not realize or was not bound to realize the notes, the debit balance remains; and it is larger than the total amount of the security deposited. There was, therefore, misfeasance by the khazanchee within the terms of the agreement, and by reason of such misfeasance there was a loss incurred by the bank to the full extent of the security.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 139 OF 1919.

S. T. K. CHETTY .. .. APPELLANT.

vs.

RAJASUNDARAM .. .. RESPONDENT.

Before Mr. Justice Robinson.

For appellant—Mr. Lambert.
For respondent—Mr. Chari.

22nd January, 1920.

Specific Relief Act (I of 1872) s. 42. Declaratory suit without further relief—Objection taken for the first time in appeal—Procedure—Amendment of plaint.—Right to a declaration against one person, and to further relief against another person.

The proviso to section 42 of the Specific Relief Act does not empower the court to dismiss a suit for a declaration because it omits to ask for consequential relief. The court can only refuse to make the declaration until the defect is remedied, and ought to allow the plaintiff to amend the plaint.

When an objection to a declaratory suit on the ground that it does not ask for consequential relief is taken for the first time in appeal, and allowed, the proper procedure for the court is to remand the suit to the lower court, to enable the plaintiff to amend the plaint.

Section 42 of the Specific Relief Act requires a plaintiff to include in his prayer any further relief he may have a right to against the same defendant, but it does not require him to include as defendants the persons against whom he may have a right to consequential relief.

Where a plaintiff has a right to a declaration against one person, and a right to a consequential relief against another person, he is not bound to join the latter as defendant in the declaratory suit, but can sue for a declaration without asking for further relief.

JUDGEMENT.

ROBINSON, J.—Plaintiff being the owner of a certain house mortgaged it to the firm of C. P. L. K. N. who got a mortgage decree against him. The mortgagee tried to sell the property in execution but no sale was carried through. He then transferred his decree to the present appellant firm of S. T. K. who brought the house to sale and bought it themselves. They obtained a sale certificate in 1911. Plaintiff now seeks a declaration that the sale certificate granted is void on the grounds that no notice of the assignment of the decree had been given to him and that no notice of the intended sale was given to him. He claims to be in possession at the time of suit. In 1915 the S. T. K. firm applied for possession but their application was dismissed and barred by limitation. In 1915 one Desai was in occupation of the house and is so still he says as the tenant of S. T. K. The plaintiff filed a suit against Desai as his tenant and the matter came up to this court but it was held that no tenancy was proved. Plaintiff then sued Desai for use and occupation but he again lost his suit it being held that he was not the owner of the property. Plaintiff then filed the present suit and it was decided in his favour in the first court. When the plaint was instituted on the 2nd December 1918 the court held that the suit was in effect one for cancellation of a document and

that it must be stamped to the full value of the property. Plaintiff paid the deficient stamp duty. The decree of the first court was based on the two grounds of want of notices mentioned above, and the decree given was that the court sale at which S. T. K. had bought the property was void, and it was set aside and the sale certificate issued was declared to be void. The only point that is now argued in this appeal is that the plaint was one for declaration merely and that there was no prayer for the specific relief of possession and that the suit therefore should have been dismissed. It is admitted that this point was raised specifically for the first time in the divisional court. But Mr. Lambert argues with some ingenuity that in the written statement S. T. K. denied that plaintiff was in possession and explains the failure to plead that the suit should be dismissed for want of a prayer for consequential relief on the ground that plaintiff was at that time claiming to be in possession, and the plea could not therefore be properly raised until the question of possession had been decided. He says that he urged that the issues were insufficient and asked that a further issue as to possession should be drawn. But he admitted he did not suggest any issue as to the suit failing for want of a prayer for consequential relief. He says he dealt with this omission in his argument. He admits that he cannot now argue as to want of notice.

It must be taken that the present point was taken for the first time properly in first appeal. In the case of the Bombay Burma Trading Corporation Limited *vs.* F. Yorke Smith (1) Mr. Justice Farran pointed out that the plaint did not ask for consequential relief, but that no objection had been taken by the defendants on that ground under section 42 of the Specific Relief Act and that as no fiscal regulation was contravened by the omission, he saw no reason why the court should raise the objection of its own motion. The point was raised in argument in appeal and in dealing with it the learned Chief Justice stated, "It is also to be remarked that this objection has been taken for the first time on appeal a circumstance which by itself is, in our opinion, fatal to it." The reason for this appears to me is to be found in the case of Kunj Bihari Prasadji *vs.* Keshavlal Hiralal (2) where Sir Lawrence Jenkins points out in quoting section 42 of the Specific Relief Act, "Nothing is said here about dismissing his suit; all that is enacted is that no court shall make a declaration, where the plaintiff, being also able to seek further relief, omits to do so." The court therefore cannot dismiss the suit. It can only refuse to make a declaration unless and until the defect is remedied. The result of such a defect and the proper method of dealing with it is pointed out in the case of Limba bin Krishna *vs.* Rama bin Pimplu (3) where it was held that a suit should not be dismissed by an appellate court on the ground of its being one asking merely for a declaratory decree and no consequential relief where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint. Had therefore this objection been specifically raised in the first court it would have been open to plaintiff to apply to amend his plaint or he could have maintained his position that he was in possession, when if he failed to prove it the suit might possibly have

been dismissed, and even if the divisional judge had entertained the objection his proper course would have been to have remanded the case so that plaintiff might have an opportunity, if he chose, to avail himself of it of amending his plaint. But it is unnecessary to deal with the matter further here for various reasons. In the first place the effect of the court's order in demanding stamp fees to the full value of the property was to convert the suit from one for a mere declaration into one for cancellation of the sale at which S. T. K. bought. He should no doubt have insisted on the amending of the plaint but unfortunately that was not done. However, even if the suit be treated as one for a bare declaration, it is clear that any consequential relief the plaintiff should ask for would be relief consequent on the main prayer of his suit. The appropriate consequential relief necessary to support the suit as laid would be the relief cancelling the sale and not for possession. S. T. K. was apparently not in possession. He endeavoured to obtain possession and the court had held that he was not entitled to possession as his claim thereto was barred by time. Desai was the person who was in actual possession and he was not a party to this suit and no decree for possession therefore would have been effectual as against Desai and plaintiff would still have had to bring another suit to obtain possession. That necessity would not have been done away with by the consequential relief even if it had been granted in the present case, and therefore the object of section 42 in requiring that the plaintiff shall ask for consequential relief where it is open to him would not have been satisfied. Section 42 does not require a plaintiff to include in his prayer every relief or every claim that he can make against every and any person but it only requires that he should ask for such reliefs as against the particular defendant in the suit. In my opinion, therefore, there is no force in the particular point that has been pressed in this appeal, and that, even if it could have been allowed, it would not have effected more than to allow the plaintiff an opportunity of amending his plaint. The appeal is, therefore, dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 400B OF 1919.

BA GYI and others .. .. APPELLANTS.

vs.

KING-EMPEROR .. .. RESPONDENT.

Before Mr. Justice Maung Kin.
For applicants—Mr. Bomanji.

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(1) 17, B. 197.
(2) 28, B. 567.
(3) 13, B. 548.

11th February, 1920.

Gambling Act (Burma Act No. 1 of 1899) s. 7. Presumption against persons found in a common gaming house—rebuttal of presumption.

The presumption under section 7 of the Gambling Act that persons found in a common gaming house were there present for the purpose of gaming may be rebutted by showing that they were inmates of the house, or were there for some legitimate business.

JUDGMENT.

MAUNG KIN, J.—The warrant was in order. The entry was made in a legal manner. The search was made in accordance with the law. Gambling instruments were found. The presumption under section 7 of the Burma Gambling Act arose against all the accused. But as regards Ma E Pyu, Ma Shin, Ma E Hla, and On Bu the fact that they were inmates of the house which was a small one may be held as rebutting the presumption. This remark may also be applied to Maung E Maung another inmate. As regards Maung Aung Min I cannot accept his statement that he was arrested downstairs where the first accused Maung Ba Gyi kept his shop, and he had gone there to settle his accounts. If I can hold that his statement is acceptable, and he was not upstairs when the police arrived, he should be acquitted. But I cannot. Moreover, I am unable to accept the defences of the other accused. The convictions of Maung E Maung, Ma E Pyu, Ma Shin, Ma E Hla, and Ba On Bu are set aside, and the fines, if paid, will be refunded. The convictions are confirmed as against the rest. The sentenecs on them are also confirmed, except in the case of the first accused Maung Ba Gyi. In his case the fine will be reduced to Rs. 100/-.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION NO. 276 B OF 1919.

BO GYI .. .. APPELLANT.

vs.

MA NYEIN .. .. RESPONDENT.

Before Mr. Justice Robinson.

For applicant—Mr. Lambert.
For respondent—Mr. Nicol.

12th November, 1919.

Criminal Procedure Code (Act V of 1898) s. 488. Order for maintenance. —Subsequent declaratory decree of civil court.

The jurisdiction conferred by section 488 of the criminal procedure code is auxiliary to that possessed by the civil courts, and before en-

forcing an order for maintenance made under this section a magistrate is bound to take into consideration any subsequent order of a civil court which would disentitle a wife to maintenance.

A magistrate ought to refuse to enforce an order for maintenance under section 488 if after the passing of the order a civil court has decided that the respondent was not the father of the child.

JUDGMENT.

ROBINSON, J.—The respondent obtained an order from the subdivisional magistrate of Shwegyin against the petitioner for payment of two rupees a month for the maintenance of her child. The petitioner did not apply to have that order reversed, but instead he brought a civil suit in the township court for a declaration that the child was not his. He obtained a decree, and then applied to the subdivisional magistrate to cancel the order previously made for maintenance. His application was rejected, and properly rejected as the magistrate has no power to cancel the order under section 488 once made. But he now comes to this court, and points out that the magistrate is not entitled to disregard the civil decree that has been obtained, and which has finally settled the question of paternity.

It has been pointed out in numerous cases that the jurisdiction conferred on a magistrate under section 488 is only auxiliary to that possessed by the civil courts, and a magistrate ought to take the judgment of a competent civil court into consideration, if it settles the question of relationship, and finally places the matter outside the pale of discussion. The result of the civil decree is to supersede the order of the magistrate directing maintenance, and as the cases cited in the notes to section 488 of Sohoni's Criminal Procedure Code show, the magistrate is not entitled to enforce his previous order. As the peitioner did not ask the magistrate for any order which the magistrate had jurisdiction to pass, I am unable to accept his application, and accordingly with the above remarks, it is rejected.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 332 B OF 1919.

MA TWE .. .. APPLICANT.

vs.

LWE HAIN .. .. RESPONDENT.

Before Mr. Justice Robinson.

For applicant—Mr. Sin Hla Aung.
For respondent—Mr. Thein Maung.

12th December, 1919.

Burmese Buddhist Law—Marriage between a Chinese Buddhist and a Burmese Buddhist woman—Lex loci.

The validity of a marriage must be decided by the *lex loci contractus.*

Semble. The marriage of a Burmese Buddhist woman with a Chinese Buddhist would be valid if the requirements of Burmese Buddhist Law are complied with.

JUDGMENT.

ROBINSON, J.—The point for decision in this case is whether petitioner and respondent were man and wife. The two ran away together, and respondent kept petitioner in the house of one San Min. It is clear that he made no attempt to treat her as his wife during this period. He got tired of the girl, and did not wish to continue his connection with her. The girl would not return to her home unless he took her, and surrendered her to her parents. It appears that considerable persuasion was used to induce him to take her back to them. Eventually both went to the house of Tun Nyein which is close to the house of the girl's parents. The girl then returned to her home, the neighbours were collected, and the girl and her elder sister went and begged the respondent to come and surrender the girl to her parents. It is perfectly clear that he went there with the greatest reluctance. When he went there he found a collection of people waiting him, and some so-called elders proceeded to question him. They asked him whether he would live with the girl as his wife, and he reluctantly said that he would. He was then asked where they would live, and he said in her parents' house. Two of these lugyis admit that they did not think that he ever intended to carry out his promise to marry the girl. These witnesses further go on to state that for about a month from that time they saw petitioner and respondent living in the girl's parents' house as man and wife. In order to decide whether there was a valid marriage, it is first necessary to decide the law binding upon the parties in this matter. Petitioner is a Burman Buddhist and respondent is a Chinese Buddhist born in Burma. I have no hesitation in agreeing with the dictum of Sir Charles Fox in the case of Maung Sein Kyi *vs.* Ma E (1) that the law of the place where it was contracted determines the validity of a marriage and that this question must be decided by the Burmese Buddhist law. Under that law there must be free consent of the parties, but it is obvious that the consent of the respondent was induced and was very reluctant. But assuming that this amounts to such consent as would constitute this a promise of marriage, it would be necessary for that promise to be followed by open living as man and wife. As regards this latter point, the evidence is conflicting. The position of the so-called lugyis is not such as tends to inspire confidence in their veracity. They are neighbours. They were specially called in order to effect this marriage. No sufficient ground has been made out in my opinion for me to differ from the finding of fact on this point some

but primarily for the preservation of the public health, and the provision as to fees was intended only to enable them to provide the necessary staff for inspection, and for enforcing the bye-laws. It is urged that when the assistant health officer has certified for thirty-nine lodgers, the primary object of his inspection and certificate will be even better served by entering in the certificate thirty instead of thirtynine as the maximum number, and that if the proprietor so wishes there is nothing to prevent the municipality acceding to his request, and that that request being eminently reasonable, the municipality is bound to grant it.

The rules as to the interpretation of such Acts as the Burma Municipal Act are laid down in Maxwell on The Interpretation of Statutes, fifth edition page 481 *et seq.* "Rules and byelaws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the rights of persons. They must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorizing them, nor repugnant to that statute, or to general principles of law. . . . . In determining the validity of byelaws made by public representative bodies under statutory powers, their consideration is approached from a different standpoint from bye-laws of railway or other companies, which carry on business for their own profit, although incidentally for the advantage of the public. Courts of justice are slow to condemn municipal byelaws as invalid, on the supposed ground of unreasonableness, and support them if possible by a "benevolent" interpretation, and credit those who have to administer them with an intention to do so in a reasonable manner. But, on the other hand, if a byelaw necessarily involves that which is unreasonable, it is the duty of the court to declare it to be invalid." On the other hand it is pointed out that "where the statute conferring the power to make byelaws enacts that any such laws consistent with the provisions of the statute, and not repugnant to any other law in force, shall have the force of law when confirmed by the executive, it is doubtful whether a court would not be precluded from questioning the reasonableness of such byelaws, or whether they are *ultra vires*, unless it be in some very extreme case."

In considering these byelaws in the light of these principles, it is impossible to say that they are *ultra vires* of the powers given by the Act, or that they are unreasonable or invalid as being repugnant to general principles of law. It is essential that the maximum number of lodgers which may properly be permitted must be specified, and it is impossible to say that the municipalty is not authorized to charge fees on that maximum number. Unless the byelaw can be held to be invalid as being unreasonable, the court is not justified in interfering. At the same time it is impossible not to admit that the applicant's request is perfectly reasonable. This is a tenement lodging house divided for several families, and to compel him to pay fees calculated on the maximum number reported by the assistant health officer may only lead him to take in more lodgers to the discomfort of families occupying a tenement or compel him to alter the construction of the house by reducing the size of the tenements to the

detriment of families who might otherwise occupy the present accomodation. The wisdom of the committee may be questioned, but it is not for this court to dictate to them, and the court has no power to interfere where the byelaw is valid and legal as it is in the present case. The application is dismissed.

THE

BURMA LAW TIMES.

VOL. XIII.] MAY-JUNE, 1921. [Nos. 5 and 6.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 88 OF 1919.

A. A. GANY .. .. APPELLANT.

vs.

A. OMER .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt., C. J. and Young, J.

For appellant—Mr. Bilimoria.
For respondent—Mr. Robertson.

1st March, 1920.

Probate and Administration Act (V of 1881) s. 50 Revocation of probate or letters of administration—who can apply, Surety to an administration bond. Discharge of surety. Remedy of surety desiring to be discharged.

Application for revocation of probate or letters of administration can be made only by a person who is interested in the estate, and who has an immediate right to, and is willing to take a grant of letters of administration in substitution.

A creditor of the estate, or a surety to an administration bond cannot apply for revocation of a grant.

A surety to an administration bond cannot be discharged from his liability till the estate is fully administered.

The proper remedy for a surety to an administration bond who wishes to be discharged would be to get some person entitled to a grant to apply for revocation.

JUDGMENT.

TWOMEY, C. J. AND YOUNG, J.—This is an appeal against an order rejecting an application by a surety to have the letters of administration granted to his principal revoked, on the ground that the principal was wasting the estate. The learned judge refused the application on the ground that the surety was not a person

interested in the estate. Section 50 of the Probate and Administration Act of 1881 does not lay down who may or may not apply to revoke. But the cases cited show that a mere creditor's application cannot be entertained, because he is not interested in the estate, and no case has been cited to us in which revocation has been ordered at the instance of a person not interested. A surety is not a person interested in the estate. In England the practice seems to be to allow no one to apply to revoke a grant however good the case may be on the merits, unless he has himself an immediate right to, and is willing to take a grant of letters of administration in substitution. See williams on Executors, 10th edition page 457, and Coutt's Probate Practice, 14th edition page 181. Administrators as in India have to give bonds with sureties for the due administration of estates entrusted to them, and in England as here the court will not discharge sureties. See Williams on Executors 10th edition page 429. A surety as such will not be entitled to an immediate grant, and following the English rule we must hold that he is not entitled to apply for revocation.

His proper remmedy would seem to be to get some one entitled to a grant to apply. The present appeal must therefore be disallowed with costs,—two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 142 OF 1919.

ACHAYA and others .. .. APPELLANTS.

vs.

MAUNG PO SAING and one .. .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Sen.
For respondent—Mr. Bose.

13th May, 1920.

Evidence Act (I of 1872) B. 102—Burden of proof—Vendor and purchaser, non-payment of consideration—Effect of laches.

In a suit for possession by a purchaser claiming under a registered sale-deed, the burden of proving non-payment of consideration is on the party alleging it *viz.* the vendor, but if possession has been withheld from the purchaser for a very long time, and he has submitted to the withholding of possession, the burden is shifted on to the purchaser, unless the withholding of possession for a very long time can be explained otherwise than as being due to non-payment of consideration.

JUDGMENT.

MAUNG KIN, J.—This appeal arises out of a suit by plaintiffs for the possession of a house site with a house thereon on the allegation that the defendants sold the house to them under a registered deed. The defendants failed to prove that they did not receive the consdieration fo rtheir sale. In the lower courts there was some contest as to whether or not the transaction was a *benami* one, but the point is not argued before me. Upon the evidence it is right to hold that the plaintiffs have failed to prove the payment of consideration, so the position is that the plaintiffs are not able to prove the payment of consideration and the defendants can only say that they have not received any payment, but cannot prove their allegation. How is the case to be decided? It must be decided by ascertaining on which side the burden of proof lies. For the defendants the cases of Achobandi Kuari *vs.* Mahabir Prasad (1) and Bihari *vs.* Ram Chandra (2) have been cited as showing that the burden should be placed upon the plaintiff.

In the first case the suit was for posession by the purchaser under a registered deed of sale. The defendant (vendor) admitted the execution and the registration of the deed, but denied receipt of consideration. The deed was executed in January 1876 and the suit was instituted in 1884. The vendor had been in possession during the whole of that period, namely, over eight years. The plaintiff produced no evidence to prove the payment of consideration. Oldfield and Tyrell, J. J. held that under ordinary circumstances the party alleging non-payment of consideration would be bound to prove his allegation, but the fact that the plaintiff had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

In the second case the plaintiffs were usufructuary mortgagees. They were never given possession of the mortgaged property, nor did they attempt to recover possession until the period of limitation had almost expired. The defendants (mortgagors) pleaded that no consideration had passed. Stanley, C. J. and Banerji, J. held following the first case above cited that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. The case of Mahabir Prasad Rai. *vs.* Bishan Dayal (3) was distinguished, in that in the case before the Bench, possession had been withheld for nearly twelve years, whilst in Mahabir's case there was no withholding of possession for a length of time. In the latter case it was laid down that where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the

(1) 8, A. 641.
(2) 33, A. 483.
(3) 27, A. 71.

executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of the suit on the bond he denied receipt of consideration, even if such denial was made before the registering officer.

Now, in the case before me possession has been withheld for less than two years, and the lower appellate court, whilst saying that the fact that the vendors had remained in possession of the property is undoubtedly a point in favour of the defendants' claim, also says that it does not seem to it to be conclusive. It goes on to observe:—"It appears from the statement of the respondent, Po Saing, that he has had other transactions with the defendant, Ma Shwe Ma. He says that he once stood security for her for a sum of Rs. 370/-. The parties are not strangers to each other, and the fact that immediate possession was not insisted on does not establish the appellants' case." So that the fact that the defendants were in possession has been explained on a footing other than that of the non-payment of consideration. These special features in the case distinguish it from Achobandil's case (1) and Bihari's case, (2) and the special rule shifting the burden on to the purchaser by reason of possession being withheld for a long period, cannot be applied to the present case. Mahabir's case (3) is more nearly akin to the present case than the two other cases. And there is nothing in the case to take it out of section 102 of the Indian Evidence Act. For the above reasons, the appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 154 OF 1917.

ASOOMEAH and one .. .. .. APPELLANTS.

vs.

V. S. R. M. CHETTY .. .. .. RESPONDENT.

Before Justices Maung Kin and Rigg.

For appellants—Mr. N. M. Cowasji.
For respondent—Mr. Giles and Mr. Banerji.

22nd May, 1918.

Evidence Act (I of 1872) ss. 68 and 69. Proof of execution of documents requiring attestation—proof of death of attesting witness.—Person subject to the process of the court.

The death of an attesting witness to a document must be proved by proper legal evidence, not by hearsay.

The fact that an attesting witness cannot be found must be proved to the satisfaction of the court by evidence of a strict, diligent, and honest search.

A witness is subject to the process of the court, if he can be compelled to attend the court to give his evidence. A commission is not a process of the court, and a person for whose examination a court may in its discretion issue a commission is not a person subject to the process of the court. The issue of a commission for the examination of a person makes that person subject to the process of the court to which the commission is directed.

JUDGMENT.

MAUNG KIN AND RIGG, J. J.—The plaintiff respondent in this suit V. S. R. M. Chetty sued Assoomeah, a merchant residing at Chittagong on a mortgage executed on 11th September, 1907, by one Fazal Rahman, whom plaintiff alleges to be defendant's duly constituted agent for this purpose. He also joined as defendant S. S. A. O. Chetty firm who had a subsequent mortgage on the property. The first defendant in his written statement denied that he executed the mortgage, or borrowed the sum of Rs. 7,000 on it, or that he had authorized anybody to execute the document which purported to be the mortgage in suit. The second defendant denied generally the correctness of the statements of the plaintiff and put the plaintiff to proof of them. On these pleadings three issues were fixed, the first two of which only are important to the decision of this case. The first issue is whether Fazal Rahman executed the mortgage deed in suit as agent of defendant, and the second is whether if he did so, he exceeded his power under the power of attorney. It is contended on appeal that as the mortgage deed was one requiring attestation by two witnesses the plaintiff was bound under the provisions of section 68 of the Evidence Act to call one of the attesting witnesses to prove execution and that he has failed to call either of the attesting witnesses or to prove that S. R. M. Mutu Veliappa is dead or cannot be found. There is therefore no legal proof of execution of the mortgage, and the suit fails on that ground.

We are unable to agree with the opinion expressed by the learned district judge that the evidence on the record is sufficient to prove the death of S. R. M. Mutu Veliappa Chetty. It is merely hearsay evidence, and no witness has been called who has any personal knowledge of the death of Mutu Veliappa. From the evidence it appears that he disappeared from Rangoon some four or five years ago, and so far as enquiries went has not returned to Burma. The plaintiff and his witnesses apparently contented themselves with believing the story of some of the persons who were questioned about the death of Mutu Veliappa, and they did not make any attempt to enquire into the truth of their story. In these circumstances we should find some difficulty in holding that it was shown that Mutu Veliappa could not be found. The degree of diligence required in seeking for the attesting witness to a document is the same as that required for the search of a lost paper. The enquiry must be strict, diligent, honest, and satisfactory to the court. It should be made at the residence of the witness, if known, and at all other places where

he may be expected to be found, and also, in general, of his relatives and others who may be able to give information concerning him. (See Taylor on Evidence, 10th edition paragraph 1855.) The enquiry in this case was very far short of this requirement. The appellant however has filed an affidavit stating that Mutu Veliapa is not dead, but is in Pudukotta State, and contended that his evidence could be taken on commission, and that, for that reason, he is a person "subject to the process of the court" within the meaning of section 68 of the Evidence Act. His learned counsel quotes from Stroud's Law Lexicon the meaning of the word "process" as including generally the activity of a civil or criminal court, but Mr. Wharton in his Law Lexicon while admitting that the term might have a wider meaning states that it is generally confined to a summons or other writ. It is conceded that if he was in Madras, this court has no power to compel his personal attendance, Mr. Giles argues, that the fact that the court can issue a commission does not render this witness subject to the process of the court. The issue of a commission is a matter within the discretion of the court issuing it, and when a commission is issued, the person to be examined on commission becomes subject to the process of the court issuing the commission. It appears to us that the natural meaning of the words "subject to the process of the court" is that the witness can be compelled to attend the court, and give his evidence personally. This appears to be the view taken in English courts. Taylor remarks that if an attesting witness is out of the jurisdiction of the court, then a document can be proved by other evidence, and in the notes to paragraph 1851, cites authorities to show that this is the law notwithstanding the power the court has to examine on interrogatories under order XXXVII rules 1 and 5 of the Rules of the Supreme Court 1883.

We are therefore of opinion, that since it is conceded that Mutu Veliappa Chetty was in Madras, at the time of the trial of the suit, he is not a witness subject to the process of the court, and therefore the court could under section 69 of the Evidence Act take evidence to prove the attestation of the witness to be in his handwriting. The second attesting witness is Tafazul Ahmed. According to the evidence of the plaintiff this witness was produced as an attesting witness by Fazal Rahman. The evidence for the plaintiff shows that enquiries were made from Fazal Rahman as to the whereabouts of this witness, and also from various other Bengalees, but none of them could give satisfactory answers. The mortgage was executed more than ten years ago, and we think under the circumstances the plaintiff has done all he reasonably could to discover the witness and has failed, and that we are justified in saying that Fazal is a witness who at the time of the trial could not be found. Mr. Cowasji has not seriously contended that Fazal Ahmed is a witness whom plaintiff was able to find after due and diligent search. He has rested his case on the fact that the other witness Mutu Veliappa could and should have been called. For these reasons we are of opinion that the first two grounds of appeal must fail. It has not been contended that the proof of identity of the handwriting of the attesting witnesses is not sufficient, and we are of opinion that there is sufficient proof on the record that the

mortgage deed was duly executed by Fazal Rahman in favour of the plaintiffs.

The next question for decision is whether Fazal Rahman at the time of executing the mortgage had power to execute it on behalf of the first defendant. Assoo Meah was examined on interrogatories, and his answers are of the a most unsatisfactory kind. He admits that he did execute a power of attorney in favour of Fazal Rahman, but says it was a special power. As against this there is the record in the registration office, Rangoon, that the power of attorney held by Fazal Rahman was a general power of attorney. P. R. M. A. Raman Chetty swears that before the deed was executed he showed the power to his pleader, and was informed that was in order. We observe that in exhibit C7 Fazal Rahman in 1905 on the same power of attorney mortgaged a part of the property, and later in exhibit C7i he cancelled the mortgage. Again in 1909 on the same power of attorney he mortgaged the property to S. S. A. V. Chetty and Assoo Meah admits that he knew of this, and took no steps to repudiate it. The title deeds of the property were handed over to the plaintiffs, and it is incredible that for ten years Assoo Meah could have been in ignorance as to what had happened to this land. He came to Rangoon, but he made no attempt to repudiate this transaction of his agent. Under these circumstances there is a strong presumption that the power of attorney was a general power. We may also remark that if this were not so, it would be easy for Assoo Meah to produce a copy of the power of attorney, or the person who wrote it to show that he did not authorize such dealing with his property on the part of Assoo Meah. The question as to the exact authority conferred by this power of attorney was peculiarly within the knowledge of Assoo Meah. Under section 106 of the Evidence Act the burden of proving that it had not the effect plaintiff alleges lay upon Assoo Meah. We see no reason to interfere with the judgment and decree of the district court, and we dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 42 OF 1918.

K. N. K. L. CHETTY .. .. .. APPELLANT.

vs.

BA TIN .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt. C. J. and Ormond, J.

For appellant—Mr. Chari.
For respondent—Mr. Hay.

25th July, 1918.

Provincial Insolvency Act (III of 1907) s. 28, "date of adjudication." Ss. 34 and 38 "date of order of adjudication."

The words "date of adjudication" in section 28 of the Provincial Insolvency Act have the same meaning as the words "date of order

of adjudication" in sections 34 and 38, and do not relate back to the date of presentation of the petition on which it is made as provided in section 16 (6) of the Act.

JUDGMENT.

TWOMEY, C. J. AND ORMOND, J.—The appeal in this case is as to the proper construction of the words "before the date of such adjudication" in section 28 of the Provincial Insolvency Act. The district court has held that the appellant's debt is not provable in insolvency, because the obligation was incurred by the debtor after 10th August 1916, the date on which the petition was presented, though it was prior to the 17th November 1916, on which day the order of adjudication was passed. The learned judge came to this conclusion having regard to the terms of section 16 subsection 6 of the Act which provide that an order of adjudication shall relate back to, and take effect from the date of presentation of the petition on which it is made. In support of this view, it is pointed out that in other sections e. g., sections 34 and 38, the term "date of the order of adjudication" is used, and we are asked to infer that the "date of the adjudication" must be a different date. We are unable to accept this view. The plain meaning of the term "date of such adjudication" is the date on which the adjudication is actually made, and provisions of section 16 clause 6 do not go so far as to require that any such adjudication should be antedated. Section 38 protects *bona fide* transactions up to the actual date of the adjudication, and it appears to us that such transactions are proveable under section 28. A comparison with the corresponding sections of the Presidency Towns Insolvency Act lends support to this construction. Section 46 of the Act contemplates that creditors can prove debts incurred after the presentation of the insolvency petition, and before the date of the adjudication, unless the creditor has had notice of the presentation of the petition The purpose of section 16 subsection 6 of the Provincial Insolvency Act is the same as that of section 51 of the Presidency Towns Insolvency Act, namely to provide for the vesting of the insolvent's property in the receiver or assignee, as from the date of presentation of the petition, or other act of insolvency. We see no reason to hold that in the case of the Provincial Insolvency Act any more than in the case of the Presidency Towns Insolvency Act, it was intended to debar creditors from proving debts not invalidated by other provisions of the Act.

The appeal is allowed, and the order of the district judge is set aside, and the appellant will be given an apportunity of proving his debts. The appellant is entitled to his costs in both courts, advocate's fees—one gold mohur in the district court, and two gold mohurs in this court.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 1 OF 1920.

KARAMATH KHAN .. .. .. APPELLANT.

vs.

S. P. L. LATCHMI ACHI .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt. C. J. and Young, J. and Rigg, J. J.

For appellant—Mr. Chari.
For respondent—Mr. Doctor.

29th March, 1920.

Transfer of Property Act (IV of 1882) s. 54, sale, contract of sale followed by possession—suit for possession by owner, equitable defence of possession obtained under contract of sale.

In a suit by an owner for possession of immoveable property of the value of rupees one hundred or more, the defendant may without stamping his written statement, plead as a valid defence to the suit that he is in possession under a contract for sale, although he has no registered sale deed.

ORDER OF REFERENCE.

16th January, 1920.

YOUNG, J.!—In this suit one Lachmi Achi, widow and heir of legal representative of one S. P. L. Latchmanan Chetty by her agent Ramanathan Chetty sued to evict one Karamath Khan from a dwelling house standing on leasehold land. The case for the plaintiff was that the defendant had agreed to purchase the property in 1915 for Rs. 1000/- payable by monthly instalments of Rs. 30/- and was therefore let into possession, but that he had never paid any of the purchase money.

The case for the defendant was that he had bought the leasehold land in 1912 for Rs. 300/- for which he had given a promissory note. That there was then upon the land not the present house, but a thatched hut which he had to dismantle; that he had built the present house which was worth Rs. 2500/-. He said he was willing to pay the amount due on the promissory note and argued that the plaintiff was only entitled to sue for this and not for eviction. He claimed to be entitled to sue for specific performance and reserved his right to do so.

The learned judge found for the plaintiff both on the facts and on the law, and granted a decree for eviction. The defendant has appealed: and the appeal raised the question whether a person in possession of land of the value of over Rs. 100/- under a contract for sale can successfully resist eviction by pleading his willingness to perform his part of the contract when he has no registered deed of transfer.

In Begam *vs.* Mahomed Yakub (1) decided in 1894 which was argued before six judges, five judges concurred in holding that when a buyer of immoveable property of a value exceeding Rs. 100/- is in a position successfully to maintain a suit for specific performance of the contract for sale, he can defeat a suit for ejectment brought against him by the seller, if he proves that even after such suit brought, he has paid or tendered the amout of the price, and has at a proper time and place tendered a proper conveyance of the property to the purchaser for execution by him, and that to give the seller in such a case a decree for the ejectment of the buyer would be to give the seller a decree in fraud of his contract of sale.

In Immudipattam Thirugnana *vs.* Periya Dorasami (2) there are certainly dicta of the Privy Council pointing in the same direction. In Kurri Veerareddi *vs.* Kurri Bapireddi (3), a Full Bench held that the provisions of section 54 of the Transfer of Property Act were imperative, and that the courts would not be justified in departing from them on equitable grounds, and that a contract for sale followed by delivery of possession does not, when there is no registered sale create any interest in the property agreed to be sold and cannot even if enforceable at date of suit or decree be pleaded in defence to an action for ejectment by one having a legal title to recover.

In Mahomed Musa *vs.* Aghore Kumar (4) their Lordships of the Privy Council again enunciated dicta pointing in the same direction as in Immudipattam Thirugnana's case, (2) but in the latter case of Maung Shwe Goh *vs.* Maung Inn, (5) the Committee seemed perhaps inclined to take a different view. In Salamat-uz-Zamin Begam *vs.* Masha Allah Khan (6). Walsh and Piggott J. J. dealt with the same question and Walsh J. was of opinion that Mahomed Musa's case (4) in effect overruled Kurri Vurareddi's case (3) and that the dicta in Maung Shwe Goh's case (5) were directed to a different point. In K. S. R. Ramanathan Chetty *vs.* Ranganathan Chetty (7), the question of the necessity of registration again came before the High Court. Plaintiff and defendant had exchanged adjacent plots of land worth over Rs. 100/- and each had gone into possession but neither had a registered conveyance. Defendant built a costly building partly on the land he had taken in exchange. Plaintiff sued to evict. The Chief Justice held he was estopped, and seemed to think that Kurri Veerareddi's case (3) might to be reconsidered, Seshagirri Ayyar J. differed and held that Kurri Veerareddi's case decided that if the party resisting possession has no statutory or prescriptive title, he could not rely on equities to resist the suit.

(1) 16, A. 344 at p. 350.
(2) 24, M. 377.
(3) 29, M. 336.
(4) 42, C. 801.
(5) 44, I. A. 15; 10 B. L. T. 69.
(6) 40, A. 187.
(7) 40, M. 1134.

He held that this was good law, and had not been overruled by Mahomed Musa's case (4).

In consequence of the difference of opinion the matter was referred to three judges, one of whom considered that Kurri Veerareddi's case (3) was overruled by Mahomed Musa *vs.* Aghore Kumar's case (4), the other two held a contrary view. The point has also been before the Bombay High Court and was referred to a Full Bench in Bapu Apaji *vs.* Kashinath Sadoba (8). The question referred was whether when the plaintiff being the owner of certain property seeks to recover possession of that property, it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendants, the agreement being at the date of suit still capable of specific enforcement but there being no registered conveyance passing the property to the defendants. The referring judges also stated that it was to be taken for the purposes of the case that possession had been taken for the defendants under the agreement of sale and that they were willing to perform their part of it. The answer of the Bench was that a suit for specific performance was not the purchaser's only remedy, and that he might in the circumstances stated in the question if there were no other facts operating to his prejudice successfully plead his contract for sale and the possession acquired under it. It may be observed that the court came to this decision independently of and without noting Mahomed Musa's case (4).

In Calcutta the decisions would also appear to be adverse to the views of the Madras High Court. Thus in Puccha Lal vs. Kunj Behari Lal (9) when a purchaser of immoveable property under an unregistered kabala paid Rs. 500/ the agreed price, and was placed in possession, Jenkins C. J., and Mukerjee J. held following the English equities that in the absence of circumstances shewing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover the property from the former purchaser, and that to decide otherwise would be to contravene the abiding directions to proceed in all cases according to equity and good conscience. In a more recent case Shafikul vs. Khishna Govinda (10) Richardson J. sitting with Teunon J. went further and was of the opinion that a similar suit could not succeed even if a suit for specific performance was barred by limitation.

As regards the facts of the case, there are improbabilities on both sides: in a suit for specific performance it would however be for the present defendant to prove the agreement on which he relies and I think he would fail, so far as the terms are disputed. As however the plaintiff admits that the defendant was in possession under an agreement to purchase and that he paid the rates and taxes for a

(8) 41, B. 438.
(9) 18, C. W. N., 445.
(10) 23, C. W. N., 285.

number of years, I think a court of equity would at any rate decree specific performance on payment by defendant of the sum claimed by the plaintiff viz: Rs. 1000/-, and this sum the defendant states he is willing to pay. His counsel would have been better advised if instead of reserving in his written statement the right to file a suit for specific performance, he had filed the suit and then applied for it to be heard either with or before the present one. That is the obvious remedy, and would have saved all complication. As he has not done so, it is necessary to consider his remedy.

In my opinion the precise point in question in this suit was not before the Judicial Committee either in Immudipattam Thirugnana *vs.* Periya Dorasami (2), or in Mahomed Musa *vs.* Aghore Kumar (4), and though it is true *dicta* in each case would if applicable establish the propositions maintained by the Indian Courts other than Madras whose decisions are cited above, yet having regard to the doubt of the Judicial Committee in Shwe Goh's case (5) as to the applicability of English rules of equity when the terms of the section of the Transfer of Property Act now under consideration were specifically brought to their lordships' notice, I think the courts are free to form their own opinion upon the matter. In this view I am fortified by the warning of Lord Halsbury in Quinn vs. Leatham (11) cited by Napier, J. in Ramanathan *vs.* Ranganatham (7) that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found, and again that a case is only an authority for what it actually decides.

There is therefore an equity in favour of the defendant and the question distinctly arises whether he should be allowed to prove such equity by way of defence, or be relegated to a separate suit, and whether if he should be so allowed he can raise the plea without stamping his written statement. The preponderance of authority in the High Courts is distinctly in favour of an affirmative answer to the main question and the dicta of the Judicial Committee in Immudipattam Thirugnana's case (2) and in that of Musa Mahomed (4) are very clear, but those in Shwe Goh's case (5) must also be borne in mind. On the other hand while in England the defence would seem to be allowed to be raised by section 24 of the Judicature Act of 1873 which effected the fusion of law and equity, we have nothing in the Civil Procedure Code corresponding to it.

The plea would seem to be a substitute for a cross-action of specific performance and in Attorney-General for Trinidad vs. Bourne (12), it was argued (though vainly) that if a suit for specific performance did not lie against the crown the equitable plea of part performance could not be raised in defence by a subject in a suit by the

(11) (1901), L. R. A. C., 495.
(12) (1895), L. R. A. C., 83.

crown to evict. If then it is a substitute for a suit for specific performance it might seem to be a counterclaim which is defined in the "Annual Practice for 1919" as practically a cross-action and described as intended to save any defendant who has a valid cause of action of any description against the plaintiff from the necessity of bringing such cross-action, unless his cause of action is of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim.

But if the plea is correctly described as a counterclaim it may be urged that there is nothing in the Code of Civil Procedure to allow such to be raised except the mention of the word in the schedule as part of an amendment to a schedule of the Court Fees Act and that Order VIII Rule 6 which might be supposed to be a suitable place for introducing a provision allowing a counterclaim is silent on the point. It may also be urged that it is not a counterclaim but only a defence that the defendant is quite content to let the plaintiff be titular owner, if his own possession is secured to him, and that the court's decree will serve all his purposes. This however may be said to be tantament to asking the court to participate in saving him the courtfee on his written statement, and the stamp fee on his conveyance, and to let loose a flood of unregistered titledeeds in the shape of its own decrees. Still it is the course which has a vast preponderence of authority in India in its favour and perhaps the binding direction of the Judicial Committee. It shortens, and cheapens litigation: on the other hand it may be urged that the legislature has weighed these advantages, and found that the advantages of registration outweigh them and therefore enacted section 54 of the Transfer of Property Act.

If the clear and sweeping words of their lordships in Mahomed Musa's case (4) apply, there is an end of the matter, so far as the courts are concerned, but, it may be observed that the Bombay High Court in Bapu Apaji's case (8) though the case was mentioned in argument, never referred to it in the judgment, and that Lord Selborne in an earlier portion of his judgment in Maddison *vs.* Alderson (13) which was so largely quoted by their lordships in Mahomed Musa's case (4) distinctly implied that equity would never relieve against a public statute of general policy in cases admitted to fall within it. The case is an important one, and as none of these authorities were apparently cited before the learned trying judge, I am not certain that the advocate for the respondent was not somewhat taken by surprise in the appeal.

I feel it desirable that the case should be fully argued and, so far as may be, finally decided. I would therefore suggest that the following questions be referred to a Full Bench:—

If the plaintiff being the owner in law of immoveable property of the value of Rs. 100/- or over seeks to recover possession of that property from a defendant who has no registered deed of transfer

(13) (1883), L. R. 8 A. C., 467.

may the defendant plead as a valid defence,—with or without stamping his written statement,—that he is in possession under a contract for sale.

TWOMEY, C. J.—The question raised is one of much importance and in view of the conflicting decisions of the Indian High Courts I agree that it should be referred to a Full Bench of this court.

The opinion of the Full Bench was delivered in the following

JUDGMENT.

29th March, 1920.

YOUNG, J.—As shown in the order of reference there is a strong consensus of opinion in the High Courts of Calcutta, Bombay and Allahabad leading to the view that this question should be answered in the affirmative, though some of the courts go further than others and the reasons for the decision vary.

Thus in Calcutta in Paccha Lal *vs.* Kunj Behari Lal,(1) Jenkins, C. J. and Mukerjee, J. held that where a defendant had been put in possession of land and had actually paid the price Rs. 500/- but not been given a registered instrument of transfer he could not be evicted, reversing the decision Coxe, J. who had held that the transaction in favour of the defendant was a nullity under section 54 of the Transfer of Property Act. The appellate court held that to grant a decree of eviction would be a contravention of the abiding direction to proceed in all cases according to equity and good conscience. Here it will be noticed that the defendant had actually paid the purchase price.

In Allahabad a Bench of six judges in Begam *vs.* Mahomed Yakub (2), held that prior payment was not essential and that it sufficed if a purchaser of immoveable property of over Rs. 100/- in value was in a position to maintain successfully a suit for specific performance and tendered the price and conveyance even after a suit had been brought for eviction and that to decide otherwise would be to give the seller a decree in fraud of his contract for sale. In Salamat-uz-Zamin Begam *vs.* Masha Allah Khan (3), Walsh, J. seemed to hold that where two parties had sold to each other lands of over Rs. 100/- in value by registered deeds but had never taken possession and subsequently agreed to exchange the lands back again, that the mere agreement having been acted on operated as a valid exchange. Pigott, J. refused to go so far and held that the mere agreement did not effect a change of ownership, but that the defendants were not mere trespassers: that there was a contract for exchange and that there was no reason why the law should not hold the parties bound by the contract so far as it was carried into effect and by the equities arising out of their own acts.

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(1) 18, C. W. N., 445.
(2) 16, A., 344.
(3) 40, A., 187.

In Bombay, in Bapu Apaji Potdar *vs.* Kashinath Sadoba Gulmire, (4) a full bench decided a similar question in the affirmative on the ground that the vendor in such circumstances was a trustee for the defendant and that the court would not aid him to commit a breach of trust.

In Madras alone a contrary view was taken notably in the Full Bench case of Kurri Veerareddi *vs.* Kurri Bapireddi (5), where the court held that the question whether assuming the defendant's right to obtain specific performance by way of execution of a sale deed by the plaintiff was not at the date of suit, barred by limitation, the plaintiff was entitled to maintain his suit for the recovery of possession of the land agreed to be sold, must be answered in the affirmative, basing their decision on the clear words of section 54, of the Transfer of Property Act that a transfer of property of Rs. 100/- in value can only be affected by a registered instrument and that a contract for sale does not by itself create any interest in or charge upon the property. In a later case K. S. R. Ramanathan Chetty *vs.* Ranganathan Chetty (6), two out of five judges were inclined to doubt whether the former decision of the court in Kurri Veerareddi *vs.* Kurri Bapireddi(5) was correct, but the majority held otherwise. There is therefore a weakening of view even on the part of this court.

Speaking for myself if I regarded the question as one of the transfer of ownership I should find it very difficult to disregard the plain words of section 54 of the Transfer of Property Act or to hold that any equity could prevail against the clear words of the statute. But upon further consideration I do not think that any such claim is involved. The suit is one for possession only and the defendant only seeks to retain that possession. I do not see that we are really concerned with section 54 of the Transfer of Property Act at all. It seems to me to be a question of contract purely and simply; and in my opinion the defendant may plead and if he can prove that he has been let in under a contract, he cannot be considered or treated as a mere trespasser so long as that contract subsists. He is more than a mere licensee, because a license is a thing complete in itself, while here his possession is in part performance of a contract. He is not a lessee, but like a lessee he is in under a contract and like a lessee, he cannot be evicted while the contract subsists, except for causes provided in the contract. If there are no such causes specified the plaintiff can only succeed by suing to set aside the contract and adding a prayer for possession, (obtaining the leave of the court if necessary) and unless and until he can set aside such contract, I think the defendant may, in the language of the Bombay High Court, successfully plead his contract of sale and the possession acquired under it. If the defendant goes further and seeks ownership in addition to possession he must do so by a cross

(4) 41, B., 438.
(5) 29, M., 336.
(6) 40, M., 1184.

suit; such a claim is obviously not a set-off, but is a counterclaim or cross-action, and I agree with the views of Messrs Woodroffe and Amir Ali that the Code of Civil Procedure does not introduce counter-claims, though there is nothing to prevent their introduction by rule. This has not been done in this province and a separate suit would be required until such is passed. But if the defendant merely seeks to secure his possession no stamp is necessary.

I would therefore answer the reference by saying that a defendant may plead by way of defence to a suit for eviction by an owner that he is in possesion under a contract to sell, that the plea limited as aforesaid requires no stamp, and that if he can prove the contract, it will be a valid defence however valuable the property may be and whether he has a registered deed of transfer or not.

RIGG, J.—The question referred for our decision is as follows:—"If the plaintiff being the owner in law of immoveable property of the value of Rs. 100 or over, seeks to recover possession of that property from a defendant who has no registered deed of transfer, may the defendant plead as a valid defence with or without stamping his written statement, that he is in possession under a contract for sale."

The parties entered into a contract for the sale of a house for a sum (the amount of which is in dispute) and the vendee was let into possession. He admits that he owes the vendor a sum of money for the house, but claims that the vendor is not entitled to sue him in ejectment, but for money due, and that on payment of the money, he can enforce specific performance of the contract. It is conceded that there is no registered instrument relating to the transaction between the parties, no transfer of ownership has taken place, but it is urged that the plaintiff cannot succeed merely by showing that the title to the ownership of the property is in law still with him, and that the equities arising from part performance of the contract, and the position of the plaintiff as trustee for defendant are a sufficient answer to the claim.

Under the provisions of section 54 of the Transfer of Property Act, a contract for the sale of immovable property does not of itself create any interest in or charge upon the property, but this clause merely abolishes the English doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate. A contract for the sale of immoveable property is one that can be specifically enforced. From the time that he enters into the contract, the owner holds the estate in trust for the purchaser subject to the payment of the purchase money, but he is more than a mere dormant trustee, having an interest in the property, and a right to protect, and to assert that interest. This seems to me clear from illustrations (g) and (h) to section 3, and the illustrations to clause (b), section 27 of the Specific Relief Act, read with the rights and liabilities of seller and buyer, which are defined in section 55 of the Transfer of Property Act. Being thus bound to hold the property for the benefit of the purchaser to the extent necessary to give effect to the contract

itself, the vendor cannot divest himself of his fiduciary obligation, unless he can show his right to avoid the contract. The buyer is not a trespasser, even if he has been let into possession of the land without payment of the whole or part of the purchase money, but holds under a subsisting contract. In Akbar Fakir *vs.* Intail Sayal (7), a bench of the Calcutta High Court quoted Sir George Jessel in Walsh vs. Lonsdale (8) that where in pursuance of a contract for a lease or sale, the intended transferee had taken possession, though the requisite documents have not been executed, the position is the same as if the documents have been executed, provided specific performance can be obtained between the parties. The learned judges say "If we were to accept the contention of the appellant, the result would be this:—as soon as the suit for ejectment was instituted, the defendants must institute in that court a counter suit for specific performance of his contract, and obtain a stay of proceedings for ejectment.....Clearly, the court should not encourage mischievous multiplicity of litigation in this manner. We hold that plaintiff is not entitled to eject the defendant, nor is he entitled to a decree for the balance of the consideration in this suit because he has not sued for the recovery of the money." In my opinion, the defendant in this case would have a complete answer to the plaintiff's suit, if he pleaded successfully that the contract had not been terminated, and that he was ready to complete his part of it, if required.

TWOMEY, C. J.—I agree in thinking that we can dispose of this question on the simple ground that the plaintiff is bound by his contract and is thereby precluded from ejecting the defendant as if he were a mere trespasser. An owner of property is not necessarily entitled to its immediate possession. He may have parted with the right of immediate possession by contract, and that appears to be his position when he has entered into a valid contract for the sale of the property, and has put the vendee into possession. So long as the contract subsists, he can exercise his rights of ownership only so far as they are consistent with his obligations under the contract. His remedy against the defendant is to enforce the contract, or show that it no longer binds him.

I concur in answering the reference in the affirmative.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 368 OF 1919.

KHATIZA BIBI and others .. .. PLAINTIFFS.

vs.

HAJEE AHMED ISMAIL and others .. .. DEFENDANTS.

Before Mr. Justice Rigg.

For plaintiffs—Mr. Giles and Mr. B. Cowasji.

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(7) 29, I. C., 707.

(8) L. R. 21, Ch. D. 9.

15th March 1920.

Mahomedan Law—Wakf—doctrine of Mushaa, freehold property in Rangoon—Relinquishment of possession on the part of the wakif.

The doctrine of *mushaa* does not apply to shares in companies, or to shares in freehold property in large towns.

Ibrahim Goolam Ariff vs. Saiboo 35, C. 1, followed.

The balance of authority in Mahomedan Law seems to be in favour of the validity of a wakf of an undivided share even in property capable of division.

It is essential to the validity of a wakf that the wakif should actually divest himself of possession of the wakf property.

JUDGMENT.

RIGG, J.—This is a suit for a declaration that a wakf made on 14th April 1915, is null and void, and that the property forms part of the estate of Esoof Hashim Malim.

The property in suit is a fourth share in the undivided property known as house No. 256 Dalhousie street. The history of the property is clear. Esoof Hashim Malim had two wives. By his first wife Khatiza Bibi the first plaintiff, he had two sons, the second and third plaintiffs and a daughter Hawa Bibi who predeceased him, and left no children. Hhis second wife was Sara Bibi, who with her son Ebrahim also predeceased him. On Hawa Bibi's death, her property devolved on her parents, and a family agreement was made between her father, mother, and two brothers, by which each of them was to share equally in the estate. The agreement was embodied in a registered deed of date 12th March 1913.

On the 16th April 1913 another agreement was made whereby Esoof Hashim Malim was to receive as his share, of the rent Rs. 1200 for two years, and if his sons failed to build on the part of the land that was vacant, he was to receive Rs. 1800. On the 14th April 1915, the agreement to pay Rs. 1800 was altered into an agreement to pay Rs. 1450, and on the same day Esoof executed a power of attorney in favour of the seventh defendant, and two others, and signed a receipt for the rent due, and for rent accruing up till 15th October. He then went to Medina, and died in Syria about eighteen months ago.

In May 1919, when plaintiffs entired into an agreement with the seventh defendant for the sale of their undivided share of the Dalhousie street property, their advocate discovered that a wakf of the deceased's share in the property had been made by registered deed at Bombay in April 1915, which would be about the time he was on his way to Medina. The original deed is not forthcoming, and although the trustees named in the deed have been served with summonses to appear, no one has come forward to defend the wakf. There is no evidence that Esoof Hashim Malim executed the deed of

wakf, but Mr. Giles argues that even if he did so, the makf is void (1) on the ground that the doctrine of *musha* applies to it, and (2) because the wakif took no steps to carry out his presumed intention, and a mere dedication is not sufficient to constitute a valid wakf.

The first ground of objection seems to me doubtful. In his Digest of Anglo-Mahomedan Law, Sir Rowland Wilson states (para 321) that the balance of authority seems in favour of the validity of a wakf of an undivided share, even in property capable of division. This is the opinion of Abu Yusuf, but Mahomed differs from him, and bases his difference on the difficulty of delivering possession of property that is not specifically apportioned. In Ibrahim Goolam Ariff *vs.* Saiboo (1) their lordships of the Privy Council said that the doctrine of *musha* ought not to be applied to shares in companies, and tc freehold properties in a commercial town. This *dictum* is binding on me.

The Calcutta High Court, and the Allahabad High Court have decided that the authority of Abu Yusuff is to be postponed to that of Mahomed Su, Muhammed Azizuddin Ahmed Khan *vs.* The Legal Remembrancer to the Government (2), and in the absence of any judicial opinion to the contrary, this view must be accepted. In the case just cited it was held that a Sunni Mahomedan making a wakf must actually divest himself of possession of the wakf property. In the present case, Esoof Hashim Malim took no steps whatever with regard to carrying out his intention to make a wakf. The deed provides for payment to him of Rs. 125/- a month, yet on the 30th August he signed an agreement for a smaller sum. He never mentioned the existence of the wakf to any one, so far as it is known, and it must be coonsidered wholly inoperative.

There will be a declaration that the deed of date 14th April 1915 purporting to create a wakf, and to be executed by Esoof Hashim Malim is null and void, and that his share in the premises described in the deed forms part of the estate of Esoof Hashim Malim. No order as to costs seems necessary.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 82 OF 1919.

MA HLAING .. .. APPELLANT.

vs.

P. R. A. R. CHETTY .. .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt. C J. and Robinson, J.

For appellant—Mr. Halkar.
For respondent—Mr. Das.

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(1) 35, C. I.
(2) 15, A. 321.

19th May, 1920.

Burmese Buddhist Law—Mortgage of joint property by husband alone, presumption of consent by subsequent acquiescence of wife.

The question whether subsequent acquiescense by the wife in a mortgage of joint property by the husband alone would bind the wife depends on the circumstances of each case.

In mortgages, as in sales, the wife's consent may be presumed only when the husband is acting as the wife's agent, and manages the business of the family on behalf of both.

Where a man had two wives, and was managing the business of the family chiefly in association with the lesser wife, and the elder wife kept exclusive control over her property, her consent to the mortgage could not be presumed.

JUDGMENT.

TWOMEY, C. J. AND ROBINSON, J.—The respondent Chetty firm sued on two mortgages dated October 1913 and June 1916 of eight pieces of land measuring 167.40 acres in all, the mortgagors being Maung Tun E and his lesser wife Ma Pwa Chon. Ma Hlaing the appellant was joined as third defendant although she was not a party to the mortgages. She is Maung Tun E's elder wife and the plaintiff states that though not interested in the mortgaged property she is joined as defendant because the money borrowed by Tun E was for her benefit also, and she is equally liable to repay.

Maung Tun E and Ma Pwa Chon confessed judgment. Ma Hlaing in her written statement set up the defence that she had been divorced from Tun E as she objected to life with him after he took his lesser wife, and that the two largest pieces of land, called Lindwe Mezali and Potilok, measuring 99 acres in all were allotted to her as her share of the joint property at the time of the divorce. She denied all knowledge of the mortgages and denied any liability under them and she pleaded that the two above holdings belonged to her. In the course of the trial of the suit she receded from the position taken up in her written statement and waived her contention that there was a divorce and a division of the joint property. She set up the defence however that her share in the two holdings Linzwe Bezali and Potilok was not affected by the mortgages as she was not a party to them.

The district court found that she was bound by the mortgages. The learned judge held that even if she did not know at the time of the execution she subsequently acquiesced in the transactions as shown by her conduct in going with Tun E and trying to effect a compromise with the Chetty for Rs. 10000/-. The judge relied on the case of Maung Twe *vs.* Ramen Chetty (1) as an authority for the proposition that "such acts of husbands with the consent or acquiescence of the wives bind the latter in mortgages though not in sales."

(1) 1, L. B. R., 11.

On the evidence it cannot be held that Ma Hlaing consented to the mortgages at the time or knew about them. Her husband Tun E says that she did not know about the first mortgage, but he told her about it a month afterwards and she said nothing. He did not tell her about the second mortgage. He also states that he consulted Ma Hlaing before mortgaging the land and asked her to come for the purpose. She refused to come, and she refused to give the tax receipts so he had to mortgage with old tax receipts and not with the recent ones. It is clear that she was not on good terms with her husband and his lesser wife at the time and if these two holdings were allotted to her for her separate maintenance, as seems probable, it is not likely that she would have agreed to mortgage them. Tun E admits that Ma Hlaing paid the revenue on these lands, and that she kept the surplus income of the land.

Even if we accept the evidence that Ma Hlaing joined Tun E in trying to effect the compromise with the chetty I think the district court was not justified in regarding her conduct in that matter as acquiescence in the mortgages. But even if it is regarded as acquiescence the case of Maung Twe *vs.* Ramen Chetty (1) does not go so far as the judge remarks. That case merely decided that even where a wife consents to or acquiesces in a mortgage the presumption does not arise that she also assents to a sale of the property nor should apparent acquiescence subesequent to the sale be regarded as proof of consent by the wife to such sale. The learned judges left open the question whether subsequent acquiescense by the wife in a mortgage of joint property executed by her husband alone would bind the wife. It would in our opinion depend largely on the circumstances. In mortgages as well as sales it appears to us that the circumstances must be such as to show that the husband is acting as the wife's agent, and the husband ostensibly with the wife's assent manages the business of the family on behalf of both. In that case consent may be implied. Vide Ma Nyein Thu *vs.* P. S. M. L. Murugappa Chetty (2), also Ratana *vs.* Kumarappa Chetty (3). In the present case where the husband appears to have been carrying on his business chiefly in association with his lesser wife, and the lands in question appear to have been under the exclusive control of the elder wife Ma Hlaing, the consent of Ma Hlaing to the mortgages cannot properly be presumed.

We therefore allow the appeal and direct that the decree of the district court shall be modified by adding a declaration that the appellant Ma Hlaing's interest in the Linzwe Mezali and Petilok lands is not affected by the mortgages. We do not decide the extent of the appellant's interest in the properties. One of them is shown to be *payit* of Tun E and the other *lettetpwa* of Tun E and Ma Hlaing. The costs of the appellant in both courts will be borne by the respondent.

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(2) 6, B. L. T. 113.
(3) 8, Bur. L. R. 319.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 10 OF 1918.

MA PWA .. .. APPELLANT.

vs.

MA YIN and one .. .. .. RESPONDENT.

Before Sir Daniel Twomy Kt. C. J. Ormond, J.

Mr. appellant—Mr. Lambert.
Mr. respondents—Mr. A. B. Banerji.

22nd January, 1919.

Chinese Customary Law—Adoption of daughters. Adoption of Burmese Buddhist daughter by Chinese Buddhist—Ceremonies of Chinese adoption.

Chinese customery law allows the adoption of daughters with rights of inheritance in the adoptive parents' estate in the absence of natural children and adopted sons, subject to the widow's right of maintenance.

A Chinese Buddhist in Burma can adopt a Burmese Buddhist as daughter with the same rights of succession as a Chinese adopted daughter.

The ceremonies, and effects of adoption, and the status and rights of adopted persons are to be decided by the personal law of the adoptive parents, not by the personal law of the adopted child.

There is no ceremony necessary for an adoption under Chinese customary law.

Ma Pwa *vs.* Yu Lwai, 9. B. L. T. 187 referred to.

JUDGMENT.

30th May 1918.

TWOMEY, C. J. AND ORMOND, J.—In this suit the plaintiff Ma Yin prayed for a declaration that she is the adopted daughter and sole heir of a deceased Chinaman Wun Pein Hein, and his first wife Ma Pi and for an administration decree, the defendant Ma Pwa being the second wife and widow of the deceased. In a former suit one Yu Lwai sued Ma Pwa and Ma Yin for a declaration that he was the adopted son, and sole heir of Wun Pein Hein. In the plaint in that suit Yu Lwai stated that Ma Yin was an adopted daughter of the deceased. Ma Yin as codefendant in that case admitted the plaintiff Yu Lwai's claim as the adopted son and sole heir, but the widow Ma Pwa denied the adoption of both Yu Lwai and Ma Yin. Yu Lwai's suit was dismissed on appeal. The learned chief judge Sir Charles Fox in the course of his judgment dealt also with Ma Yin's claim as an adopted daughter, and he evidently considered that the claim was made out, but he expressly held that no decision could be given in that

case as to the rights of Ma Yin. Nevertheless in the present case the learned judge on the original side has held that the judgment in Ma Pwa *vs.* Yu Lwai's case (1) is conclusive on the question of Ma Yin's adoption, in other words, the learned judge held the question of her adoption to be *res judicata.* This finding is clearly erroneous. As it was found in the former case that the plaintiff Yu Lwai had failed to prove his claim, the opinions expressed by the appellate bench in that case as to the co-defendant Ma Yin's rights was entirely immaterial, these opinions not being necessary to support the grounds on which the suit was dismissed. It is not sufficient that an issue was raised in that suit as to Ma Yin's adoption, for as the case turned out, the issue was not a material one. The question whether Ma Yin was or was not adopted by the deceased and Ma Pi according to Chinese Customary Law must therefore be treated as *res integra.* We are not at liberty to use evidence taken on this issue in the other suit, because that evidence was not put in the present suit. The suit must therefore, be remanded to the original court for the determination of this issue.

But such remand will be necessary only if we agree with the learned judge that as a matter of law a Chinese Buddhist in Burma can adopt a Burmese girl as his daughter, and that such an adopted daughter is entitled to succeed to his estate in the absence of natural children, and in the absence of an adopted on. The learned judge has found that such an adoption is valid, and that in such circumstances the adopted daughter is sole heir. He has further held that though the widow had the power of adopting a son after her husband's death with the consent of her late husband's nearest male relative, that power of posthumous adoption had in fact lapsed, as it was not exercised within a reasonable time. It is not necessary for us to decide this point as it was not material for the decision of the case at all, but we note that the judge has given no authority in support of his opinion that the widow's power to adopt had lapsed by efflux of time. We also note that the judge in decreeing that the adopted daughter is sole heir appears to have overlooked the widow's right to maintenance to which she is admittedly entitled under Chinese Customary Law.

We now turn to the question of law as to the power of a Chinese Buddhist to adopt a Burmese Buddhist girl as a daughter and as to the rights of such an adopted daughter. The general question as to the power of a Chinaman in Burma to adopt a child has been examined in Sir Charles Fox's judgment above cited and we agree generally in the views therein expressed. Three text books have been quoted as authorities:—Jernigan's "China in Law and Commerce," Parker's "Comparative Chinese Family Law" and Alabaster's "Notes on Chinese Criminal Law." They leave no room for doubt as to the prevalence of the practice of adoption among the Chinese, and as to the rights of the adopted son to inherit to the exclusion of the widow. As to the adoption of daughters, Jernigan

(1) 9, B. L. T., 187.

on page 124 quotes a previous writer Von Moellendorff author of "the Family Law of the Chinese" as his authority for the statement that "a man may adopt a person as son or daughter," but the remainder of the chapter dealing with the adoption of children, does not refer specifically to daughters. Parker in his reference to adoption at page 14 of his work does not mention adopted daughters, but on page 23 be quotes Von Moellendorff as follows; "Excluding local considerations, and special topical circumstances it may be said that ninety-nine out of hundred adoptions are made by persons who are childless, and of these again, seventy per cent of adoptions are those of males" from which it may be inferred that female adoptions are by no means uncommon even in China. Alabaster in his work on Chinese Criminal Law (at page 168-170) refers to adoption very briefly and does not mention adopted daughters, but there is nothing to indicate specially that a daughter may not be adopted. The extracts from Jernigan's and Parker's works are sufficient to set at rest any doubt on this point. The usual practice in China is no doubt to adopt a member of the same clan, or a person with the same name, but the authorities show clearly that strangers are sometimes adopted, and that there is nothing invalid in such adoptions. It is argued that an adoption of a Burmese girl by a Chinaman is a thing unheard of, and that such an adoption cannot be regarded as valid according to Chinese Customary Law, the object of adopting a child according to Chinese ideas being to prevent the family from dying out, an object that is not well served by adopting a girl. Whatever may have been the origin of the practice of adoption, it is clear that nowadays the mere desire to carry on the family is not the sole motive of childless people in adopting a child. We agree with the remarks of Sir Charles Fox on this point. It appears that a Chinaman can adopt a girl in his own country, and there seems to be no good reason for holding that he cannot do so in Burma or that he cannot exercise the right in favour of a Burmese girl.

Nor can we find any sufficient ground for holding that an adopted daughter (in the absence of an adopted son) has not the same rights of inheritance as an adopted son. Mr. Lambert relies on the wording of the following passage at page 145 of Jerniga's work:—"When there is a failure of the male line, and no adoption has been made, the relations of the deceased sometimes meet in family council and adopt a son who then succeeds to the whole inheritance. The daughters succeed to the property only when there is a complete failure of male heirs both natural and adopted." He contends that "the daughters" in this passage do not include adopted daughters. We are unable to give the passage this restricted meaning in the absence of any authority showing that an adopted daughter stands on a different footing to an adopted son.

The case is remanded to the original side for further enquiry, and a fresh finding on the issue of fact as to Ma Yin's alleged adoption. When this finding has been recorded, the record should be returned to the appellate side in order that a final order may be passed on the appeal.

22nd January, 1919.

TWOMY, C. J. AND ORMOND, J.—The case was remanded to the original side for a finding on the question whether the plaintiff Ma Yin was adopted by the deceased, and his wife Ma Pi according to Chinese Customary Law. The learned judge finds it proved by abundant and overwhelming evidence "that she was adopted, but that there is no evidence as to the adoption being in accordance with the requirements of Chinese Customary Law. He urges however that as the person adopted in this case was a Burmese girl, and as the adoption took place in Burma, in the manner usual amongst Burmese Buddhists, the adopted child was thereby invested at the most with the status and rights of a child adopted by Burmese Buddhists. This view cannot be accepted. The effects of adoption and the status and rights of the person adopted depend upon the personal law of the adoptive parents. As it is clear in this case that there was an intention to adopt, and that this intention was carried out, it must be held that all the incidents of an adoption under the personal law of the deceased and his wife, namely Chinese Customary Law, attach to the adoption. We have already held that a Chinese Buddhist in Burma can adopt a Burmese girl as his daughter, and that such an adopted daughter is entitled to succeed to his estate in the absence of natural children, and in the absence of an adopted son. According to the authorities on Chinese Customary Law, it appears that if the person adopted is a stranger, as in this case, the agnates of the deceased can exclude the adopted stranger. See Parker pages 22 and 25. The only agnate was Wum Pein Wa the second defendant, a younger brother of the deceased Wun Pein Wain. He admitted the adoption, and admitted also that no ceremony is necessary for a Chinese adoption. He pleaded however in his written statement that neither the adopted daughter (the plaintiff), nor the widow (the first defendant), was entitled to anything more than maintenance out of the estate. But he has never objected to the adoption of the stranger, and since the hearing of this appeal, he has put in a petition expressly stating that he has no objection to the adopted daughter inheriting the property, if an adopted daughter can inherit under the Chinese Customary Law. There is therefore no objection by the agnates.

The preliminary decree for accounts should be amended so as to provide that the commissioner in addition to the accounts ordered by the judge to be taken shall determine the amount that should be allotted to the widow Ma Pwa for her maintenance having regard to the value of the estate, and the widow's position in life.

Subject to this modification the appeal is dismissed. The costs of the appeal will be borne by the estate.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 124 OF 1919.

RANGOON MUNICIPAL COMMITTEE .. APPELLANT.

vs.

BURMA RAILWAYS COMPANY, LTD. and others RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Young, J.

For applicant—Mr. Lentaigne.
For respondents—Mr. Ormiston.

11th February, 1920.

Nuisance, statutory authority—Burma Municipal Act (Burma Act III of 1898) ss. 98, 112 and 146—refuse, rubbish, and offensive matter.

Per Curiam.—Sections 98 and 112 of the Burma Municipal Act, do not either directly, or by necessary implication authorize the commission of a nuisance.

The general provision in section 146 of the Municipal act for compensation out of municipal funds to persons sustaining damage by reason of the exercise of any powers under the act does not authorize the commission of a nuisance.

Per Twomey, C. J.—The words "refuse, rubbish and offensive matter" in section 98 of the Burma Municipal Act do not include nightsoil, and neither section 98 nor section 112 of the Act imposes on municipal committees an imperative duty of removing and disposing of nightsoil.

Per Young, J.—The words "refuse, rubbish and offensive matter" in section 98 of the Burma Municipal Act include nightsoil, and section 98 of the act imposes on municipal committees the imperative duty of removing and disposing of nightsoil, but the duty so imposed can be performed without committing a nuisance.

JUDGMENT.

TWOMEY, C. J.—The Burma Railways Company (plaintiffs respondents) occupying a plot of land adjoining one of the Rangoon municipal nightsoil depots sued for an injunction restraining the municipal committee (defendants-appellants) from maintaining and continuing the depot so as to constitute a nuisance. The transfer of nightsoil from carts to the municipal drains was alleged to give rise to an intolerable stench and noxious vapours which render the plaintiffs' quarters unfit for habitation. The municipal committee denied the allegations as to stench, and noxious vapours, and alleged that every care is taken to prevent any "unreasonable" smell from arising at the depot. But the principal defence was that no cause of action lies as the committee have a statutory duty under section 98 of the

Burma Municipal Act for providing the site in question for the disposal of sewage. They also pleaded under section 42 A. that the operations have been carried out lawfully in good faith and with due care and attention. There were further pleas as to limitation and as to delay and acquiescene on the part of the plaintiffs, but we are not concerned with these pleas now.

The learned judge on the original side has found that an imperative duty is laid on the committee by section 98 of the Municipal Act to provide depots for the disposal of night-soil. But he has also found that section 98 is not sufficient to cover the municipal committee's actual operations at the nightsoil depot because (a) the depot is in fact a nuisance, (b) the Act does not expressly, or by necessary implication permit a nuisance to be committed in the disposal of nightsoil and (c) the legislature cannot have contemplated the nuisance as an inevitable result of carrying out the provisions of section 98. The judge was further of opinion that the committee could claim immunity under section 42 A only if they could show that they were legally authorized to commit the nuisance complained of i. e., that it was lawfully done. In short they would have to show that what they did is covered by section 98 before they could shelter themselves under section 42 A, and they had not shown this. The memorandum of appeal does not refer to section 42 A at all, and it may be taken that the committee do not seriously dispute the judge's finding as to that section. It is also not disputed now that the method of disposal at the nightsoil depot does in fact constitute a nuisance to the plaintiffs.

To succeed in this appeal the municipal committee have to satisfy us, first, that the trial judge's construction of section 98 as imposing as imperative obligation is correct, and, secondly, that he has erred in his application of the section, i. e., in not holding that the section protects the committee even though their operations do in fact constitute a nuisance.

The municipal committee's case with reference to section 98 is that subsection 2 imperatively requires them to provide depots for the disposal of nightsoil within the municipal limits leaving it to the local government if it thinks fit to require the depots to be outside the municipal limits. The section does not mention nightsoil at all; but it is contended that the term "offensive matter" in sub-section 2 includes nightsoil. For the respondent company it is argued that the section must for two reasons be regarded as permissive and not mandatory.

First, an option is left to the local government whether the section is to be applied or not to any particular municipality. It has been applied by the local government to Rangoon; but, it is argued, the very fact that the legislature did not directly apply it, but left it to the local government to say whether it should be applied or not deprives the section of the mandatory character which it might otherwise bear. This view receives some support from the opinion expressed by Lord Watson in Managers of the Metropolitan Asylum District *vs.*

Hill (1). In that case the Act authorized the Poor Law Board to form districts in the metropolitan area as they might think fit and to direct that for each district so formed there shall be an asylum or asylums. It was held that as the Board was not bound to form a district they were under no statutory compulsion to establish an asylum. Partly on this ground it was held that the managers were not performing an imperative duty imposed by statute in establishing a smallpox hospital in a certain district. The compulsion, if any was that of the Poor Law Board, and not of the legislature. Similarly, in the present case it is argued that any compulsion would come from the local government and not from the legislature which has left to the local government the option of applying section 98 or not. I am doubtful whether this argument can be accepted. It seems to me that it would carry us too far. For, if a section which is *prima facie* mandatory is to lose its mandatory character merely because the local government has the option of applying it or not, it would follow that none of the provisions of the Act can preserve a mandatory character in view of sections 3 and 4 which leave it to the local government to decide whether the Act shall or shall not apply at all to a particular local area.

The second reason is more substantial, namely, that the Municipal Act has no compulsory provision for the removal of nightsoil from latrines, privies etc, but confers only permissive authority under section 112. If the committee choose not to exercise this permissive authority to remove, there would be no nightsoil for disposal at the depots. It would follow that the committee are not bound to undertake the disposal of nightsoil. Sub-section 1, of section 98 lays on the the committee the duty of removing "house refuse" of any kind from premises within the municipal limits. But it was not contended at the trial of the suit, nor is it urged in the memorandum of appeal that nightsoil is included in the term "house refuse" in sub-section 1. The contention all through has been that nightsoil comes under sub-section 2 by reason of its being "offensive matter" not by reason of its being "house refuse." Mr. McDonnell has now brought to our notice an English Municipal enactment, Public Health (London) Act 1891, section 141, under which "nightsoil" is included in "house refuse" for the special purposes of that enactment. But we have to consider whether the term has this meaning in section 98 of the Municipal Act and we must be guided by the provisions of the Act itself. "House refuse" is not defined in the Act. But "sewage" is defined in section 2 clause 9 as meaning nightsoil and other proper contents of water-closets, latrines etc. And the permissive section 112 expressly refers to the removal of "sewage." In my opinion if it was the intention of the legislature that section 98 should cover the disposal of nightsoil, it is unlikely that we should find in the section no express reference to nightsoil or sewage as in section 112 which deals with the same subject. The provisions of section 98 point I think to such house refuse as house and compound sweepings, garbage, rags and bones, waste paper and the debris of housekeeping rather than to nightsoil.

(1) 1880, L. R. 6 A. C. 193.

There is no imperative obligation to remove "offensive matter" *as such*, and therefore, no imperative obligation to dispose of it at depots or otherwise. But in view of the municipal committee's contention in the trial court and in the memorandum of appeal that "offensive matter" in section 98 includes nightsoil, I note that this contention appears to be untenable. The words "offensive matter" by themselves would of course include nightsoil. But we have to construe them here with reference to the context and especially with reference to the associated words "refuse and rubbish." The term "offensive matter" is used in association with the same words in section 148. The term "offensive matter" is also used in section 150, but in association with other words. From the terms of these sections and the side-notes thereto, it would appear that the words "offensive matter" in section 150 do include nightsoil, while in section 148 they do not. In each of these sections the general words "offensive matter" are controlled and restricted by the particular words which precede them. The particular words in section 150 show that nightsoil is included while the particular words in section 148 indicate that it is not. If we construe the term "offensive matter" in section 148 as including nightsoil, the absurd result would follow that people could be fined for depositing nightsoil in drains specially set apart for the purpose of carrying off sewage i.e., sewers. For such special drains are expressly excepted from the operation of section 150, but not from the operation of section 148.

Now, if nightsoil is not included in "offensive matter" in section 148, we can hardly hold that it is included in "offensive matter" in section 98, the associate words, viz. "refuse and rubbish," being the same in both sections. "Rubbish" it may be pointed is clearly used as something distinct from "sewage" (and therefore from nightsoil) in sections 50 and 112. "Refuse" in its ordinary meaning does not include nightsoil. It is given in the Century Dictionary as a synonym for rubbish.

To sum up this part of the case it is, to say the least, very doubtful whether section 98 applies to nightsoil at all, and even if it does apply, the section imposes no imperative duty to remove the nightsoil and therefore, no imperative duty to dispose of it. It may be argued that if the legislature ordains that sites shall be provided for the disposal of nightsoil the legislature must be supposed to have contemplated as an imperative duty the actual removal of nightsoil to these sites for disposal there. But we are met by the difficulty that in section 98 clause 1 where the legislature provides for the removal of refuse and rubbish, the legislature *expressly directs* that it shall be done and does not leave it to be inferred.

On the above grounds I would hold that the power to remove and dispose of nightsoil is not proved to be mandatory, and if this view is correct there can be no doubt that the committee are bound to exercise the power with due regard to the private rights of others. It would follow that the plaintiff company are entitled to an injunction to restrain the committee from infringing their rights by committing the nuisance complained of.

Turning now to the second part of the case, we will assume that the views expressed above are erroneous. Let us concede, as the learned judge did, that section 98 does impose an imperative duty on the committee to provide sites and places for the disposal of nightsoil, and psesumably, also to dispose of nightsoil at those places. We have to consider whether this would be a sufficient defence to the suit.

For the committee, it is contended that the legislature having imposed upon them these imperative duties with reference to nightsoil, it must be taken that the legislature also gave them full discretion to choose sites for the nightsoil depots. In support of this contention we are referred to the rulings of the English courts in the interpretation of Railway Acts and especially to the case of the London Brighton and South Coast Railway, Co. *vs.* Truman (2). It is clear from that case that a railway company acting under its statutory authority has an absolute discretion in selecting sites for additional stations yards and other conveniences in the vicinity of the railway. Lord Blackburn held that the railway company were not bound to prove the impossibility of erecting cattle yards and pens anywhere else within the defined limits without being a nuisance to anyone. It is urged that the municipal committee similarly are not bound to prove the impossibility of establishing their nightsoil depots anywhere else without being a nuisance to the neighbouring occupiers. But it is clear from the judgments in Truman's case (2) that the principle of construction applied to Railway Acts is not of general application. The reason for the special construction given to Railway Acts is explained in the following passage of the judgment of Lord Selborne:—"Although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorized that it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act." It does not appear that the same principle has ever been applied in construing the powers of a sanitary authority for the disposal of sewage. Reference may be made to the following cases of this nature: The Attorney General *vs.* Leeds Corporation (3), Price's Patent Candle Co., Ltd., *vs.* London County Council (4). The Attorney General *vs.* The Council of the Borough of Birmingham (5). In all these cases the sanitary authority was restrained from committing a nuisance in the disposal of sewage. It is true that in English municipal legislation there is a general provision requiring the powers of the sanitary authority to be exercised so as not to cause a nuisance. But these cases are instructive as showing the intention of the legislature, at any rate in England, that such operations as the disposal of sewage must be carried out in such a way as not to cause a nuisance. There is no special clause in the Burma Municipal Act requiring the committee to exercise its power so as not to cause a nuisance. But neither is there any clause ex-

(2) (1886) 11, A. C. 45.
(3) L. R. 5., Ch. Ap. 583.
(4) 1908, L. R. 2 Ch. 526.
(5) 70, E. R. 220.

pressly excusing a nuisance. It is clear that the burden lies on the municipal committee to establish that the legislature intended to take away the private rights of individuals. They must show that such an intention appears either by express words or by necessary implication. In dealing with this part of the case the learned trial judge points out that the methods of removal and disposal are left entirely to the committee. The Act gives no direction about removal by carts, or as to the methods to be followed at the nightsoil depots. It may be, as the respondents now in fact contend, that these methods cannot be practised without committing a nuisance, but it is by no means established that they are the only practicable methods of dealing with the nightsoil, and the judge was no doubt right in holding it not established that the legislature must have had these very methods or some such methods in view. But it appears that even the present method of disposal can be practised without causing a nuisance, if it is carried out at a sufficient distance from dwellings. The plaintiff company's buildings are within fifty feet of the depot. Dr. Hayne gave his opinion that there is not a sufficient area at the depot to deal with the nightsoil business. He suggested that the area set apart for the purpose should be extensive enough to have free space of fifty yards separating the actual depot from neighbouring buildings. It seems probable that if the municipal committee had taken up a sufficient area of land for this purpose at the outset, no question of nuisance from this particular method of disposal would have arisen. Adapting the language of Lord Selborne in the Metropolitan Asylum District case, (1) I would hold that there is no evidence on the face of the Municipal Act that the legislature supposed it to be impossible for the effectual disposal of nightsoil to be carried out somewhere and under some circumstances without creating a nuisance.

No stress is now laid upon the fact that the nightsoil depot was established some years before the plaintiff company occupied a plot of land adjacent thereto and built quarters thereon for the members of their staff. In Truman's case (2) Lord Halsbury obeserved that the old nation of people losing their rights of complaint because they come to a nuisance has long since been exploded. Further authorities on that point are cited in Kerr on Injunctions, fifth Edition page 207.

In paragraph 5 of the memorandum of appeal reference is made to the provisions of section 146 of the Municipal Act, providing for the payment of compensation to persons sustaining damage by reason of the exercise of any of the powers vested in the municipal committee. This section was relied upon before trial judge as going to show that the legislature intended to take away private rights. But, as the learned judge points out, the provision is in very general terms and has no special relation to the powers for removal and disposal of sewage. In my opinion it would certainly be going too far to infer from this section that the legislature contemplated the causing of a nuisance in the disposal of sewage.

I have not discussed the question whether the municipal committee acted negligently in carrying out the nightsoil disposal operations.

There is evidence shewing that more might have been done to mitigate the nuisance. But the point seems immaterial in view of the finding which I think we must come to viz., that the committee are not authorized expressly, or by necessary implication to commit a nuisance and that the legislature cannot be supposed to have contemplated the nuisance as a necessary result of exercising the powers conferred on the committee by section 98.

For these reasons I would dismiss the appeal with costs, advocates' fees ten gold mohurs a day for three days.

YOUNG, J.—Having had the advantage of reading the judgment of the chief judge with the conclusion of which I agree I need only add a very few words. Mr. McDonnell having candidly admitted that he did not think he could contend that the smell was not a nuisance, our task is considerably lessened, and is confined to the questions (1) whether the disposal of nightsoil by the municipality is imperatively required by the legislature and (2), whether a nuisance is the practically inevitable result.

The first question depends on the construction of the Burma Municipal Act, and I agree with the chief judge in thinking that section 98 if otherwise imperative does not cease to be so from the fact that the section only becomes operative at the discretion of the local government. Under section 3 clause 1 the whole Act only becomes operative from the date on which the local government chooses to appoint, and whatever may have been the effect of the delegation of powers to the local government board under the Metropolitan Poor Act 1867 which caused Lord Watson in the Managers of the Metropolitan Asylum district *vs.* Hill (1) to hold that the compulsion was not that of the legislature, I cannot think that in the Burma Municipal Act the delegation by the legislature to the government itself of the power to apply the section makes the compulsion—if it otherwise exists—that of the government and not that of the legislature.

I am unable however to agree with the chief judge in thinking that the terms "refuse rubbish and offensive matter" in section 98 do not include sewage. *Prima facie* it is admitted that they clearly may: it therefore follows that good reason must be shewn for excluding the meaning. It is urged that in section 112 the legislature expressly mentions sewage and an inference is drawn from the omission to mention it in section 98. In my opinion section 98 clause 1 is the compulsory counterpart of the optional section 112 clause 1. Section 112 permits a municipality to remove sewage and rubbish from any building or land within its limits. Section 98 compels it to remove refuse and rubbish of every kind from the same places. I think the meaning is the same, and cannot think that the legislature intended to leave the removal of sewage optional. Clause 2 of section 98 provides the next step and requires the municipality after it has removed this refuse and rubbish of every kind to provide sites and places on which it may be collected, deposited, and disposed of. It adds the still more comprehensive term "and all offensive matter." I cannot think that any distinction is intended to be drawn or that anything is

intended to be collected, deposited, and disposed of under clause 2, which was not intended to be removed under clause 1, and I consider offensive matter merely hyphenated rubbish or refuse.

Then it is further argued that the terms "refuse, rubbish, or offensive matter" do not always include nightsoil in the Act and reliance is placed on section 148. This section penalizes anyone who without the permission of the committee deposits earth, refuse, rubbish or offensive matter in any public drain or drain communicating therewith and it is argued that if these terms include nightsoil anyone would be liable to be fined for throwing it into a drain even though it were specially constructed for the purpose. The argument seems to me to lose sight of the governing words "without the permission of the committee." The committee is especially careful to see to the provision of latrines and such like and numerous sections give them wide powers to see that these are built in sufficient numbers and properly kept. To argue that refuse cannot include nightsoil because the use of such places for their proper purposes would then be punishable under the section would to me seem only possible if the words "without the permission of the committee" were absent. The committee must be assumed to permit the proper use of the places which it has ordered to be built for the very purpose.

Section 150 penalizes the improper use of drains not set aside for the purpose: the term offensive matter is used and is admitted to include nightsoil. If the term includes it in one place, it probably includes it everywhere unless there are strong reasons to the contrary. It is urged that if nightsoil is included under the terms refuse or offensive matter in section 148, this section and section 150 overlap. It may be so, but if so, I would prefer to assume that fact rather than to hold that the legislature intended to include nightsoil under the term offensive matter in one section and exclude it in the preceding section. I incline however to think that in the one section the draftsman had chiefly in mind solid matter and in the other liquid. In section 148 he speaks of earth, and offensive matter in section 150 of water and offensive matter.

As a matter of fact the legislature seems to me to be sometimes more timorous than at others. In section 98 it is bold and speaks of refuse, and rubbish only. In section 151 determined to leave nothing to chance, it speaks of any carcass dirt, dung, bones, ashes, nightsoil, or filth, or any noxious, or offensive matter, and imposes a fine on any owner or occupier who does not put any such matter into a proper receptacle. Section 98 clause 3 authorizes the committee to require owners and occupiers to provide such receptacles and I should regret to think it necesary to hold that any of these things had to be placed in "the proper receptacles" by owners and occupiers under section 151 but that the municipality was not bound to remove them under section 98.

It may be said that we are concerned not to speculate as to the intentions of the legislature but to construe its language. This is true, but I am of opinion that refuse which primarily means anything

refused or rejected is amply wide enough to include nightsoil, and I cannot regard the fact that the legislature speaks expressly of sewage in section 112 and of nightsoil in section 151 as any sufficient reasons for supposing it did not intend to include it in the term refuse or offensive matter in section 98. It is admitted that the local government has applied section 98 to the municipality of Rangoon and I think under subclause 1 the terms refuse, rubbish, and house refuse include nightsoil and that the committee is bound by law to remove it. I think that under clause 2 the committee is bound to provide places and sites for the collection, deposit, and disposal of what it is bound to remove under clause 1 and that under clause 3 it is entitled to call upon owners and occupies to provide proper receptacles for the reception of all such things, till the municipal servants can remove them. There is no express provision that it is to be the municipality that is to dispose of the refuse, rubbish, and offensive matter: all that it is expressly required to do is to provide sites where such offensive matter may be collected, deposited, and disposed of. It is not expressly required either to collect, deposit, or dispose of such things. If it has, as I think, to remove such offensive matter it would naturally have to deposit it in the places which it is bound to provide for the purpose, and if so, I think it may be held that it is bound to dispose of it. I think therefore that section 98 imposes on the municipality the duty both of removing and disposing of the nightsoil.

We are not now concerned with any nuisance arising or alleged to arise from the removal of the nightsoil from premises—or its transport through the streets, but only with the one that arises from its disposal at this particular site and place. The question is whether this enforced disposal of the nightsoil inevitably causes a nuisance. If it does, the municipality is excused, if it does not, the municipality is not.

Dr. Blake the municipal veterinary officer in whose charge the various depots lie tells us (pp. 32, 33) that during the cold weather no smell from this particular depot reaches across the street, that in May which he says is the worst month there would be a bad smell, but not beyond the width of the street, and he therefore naturally admits (p. 54) that the larger the area of the depot, the less the nuisance will be to outside people. Dr. Hayne the then chief medical officer for the railway states that he thinks it would tend to check the smell to a great degree if the area were properly enclosed, but he does not think it large enough and suggests that a depot should be one hundred yards square, so that the transfer of the nightsoil should take place fifty yards from any inhabited place. Now this transfer operation which causes the nuisance complained of does not take place in the centre of the depot but at the extreme end, and that end is the nearest to the plaintiffs' quarters. These lie on the other side of First Street. If the width of the road which exhibit 1 shews to be only thirty feet makes as Dr. Blake thinks, so much difference, the distance caused by the removal of the place of transfer further inside the depot might prevent the nuisance altogether. There is no evidence that experiments have been made to settle the range of the smell. The depot has been in existence

for thirty years. If its existing area is insufficient, there is no evidence that more land might not have been taken up in the first instance: if the municipality took up too small an area, that is their fault as well as their misfortune.

Lord Blackburn in the Managers of the Metropolitan Asylum District case (1) at page 208 of the report seems to have been doubtful as to the position if it were shewn that the thing enjoined and done must create a nuisance unless it was done on a site so extensive that it could not be obtained at all or only at a cost so enormous as to make it practically impossible. In that case it was held that the act complained of was not imperatively enjoined by statute. In the present case I think it is enjoined, but nothing in the Act has been brought to our notice to shew that the legislature thought it impossible to carry out the work without causing a nuisance: on the contrary the legislature in section 98 seems to have contemplated isolated areas being selected in the first instance, a growth of population attended possibly by a nuisance in the future, and if so, a compulsory transference of the depots to more remote sites, outside municipal limits. These words seem to me rather to negative the idea that the legislature regarded the nuisance as inevitable or contemplated authorizing one.

It foresaw the possibility and provided for it. It gave the municipality a wide area of selection in the first instance and provided for a subsequent compulsory change of site, if a nuisance arose. The nuisance arises from the transfer of the nightsoil and the transfer takes place by night. The land of this particular depot is surrounded by roads and there is no complaint from passers by: the other buildings in the vicinity are stated to be warehouses occupied only by day and the omission of the defendants to insist that if it is a nuisance at all, it is a public one seems to indicate that they only fear the plaintiffs, and it would not seem difficult or at any rate impossible to safeguard the plaintiffs or in the last instance, if they wish to maintain the depot to acquire their property, which has only buildings of the value of Rs. 2000—3000/- upon it. There are it is true provisions in the Act for compensation, but I see no reason to suppose from this fact that the legislature contemplated this nuisance being inevitable or that it is so in fact.

I therefore agree with the chief judge in dismissing the appeal. I also agree in the order as to costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISELLANEOUS APPEAL No. 27 OF 1918.

SADAYAPPA CHETTY .. .. .. APPELLANT.

vs.

ANAMALAI CHETTY and one .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Ormond, J.

For appellant—Mr. Leach.

For respondent—Mr. Lentaigne and Mr. A. B. Banerji.

28th May, 1918.

Civil Procedure Code (Act of 1908) s. 151. inherent powers of court—application to transfer a decree of a British court to a court outside British India.

The code of civil procedure contains no provision enabling courts in British India to transfer their decrees for execution to courts outside British India, but under the inherent powers reserved to the courts by section 151 of the code, the courts may and should transmit to any foreign court on the application of a party the documents necessary to enable such courts to execute the decrees under the powers conferred on them by their own legislatures.

JUDGMENT.

TWOMEY, C. J. AND ORMOND, J.—The respondent applied to the judge on the original side of the court to have his decree against the appellant transferred to the Pudukotta Chief Court for execution and it was sent accordingly. The appellant applied to have the execution stayed, and the judge on the original side requested the Pudukottai court to stay execution. Subsequently the judge on the original side on the application of the respondent allowed the execution to proceed. In appeal from this order Mr. Leach for the appellant (the judgment debtor) urges that a court has no power under the code of civil procedure to transfer a decree for execution to a court outside British India, and cannot even send the requisite documents to such a court for the purpose of execution.

It is true that there is no provision in the code authorizing courts in British India to transfer their decrees for execution to a court in a Native State. But there is in our opinion nothing to prevent the transmission of certified copies of the necessary documents to such a court to enable it to execute the decree under any powers conferred by the legislative authority of its own state. It appears to us that section 151 of the code of civil procedure is wide enough to cover this procedure, and that it is a proper course to pursue, when as in the case of Pudukotta, the state has intimated its willingness to have decree of courts in British India executed in the courts of the state. We are supported in this view by the opinion of the learned Chief Justice of Madras in the full bench case of Pierce Leslie & Co., *vs.* Perumal (1). It is not necessary for us to decide whether the transfer of documents to a court outside British India in the manner indicated above would or would not have the full legal effect of a transfer for execution under the provisions of the code of civil procedure.

The appeal is dismissed with costs,—advocate's fees three gold mohurs.

(1) 40, M. 1069.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 138 OF 1918.

U NANDIYA and others .. .. .. APPELLANTS.

vs.

U KAW WIDA and others .. .. .. RESPONDENTS.

Before Sir Daniel Twomey, Kt. C. J. and Robinson, J.

For appellants—Mr. May Oung.
For respondents—Messrs. Maung Gyi and Ba U.

10th May, 1920.

Buddhist Ecclesiastical Law—Saduthantaka ownership of religious property—Right of survivor ship—Right of survivor to admit a new member into joint ownership.

Burmese Buddhist Ecclesiastical Law allows the dedication of religious property to a group of two, three or four pongyis among whom title passes on the death of one of the members by survivorship to the rest, until the last survivor gets the whole property as his poggalika.

On the death of a member or members of the group, it is lawful for the survivors to admit a new member to joint ownership of the property in place of the deceased, and the persons so admitted can maintain a suit for possession of the property.

JUDGMENT.

TWOMEY, C. J. AND ROBINSON, J.—The plaintiffs, three Buddhist monks, sued for possession of certain religious land and buildings thereon, the whole known as the Man Kyaung at Bassein. They claimed the property on the ground that they are the three surviving members of what is known in Buddhist Ecclesiastical Law as a *Saduthantaka* or group of four joint owners of this property, the fourth member U Okgantha having died. They alleged that shortly after U Okgantha's death the first and second defendants (two pongyis) wrongfully took possession of the property and the third and fourth defendants (a layman and his mother) were in occupation of certain buildings on the land. The first and second defendants claimed that the property was the *poggalika* property of U Okgantha deceased who had made a gift of the property to the first defendant in his lifetime. The second defendant pleaded that he was merely the first defendant's disciple and has no separate interest in the dispute. The third defendant pleaded that he was the *kappiya* or lay steward of the kyaung and supported the first defendant's case. He claimed ownership of the house in which he lived on the kyaung land and also claimed joint ownership with defendant of one of certain religious buildings on the land. We are no longer concerned with the pleas of the third and fourth defenants which were rejected by the district court, holding that the *kappiya's* house was built on the kyaung

land merely by sufferance of the presiding pongyi, and dismissing the claim of the third defendant to joint ownership as having no basis whatever. As regards the alleged gift by U Okgantha to the first defendant the district court held that there was no valid gift and this finding has not been disputed.

The learned judge held further that the dedication of the religious property in question to a group of four pongyis was proved. He accepted the explanation of *Saduthantaka* property in U May Oung's Buddhist Law of Inheritance (Vol. II. p. 181) as property belonging jointly to four pongyis among whom the title passes by survivorship until the last survivor gets the whole property, but he was not satisfied that on the death of one member it was permissible for the survivors to admit a new member in his place in the joint ownership group. The suit for possession was therefore dismissed and the first defendant whose gift had been held to be invalid was allowed to remain in possession. There was an appeal to the divisional court. The divisional judge remarked that the appellants are entitled to a decision on the claim that the Man Kyaung land and buildings belonged to a group of four pongyis who could keep the property in the group by electing successors to any member who died and that the three appellants are the survivors of the group, the fourth place being vacant temporarily owing to the dispute about the Man Kyaung. He held that such a system is unknown to Burman Buddhist Ecclesiastical Law, but the only ground he gives for his opinion is that "the system is too advanced an idea for a primitive system of law."

In this second appeal by the plaintiff-appellant pongyis it is admitted by the learned counsel for the respondents that the *Saduthantaka* system is an integral part of the Buddhist Ecclesiastical Law, and the only argument on which he relies is that according to recognized authorities on the subject the survivors of a *Saduthantaka* group have no power to fill the place of a deceased joint owner. He contends that on the death of each joint owner his interest is merged in that of the survivors until only one survivor is left when the property becomes his *poggalika*. We have been referred to a work which both sides admit to be a high authority on Buddhist Ecclesiastical Law viz the Maingkaing Sayadaw's Tipitaka Viniccaya, on pages 334 to 338 of which (annexure 1 to this judgment) the method of creating joint ownership of religious property is described. But this work does not lay down whether the survivors in a group of joint owners have the right of filling up vacancies. A passage from a work of still higher authority was produced at the final hearing of the appeal; it is an extract from page 394 of the Vinaya Mahavagga Athakatha, Pali Text, Civara Khandaka, part VIII. (Annexure 2 to this judgment) The translation as given in the annexure to this judgment has been approved by the learned counsel for both parties and both gentlemen are Pali scholars. But it is agreed that the literal rendering of the passage underlined in the second annexure is as follows:—"*If, being undivided, to their fellow residents they give, it is as not given.*" According to the respondents' learned counsel this implies that a group of joint owners cannot give the property at all without first partitioning it. On the other hand Mr. May Oung asks us to construe the

passage merely as prohibiting a gift of an undivided share but not as prohibiting the admission of an additional joint owner of the whole property. It appears to us that the latter view is the more reasonable. The ecclesiastical law clearly favours the formation of groups of two or more than two joint owners of religious property, and no reason is suggested why it should be permissible for a single pongyi to constitute such a group consisting of himself and one or more others, and yet be inadmissible for a group of two or three to admit an additional member as joint owner with them. If such a distinction really existed in the ecclesiastical law it could always be evaded by the members of the original group resorting to partition among themselves and then forthwith recombining with the additional member whom they wish to introduce. It is unreasonable to suppose that the ecclesiastical law contemplated such an absurd procedure and we think that if the view advanced for the respondents were correct, clear and definite authority would have been found for it. As it is we see nothing repugnant to general legal ideas in the introduction, by consent, of an additional joint owner to replace one who has died.

There is no longer any contest as to the material facts of this case. The three plaintiffs-appellants were admittedly joint owners in a Saduthantaka group covering the property in dispute, together with U Okgantha deceased, U Okgantha being the sole surviving member of the original group into which the three plaintiffs were successively coopted as vacancies occurred.

We think that the plaintiffs-appellants are entitled to a decree for possession as prayed. The decrees of the district and divisional courts are set aside and the plaintiff's suit will be decreed with costs in all courts.

ANNEXURE (1).

MAINGKAING SAYADAW'S

TIPITAKA VINICCAYA, PAGES 334 TO 338.

OPINION ON DWITHANTAKA.

The method of creating ownership such as Dwinthantaka, Tithantaka and so on is not given directly in the Vinaya, the commentaries or sub-commentaries known as Wimati Winodani Tika and Tharattha Dipani Tika. It is only in the Vajirabuddhi Tika that mention is made under the heading (Thamma Parikkhara Pyu) "the making of common ownership." Even in the Vajirabuddhi Tika opinion differs (on the point). The learned sayas of the present day also differ in opinion among themselves. Such being the cause I will show clearly how Dwinthantaka and like ownerships are created according to the words of the Vajirabuddhi Tika and will give my opinion on the modes of creating Dwithantaka, Tithantaka and like ownerships. Let the learned read, note and ponder:—

Pali text begining "idam tuyham.....dinnam yeva hoti" indicates taking; and having regard to the passage in the commentary on the first kathina rule in respect of a *pacittiya* offence, common ownership in property is created by employing the words, "Mama santakam tawaca mamaca hotiti eva i. e. "let my property be thine as well as mine." So say the sayas and so should it be written, in the "gandi pada" way. In the "anugandi pada," the method is elaborate or lengthy. The following method (of creating common ownership) is that which is the considered opinion of the sayas viz:— If many rahans or two rahans wish to own property in common they should make their gift to a rahan who observes the rules of his order, each rahan giving absolutely to him all properties he owns or will own in future. The Vinaya-observing rahan then gives back to those of the rahans who wish to own property in common all the property he has received from each of them. As this mode is that which is based on the spirit of the Vinaya and later works, it is the surest method of creating joint ownership. Such is the considered opinion of the sayas.

But some sayas say as follows; As the latter mode is one which is in conflict with, and opposed to, the ancient method viz; by saying "Let what is mine be thine" those rahans who desire to create joint ownership should carefully consider the matter. Thus, if it is desired to create Dwithantaka ownership according to the methods of the early sayas and the other sayas as mentioned in the Civara Khandaka of the Vajirabuddhi sub-commentary, and the subject of the joint ownership is property actually in possession, then the words used should clearly state it, but if it refers to property to be acquired hereafter that should also be clearly stated. If there be two rahans one shall say to the other first "Let my property be thine and mine." In this way Dwithantaka ownership can be properly created.

Dwithantaka ownership can be created by employing the Burmese language also. (If one say to the other) "Let all my *garubhan* and *lahubhan* property present and future be thine and mine" (and the other says) "Let all my *garubhan* and *lahubhan* property present and future be thine and mine." If it is desired to create joint ownership of present property only, then leave out the words future property.

If three or four rahans desire to create joint ownership, all being present, one of them should first say to the others who desire to become joint owners "Let my property be yours as well as mine" and the others each in turn should say the same to the others.

If it is desired to create *dwithantaka* or *tithantaka* ownership in the manner stated by the latter sayas as shown in subcommentary referred to above, the two or three rahans, as the case may be, should say each in turn to a rahan who observes the Vinaya rules and whom they trust, and who is not to be included among the joint owners, "I give you this" and if one of the proposed joint owners speaks on behalf of the others he should say "We give you this" at the same time giving the property absolutely. The rahan who receives the gift then should give the property to the proposed joint owners, saying "I give

you this." Thus by the gift—receiving rahan returning the gift to the proposed joint owners, is the *Dwithantaka* and *Tithantaka* ownership created.

Of the two modes of creating joint ownership, although some may say that the latter method is not in accordance with tradition, still, as it differs only slightly and is not opposed to the *Vinaya*, the commentaries and subcommentaries, it must be regarded as excellent.

If, having in view the passage in the commentary on Parajikan pathama kathina rule which says that the use of the words "Let the property be thine" does not make it a good gift, it be asked whether the first mode of creating joint ownership is in conflict with it, I answer, No.

The passage in the commentary had no reference to the property or to the action of giving, but dealt only with the badness of the gift when the genitive case "of thou" is employed in saying "Let the property be thine." But scholars will know that where the property and the taking are mentioned, and the gift is made by saying "Let the property be thine" employing the dative case of the word thou, the gift is a good gift. The gift to be valid must be evidenced by the employment of the dative of possession or ownership.

ANNEXURE (2)

ORIGINAL COMMENTARY ON VINAYA TEXT.

VINAYA MAHAVAGGA ATHAKATHA PALI TEXT, CIVARA KHANDAKA

PART VIII. PAGE 394.

If jointly owned property (Dwithantaka) has not yet been divided and one of the owners dies, the survivor becomes the sole owner. The same applies to property jointly owned by several persons. If all the owners die the property becomes "Sanghika." *If the joint owners without dividing the property among themselves give it to their fellow residents, the gift is void.**

If they give away the property after the division among the owners, the gift is good. If all the original owners die the property (so given away) does not become Sanghika.

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*As pointed out in the judgment the literal rendering of this sentence is. "*If being undivided to their fellow residents they give, it is as not given.*" —Editor B. L. T.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 103 OF 1919.

U PAW .. .. APPELLANT.

N. R. M. A. CHETTY .. .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Bomanji.
For respondent—Mr. S. N. Sen.

17th May, 1920.

Civil Procedure Code (Act V of 1908) O. XXI, rr. 91, 92, 93—Remedy of of auction purchaser when judgment debtor has no sale able interest—decree-holder purchaser.

The only remedy of a purchaser at a sale in execution of a decree who finds that the judgment debtor had no saleable interest in the property is an application to set aside the sale under Order XXI rule 91, and it makes no difference that the decree holder is himself the purchaser.

A decree-holder who has purchased his judgment-debtor's property in execution of his own decree, and entered satisfaction for the decree cannot on discovering that the judgment debtor had no saleable interest in the property sold, treat the sale and entry of satisfaction as void, and apply for fresh execution of his decree.

JUDGMENT.

MAUNG KIN, J.—This appeal arises out of an application made by the respondent, a Chetty firm against the appellant their judgment debtor. Long before this application the Chetty firm had obtained a mortgage decree upon certain lands against the appellant. In due course, certain property was sold by auction in execution of the decree, as being part of the mortgaged property. The Chetty firm purchased it, after having previously obtained leave of the court to bid. After this, the Chetty firm asked the court to set off the proceeds of sale of the property against the decretal amount. This was done. Subsequently the Chetty discovered that the land sold was not covered by the mortgage, and that it did not belong to the mortgagor, the appellant. It appears that they made the discovery long after the expiry of the time allowed for an application under the civil procedure code to set aside a sale on the ground that the judgment debtor had no saleable interest in the property. So they filed a suit to have the sale set aside. They failed because it was held that under the civil procedure code, no such suit lay. Then on the 4th December 1918 they made the present application for sale of the mortgaged property alleging that though the proceeds of the sale of the wrong property had been set off against the decretal amount, the applicants had not in fact

been paid anything towards the decree. The appellant judgment debtor resisted this application on the ground that the Chetty must treat himself as having been paid to the extent of the sale proceeds of the property be bought, though it was not part of the mortgaged property. The lower court held that the Chetty firm, by being merely credited on the record of the case with the proceeds of the sale of the wrong property could not be held to have been paid to the extent of the sale proceeds, as they did not get the property they bought. If the Chetty firm were outsiders, what are called stranger purchasers as distinguished from decree holder purchasers, they would not have been able to recover the amount they paid for the property except under the provisions of Order XXI rule 91. This is quite clear from the ruling of a Bench of this court in Soolayman Cassim Simji *vs.* S. S. A. O. Chetty (1) where it was held that in the case of a sale by court there is no warranty, express, or implied, that the judgment debtor has any saleable interest in the property; that if after the sale it is discovered that the judgment debtor has no saleable interest in the property, the auction purchaser can apply within thirty days under Order XXI rule 91 to have the sale set aside, and he would then be entitled to an order for refund of his purchase money; and that he has no remedy by a separate regular suit against the judgment creditor to recover his purchase money. What is the remedy of a decree holder purchaser who has failed to, or who could not, by the bar of limitation, have the sale set aside under Order XXI rule 91? Is he debarred from filing a suit to have the sale set aside, and to recover the money he paid? He must be held to be in the same position as a stranger purchaser. Is he not then entitled to treat the sale as a nullity, and as being really infructuous! His decree has, as a fact, not been satisfied. In the case of a stranger purchaser, the purchase having been debarred from resorting to a regular suit, the decree holder and the judgment debtor have the benefit of the sale proceeds. In the case of the decree holder purchaser, a wrong property having been sold, he does not get any benefit out of the transaction. The judgment debtor, of course, desires to have the same benefit as he would have in the case of a stranger purchaser. It may be contended that there is no justice, equity, or common sense in saying that the Chetty firm should be treated as having received payment towards the decree, when in fact they have had no benefit at all. But the present case cannot be distinguished from one where under similar circumstances, the decreeholder has paid into court the amount of the sale proceeds. The fact that in this case the proceeds were credited towards the decree is due to a fortuitous circumstance. If the decreeholder had paid cash into court they would never have had it refunded to them. I must therefore hold that whether there was a payment in cash, or a book entry in respect of the purchase, the result must be the same. In either case the learned counsel for the appellant urged that the decreeholder purchasers in this case should not be placed in a better position than a stranger purchaser. The wrong property was sold through the fault of the decreeholder, and if it had been purchased by a stranger,

(1) 12, B. L. T. 211; 10, B. L. R. 76.

and he had made the discovery that it was not the judgment debtor's property too late, the decreeholder would have been benefited. In the reverse case, it would not be unjust to hold that he should suffer the loss. I entirely agree with this contention. For these reasons, the appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 105B OF 1920.

CHIN PIN and others .. .. .. APPLICANTS.

vs.

KING EMPEROR .. ..

Before Mr. Justice Maung Kin.

For applicants—Mr. Bomanji.

10th June, 1920.

Criminal Procedure Code (Act V of 1898) s. 556. Case in which magistrate is personally interested—magistrate issuing warrant under Gambling Act (Burma Act I of 1899) s. 6, authorizing police to enter and search houses.

A magistrate who upon information furnished to him directs the issue of a warrant under section 6 of the Gambling Act is personally interested in the case within the meaning of section 556 of the Criminal Procedure Code and is disqualified from tryng it as a magistrate.

JUDGMENT.

MAUNG KIN, J.—This application arises out of a gambling case. The applicants desire a tranfer of the case from the court of the township magistrate Letpadan East, to some other court.

The main ground is that the magistrate issued the warrant under section 6 of the Gambling Act after expressing his belief on the information received that the house in question was a common gambling house, and that he is therefore disqualified from trying the case. The belief expressed was that the information was credible to the extent that a warrant may issue on the strength of it. That information alone is not sufficient to warrant a conviction, but it does help to raise the presumption under section 7, when the provisions of section 6 of the Act have been complied with. What the trying magistrate has to do when the police send up the case for trial, is to see whether the provisions of section 6 have been complied with. One of the points he has to satisfy himself of under that section is as to the sufficiency to the information. The legislature has not laid down that the magistrate who issued the warrant may try the case. The issue of a warrant is extra judicial. The trying magistrate takes cognizance

of the case upon a police report. As he has to consider the question of the sufficiency of the information, he should be a different person from the one who issued the warrant. To allow the magistrate issuing the warrant to try the case, is hardly fair to the accused who asks him to see whether the information was sufficient or not. The magistrate has already formed his opinion on the point. There is another way of looking at the matter. The magistrate who issued the warrant was the one who set the law into motion, and was therefore somewhat in the nature of a prosecutor. It must here be borne in mind that the magistrate was doing what a police officer empowered under section 6 is able to do. In either view of the matter, the spirit of section 556 of the criminal procedure code is violated, and its intention virtually defeated.

I would direct that the case be transferred from the court of the township magistrate Letpadan East to such other court in Tharrawaddy as the district magistrate may appoint.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 127A OF 1920.

KING EMPEROR .. .. .. APPLICANT.

vs.

PO MYA .. .. RESPONDENT.

Before Mr. Justice Robinson.

4th June, 1920.

Habitual Offenders Restriction Act (Burma Act II of 1919) s. 3, order of restriction against habitual offenders s. 10, means of livelihood within area of restriction—order demanding security.

Proceedings under the Habitual Offenders Restriction Act can be taken only in cases in which a magistrate may under section 110 of the Code of Criminal Procedure require a person to execute a bond for his good behaviour.

Under section 10 of the Habitual Offenders Restriction Act no order of restriction can be made against a person unless the court is satisfied that such person has adequate means of earning his livelihood within the area of restriction.

The Habitual Offenders Restriction Act contains no provision enabling a court to demand security to enforce compliance with the order of restriction. Breach of the order is punishable under section 18 of the Act.

JUDGMENT.

ROBINSON, J.—Accused Po Mya was convicted and sentenced to seven years' transporation and an order was, at the time of sentence, passed under section 565 directing that he should after release report his residence and any change of residence to the police. He apparently failed to do so. On 6th November 1918 he was sentenced to one month's simple imprisonment for leaving his village without permission. At least this is what the magistrate records in his judgment. The magistrate then received a report that the accused in breach of the order under section 565 often left his village without permission, and he issued a notice to accused calling upon him to show cause why he should not "under the provisions of section 4 (a) of the Burma Habitual Offenders Restriction Act enter into a bond in the sum of Rs. 100/- with two respectable landowners of Ywamaton village as sureties for restricting his movement beyond Ywamaton village tract for the term of one year." He used the form of the order to show cause against furnishing security for good behaviour, (section 112 Criminal Procedure Code). When the accused appeared the order was explained to him and the magistrate recorded the evidence of a sub-inspector of police that he found accused absent from his village and that he had been absent for ten days. He also recorded the evidence of two witnesses to show that accused often left his village without permission. In his final order the magistrate found that the accused "is in the habit of leaving his village often without reporting to the police." He then directed him to enter into the bond and on accused saying he could not furnish security he committed him to jail for one year.

The order under section 565 required accused to report his residence, or change of residence, and if he merely went away for a few days he probably committed no breach of that order. But however that he may be, and assuming that he had been guilty of a breach of it he could have been punished as provided in the section itself. That breach gave the magistrate no jurisdiction to take action under Burma Act II of 1919. By section 3 (1) of this Act it is enacted that in any case in which a magistrate may, under the provisions of section 110 of the Code of Criminal Procedure, 1898, require a person to show cause why he should not be ordered to execute a bond for his good behaviour the magistrate may in lieu of, or in addition to so doing, require such person to show cause why an order of restriction should not be made against him.

No report was before the magistrate that would have justified him in taking action under section 110 of the Criminal Procedure Code and therefore he was not justified in taking action under the Burma Act. Again, this latter Act makes no provision for taking a bond and demanding sureties. It merely provides for an order of restriction being passed. If such an order is passed and is then violated the person can be punished under section 18 of the Act. An order of restriction is passed under section 7 of the Act, and will be in accordance with the rules made by the local government under section 17 of the Act. Before the magistrate decides to pass an order res-

tricting a person to any specified area, he must be satisfied that that person has adequate means of earning his livelihood within that area. This was not done in this case. For the above reasons it is clear that the magistrate had no grounds before him which gave him jurisdiction to make an order under the Act. He was not entitled to take a bond from the person before him, and his procedure was entirely wrong.

The Act provides an alternative to action under the good behaviour sections of the Code, and can be used when it is considered more appropriate, or when security cannot be furnished. An order of restriction may also be substituted for an order requiring security for good behaviour and that, whether security has been given or not for the unexpired portion of the period. But no order can be passed except in those cases in which the magistrate could have acted under section of the Code, ~~and can be used when it is considered more ap-~~ and Po Mya will be released. Revision magistrate is set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 159A OF 1920.

KING EMPEROR .. .. .. APPLICANT.

vs.

PYU ZIN .. .. RESPONDENT.

Before Mr. Justice Maung, Kin.

25th June, 1920.

Criminal Procedure Code (Act V of 1898) section 110 (f)—desperate and dangerous character. Section 117, evidence of general repute.

Under section 117 of the code of criminal procedure evidence of general repute is admissible only to prove that a person is a habitual offender. It is not admissible to prove that a person is a desperate and dangerous character.

A provision of the law which is an exception to the general rules of evidence must be applied only to the cases to which it is confined by the legislature.

JUDGMENT.

MAUNG KIN, J.—This is a case in which the accused was charged with being a desperate and dangerous character under section 110 (f) of the criminal procedure code. In such a case evidence of general repute is not admissible to prove the charge, as held by Sankaran

Nair, J. in Muthu Pillai *vs.* Emperor (1). The learned judge remarked. "The only remaining evidence is of general repute and hearsay. Such evidence is only admissible under section 117 to prove that the person is a habitual offender under section 110, but not to prove a charge under section 110 clause (f) of being a desperate and dangerous character. * * * * I am clearly of opinion that where a person is solely charged under clause (f) evidence of general repute is not admissible, as a provision of law, which is an exception to the general rules of evidence must be applied only to the cases to which it is confined by the legislature."

Kali Haldar vs. Emperor (2) and Wahid Ali Khan *vs.* Emperor (3) were cited by the learned judge as supporting his view. In those cases it was laid down that a charge of the kind under consideration cannot be proved by evidence of general repute, but must be proved by definite evidence. In the present case there is no direct evidence of the fact that the accused was so desperate and dangerous as to render his being at large without security hazardous to the community." The witnesses who are all village headmen say (1) that they heard that the accused was suspected in connection with (a) a decoity which was committed some three years ago, and (b) the abduction of a woman, and (2) that they heard that the accused associated with certain persons whom they called bad character. Obviously the evidence is all hearsay, and does not come up even to evidence of repute. The order against the petitioner cannot be sustained and is therefore set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS No. 127 AND 128 OF 1920.

PO MYAING and one .. .. .. APPELLANTS.

vs.

KING EMPEROR .. .. .. RESPONDENT.

Before Mr. Justice Maung, Kin.

For the crown—Mr. Mya Bu, Asst. Govt. Advocate.

27th May, 1920.

Penal Code (Act XLV of 1860) s. 397. Robbery or dacoity with attempt to cause death or grievous hurt. Form of charge—s. 34. Acts done by several persons in pursuance of common intention.

(1) 34, M. 255.
(2) 29, C. 779.
(3) 11, C. W. N. 789.

Section 397 of the Penal Code does not create and distinct substantive offence. It is merely a supplement to sections 392 and 395 which create the substantive offences for which sections 397 provides a minimum punishmert.

There can be no charge or conviction under section 397 standing by itself, as that section creates no separate offence. The charge as well as conviction should be under section 392 or 395 as the case may be, read with section 397.

The higher punishment provided by section 397 can be inflicted only on the offender who actually uses a deadly weapon, or causes or attempts to cause death or grievous hurt, and section 34 of the code cannot be applied to the other offenders to make them liable to enhanced punishment under section 397. The charge and conviction as against them should be one under section 392 or 395 as the case may be.

JUDGMENT.

MAUNG KIN, J.—In my judgment the evidence justifies the conclusion that appellants Po Myaing and Po Sin were the men who committed robbery against Maung Ne Aung and his wife, Ma Shwe Si. Although Po Sin used a yoke-pin on Maung Ne Aung the latter has said that no pain was caused thereby. Therefore this is not a robbery in which hurt was caused, but it is clear that Po Sin overawed Maung Ne Aung by holding a *da* called "*damouk*" over his head. The learned magistrate convicted the appellants under section 397 of the Indian Penal Code. That section does not create any substantive offence; it only says that if at the time of committing robbery or dacoity the offender uses any deadly weapon, etc, the imprisonment with which such offender shall be punished shall not be less than seven years. It only provides that in a case falling under section 397 the minimum term of imprisonment to be awarded to the offender who uses any deadly weapon, etc., shall be for seven years. The magistrate should have convicted the appellants under section 392 for robbery, and if the case of either or both falls within section 397 he could award a sentence or imprisonment for less than seven years. The magistrate held that "under section 34 of the Indian Penal Code., each of the accused is liable for the act of the other, because common intention was obviously to rob and what they did was in furtherance of the common, object." He then proceeded to convict both the appellants under section 397 Indian Penal Code and sentenced each to seven years' transporation. There is abundant authority for holding that only the robber or dacoit, as the case may be, who used a deadly weapon at the time of the commission of the offence could be punished in obedience to the mandate contained in section 397, but that the offence of which the offender could be guilty will be under section 392 Indian Penal Code or section 395, Indian Penal Code as the case may be. The circumstances of a particular case may be such that even without reference to section 397 the robbers jointly concerned in committing the offence may be imprisoned for more than seven years, because under sections 392 and 395 the maximum terms

of imprisonment are fourteen years, and ten years respectively. The only authority which might support the learned magistrate is the Allahabad case of Queen Empress *vs.* Mahabir Tiwari (1). This court had the first opportunity of considering that case in Nga Sein *vs.* King Emperor (2). Irwin, J, who decided the latter case stated the facts and the purport of the Allahabad case as follows:—"The case was one of decoity in the house of a man called Gajraj and Gajraj's arm was broken by the dacoits. Mahabir and several other dacoits joined in beating Gajraj. The actual blow which broke Gajraj's arm was not struck by Mahabir, but under section 34 Mahabir was held guilty of grievous hurt because the beating was in furtherance of the common intention of all, and he could have been convicted of causing grievous hurt, if there had been no dacoity. That was why section 397 was held to apply." The learned judge then proceeded to say, "The present case is different. One of the dacoits, apparently the approver Po Lwin, carried a spear, and made thrusts with it through the door into the inner room which was dark. This fact would not render the other dacoits liable to conviction for using a spear, and therefore Mahabir's case is no authority for saying that section 397 applies in this case. The words in section 397 'such offender' plainly mean any offender who uses a deadly weapon and no other." He then altered the conviction to one of dacoity under section 395. The result was that the Allahabad case must be regarded as having been merely distinguished, though one cannot help thinking that Irwin, J. really dissented from it. We have next the case of Po Win and others *vs.* King Emperor (3). In that case Tun Baw and Shwe Don had been convicted under section 392 read with section 397, Indian Penal Code, but the man who used a clasp knife was Po Win. It was pointed out that the case of Queen Empress *vs.* Mahabir Tiwari(1) was overruled by the case of Queen Empress *vs.* Senta (4), which takes the same view as that taken by Irwin J. in Nga Sein *vs.* King Emperor.,(2) and that in the Bombay High Court also a similar view was taken in the case of Queen Empress *vs.* Bhavjya (5). The convictions of Tun Baw and Shwe Don were therefore altered to convictions under section 392 Indian Penal Code and they were each sentenced to five years' rigorous imprisonment. Po Win's appeal was dismissed. The case of Queen Empress *vs.* Senta (4) was followed in Emperor *vs.* Nageshwar (6). The learned judges (Knox, Acting J. and Banerji J.) in the course of their judgment in Queen Empress *vs.* Senta observed: "section 397 of the Indian Penal Code is not in our opinion a section which creates any distinct and separate offence. It is a section which relates back to the previous sections 392 and 395; the offence committed may be the offence of robbery, or it may be the offence of dacoity. According to the actual offence found the conviction should be either under section 392 or 395, as the case may be, and in the case of persons to whom section 397 applies, under any of those sections read with section 397; but it should not be under section 397. The punishment is really inflicted under the power given by one of the two sections abovemen-

(1) 21, A. 263.
(2) 3, L. B. R. 121.
(3) 7, L. B. R. 26.
(4) 28, A. 404 foot note.
(5) Ratanlal Unrep. Ca. 797.
(6) 28, A. 404.

tioned; but section 397 directs that the court which awards sentence has no alternative, under the circumstance to which we shall presently allude, but to pass a sentence of at least seven years' rigorous imprisonment upon the offender or the offenders. The offender or the offenders who must receive this amount of punishment at the least are the particular persons who the court finds were, at the time of committing the offence under section 392 or 395, using a deadly weapon, or who caused grievous hurt or attempted to cause death or grievous hurt. Along with these persons there may have been others who were equally guilty of the offence either under section 392 or 395; their punishment will be apportioned by the court according to the powers given under section 392 or 395. It may be and should be, if the court considered them deserving of it, a sentence of seven years' rigorous imprisonment, or a sentence of some term under seven years. All are equally liable under the provisions of section 34 read with section 392 or 395 for the offence of robbery or dacoity, as the case may be. The one point the law demands under section 397 is, that whatever the punishment awarded to these other persons may be, each and every one of the offenders who is found using a deadly weapon, or causing grievous hurt, or attempting to cause death or grievous hurt, that offender or those offenders must receive a term of imprisonment which must not fall short of seven years. * * * It will be see from our judgment that in our opinion no court should draw a charge sheet under section 397 as that section does not create a substantive offence. The charge to be in proper form should be in the case of offenders using a deadly weapon, etc., a charge under section 392 read with section 397 or section 395 read with 397, as the case may be; in the case of the others a charge under section 392 or section 395." In the present case the first mistake the learned magistrate made was in thinking that section 397 created a substantive offence different from the one under section 392. Having thought that section 397 provides punishment for a substantive offence he held that the act of one of the two robbers, viz; the overawing of Ne Aung with a damouk was in furtherance of the common intention of both under section 34. This was clearly wrong. Section 34 could be applied only in the case of a substantive offence committed by one in furtherance of the common intention of that one and the others who were concerned in the offence, as pointed out in Senta's case, (4) by Knox, A. C. J. and Banerji, J. The appellant Po Sin used a damouk in such a way that he overawed Maung Ne Aung. He was therefore guilty of having used a deadly weapon at the time of the commission of the offence of robber. The instrument used is clearly a deadly weapon therefore he was guilty of robbery only, and the punishment to be awarded to him is not regulated by section 397. The robbery in this case is not accompanied by any act of cruelty, the husband and wife were not hurt, and the property stolen was not of great value. I would therefore sentence Po Myaing to two years' rigorous imprisonment. The sentence passed by the magistrate upon Po Myaing is set aside. As regards Po Sin the conviction against him under section 397 Indian Penal code is altered into one under section 392 Indian Penal Code read with section 397. The sentence passed upon him is confirmed.

THE

BURMA LAW TIMES.

JULY-AUGUST
AND
VOL. XIII.] NOVEMBER-DECEMBER, 1920. [NOS. 7, 8, 9 & 10.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 160 OF 1919.

A. C. T. R. M. CHETTY .. .. .. APPLICANT.

vs.

PO U. and others .. .. RESPONDENT.

For appellant—Mr. Aiyer.
For respondent—Mr. Bomanji and Mr. Surty.

19th July 1920.

Civil Procedure Code (Act V of 1908) O. XLI, rr. 4 and 33. Power of court of appeal—power to be exercised only in favour of parties to the appeal.

Under Order XLI rule 33 of the code of civil procedure a court has no power to pass any decree or order in favour of a plaintiff or defendant who is not a party to the appeal. The power to reverse or vary a decree in favour of all the plaintiffs or defendants under Order XLI rule 4 can only be exercised when the decree proceeds on any ground common to all the plaintiffs or all the defendants.

Haridas Dey *vs.* Kailash Chunder 44. I. C. 480 followed.

JUDGMENT.

MAUNG KIN, J.—The applicant obtained a mortgage decree in respect of a piece of revenue paying land against the mortgagor Po U. The mortgagor made default in payment of revenue for the land, and to prevent the mortgaged property from being sold by government for arrears of revenue, the applicant (decree-holder) paid up the arrears. Subsequently he asked the court which passed the decree to add the amount so paid to the amount of the decree. The court referred him to a regular suit. Hence the suit out of which this

application arises. The suit was against Po U and three others who were his lessees of the mortgaged property. The trial court passed a decree against Po U, and dismissed the suit as against the other defendants. Po U did not appeal, but the applicant did as against the other defendants. Po U was, of course, not a party to the applicant's appeal. The lower appellate court held that the other respondents were not liable, and dismissed the appeal against them. It also held that the applicant was not entitled to be reimbursed by Po U the amount paid, as there was no express agreement on Po U's part to pay the same, and dismissed the suit as against Po U also, by setting aside the decree passed by the trial court against him. In doing so, the appellate court purported to act under Order XLI rule 33 of the code of civil procedure.

It is an interesting question whether under the circumstances of the case (which I have not fully stated because, in the view which I take of the meaning of Order XLI rule 33, it is unnecessary to do so) Po U would be liable. At any rate, the ground on which the lower appellate court, held that Po U was not liable is quite untenable. This application is made on the ground that the lower appellate court had no jurisdiction to set aside the decree against Po U. The material words of the rule are "may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." These words show clearly that the power under this rule can be exercised against the respondents or parties to the appeal, but not against those who are not such, although they were parties to the suit in the original court. The illustration makes the matter quite clear:—A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals, and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y." The illustration makes it quite clear that the power can be exercised against Y, because Y is a party to the appeal.

The point has been raised and decided in Haridas Dey *vs.* Kailash Chandra Bose (1) by Fletcher and Huda. J. J. of the Calcutta High Court. The judgment of the court was delivered by Fletcher. J. who observed:—It was not competent to the learned judge of the lower appellate court in the appeal to which the nonconsenting defendants were not parties to vary the decree of the first court in the manner he did.....It is suggested that he had power under order XLI rule 33, of the civil procedure code. That obviously is not so. That section does not apply to a person who was not a party to the appeal. These non-contesting defendants were not parties to the litigation in the lower appellate court. Obviously, on first principles, the learned judge in that court could not vary the decree of the court of first instance as regards their rights and liabilities as adjudicated on by that court."

Except under Order XLI rule 4 the appellate court cannot vary the decree of the trial court so as to affect a plaintiff or defendant

(1) 44, I. C. 480.

who is not a party to the appeal. That rule deals with the case where the decree passed by the trial court proceeds on any ground common to all the plaintiffs or to all the defendants. The present is not that sort of case. Po U alone was held liable. The other defendants who were tenants could not possibly have been held liable.

For these reasons I hold that the lower appellate court exercised a jurisdiction not vested in it by law in setting aside the decree against Po U. That decree will be restored.

This application is also made on the ground that the other defendants admitted their liability and that the suit should have been decreed against them on their admissions. But the admissions they made were as to their legal liability. The courts below have found as a matter of law that they were not liable. That is a correct view. Their admissions were made in ignorance of the law on the subject. I think the ground set up in the application as regards them is untenable. The application is dismissed as against them with costs, and allowed as against Po U with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 62 OF 1920.

A. H. DAWOOD .. .. PLAINTIFF.

vs.

R. B. A. RAHMAN .. .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. Das.
For defendant—Mr. Leach.

5th July 1920.

Courtfees Act (VII of 1870) s. II. Courtfees on mesne profits when amount decreed exceeds amount claimed.

Civil Procedure Code (Act V of 1908) Order XX rule 12, enquiry as to mesne profits.

Section 11 of the Courtfees Act applies to mesne profits ascertained on enquiry under Order XX rule 12.

A final decree under Order XX rule 12 (2) (c) in respect of mesne profits should not be passed until courtfees have been paid on the difference between the amount of mesne profits claimed in the plaint and the amount ascertained as due after date of institution of suit.

JUDGMENT.

RIGG, J.—Plaintiff asked for mesne profits up till the institution of his suit and for future mesne profits from the date of institution

until possession of the premises was given. The question for decision is whether plaintiff is entitled to execute his decree for future mesne profits without paying additional courtfees under section 11 of the Courtfees Act. There seems to be no decision on the point in issue in this court, and as the revenue authorities are interested in the result of my decision, I directed notice to issue to the government advocate. In Bombay a bench ruled that where a plaintiff asked for mesne profits only from the institution of the suit till the property was restored to him, and the amounts of those profits was left to be determined in execution proceedings, no courtfee was required; see Ramkrishna Bhikaji *vs.* Bhimabai (1). The decision in that case proceeded on the ground that if the plaint had not asked for future mesne profits, but they had been awarded under section 211 of the civil procedure code of 1882, section 11 Courfees Act would not have been applicable, as the plaint did not ask for future mesne profits. Section 211 of the old code provides that when the suit is for the recovery of possession of immoveable property yeilding rent or other profit, the court may provide in the decree for the payment of rent or mesne profits, from the institution of the suit until delivery of possession. In Order XX rule 12, which corresponds with section 211, it is provided that " where a suit is for the recovery of possession of immoveable pproperty and for rent or mesne profits the court may pass a decree directing an enquiry as to rent or mesne profits from the institution of the suit etc." If the argument of the learned judges of the Bombay High Court is based on the fact that the relief granted was not claimed but was given by the bounty of the court, it has no longer any force, as under the present code the relief must be claimed. The judgment proceeds " In the p esent case, the plaint does ask for future mesne profits, but the claim would not be one in respect of which a fee could be payable under section 7, as the amount could not have been stated even approximately. The language of section 11 clearly points to a claim for mesne profits for which an amount can be and has been claimed by the plaint and in respect of which some fee has been actually paid." The judgment concludes with a doubtful expression of opinion that section 11 might apply if the plaint asked for future and past mesne profits. The result of this decision appears to me, with very great respect, to lead to an anomalous position. Past mesne profits might be a small sum, whereas the future profits when calculated in execution, might represent a very large sum. A plaintiff who forebore to sue for his past profits, to which he is legally entitled, would have to pay no courtfees on the future amounts awarded to him, whereas if he did sue for the past profits, he would be charged courtfees. The Bombay decision has been followed by the Madras High Court in Maiden *vs.* Janakiramayya, (2) but no reasons have been given by the learned judges. Order VII rule 2 appears to require a plaintiff suing for mesne profits to make some approximation; the words "the plaint need only state approximately the amount (of mesne profits)" in section 50 of the old code have been altered in the present code to "the plaint *shall* state approximately the amount sued for." It is a matter of indifference

(1) 15, B. 416. (2) 21, M. 371.

what the approximation is, but there must be some approximation. If this view is correct, the foundation of the Bombay decision, *viz.* that section 11 of the Courtfees Act only applies where some claim has been made, seems to me unsound.

In Chedi Lal and one *vs.* Kirath Chand and others (3) two of the learned judges expressed the opinion that section 11 would apply to future house rent claimed. The point was very briefly argued. In Dwarka Nath Biswas *vs.* Debendra Nath Tagore (4) the judges doubted very much the correctness of the rule laid down in Bombay, but did not consider it further, as they were dealing with a case where there had been a claim for *past* profits, and they held that both in Bombay and Allahabad, the judges inclined to the view that section 11 did apply to such claims. In Ijjatulla Bhuiyan *vs.* Chandra Mohan Bannerjee(5) Mukerjee, J. said that he was not prepared to accept the view of the Bombay High Court in Ram Krishna Bikaji's case, (1), and that the contrary opinion in Dwarka Nath Biswas' case (4) was clearly well founded on reason and principle.

I have not been able to find any other authorities on the question in issue. The second part of section 11 is as follows:—"Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the court shall fix, the suit shall be dismissed."

Mr. Das argues that a plaint can only be stamped on the amount due at the time of the institution of the suit, and that section 11 applies to cases where the relief has been undervalued. If this was the case, the second part of section 11 would have no purpose. It seems to me clearly to apply to mesne profits ascertained under the provisions of Order XX rule 12. Strictly speaking, the cause of action has not arisen in the case of such profits at the time of the institution of the suit, but in order to prevent needless litigation special provision is made for their ascertainment by the decree, and courtfees become payable on any amount over the approximation required by Order VII rule 2. In my opinion, the view taken by the learned judges of the Calcutta High Court is correct, and courtfees must be paid on the difference between the amount claimed in the plaint, and the amount ascertained to be due subsequent to the filing of the suit. There will be an enquiry about this amount, and the result of this enquiry will be reported to me so that a final decree may be passed in accordance with sub-section (2) (c) Order XX, rule 12. I may call attention to the fact that the procedure prescribed in Order XX rule 12 supersedes that in section 244 (a) and (b) of the old code of civil procedure.

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(3) 2, A. 682.
(4) 33, C. 1232 at p 1235.
(5) 34, C. 954 at p. 968.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 219 OF 1919.

A. DAVID .. .. APPLICANT.

vs.

SUPERINTENDENT ST. ANTHONY'S HIGH SCHOOL RESPONDENT.

Before Mr. Justice Maung Kin.

For applicant—Mr. Auzam.
For respondent—Mr. Shaw.

2nd August, 1920.

Master and servant—Damages for wrongful dismissal, measure of damages.

In the absence of any special agreement or custom to the contrary a master can dismiss his servant at any time by a verbal notice. After dismissal, whether wrongful or not, the servant cannot claim wages. His only remedy is a suit for damages sustained in consequence of his master's breach of the contract to employ him.

In the case of a schoolmaster or other servant paid by the month, one month's salary would be reasonable damages.

M. E. Moola *vs.* K. C. Bose. 9 B. L. T. 63; 8 L. B. R. 420 followed.

JUDGMENT.

MAUNG KIN, J.—Plaintiff was a teacher in St. Anthony's High School on a salary of Rs. 140/- a month. He was on leave from 26th February to 2nd March 1919. He returned to duty on the 3rd March 1919, when the superintendent gave him a verbal notice to the effect that his services would not be required after the end of March 1919. The plaintiff asked for a written notice to be given to him, and one such was given on the 17th March, 1919. At the end of March, 1919, he was discharged. He was paid up to the end of March, 1919, but he claims that he was entitled to a clear month's notice, and claims to be entitled to Rs. 140/- in lieu of such notice.

There was nothing said at the time of his engagement as to how his services were to be determined, but in the opinion of the lower court a month's wages in lieu of a month's notice would be necessary. It also held that there was no authority for holding that notice in writing was necessary, or that the month's notice should end with a calendar month. The learned judge held that the month's notice to which the plaintiff was entitled was from 3rd March to 2nd April, 1919, and that as he had already received wages for the period from the third to the thirtyfirst of March, the plaintiff was entitled to his wages for the 1st and 2nd April, 1919. He accordingly gave him a decree for Rs. 9/5/4.

The plaintiff has applied for revision of this decree. After the dismissal, whether wrongful or not, the servant is not entitled to claim wages. His remedy, if he alleges a wrongful dismissal, is by action for the damages sustained by him in consequence of the breach of the master's contract to employ him. See Ranee Usmut Koowar *vs.* Tayler (1), Issur Chunder Mookerjee *vs.* Puddo Lochun Goopta (2) and Halsbury's Laws of England volume 20 section 214, pp. 109 et. seq. At page 112 we find the following passage "Where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is a custom to that effect, the measure of damages for the breach is the amount of such wages, which is to be regarded as liquidated damages. The same principle applies where the contract specifies a paricular sum to be payable as and for liquidated damages in the event of a breach. In any other case the damages are to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal, including the value of any other benefit to which he is entitled by virtue of his contract, and of which he is deprived in consequence of its breach, after taking into consideration the probability of his obtaining employment elsewhere. If, therefore, he obtains other employment immediately after his dismissal, the amount which would otherwise be payable as compensation must be reduced by the amount of remuneration which he received in respect of such employment, and if he is paid the same or higher wages, his loss is merely nominal. Moreover, it is his duty to minimize his loss, and he must therefore use due deligence in endeavouring to obtain employment. If but for his own default, or neglect, he could immediately after his dismissal have obtained suitable employment at similar wages he cannot recover more than nominal damages against his master. He is not, however, bound to accept employment of a different kind, or even in lower position in the same kind of employment, and, in such case, it is immaterial that the rate of wages offered is the same. In assessing damages the jury is entitled to take into consideration all that has happened, or is likely to happen, to increase or mitigate the servant's loss down to the date of trial." So it seems that the dismissed servant, in the absence of an express contract to the contrary, would only be entitled to damages to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongul dismissal, and he is bound to minimize his loss, and must use due diligence in endeavouring to obtain employment forthwith. There is no authority for holding that a monthly servant, that is to say, a servant paid by the month, is entitled to a month's notice, and it would seem that in the absence of any express agreement or established custom to the contrary, the contract of service is terminable by reasonable notice. In M. E. Moola *vs.* K. C. Bose (3) Twomey, J. held that in the case of a clerk hired by the month, fifteen days' notice is not unreasonably short. In the present case the plaintiff got twenty-eight days' notice. The learned

(1) 2, W. R. 307.
(2) 5, W. R. Misc. 18.
(3) 9, B. L. T., 63; 8, L. B. R. 420.

judge of the court below has allowed him thirty days' notice by giving him two days' wages in April. I am unable to see that the plaintiff has, in any way, been unjustly dealt with. His application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 184 OF 1919.

ANA PAKIRI SHA .. .. APPELLANT.

vs.

P. L. M. SERVAI .. .. RESPONDENT.

Before Justices Maung Kin and Rigg.

For appellant—Mr. Robertson.
For respondent—Mr. Chari.

10th August 1920.

Civil Procedure Code (Act V of 1908) O. XXIII r. 3.—Compromise of suit—so far as agreement or compromise relates to the suit.—S. 47, questions relating to the execution, discharge or satisfaction of a decree, objection to decree as being invalid, or ultra vires.

Under Order XXIII rule 3 parties can settle their disputes on any such lawful terms as they might agree to, and are not restricted to the relief claimed in the plaint. The words "relates to the suit" mean "relates to the matters of the claim in the suit," and do not restrict the relief granted in the compromise to that asked for in the plaint, or less.

Joti *vs.* Izari 30 M. 478, and Natesa Chetti *vs.* Vengu Nachiar 33 M. 102 followed.

An objection to a decree on the ground that it is invalid, or *ultra vires*, is not a question relating to the execution of the decree, and must be taken by a regular suit or appeal, not in execution proceedings.

JUDGMENT.

RIGG, J.—In civil suit No. 2 of 1918 of the district court of Myaungmya P. L. M. Somasundram Servai sued Ana Pakiri Sha for the recovery of five pieces of land and also for ejectment and mesne profits which he valued at Rs. 1600/- and further mesne profits which he also valued at the same amount until the defendant was ejected. The parties came to a compromise. In the first paragraph of the compromise petition the defendant agreed to give possession to the plaintiff of the land in suit, and in the second paragraph the defendant, his wife and his son agreed at the cost of the plaintiff to execute a registered deed of sale for a certain plot of land which stood in the names

of the wife and son. The plaintiff was to take over possession of the lands and the defendant was to call the tenants and make over the rents of the current year to the plaintiff. The defendant also agreed to vacate the land and take away the materials of the house by a certain date. The plaintiff on the other hand was to keep a sum of Rs. 1,500/- in deposit out of which a sum of Rs. 1,000/- was to be paid to the defendant after the execution of the registered deed of sale and after making over the rents to the plaintiff, the sum of Rs. 500/- was to be paid after the defendant had removed his house from the land. That compromise was passed under the provisions of Order XXIII, rule 3 of the civil procedure code, and an appeal against the order of the court lies under Order XLIII, clause (m). No appeal however was preferred. As the defendant did not carry out the second portion of the compromise decree, the plaintiff applied for execution, and the court directed that the land and the house mentioned in that portion of the decree were to be made over to the plaintiff and the materials to be removed by the court bailiff. That order was passed on the 17th June 1919. On the 22nd September as the judgment-debtor did not appear in court to execute the sale deed of the land, the judge executed it under Order XXI rule 24 (4) and (5), of the civil procedure code.

The appellant appeals against those two orders on the ground that the lower court erred in issuing execution in excess with respect to the second portion of the decree which, it is contended, is extraneous to, and in excess of, the plaintiff-decreeholder's claim in the suit. It is contended that by reason of this defect any orders in execution made by the court are incompetent and without jurisdiction and are not enforceable. Order XXIII, rule 3 is as follows:— "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

The question argued at the bar was as to the meaning of the words "so far as it relates to the suit." Mr. Robertson contends that these words mean "so far as the matters in the compromise decree are not extraneous to, and are connected with, the actual subject-matter of the suit." In support of his contention he quotes a ruling of the Patna High Court in Gauri Dutt *vs.* Dohan Thakur (1) in which Roe, J. said that the thought the agreement to pay after the specified date a rate of interest not claimed in the plaint was outside the scope of the suit, and that any portion of the compromise which fell outside the scope of the suit was invalid and could not be executed as part of the decree. Mr. Robertson also relies on a full bench ruling in the same High Court in Charu Chandra Mitra *vs.* Sambhu Nath Pandey (2). That case however really deals with the question whether registration was necessary for portions of the compromise which referred to property which was not included in the subject-matter

(1) 2, Patna L. J. 673. (2) 3, Patna L. J. 255.

of the suit. The learned judges said that, when the compromise contains matters outside the scope of the suit, the court must record it and draw up a decree giving the parties the right to execute it in respect of matters which fell properly within the scope of the action leaving it to the parties to enforce by whatever means they choose that portion of the compromise which refers to matters outside the scope of the suit. I feel some doubt as to the correctness of the ruling laid down by Roe J. as judge in the former case. It was a case in which money had been borrowed and the defendant agreed to pay the plaintiff a certain sum of money on or before a certain date, and it was agreed that if the money was not paid by that date, interest was to run at the rate of twelve annas per cent per mensem, and it was further agreed that if the money was not paid on the date fixed, the interest should run at a higher rate. I find it difficult to see why if the compromise was not carried out by the first date fixed, the parties should not have agreed as part of the consideration to agree that a higher rate of interest should be charged. Many of the cases cited to us are more concerned with the question of registration of portions of the compromise decree than with the point precisely in issue, and that is whether Mr. Robertson's contention that the compromise must relate to the subject-matter, and be confined within the four corners of the subject-matter of the suit, is a correct one, or not.

In Joti Kuruvetappa *vs.* Izari Sirusappa (3) a bench held that the language of section 375 of the old civil procedure code did not preclude parties from settling their disputes on such lawful terms as they might agree to, without being restricted to such relief as one only of the parties had chosen to claim in the plaint. This case was followed in Natesa Chetti *vs.* Vengu Nachiar (4) where the words "relates to the suit" are interpreted as "relating to the matters of the claim in the case," and it was again affirmed that there was nothing in the section to restrict the relief granted in the compromise to what is prayed for in the plaint or less. This case has been followed in Ayyagiri Veerasalingam *vs.* Koovur Basivi Reddi (5) and in Ratnasawmi Chetty *vs.* Ratnammal (6). The same appears to be the view taken by the Allahabad High Court in Mohibullah *vs.* Imami (7). In that case Edge, C. J., says, "I know of no law which prevents the parties to an action enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than originally claimed." The plaintiff in that case had obtained a decree for a larger quantity of land than originally claimed and in execution proceedings, the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally. This objection was described by the learned judge as one which to his mind had been most unfairly raised. In my opinion the words "so far as it relates to the suit" mean "so far as it relates to the adjustment or settlement of the matters litigated in the suit," and there is nothing

(3) 30, M. 478.
(4) 33, M. 102.
(5) 27, M. L. J. 173.
(6) 27, M. L. J. 389.
(7) 9, A. 229.

to prevent that settlement taking any form which is lawful and fair and satisfies the parties. Moreover, Mr. Robertson has failed entirely to show that the second portion of the decree is in excess of the claim in suit. There was a large claim for mesne profits, and the second portion seems to me to relate to the satisfaction of this claim. There is nothing illegal in the defendant promising to execute a deed of sale. He could not, of course, make that promise on behalf of his wife and son, and any deed of sale executed either by him or by the court on his behalf is not binding on the wife or son as the judge of the lower court remarked. Appellant has therefore failed to show that the compromise was in excess of the claim, or, was not one that might lawfully have been made with the consent of the court. Apart from this, in my opinion I think the proper remedy was by a regular suit and not by objection to the decree in the execution proceedings. Section 47 provides that all questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree. Mr. Robertson's objection is in effect that the portion of the compromise decree was *ultra vires* and ought not be executed. I am of opinion that he is not competent in execution proceedings to raise such a plea. In the case of The Manager of Sri Meenakshi Devastanam, Madura *vs.* Abdul Kasim Sahib (8) the learned judges held that where a compromise embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful, but which could not have been given if the suit had been decided after trial, objection must be taken by way of appeal. If the objection is to be taken in execution proceedings, the legislature would not have provided special provisions in Order XLIII for an appeal.

For these reasons I would dismiss the appeal with costs.

Maung Kin, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS No. 78 OF 1920.

B. LAL DWARKADAS .. .. APPLICANT.

vs.

BURMA RAILWAYS COMPANY LIMITED RESPONDENT.

For applicant—Mr. Dantra.
For respondent—Mr. Leach.

CIVIL EXECUTION No. 67 OF 1920.

BURMA RAILWAYS COMPANY LIMITED APPLICANT.

vs.

S. C. DASS GUPTA .. .. .. RESPONDENT.

(8) 30, M. 421.

For applicant—Mr. Leach.
For respondent—Mr. Dhar.

Before Mr. Justice Rigg

13th July 1920.

Civil Procedure Code (Act V of 1908) O. XXI r. 16—application for execution by transferee of a decree, benamidar O. XLI r. (35) (3)—Contents of decree in appeal, decree silent as to costs of the suit.

A benamidar is not a transferee of a decree, and cannot apply for execution of a decree, but a judgment debtor cannot oppose an application for execution by a transferee of a decree on the ground that the alleged transferee is only a benamidar.

Under Order XLI rule 35 (3) the decree of the appellate court should state the costs incurred in the appeal, and by whom such costs, and costs in the suit are to be paid, and should embody all portions of the lower court's decree which have been confirmed. When the appellate court has made no order as to costs in the suit, the order of the lower court as to costs must be held to have been confirmed.

The decree in appeal supersedes the decree of the lower court even when it merely affirms the original decree.

JUDGMENT.

RIGG, J.—Civil Execution Case No. 67 of 1920 has been heard at the same time as Civil Miscellaneous application No. 78 of 1920. In the Civil Execution Case the Burma Railways set out by petition that in May 1915 they obtained a decree against Das Gupta in Civil Regular No. 154 of 1913 of this court for costs; on the 11th September 1915 the decree was transferred to Mandalay for execution, and an application was made in December 1915 to the district court, Mandalay for the execution of the decree by the arrest of the judgment-debtor, Das Gupta. The execution proceedings at Mandalay went on until July 1917 when the district Judge, Mr. Moseley, made an order that the judgment-debtor should pay the decretal amount by instalments of Rs. 50/- a month starting from the 1st September 1917. In the meantime the judgment-debtor had appealed to the appellate bench of this court in Civil First Appeal No. 176 of 1915. His appeal was dismissed with costs and in the printed portion of the usual form of decree relating to the amount of costs incurred by the appellant or respondent in a lower court the costs have been deleted as well as in the memorandum of costs incurred in the appeal. The costs there shown are merely for costs incurred in this court. An application in aid of carrying out the order of the district judge, Mandalay was transferred to that court by Civil Execution case No. 325 of 1915 and a certificate dated July 1918 was received from Mandalay in this court stating that Rs. 50/- had been recovered from the judgment-debtor. On the 20th March 1920 the Burma Railways

sold their decree to Dwarkadas for Rs. 500/-. They now ask that Dwarkadas may be substituted on the record as their decree-holder and pending orders on this petition in Execution Case No. 67 they ask that the decree obtained by the judgment-debtor against Bissesserdas in suit No. 94 of 1913 in the district court of Mandalay may be attached. Objection has been taken by the judgment-debtor to the *locus standi* of the Burma Railways in making this application on the ground that at the date on which it was filed, namely, 24th March they had already sold their decree to Dwarkadas. It is obvious however that the application was the only way in which they could bring it before notice had been issued to the judgment-debtor that the decree had been sold, and the court had allowed the transferee's name to be substituted for that of the Burma Railways. This is quite clear from Order XXI, rule 16, of the civil procedure code. This objection therefore falls to the ground.

The judgment-debtor has applied for the issue of a commission to Mandalay to examine certain witnesses to prove that Bissesserdas is the real owner of the decree and that Dwarkadas is only his benamidar. He urges that on the authority of Abdul Kureem *vs.* Chukhun (1) a court executing a decree under Order XXI rule 16 ought not to recognise benami transfers. The judgment itself runs as follows:— "The contention is this, that under section 232 the court executing the decree should not recognise *benami* transfers. We are of opinion that this contention is not valid. The section says that where a decree is transferred by an assignment in writing, the transferee may apply. The *benami* system is recognised in this country, and a *benamidar* is not a transferee of the decree. The section only authorises the court to allow the transferee of the decree to apply for execution. If the *benamidar* is not the transferee, he has no *locus standi* under section 232." This judgment appears to me to contain an error in printing and I think the word "not" should be struck out before the word "valid," otherwise it is unintelligible. This case was considered in Balkishen Das *vs.* Bedmati Koer (2). At page 395 the learned judges say, "Under section 232 the court, after giving notice to and hearing the objections of the decree-holder and judgment-debtor, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing, and as between the decree-holder and the judgment-debtor the effect of the sanction is, it seems to us, to place the person who acts under it and proceeds with the execution in the place of the decree-holder for the purpose of the execution, whether the transfer is real or nominal. The legality of the proceedings taken in pursuance of an application made and allowed under section 232 must depend not on the reality of the transfer, but on the sanction accorded; and if the result was to obtain satisfaction wholly or in part, we know of no authority for the proposition that the proceedings would, as regards the judgment-debtor, be invalid, merely because the person at whose instance they

(1) 5, C. L. R. 253 at p. 256. (2) 20, C. 388.

were taken with the sanction of the court turned out to be a *benamidar* of the decree-holder." With these remarks I venture to concur, and think that if a person places another person in such a position as to be able to execute a decree he is not to be heard if he objects to the execution of that decree on the ground that his *benamidar* is not authorised by him to execute that decree. For these reasons I am of opinion that the objection to the substitution of the transferee on the ground that he made it to a *benamidar* is invalid in law, and I decline to issue the commission to Mandalay for the examination of the witnesses named in the judgment-debtor's petition.

The question chiefly argued at the Bar is whether the decree which the Burma Railways sold to Dwarkadas can be executed as there was an appeal and it was the original decree that was sold and not the decree of the appellate court. Before dealing with this question I may point out that if it is true, as has been stated at the bar that it is the practice of the officials of this court when drawing up appellate decrees to say nothing about the costs incurred in the lower court, that practice is, in my opinion, contrary to the plain provisions of Order XLI rule 35, sub-section 3 which provides that the decree shall also state the amount of costs incurred in the appeal and by whom or out of what property and in what proportion such costs and the costs of the suit are to be paid. In the present case the only order passed on the appellate side is that the appeal be dismissed and that the appellant pay the respondent a certain sum of costs. Nothing whatever has been said about costs in the lower court and that portion of the lower court's decree has neither been dissented from, nor confirmed, nor considered. In these circumstances if the Burma Railways want to enquire what orders were passed as to costs in the lower court it appears to me to be only one decree that they could possibly consider and that is the decree in the lower court. And that decree, so far as it relates to costs, still remains the only order which any court has yet passed on the subject of costs. As regards the general question of whether the appellate decree should be the one to be executed or not there is undoubtedly a very general consensus of opinion of the High Courts of India that the decree to be executed is the appellate decree and not the decree of the original court. The earliest case cited is Chowdhry Wahid Ali *vs.* Mullick Inayet Ali (3), in which the learned judges held that the decree which had been modified in regular appeal was a decree of the court, and the court being one established by royal charter the period of limitation was twelve and not three years. The next case cited is one that was referred to in the only judgment delivered on this subject by their lordships of the Privy Council, which is the case of Ram Charan Bysak *vs.* Lakhi Kant Bannik (4) where Norman, J. said that "the decree of the appellate court is to be the final determination of the suit and of all matters in dispute therein. The appellate court is not merely at liberty, but is required, to dispose by its decree of the costs in the lower court, a

(3) 6, Beng. L. R. 52.

(4) 7, Beng. L. R. 704 at p. 708.

matter which, in cases where the decree is affirmed, is merely a part of the affirmance." He went on to instance a case where the appellate court varied a decree and argued that in such instance it would be the duty of the appellate court to make one single and complete decree in the suit. He came to the conclusion that the decision of the lower court was merged in, and superseded by the decree of the superior tribunal. That case and the case cited by the Madras High Court were considered by the Judicial Committee in Kistokinker Ghose Roy *vs.* Burrodacaunt Singh Roy (5). Their lordships said, "The Full Bench of the High Court of Bengal has ruled that, whether the decree of the lower court is reversed, or modified, or affirmed, the decree passed by the appellate court is the final decree in the suit; and in the words of Mitter J. "as such, the only decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are:— "Whether that decree be in affirmance, or reversal, or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution." The function of an appellate court is to determine what decree the court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given. In all these cases the decree of the appellate court may be regarded either as a direction to the lower court to make, and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the appellate court or by the lower court. In the latter case a further question arises, viz whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the appellate court as the sole decree capable of execution, or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other. In this country the nature and effect of a decree on appeal would seem to vary according to the nature of the decree under appeal, the constitution of the appellate tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up." Their lordships go on to say, "The determination however of the question must depend on the provisions of the Indian Code of Procedure. It is clear that, under that code, whatever decree is executed is to be executed by the lower court in which the record remains, or to which it is to be returned. But sections 360, 361 and 362, which prescribe the form of the decree of the appellate court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the lower

(5) 10, Beng. L. R. 101 at p. 113.

court to pass and execute a certain decree," (which appears to me to be the view taken by Scotland, C. J.). "If the question were *res integra*, their lordships would incline to the view taken by the judge of the High Court in the present case, viz., that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for reasons already given, the question is not of much practical importance, their lordships will not express dissent from the rulings of the Madras High Court and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the appellate court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree." I venture to call attention to the last sentence quoted. It is the usual practice in this court and most courts in this country when dismissing an appeal merely to say that the appeal is dismissed and not to embody in the decree an affirmance of that portion of the decree which the appellate court intends to confirm. This case has been considered at some length by the Allahabad High Court in Muhammad Sulaiman Khan *vs.* Muhammad Yar Khan (6) where divergent views were taken of their lordships' meaning by the learned judges. Some questions arising in that case need not be discussed now, but both Edge, C. J. and Straight, J. held that their lordships were clearly of opinion that a decree confirmed on appeal is superseded by a decree of affirmance and that it is illogical to hold there are two decrees to be executed: from which it follows that the only decree to be executed is the appellate decree. Mahmood, J. however, held that the only decree which must be executed and supersedes the original court's decree is the decree that has either reversed or modified the original decree, and in his opinion their lordships drew a distinction between appellate decrees reversing or varying original decrees, and those which simply affirm them. It appears to me that their lordships do not express dissent, or in other words concur in the rulings of the Full Bench of the Bengal Court except that they said there might be cases in which an appellate court particularly on special appeals might limit its decision to a simple dismissal of the appeal. A case in point would I think be an appeal under Order XLI rule 11 which empowers an appellate court to dismiss an appeal in a summary manner without calling on the other side. In such a case it is clear that the respondents would not even have had notice and might not know the result of the appeal. Second appeals also are allowed for special reasons and their lordships apparently ruled that, if these were dismissed without considering the correctness of the decree apart from special

(6) 11, A. 267.

grounds on which the appeal was competent, in such cases the appellate court's decree would not supersede the original court's decree for the purpose of execution. The reason seems to be that the appellate court's decree has not considered the correctness of the lower court's decree except on a special point which has made the appeal admissible or about which it has decided that no appeal lies. Except in these cases their lordships appear to lay down the rule that the appellate court's decree should ordinarily be treated as the decree into which the lower court's decree had become merged, and to indicate that the decree of the court should embody in its decree all that portion of the lower court's decree which has been confirmed. As I have already said in the present case there is no decree that the Burma Railways could execute relating to their costs except the original decree and for that reason there is no question of the appellate court's decree superseding it. But there is a further objection to be taken to the case set up by the judgment-debtor. Execution was taken out against him before he presented his appeal, continued during the pendency of that appeal, and orders were not passed in the execution proceedings until a year or a year and four months had elapsed after the decision of the appeal. No objection had been raised until the present proceedings were instituted to the execution of the original decree held by the Burma Railways. That decree was mentioned and relied upon in the deed of assignment between the Burma Railways and Dwarkadas, and it is clear that the judgment-debtor comes too late now to object to the execution of the decree. He might have objected when that decree was transferred to Mandalay, but by his silence he has given the purchaser reason to suppose that he had no objection to the proceedings in execution. He is therefore estopped from raising the point.

There will be an order substituting Dwarkadas as transferee of the Burma Railways' decree and an order allowing him to attach the decree in Civil Regular No. 94 of 1913 of the District Court of Mandalay. Second respondent will pay costs;—ten gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR NO. 491 OF 1919.

O. RAISEE AND CO .. .. .. PLAINTIFF.

vs.

S. JOSEPH BROTHERS .. .. .. DEFENDENT.

Before Mr. Justice Young.

For plaintiff—Mr. N. M. Cowasji.
For dependent—Mr. Hamlyn.

30th April 1920.

Rangoon Rent Act (Burma Act II of 1920) s. 10 Order for ejectment, premises required by the landlord for his own occupation—Construction of statutes, proceedings of the legislature.

The words "his own occupation" do not necessarily mean personal residence, and a landlord requiring a house for quarters for his assistants requires them for his own residence within the meaning of section 10 of the Rangoon Rent Act.

Queen *vs.* Justice of the West Riding of Yorkshire 114, E. R. 198 referred to.

Proceedings of the legislature cannot be referred to as legitimate aids to the construction of an Act.

Administrator general of Bengal *vs.* Prem Lal 22, I. A. 107 followed.

JUDGMENT.

YOUNG, J.—This is a suit by a landlord firm to evict a tenant and the grounds for resisting the claim are, first, the landlord's predecessor in title agreed with the tenant in consideration of certain improvements that they had made that they would never be ejected unless they wished to leave the house of their own accord, and secondly that the landlord has not shown as required by the new Rent Act that he requires them *bona fide* for his own occupation. I have dealt with the first ground in a preliminary order when I held that such an agreement would need to be in writing and registered, and Mr. Hamlyn accordingly did not try to prove it. It remains to deal with the second ground. The premises in question were bought in June 1919, and the firm, within the first week after its purchase, raised the rent from Rs. 100 to Rs. 150, and in default requested the tenants to quit. It may perhaps be inferred that at that time, the firm wished to make as much as it could out of its new purchase, and had no intention of occupying the premises. It would seem to be the practice of the firm to give their assistants board and lodging. So far as the court is concerned, the question of board seems to be immaterial for the purpose of the case, but the question of lodging stands on a different footing. Various assistants of the firm were called, and swore that they and other assistants lived in a room in Edward Street, the rent of which was paid by their employers. The managing partner produces a number of rent bills for these premises ranging from February 1919, in which he is debited with the rent, and he also produces entries from his cash book showing that the rent of the house has been debited to the firm. The head office of the firm is in Bombay, and no books prior to Dewali are kept here, but the evidence seems to me to prove that the plaintiff's story is true, that the firm paid for its assistants' lodging. It used to pay Rs. 65 for its lodging until August 1919 when the rent was raised to Rs. 90. For the house in Phayre Street which it had recently bought, the firm wanted to get Rs. 150. The tenant declined to pay

more than Rs. 100. The landlord determined to evict him. He says his object was, if he could only get Rs. 100 for the house, to move his assistants from the flat which cost him Rs. 90, and have them in a house of his own for which he only got a rental of Rs. 100,—a proceeding which would in addition give him the whole of the ground floor for other purposes.

Mr. Hamlyn argued first of all that the words "his own occupation" must mean his own personal occupation, and desired to put in evidence the statement of objects and reasons of the Act. In the case of the Administrator General of Bengal *vs.* Prem Lal Mullick (1) the judicial committee observed that the majority of the appellate court referred to the proceedings of the legislature as legitimate aids to the construction of a section of an Act, and express their dissent stating that the same reasons which excluded these considerations when the clause of an Act of the British legislature were under consideration are equally cogent in the case of an Indian statute.

I have to construe the meaning of the words used, to decide what the legislature has done, not what it meant or what it wished to do, and in construing the words, I have to bear in mind that the Act is one which takes away rights hitherto enjoyed, and that, therefore, if there is any doubt, it must be given in favour of those whose rights are impinged upon. Now if the legislature had meant by the words "his own occupation" his own personal occupation, nothing would have been easier than to say so. The phrase is well-known, and forms the subject of a special article in Stroud's Judicial Dictionary, which fact alone shows that the word occupation does not necessarily mean personal occupation. There is also judicial authority to the same effect. Thus in Queen *vs.* Justices of the West Riding of Yorkshire (2), Patteson, J. stated that the word occupation, or even the words actual occupation did not necessarily mean residence, though ninetynine people out of one hundred would so understand it. Again in Rex *vs.* Poynder (3) we have a state of affairs not unlike the present. Three partners rented a house for the purpose of business, and allowed their manager to live there, while they resided elsewhere. The partners were held to be householders of the premises. Lastly, the Act itself negatives the idea. Premises are defined as any building let for any purpose whatever, including a stall in a market. One does not reside in a stall, but the occupant can nevertheless be ejected therefrom. I am therefore of opinion that the words "for his own occupation" do not mean "for his own residence" only, and that when a landlord requires part of any premises for the storage of his goods, and part for the housing of his assistants for whom it is his practice to provide lodging free of cost, he requires them for his own occupation.

Next it is contended that the Act requires that the premises should be *bona fide* required for his occupation, and that this was not proved. It was urged that the firm did not require a godown, as it had

(1) 22, I. A. 107 at p. 118; 22 C. 788 at p. 799.
(2) 114, E. R. 198.
(3) 25, R. R. 345.

recently given up one, that the assistants were not being evicted from their present quarters, and might just as conveniently stay where they were, and that the claim had been trumped up at the last moment to meet the requirements of the Act.

With regard to the last point, the Act came into force on the 3rd April, when the courts were closed for the vacation. They re-opened on the 26th, and the application was drawn up on the 27th, and filed on the 28th. It was only after the Act came into force that these particulars were required to be pleaded and proved, and I see nothing in the point.

With regard to the godown, it is impossible to infer that it was not required, merely because five months ago, the firm has given up one. The managing partner of the firm was called, and was not asked a single question on the point. The abandoned godown may have been given up for many reasons. It may have been inconvenient, it may have been too dear, or the firm may deem that it made a mistake, or its business may be growing.

With regard to the quarters it is true that the assistants are not under notice, but unless "required" is to be translated as equivalent to "necessary" I do not think a landlord is required to wait till he is himself homeless or under notice before he can evict. In Errington *vs.* Metropolitan District Railway (4) Brett, L. J. stated that when an Act of parliament empowered a body to take such lands as might be required for their undertaking this did not mean such lands as were absolutely necessary but such lands as the company *bona fide* thought were for the advantage of the company. There the company was taking lands which did not belong to it, here the landlord is seeking to recover his own. I am of opinion that no harsher construction is demanded. I think that the use of the term "*bona fide*" in the Act itself points to a milder use of the word. If required" meant "absolutely necessary" there would be no question of *bona fides*. It would be a simple question of fact. Jessel M. R. in the same case explained the meaning of the term "*bona fide*" in this connection by saying "it is the company who are to be the judges of what they require, unless they are not acting *bona fide*, and evidence, and the only evidence required is the opinion of the surveyor or engineer or other officer of the company, unless the other side can show that they were not acting *bona fide*." It will thus be seen that it is for the defendant to show this lack of *bona fides*. The learned judge proceeded "you can show want of *bona fides* in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot possibly be *bona fide*."

Applying these principles, I am of opinion that the words "*bona fide* required" means less than "absolutely necessary," and something more than a whim or caprice of mere desire. The landlord can no

(4) 19, C. D. 559.

longer evict merely because the premises are his; he must give reasons, and the sufficiency of these reasons is the question in the case. Here he says he wants the ground floor as a godown, and, he was not asked why he wanted it. How can I imply lack of bona fides under such circumstances? The defendant rested his case on the fact that he had given up a godown five months before, and was content with the statement of a mere clerk that it was given up because it was not required. In my opinion, this, for reasons already given is absolutely insufficient.

His counsel again tried to prove that the premises in Phayre Street were unsuitable for a godown, but only through the biassed lips of his client. No independent evidence was called, and the plaintiff was not asked a word about it. This really suffices for the disposal of the case. The defendant uses the ground floor as a shop, and if he is evicted from it, it is improbable that he would wish to stay on in the rest of the house, but taking the house as a whole, I think the landlord's reasons are sufficient.

Firms generally recognize the necessity of securing house accomodation for those without whom their business cannot be carried on. It is true that the assistants are at present housed, and housed as conveniently as they will be in their new quarters. But the premises are hired, and eviction is still possible. The landlord, by housing them in premises of his own, obtains fixity of tenure. He also saves money. He gets Rs. 100 for his house; he pays Rs. 90 for his clerks' quarters. For Rs. 10 he secures fixity of tenure, and a godown. It was contended that this rent of Rs. 90 might under the Act be reduced to the former rental of Rs. 65, but no evidence was produced to show that the conditions required by the Act before rents can be reduced existed. Even if the rent could be reduced to Rs. 65, he would get safe quarters for his clerks, and a godown for himself for Rs. 35. I think it must be held that he required the premises *bona fide* for his own occupation, and that he cannot be restrained from recovering his own property. As regards the claim for compensation for use and occupation, plaintiff reduces it from Rs. 150 per mensem to Rs. 100. This is the old rent which defendant used to pay, and must be held reasonable.

There will be a decree as prayed, with the necessary modification as regards compensation, but as this is the first case under the Act, execution will be stayed for a month to enable the defendant to appeal if so advised.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 4 OF 1919.

D. R. SAKLAT and others .. .. .. APPELLANTS.

vs.

BELLA and one .. .. RESPONDENTS.

Before Robinson, Offg. C. J. and MacGregor, J.

For appellants—Mr. Rutledge and Mr. N. M. Cowasji.
For respondents—Mr. Giles and Mr. Lentaigne.

21st June 1920.

Suit to establish right to exclusive worship, cause of action. Civil Procedure Code (Act V of 1908). O. I, r. 8. Suit on behalf of all in same interest—O. XXXI. r. 1. Suit concerning property vested in trustees.

Every person claiming to have an exclusive right of user of a place of religious worship has a personal and individual cause of action against any person infringing that right by a user of the place under a claim to be entitled to such user.

Anandrav Bhikhaji *vs.* Shankar Daji 7 B 323 followed.

Such a suit is not a suit concerning property vested in trustees, and it is not necessary to make the trustees of the place of worship parties to the suit.

JUDGMENT.

ROBINSON OFFG. C. J.—Plaintiffs are Parsee residents of Rangoon professing the Zoroastrian religion, and they sue the two defendants for a declaration that the first defendant is not entitled to the use and benefits of the Parsee fire temple in Dalhousie Street, or to attend or participate in any of the religious ceremonies performed therein, secondly for an injunction restraining the first defendant from entering the said fire temple premises, and thirdly for an injunction restraining the second defendant from taking the first defendant into the fire temple premises. The plaint sets out that by a deed of conveyance dated 29th March 1868 the government of India granted certain lands to two Parsees upon trust to build and maintain upon the said land a temple for the use of the Parsi population. A temple was built in accordance with the provisions of this deed, and the Parsee community used and maintained it until the year 1904. It was known as the Parsi fire temple. In 1904 Bomanji Cowasjee the trustee of the said trust, with the consent of the Parsi community caused the old building to be demolished, and erected a new building on the site to be used as a fire temple in the place of the old fire temple, and by a deed of declaration and dedication dated the 20th August 1904 he declared that he held the same in trust for the free and unrestricted use of the Parsee inhabitants of Rangoon professing the Zoroastrian faith. Plaintiffs go on to say that they are members of the Parsee community and worshippers at the said temple and that they have instituted this suit not only on their behalf but on behalf of a very large number of members of the Parsee community of Rangoon who are interested in the said temple. They then go on to set out that the first defendant is the daughter of a Goanese native Christian; that the second defendant alleges that the mother of the first defendant was a Parsee and that the first defendant was duly and validly converted and initiated into the Zoroastrian religion.

Plaintiffs deny these allegations and put defendants to strict proof of them and also of the contention that the said first defendant could have been validly converted to the Zoroastrian faith. It is then alleged that on the morning of the 21st March 1915, being the Jamshedi Nowroz, while the Jasan ceremony was to the knowledge of the second defendant being performed, he brought the first defendant to the temple premises and caused her to sit within the sacred precincts of the temple, and thereby not only wounded the religious feelings of religiously inclined Parsees but also caused the desecration of the said sacred temple. They then alleged that only members of the Parsee community professing the Zoroastrian religion are entitled to the use of the said fire temple or to have access to the sacred precincts of the temple or entitled to attend, witness, or take part in any religious ceremony held therein. They further alleged that on no occasion has any person being the issue of a non-Parsee father been allowed the use and benefits of this or of any other Parsee temple or has been permitted to have access within its precincts or be present during the performance of religious ceremonies held therein, and that it was never the intention of the Parsee community that children of non-Parsee fathers should be allowed the use and benefits of the Parsee temples granted or dedicated for the use of the Parsee community. They next set out that the child of an alien (a non-Parsee) father is not a Parsee and has never been considered to be a Parsee by the Parsee community, and that such a child is not a Parsee in accordance with the well established recognised customs and usages of the community. They further contend that even assuming the first defendant could have been or has been duly and properly admitted into the Zoroastrian religion, and assuming also that her mother was a Parsee, the said first defendant even then is not and cannot be considered a Parsee or a member of the Parsee population or community in the absence of the essential and indispensable requirement that her father should be a Parsee. The defendants pleaded that the plaint disclosed no cause of action and that the suit was not maintainable. They admit that the land was granted as stated in the plaint and crave leave to refer to the grant for its terms. They then set out certain other facts as regards the subsequent grant both for the fire temple and a burial ground but deny that the terms thereof are accurately set out in the plaint. They deny that the plaintiffs are suing on behalf of a large number of the Parsee community of Rangoon. They allege that the first defendant's mother was a Parsee lady and her father a Goanese Christian, and that she had been brought up by the second defendant from early infancy as his daughter as a Parsee and in the Zoroastrian faith, and that she was duly inititated into the Zoroastrian religion. They say that the first defendant attended the temple on the occasion referred to in response to invitations issued by the priest of the temple and claimed that she was entitled to attend the temple and the religious ceremonies held therein, that her attendance gave no cause of offence to the religious feelings of Parsees or others and did not desecrate the temple. They deny the other allegations

generally and say they are irrelevant and embarrassing and should be struck out.

On the day the plaint was filed (31st March 1915) it was accompanied by an application that under the provisions of Order 1 rule 8 of the civil procedure code permission might be granted to the plaintiffs to sue on behalf of and for the benefit of all persons interested in the said fire temple, and that notice of suit might be given by public advertisement. This application was granted without any notice being given of it to the defendants. An advertisement was issued and in due course the written statement was filed. The case was first fixed for settlement of issues, and on the day fixed counsel were heard and the issues were framed, and it is stated in the judgment these issues were agreed to by the parties. The first two issues are (1) whether the plaint discloses any cause of action (2) whether the suit is maintainable. These two issues were by consent tried as preliminary issues in the court below and the learned judge in his judgment thus sets out the plaintiffs' case:—"That 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 alleged committed a trespass and furthermore desecrated the temple and infringed their right of exclusive worship, that is their right to worship alone and undisturbed by the presence of persons not belonging to their religious community." He held that the matter might be regarded (1) as an ordinary trespass by defendant on to the land not belonging to her, (2) as a trespass into the temple erected on such land (3) an interference with the plaintiffs' right to exclusive worship. He held that so far as the first two causes of action were concerned the suit would not lie; as regards the third he held that the suit would lie. With the consent of counsel the appeal has been argued before us on these two issues first, and we have now to pass orders on them.

A consideration of the plaint makes it perfectly clear that the allegations of the plaint were that the action of the defendant complained of not only wounded the religious feelings entertained by religiously inclined Parsees, but also caused the desecration of the said temple, and the grounds on which they based their rights to the exclusive use and benefit of the temple and to the undisturbed performance of their religious ceremonies therein are that the temple was dedicated for the free and unrestricted use of Parsee inhabitants of Rangoon professing the Zoroastrian faith. They claimed to be entitled to the benefits and use of this temple for the purpose of saying prayers, and having their religious ceremonies performed without the intervention of the presence of persons therein who are not entitled to use the temple or to take part in the ceremonies, and they allege that the only persons so entitled to use the temple are the Parsee inhabitants of Rangoon professing the Zoroastrian faith, and that the first defendant not being a Parsee and not being properly converted or initiated into the Zoroastrian religion was not entitled to use the temple, and therefore that her use of it wounded their religious feelings and also caused the desecration of their temple, and they

further allege that this is the case even if she had been the daughter of a Parsee mother and validly converted to, and received in the Zoroastrian faith, because she was not also a Parsee.

The first question that we have to consider is whether there was any personal individual cause of action resting in the plaintiffs. There are numerous authorities to support the principle that every person whose right of worship in a mosque or temple is interfered with or who has been excluded from or denied that right is competent to maintain a suit against those who interefere with or deny his right. It is sufficient to refer to the cases of Jawahra *vs.* Akbar Husain (1) Vengamuthu *vs.* Pandaveswara (2) Venkatachalapati *vs.* Subbarayudu and others (3) Srinivasa Chariar *vs.* Ragava Chariar (4) and Anandrav Bhikaji Phadke and others *vs.* Shankar Daji Charya (5). It is said that these are all cases in which the plaintiff has been himself excluded from the mosque or temple and that his personal right of action is obvious; that they form no authority for an opposite proposition that the infringement of his right by the user of the temple by a third person claiming to be entitled to do so, is a right of action personal to him; and that is only a right he possesses jointly with the remaining members of his community and a right as to which a suit, if brought, must be brought by the trustees or by some members of the community suing with the permission of the court for and on behalf of all. The last case however that was cited is a case which is in my opinion on all fours with the present case. In the case last quoted four persons of the Chitpavan caste of Marathi Brahmins brought a suit alleging that they and the members of their caste and two other castes *possessed the exclusive right of entry into and worship in the sanctuary of the temple,* and that the defendants, though Brahmans, not being members of the privileged castes infringed that right and polluted the shrine by entering the sanctuary and performing their worship therein. They prayed for a declaration of their right and an injunction restraining the defendants from interfering with it. It was held as regards the maintainability of the suit that the plaintiffs could maintain the suit for the personal injury alleged to have been suffered by themselves by the pollution of their sanctuary. It appears to me that in the present case, and considering only the question whether the plaint discloses any cause of action, it must be held that it does. We are not now considering whether the allegations made are established or not, but whether these allegations, if established would entitle plaintiffs to the reliefs they claim so as to permit of the suit being entertained by the court. It was found by the learned judge in the court below that the injury to their religious feelings and the alleged desecration of their temple by the presence of a non-zoroastrian attending and taking part in one of their religious ceremonies would form a good cause of action, and I can see no ground whatever for not accepting that view. The learned judge

(1) 7, A. 178.
(2) 6, M. 151.
(3) 13, M. 293.
(4) 23, M. 28.
(5) 7, B. 323.

held however that if the first defendant had been duly initiated into the Zoroastrian faith, there would be no desecration of the temple and there could be no injury to their religious susceptibilities. The plaintiffs claim that they have received injury and that their temple has been desecrated by the presence at this ceremony of a person who was not a Parsee, but that point the learned judge held he was unable to consider in this particular case, holding that the allegation that the temple had been dedicated for the use of Parsees only who professed the Zoroastrian religion set up a cause of action which amounted to an allegation of a physical trespass or a breach of trust, and that could not be dealt with unless the trustee was made a party to the suit. But if the plaintiffs have a right to carry on their worship in this temple undisturbed by the presence of any one but those who are Parsees professing the Zoroastrian religion, that right, it appears to me, may be infringed if he is disturbed by the presence of a Zoroastrian who is not a Parsee. I do not see what distinction can be drawn between an allegation based on the fact that the injury was by the defendant not being Zoroastrian, and the injury based on the allegation that she was not a Parsee. It may be that in the one case it would be held that an injury was inflicted for which relief would be granted by the court, and in the other case that no injury was inflicted for which relief could or should be given, but that is not the question that we have to deal with now but merely as to whether the allegations set up form an adequate cause of action which might, if established, entitle plaintiffs to reliefs at the hands of the court. It may be pointed out tha when the issues were drawn, an issue was framed as who are the persons entitled to the benefit of the fire temple trust, and a further issue was drawn as to whether the first defendant being the daughter of a non-Parsee father could be initiated into the Parsee community. The issues were fixed by consent. These issues were undoubtedly framed with reference to the allegations in the plaint that whether or not she was a Zoroastrian she was nevertheless not entitled to the use and benefit of the Parsee fire temple.

In the Bombay case cited, it was claimed that the shrine was polluted by persons not entitled to worship in the sanctuary doing so though they were also Brahmans, and here also it is alleged that the temple is desecrated by a non-Parsee worshipping, and that the plaintiffs' feelings are wounded by her presence while religious ceremonies were performed. I would therefore hold that the plaintiffs have a cause of action arising out of the allegation that the first defendant was a not a Parsee, as well as one arising out of the allegation that she was never duly and properly intiated into the Zoroastrian faith. In my opinion the two causes of action are personal to the plaintiffs individually.

Next it is urged that the suit is not maintainable by reason of the provisions of Order I, rule 8 and Order XXXI rule 1. If the right of suit is personal to the plaintiffs no question under Order I rule 8 seems to arise. It is true that they did apply for permission on behalf of, and for the benefit of all persons similarly interested

as themselves and that permission was granted, but at the same time it was urged that they never availed themselves of this permission. They no doubt applied with the idea of making the decision they hoped to get binding on the whole community, but this does not affect their personal cause of action, or deprive them of it. Moreover this rule is permissive only. It is intended to provide a remedy for cases in which it might be difficult, or impossible to implead all the persons it is sought to affect. It would apply to cases where the right it was sought to enforce was held jointly with others, and it can be utilised where the right is held in common with others, but it does not operate as a bar to the suit to establish a right possessed by an individual.

Lastly it is urged that the suit is not maintainable because the trustee is not a party to it, which, it is said, is made essential by the provisions of Order XXXI rule 1. That order deals with suits by or against trustees. As to this point also, the fact that the injury is personal to the plaintiffs disposes of it, but I would add that in my opinion this is not a suit "concerning property vested in a trustee" within the meaning of that rule. Had the plaintiffs asked for possession of any of the property or brought any other claim affecting the property directly, the suit would no doubt be one concerning property, but a right in connection with property is a different thing to a claim concerning property. The right that the plaintiffs claim, and which they say has been infringed arises in connection with the dedication of the fire temple, and it is the breach of that right against which they ask for relief. They do not seek to affect the property itself in any way, nor do they seek to obtain any remedy or relief against the trustee.

But it has been held by the learned judge of the court below that it would be impossible to come to any decision as to the proper interpretation of the deed of trust in the absence of, and behind the back of the trustee in whom the property is vested under that deed, and without hearing him. For the purposes of the relief that is claimed against the first defendant, which is a personal relief, the decision as to the plaintiffs' claim that the property was dedicated to the use and for the benefit of the Parsees only has to be decided, and I am unable to hold that the absence of the trustee from the record prevents the court from considering it. For the above reasons I am of opinion that the plaint discloses a cause of action, and that in respect of injury alleged to be done by the fact that the first defendant was not a Parsee, as well as that she was not a Zoroastrian, and further that the suit is maintainable.

MacGregor, J.—I concur.

IN THE CHIEF CCURT OF LOWER BURMA.

CIVIL REVISION No. 62 OF 1920.

JAMNADHAR BALDEVDASS .. .. APPLICANT.

vs.

BURMA RAILWAYS COMPANY, LIMITED RESPONDENT.

Before Mr. Justice Robinson, Offg. C. J.

For applicant—Mr. Halker.
For respondent—Mr. Leach.

12th August, 1920.

Indian Railways Act (IX of 1890) s. 72. Responsibility of railway administration as carrier of goods, liability for goods consigned on risk notes—Burden of proof.

In a suit for compensation for non-delivery of goods consigned to the railway for carriage on an approved risk note it is for the railway company to prove the loss, and for the plaintiff to prove that the loss was caused by the theft or wilful neglect of the company's servants.

East Indian Railway Company *vs.* Nathmal 39 A. 418 followed.

JUDGMENT.

ROBINSON, OFFG, C. J.—Plaintiffs sued the Burma Railways Company, Limited,alleging that they had handed to the railway company a hundred and two bags of gram for conveyance from Mandalay to Rangoon, whereas only ninety-three bags were delivered to them. They claim the delivery of nine bags or their value. The defendant company filed a written statement in which they did not admit that one hundred and two bags had been delivered to them. They admitted that only ninety three bags were delivered to plaintiff and they plead that they were exempt from liability by reason of a risk note executed by the plaintiff under which they could not be held responsible for any loss of articles consigned to them from any cause unless the loss was due to the company's wilful neglect, or theft by, or wilful neglect of its servants, transport agents, or carriers. They deny that there had been any such wilful neglect, or theft. On the case coming up for hearing a discussion took place on defendant's counsel urging that they should have a definite statement with particulars from the plaintiff if they alleged any such wilful neglect or theft by the company's servants. The learned judge held that there was no admission that the goods had been lost while in transmit on the railway, and it was not therefore necessary for plaintiff to give these particulars at that stage of the case. It was pointed out that it was for the railway to plead and prove that the goods had been lost and that then it would be for the plaintiffs to prove either wilful neglect or theft by the company's servants.

Upon this the defendants filed an amended written statement in which they admitted that a hundred and two bags had been handed over to them and that ninety-three only had been delivered to the plaintiff at Rangoon and that the remaining nine bags were lost. They repeated their pleas as to being protected by the risk note. On the 12th February, 1920 defendants' counsel pleaded that he was entitled to a decree as the risk note was admitted and no wilful neglect on the part of the defendants was pleaded. It was held that the admitted facts did not go to the extent of showing that non-delivery was due to loss, and that there should be some evidence of this and that that was in fact the only issue which could be said to arise on the pleadings. Evidence was then called for the defendants, and an order was then passed that it was clear upon the evidence that non-delivery was due to loss. The plaintiff then asked to be allowed in effect to amend his plaint by making other and entirely new allegations which properly speaking should have been made at the beginning. Plaintiff was however allowed to file the reply to the written statement that he proposed to tender, and a day was fixed for having the point argued. After hearing counsel the learned judge held that plaintiff had been given an opportunity at the beginning of the case to put in a reply alleging wilful neglect or theft, and that he had declined to take that opportunity, and had done so deliberately. He held that to allow an amendment at that stage would be to allow the setting up in fact of a suit substantially of a different nature. He therefore disallowed the application, and then proceeded to pass judgment dismissing the suit on the ground that the railway were protected from liability by the admitted risk note.

It is now argued before me that the onus of proving that the goods were not lost owing to the wilful neglect of the company or its servants or owing to theft by the company's servants was on the railway company, and section 76 of the Indian Railways Act is relied on in support of this. Section 76 does not deal with the case of risk notes at all. The loss, destruction or deterioration of goods having been proved the railway administration is to be held liable, unless they can prove circumstances which would exempt them from responsibility such as are contemplated by section 72 of the Act. Section 76 merely lays down that it shall not be for the plaintiff to prove how the loss was caused. Counsel further relies on the case of the Burma Railways Co., Ltd., *vs.* E. M. Abowath (1). But that case merely lays down that it is for the railway company to prove that the goods had been lost, and in that case the company did not plead or prove any loss such as was contemplated by the risk note.

There can be no question that in cases of this kind it is for the company to prove in the first place that the goods have been lost; that is sufficient in the case of an authorised risk note to exempt them from all liability unless and until the plaintiff establishes those facts specified in the risk note which deprive the railway com-

(1) 10, Bur. L. R. 21.

pany of the freedom from liability that they otherwise would have. In the case of the East Indian Railway Company *vs.* Nilkunta Roy (2) it was laid down that the person who says that the case falls within the exception has to prove that, when the case comes on for trial. The same view was taken in the case of the East Indian Railway Company *vs.* Nathmal Deharilal (3) in which the Calcutta case was followed. The facts of that case were almost entirely similar to the facts of the present case. "It seems to us, that unless it could be shown either that the loss was caused by the theft by one or more of the railway servants or unless it could be shown that the loss was caused by their wilful neglect, the railway were not liable having regard to the contract entered into with them by the plaintiff. It is said that the onus of showing that the loss was not so caused lay on the defendants. We think that this contention is not well-founded; on the contrary that the railway were not liable unless the plaintiff could show that the loss was occasioned by the theft or wilful neglect of the railway servants." Not only were these facts not pleaded by the plaintiff, but he made no attempt to prove them and the decision of the learned judge dismissing the suit was therefore perfectly correct unless he was wrong in not permitting the plaintiff to amend his pleadings by filing a reply to the written statement alleging these facts. As to this it must be remembered in the first place that to allow the amendment of pleadings is in the discretion of the court before whom the case is being tried and that, provided that discretion be exercised in a judicial manner, this court on appeal or revision will not interfere with it. It is perfectly clear that from the earliest stage of this case plaintiff was told that it was necessary that he should raise such a plea, and warned that if he refused to do so he would not be allowed to do so. at a later stage. Further the case as laid by them was a case founded on contract, and after waiting until their case on contract had failed they seek to set up a case in tort. It was not a case of a party who through ignorance or *bona fide* mistake or some misapprehension had misconceived his cause of action or the form of his suit: here there is an omission to plead wilful neglect or theft which was deliberate. and in such circumstances the court cannot interfere with the exercise of the discretion by the court below. The application is therefore dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 123 OF 1919.

K. K. ALLAPITCHAY .. .. .. APPELLANT.

vs.

S. S. A. S. CHETTY .. .. RESPONDENT.

(2) 41, C. 576. (3) 39, A. 418.

Before Mr. Justice Maung Kin.

For appellant—Mr. Villa.
For respondent—Mr. N. N. Sen.

27th May, 1920.

Presidency Towns Insolvency Act (No. III of 1909) section 17. Pendency of insolvency proceedings, suspension of discharge.

Insolvency proceedings are terminated by discharge of the insolvent, or by a refusal to grant him a discharge.

The suspension of an insolvent's discharge does not terminate the insolvency proceedings, and no creditor of an insolvent whose discharge has been suspended can have any remedy against the property of the insolvent, or commence any suit or other legal proceeding against him except with the leave of the court.

In the matter of Ko Shwe Gya. 9, B. L. T. 252 distinguished.

JUDGMENT.

MAUNG KIN, J.—The first defendant is an insolvent whose discharge had been suspended until a dividend of four annas in the rupee has been paid. The suit was brought against him without the leave of the insolvency court. This defendant therefore contended that section 17 of the Presidency Towns Insolvency Act bars the suit.

For the plaintiff it was contended that the insolvency proceedings were no longer pending when the suit was brought, inasmuch as the suspension of an insolvent's discharge with a condition attached operates in the same way as the refusal of his discharge. On the authority of *In the matter of* Ko Shwe Gya (1) it was urged that the refusal of the insolvent's discharge brings the insolvency proceedings to a close, and that therefore the insolvent can be proceeded against without the leave of the inslovency court. It may be correct to say that the insolvency proceedings close with the order refusing the insolvent's discharge. But an order of suspension with a condition attached appears to me to be different in form and has a different effect. The terms of the order show that he is still under the orders of the court and that he has not yet been discharged of his liability to pay the debts proved in insolvency. Where his discharge is refused the debts would still be payable, and the effect of such an order is that his application for the benefit of the Insolvency Act is dismissed. Where his discharge has been suspended, it must be held that his application for the benefit of Act remains to be further considered. Where his discharge is granted, his application is granted, and the proceedings come to an end.

(1) 9, B. L. T. 252.

I would therefore hold that in this case the insolvency proceedings were still pending at the time of the filing of the suit, and that the suit not having been brought with the leave of the insolvency court was not maintainable against the first defendant by reason of section 17 of the Act.

The appeal of the first defendant is allowed, and the suit as against him is dismissed with costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 84 OF 1919.

MA MYIN and others .. .. .. APPELLANTS.

vs.

MA TOKE .. .. RESPONDENT.

Before Mr. Justice Robinson.

For appellant—Mr. Ko Ko Gyi.
For respondent—Mr. A. B. Banerji.

2nd February, 1920.

Burmese Buddhist Law—Inheritance right of parents of married couples dying intestate.

When a husband and wife die childless within a short time of each other, their estate is regarded as the joint estate of both, and the rule of succession is that the parents of each take the separate property of their child, and share equally the joint property of the husband and wife.

But this rule is an exceptional provision intended to meet a special case, and it must not be unduly extended so as to interfere with the ordinary rules of succession.

Ma Ein *vs.* Tin Nga 8, B. L. T. 145 followed.

Ordinarily an interval of more than one month between the deaths of the husband and wife should not be considered a short time, and the rule should not be applied when the interval is more than a month.

JUDGMENT.

ROBINSON, J.—Maung Nyun and his wife Ma Sin after living with Maung Nyun's mother Ma Toke for a time left her in the rains and went and lived with Ma Sin's mother Ma We. Maung Nyun died of plague on the 4th April 1918 and Ma Sin died in child birth on the 24th May, 1918. Ma We died some twenty days after Ma Sin and the joint property of the husband and wife came into the

possession of Ma Sin's sisters. Maung Nyun besides his mother left his surviving one sister and two brothers. Ma Toke brought a suit claiming to be entitled to half of the joint property left by her son and daughter-in-law.

Under the ordinary rule of Buddhist law Ma Sin would be an heir to her husband, but where the husband and wife die within a short interval of each other a special rule of inheritance exists by which the surviving parents of the two would share the jointly acquired property of the husband and wife equally between them. This rule is based on section 32 of the 10th Book of the Manukye and is recognised in the case of Ma Ein *vs.* Tin Nga (1). The respondents claim under the authority of the decision of their lordships of the Privy Council in Ma Hnin Bwin *vs.* U Shwe Gon (2) as being entitled to succeed to the entire estate even in preference to their mother. In that decision their lordships were dealing with a case in which three sisters had absolutely severed all relation with their surviving parent. They were living separately and maintained no filial relation whatever and they were carrying on a separate business. Their lordships were careful to lay down that this decision could not be taken as dealing with or affecting parental rights in cases where the family continues to live together. But although the words "living together" are used, it is I think clear that their lordships were dealing with a case where all family ties had been broken and a complete separation had taken place. At the present day the fact that children are living apart from their parents cannot be given the same importance as it may have had in the past, but, however this may be, the question does not really arise in this case owing to the fact that Ma We is dead. The question is whether Ma Sin was the heir to her husband or whether their joint estate is to be considered as still remaining joint owing to their having died within a short interval of each other, in which case, as I have said there having been no breach of family relations the surviving parents would succeed to equal shares in preference to surviving brothers and sisters. Before, however, this rule can be applied it is necessary to consider what amounts to a short interval within the meaning of the special rule contained in section 32 of the Maunkye. In the case of Ma Ein *vs.* Tin Nga (1) the husband had died one day after his wife, so that it was not necessary to consider the point. The only other case in which the matter was in any way considered is that of Ma Kadu *vs.* Ma Yon (3). In that case the interval was one of two months and seven days, but it appears to have been assumed that this would be a short interval. In Mr. May Oung's work on Buddhist law at page 196 the question is considered and it is stated that the Manukye and other texts collected in section 308 of the Digest indicate that the rule is applicable where the husband or wife dies before the lapse of a month or a year. That does not appear in the translation given in the Digest or in Richardson's translation

(1) 8, B. L. T. 1, 145; 8 L. B. R. 197.
(2) 7, B. L. T. 105; 8 L. B. R. 1.
(3) 2, U. B. R. (1904-0,6), Buddhist Law, Inheritance. 7.

of section 32 the 10th book of the Manukye, but in the second extract from the Manu Dhammathat in section 308 of the Digest, it is said, "if the husband and wife both die within a short interval of each other, there not being even a month's interval between the two deaths the relatives of the husband and the wife shall divide the estate of the deceased equally between them," and in the 56th section of the 10th book of the Manukye it is said, "If they both die about the same time, so that it is not clear who was the survivor, or if it be known, but the months or years not ascertained,....." Beyond this there is no authority to help to a solution of what is a short interval so far as I have been able to discover. The reason for the enactment of this special rule has been considered by Mr. Burgess in the case of Ma Gun Bon *vs.* Maung Po Kywe (4) and by Mr. Justice Irwin in Ma Kadu *vs.* Ma Yon (3). The views of these two learned judges are set out in Ma Ein *vs.* Tin Nga (1) and I need not quote them again. It may be that the rule was made to apply to cases in which it was impossible to say, owing to the circumstances of the deaths, whether the husband or the wife was the survivor, or it may be due to the reasons given by these two learned judges or it may be due to the fact that the surviving husband or wife would ordinarily return to their parents after the death of their partner. But, whatever the reason may be, it is clear that the provision is an exceptional one intended only to meet a special case, and therefore the exception must not be unduly extended so as to interfere with the ordinary rule of succession. As soon therefore as the interval has become long enough to indicate which is the survivor and that survivor has taken up his or her position as such the interval would no longer be considered in my opinion a short interval so that the character of the joint property could be held to continue. There is no reason I think why this period should be a lengthy one, and taking the indication given in the Manu which I have quoted, and in the absence of any special circumstances, I think that any period over one month should not be regarded as a short interval. Ma Sin died one month and twenty days after her husband and there are in this case no special circumstances to justify the lengthening of the period. I must, therefore, hold that the special rule does not apply to the present case and consequently Ma Sin must be treated as having succeeded as heir to her husband and that Ma Toke the husband's mother has no claim to share in the inheritance as against Ma We who would under the Privy Council ruling quoted above apparently be entitled to the estate to which on her death her children would succeed.

For these reasons the appeal is accepted and Ma Toke's suit is dismissed with costs throughout.

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(4) 2, U. B. R. (1897-1901), 66.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 34 OF 1920.

GREENBURGH .. .. APPLICANT.

vs.

XAVIER .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Barnabas.

5th August, 1920.

Limitation Act (No. IX of 1908) s. 14 Exclusion of time of proceeding in another court s. 15. Exclusion of time during which proceedings are suspended.

In computing the period of limitation for a suit, the plaintiff is not entitled to exclude the time taken by the defendant in prosecuting his insolvency proceedings unless the plaintiff has taken some steps to oppose the insolvency proceedings.

N. K. M. M. Chetty *vs.* Lutchman Chetty 12, B. L. T. 83, distinguished.

JUDGMENT.

MAUNG KIN, J.—The only point in this application is one of limitation. The suit is for house rent, and would be time barred, unless the plaintiff is allowed to deduct the time occupied by the insolvency proceedings in the Chief Court in consequence of defendant's application for the benefit of the Presidency Towns Insolvency Act. The defendant inserted in his schedule the name of the plaintiff applicant as one of his creditors for house rent for thirteen months from March 1915 to March 1916 amounting to Rs. 1105/-. The defendant failed to get a discharge. The plaintiff applicant did nothing in the insolvency proceedings. He did not prove his debt because, as he says, it was admitted by the defendant. He did not oppose the insolvency, in fact he did not do any of the things which a creditor of the insolvent might do under the provisions of the Insolvency Act. In other words he took no part in the insolvency proceedings. Under these circumstances it is difficult to see how the plaintiff can claim to have prosecuted the insolvency proceedings in order to enable him to take the benefit of section 14 of the Limitation Act. He might have applied to the insolvency court for permission to sue insolvent in respect of his debt under section 17 of the Presidency Towns Insolvency Act. He did not do so, but he contends that that section operates against him as an injunction within the meaning of section 15 of the Limitation Act. But it is clear that section 17 of the Insolvency Act does not contain an absolute prohibition against the filing of suits in respect of debts provable in insolvency. It merely requires a person who wishes to sue an insolvent to obtain permission from the insol-

vency court to do so. Section 14 of the Limitation Act might apply, if, on the facts it could be held that the plaintiff had done anything in the insolvency proceedings which might be considered to be "prosecuting" a civil proceeding within the meaning of section 14 of the Limitation Act.

Counsel for applicant cites, N. K. M. M. Chetty *vs.* Lutchman Chetty (1) where Young, J. held that the fact that a creditor proved his debt in insolvency was sufficient to enable him to take the benefit of section 14 of the Limitation Act, when afterwards he filed his suit in respect of the debt. That case is clearly distinguishable from the present inasmuch as in the present case the plaintiff did nothing in the insolvency proceedings as one of the creditors to the insolvent's estate. I therefore agree with the lower court in holding that the plaintiff's suit is barred by limitation. This application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 57 OF 1919.

MAUNG KYAW KIN and others .. .. APPELLANTS.

vs.

AMINUL HUQ and one .. .. RESPONDENT.

Before Sir Daniel Twomey, Kt, C. J. and Robinson, J.

For appellants—Mr. McDonnell.
For respondents—Mr. Das.

26th April, 1920.

Code of Civil Procedure (Act V of 1908) s. 20 (c). Cause of action, jurisdiction, suit for a declaration that a decree is void. Specific Relief Act (I of 1877) s. 42. Suit for declaration, consequential relief.

Save in special circumstances a plaintiff seeking to set aside a decree against himself on the ground of fraud must institute his suit in the court in which the fraud was committed and the the fraudulent decree was obtained.

But a plaintiff whose property has been attached under a decree to which he was not a party, and who sues for a declaration that the decree is void and inoperative as against him can maintain his suit in the court to which the decree was transferred for execution, and which ordered the attachment, as his cause of action is the attachment of his property.

Banke Behari *vs.* Pokhe Ram 25, A. 48 followed.

(1) 12, B. L. T. 83.

Umrao Singh *vs.* Hardeo 29, A. 418 distinguished.

In a suit to set aside a decree or to declare it void, it is not necessary to ask for consequential relief by injunction restraining the defendants from executing the decree.

JUDGMENT.

ROBINSON, J.—The appellants filed a suit in the district court of Maubin against one Ma Thet Su in her personal capacity and as the widow of one Tafer Ali on a promissory note alleged to have been executed by both husband and wife. They are the brother and sisters of Ma Thet Su. Ma Thet Su confessed judgment which was accordingly passed against her " in her personal capacity and in the capacity of the legal representative of her deceased husband. . . . . " The formal decree ordered " that the defendant do pay to the plaintiffs the sum of Rs. 9,362|8|- only and do also pay Rs. 626|8|- the costs of the suit." Appellants then had the decree transferred for execution to Myaungmya and they attached there certain launches belonging to the estate of Tafar Ali which are in the possession of the present plaintiffs who are another widow of Tafar Ali and their minor son and Tafar Ali's partners. Plaintiffs now sue in the district court of Myaungmya and the sole relief prayed for is a declaration that the decree in Civil Regular No. 1 of 1915 of the district court of Maubin is void and inoperative. They allege that Ma That Su was never legally married to Tafar Ali. They deny that Tafar Ali executed the promissory note sued on and allege that the whole claim was a fraud and the decree obtained by collusion. Defendants deny all the allegations in the plaint and allege that palintiffs are not the widow and son of Tafar Ali. They further alleged that the court had no jurisdiction and that the suit was not maintainable as no consequential relief was asked for.

The plea as to jurisdiction was not pressed, but it is again raised in appeal, and this, and the question whether consequential relief could and should have been asked for, are the two principal matters we have now to decide.

As regards the jurisdiction of the Myaungmya court the question must be answered with reference to the cause of action. Where the plaintiff was a party to the former suit and his sole prayer is to set aside the former decree on the ground that it was obtained by fraud committed within the jurisdiction of the court which passed the decree it would no doubt be right to hold, in the absence of special circumstances, that that court alone would have jurisdiction. That is the view taken in Umrao Singh *vs.* Hardeo (1) but the learned Chief Justice was careful to emphasize the fact that that was the only relief sought and to except cases in which special circumstances existed such as are to be found in the authorities cited in his judgment.

(1) 29, A. 418.

This view was accepted and followed in Dan Dayal *vs.* Munna Lal (2) in which the learned Chief Justice distinguished the case of Banke Bihari Lall *vs* Pokhe Ram (3). This last case is on all fours with the one before us. The plaintiff had not been a party to the former suit and the defendants were seeking to enforce the decree within the jurisdiction of the court in which he brought his suit. This was one of the special circumstances referred to in Umrao Singh's case (1).

The plaintiffs' cause of action rests no doubt in part on the fraudulent suit and the collusive decree obtained in Maubin, but not being parties to that suit the decree did not affect them at all. When however it was transferred to Myaungmya and property in their possession was attached, their rights were infringed, and this infringement forms a material part of their cause of action. They do not ask that the decree be set aside, and could not do so, but that it be declared to be void and inoperative and this the court has power to do. "It is competent for every court whether superior or inferior to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud" was held by Banerji, J. in Banke Bihari Lal's case (3) following Nistarini Dassi *vs.* Nundo Lall Bose (4).

Two of the defendants reside within the jurisdiction of the Myaungmya court but the third does not. The leave of the court was not however obtained. This defendant submitted to the jurisdiction and may perhaps be taken to have acquiesced, but it is not necessary to base the decision on this ground, so it may be left undecided. This court in my opinion had jurisdiction.

As to the other question, namely, the necessity to ask for consequential relief the matter may be disposed of shortly. It may be the case that plaintiffs could have asked for an injunction restraining defendants from executing the decree against them, but it is clear that if that decree is declared a nullity, so far as they are concerned they do not need any other relief. No court would grant execution of a decree against parties in respect of whom that decree had been declared a nullity. The granting of an injunction is discretionary, and after such a decree had been granted an injunction may well be refused as unnecessary.

The provision to section 42 of the Specific Relief Act is intended to prevent a multiplicity of suits and to guard against the evasion of fiscal laws. Neither of these objects, in my opinion, is contravened in the circumstances of this case and I would hold the suit was maintainable. Had it been otherwise the suit is in my opinion one in which it would have been right to return the plaint with liberty to amend.

As to the merits I see no reason to differ from the court below as to Ma Thet Su and the second plaintiff being the legally married

(2) 36, A. 564.
(3) 25, A. 48.
(4) 26, C. 891.

wives of Tafar Ali. The evidence proves that both were his widows. As to the execution of the promissory note, the evidence is not convincing. It was a very large sum of money for persons in the position of defendants to be able to lend, and such evidence as there is goes to show they could not have had it to lend. The writer is produced and two persons who happened to pass by, and were said to have been called in. They are not persons whose bare word would be entitled to much weight, and such evidence could easily be obtained. As against this there is the evidence of persons who knew Tafar Ali, and one is his partner. Tafar Ali only knew how to write his name.

It is strange that persons in the position of defendants would lend what was to them so large a sum without any security and to a man whose assets were principally in the partnership business. It was for defendants to prove the execution of the promissory note when it was denied by his heirs, and I consider they have failed to prove it. The circumstances surrounding the suit also were most suspicious. Ma Thet Su had been unable to get letters of administration, and the Chittagonians were denying her rights. Defendants are her brother and sisters and she confessed judgment. There was no trial of the points involved. I agree with the learned district judge that having regard to the evidence as to execution and to the facts and circumstances of the case the decree was obtained by fraud in collusion with Ma Thet Su. I would dismiss the appeal with costs.

Twomey, C. J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 87 OF 1919.

MA E. GYWE and one .. .. .. APPELLANTS.

vs.

MA LE WA .. .. .. RESPONDENT.

Before Mr. Justice Robinson.

For appellants—Mr. Vakharia.
For respondent—Mr. May Oung.

23rd January, 1920.

Civil Procedure Code (Act V of 1908) O. VI. rule 17. Amendment of plaint, power to allow a relief in respect of which a suit would be time-barred.

Under Order VI rule 17 of the code of civil procedure all amendments of pleadings should be allowed at any stage of the proceedings if they satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

Kisandas *vs.* Rachappa 33, B. 644 followed.

The question whether an amendment should be allowed which would set up a fresh claim which has been time barred is a particular case of the general rule that no amendment should be allowed if it works injustice to the other side.

If the amendment is an entirely different cause of action totally distinct from the claim as originally made, and was one that was not heard of before limitation expired, the amendment would cause injustice, because it would deprive the opposite party of a legitimate defence, and ought not to be allowed. If however the amendment is merely the original claim in another form, and is one which the opposite party has had already to meet, no injustice is caused by allowing the amendment, as it only deprives the defendant of an advantage which he ought never to have received.

Mohummed Zahur *vs.* Rutta Koer 11 Moore I. A. 468 referred to.

JUDGMENT.

ROBINSON, J.—The plaintiffs sue defendant personally and as the legal representative of her husband Ko Kan Baw, deceased, to recover money due on a promissory note and a verbal loan. It was alleged that Ko Kan Baw borrowed Rs. 1470/- on the 15th March 1916, and executed a promissory note therefor; that he subsequently borrowed Rs. 450/- on the 19th March 1917, and on that date he executed a promissory note for Rs. 1920 being the amount originally lent plus Rs. 450. The plaintiffs also allege some other verbal loans, but produce evidence only as to one of Rs. 60. A decree has been passed for Rs. 60, and that sum and Rs. 450 are not now in dispute. The suit as originally filed was based on a promissory note of the 19th March 1917, and was instituted on the 14th January 1918. The subdivisional court of Henzada held that the promissory note was executed by Ko Kan Baw, and a decree was granted for Rs. 1920, and interest, and Rs. 60 without interest. The defendant filed an appeal, and the learned divisional judge held that the execution of the promissory notes was not proved. He further held that as the money originally advanced was not advanced at the time of execution of the promissory note sued on, but on a promissory note for which the promissory note sued on was substituted, no suit would lie for the loan independently of the note, even assuming that the loan had been actually made. He granted a decree for Rs. 60 only. An appeal was then filed in this court, and my brother Duckworth held that the execution of the promissory note sued on was not proved, but that the divisional judge had not come to any finding as to whether the previous loan for Rs. 1,470 or a fresh loan for Rs. 450 was proved. In view of the decision of the Full Bench of this court in the case of Maung Kyi *vs.* Ma Ma Gale (1) that in such circumstances as these a creditor can sue, apart from the promissory note, for the money due on the original contract of

(1) 12, B. L. T. 137.

loan, he remanded the case to the lower appellate court for further findings on the points in question after such amendments of the plaint as may be required, and to come to findings on the points noted, and notify the result to this court in due course. An amended plaint and an amended written statement were filed in the divisional court. The plaint sets out the original loan and the promissory note executed on the 15th March 1916, the further loan of Rs. 450, and the execution of the second promissory note on the 19th March 1917, and the defendant's knowledge of the loans to her husband, and her undertaking to make good the loans both before and after his death are recited. Then it is set out that the plaintiffs sue on the original contract of loan, and not on the promissory note, the execution of which has been doubted, and that the cause of action arose on the 15th March 1916, the 19th March 1917, and on various dates as regards the petty loans. The written statement objects to the amendment of the plaint as changing the cause of action, and the nature of the suit. Further that the amendment if allowed will cause such an injury to the defendant as will not be compensated for by imposing terms, and that the suit as now amended is barred by limitation. On this the learned divisional judge ruled that he had only to come to findings on the two questions of fact indicated in this court's order. The learned divisional judge found that the loans of Rs. 1,470, and Rs. 450, were proved. These findings having been returned to this court, objections were filed by the respondent. They are that the amendment in so far as it relates to the first loan is not permissible, that the suit on the first loan was barred by limitation, and that the loans were not proved.

It will be seen that when the amendment was allowed, the claim for a cash loan of Rs. 1,470 was barred by limitation. The question therefore, that is before me for decision is whether in the circumstances of this case, the amendment should have been allowed the effect of which would be to make a debt that was already time barred within time, and permit the plaintiff to sue on a cause of action which at the time it was first put forward was barred by limitation. The effect of allowing the amendment is to bring the suit within time as limitation is to be counted up to the date of the original institution of the suit. The amendment was allowed by this court, and it is at least open to doubt whether I could now consider the matter which has to be decided, namely whether the amendment should have been allowed. I do not however think it necessary to decide this appeal on that ground, and moreover I have come to the conclusion that to allow it was proper.

The general rule is to be found broadly stated in Muhammad Sadiq *vs.* Abdul Majid (2) where it is said (p 618) "We think, however, that no court would have power to allow a new cause of action to be introduced into a plaint after that cause of action had become barred by limitation." The question there considered was whether the amendment amounted to a new cause of action or merely a correction

(2) 33, A. 616.

of the description of the property. This general rule was accepted in Balkaran Upadhya *vs.* Gaya Din (3), but it was held that in that case there was a new cause of action in effect. A case very similar to the present one is that of Kisandas Rupchand *vs.* Rachappa Vithoba (4). In that case plaintiff sued to recover Rs. 4,001, but he alleged a partnership and that he had brought in this sum as capital. Defendants denied any partnership, and that plaintiffs had ever contributed Rs. 4,001, or any other sum as capital. The first court held that plaintiffs had supplied cloth to defendants to the value of Rs. 4,001, but that there was no partnership, and the suit was so framed really to avoid payment of courtfees. He therefore refused to grant any relief. The lower appellate court however being of opinion that plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their pleader, allowed an amendment. At the date of this order the claim as to Rs. 3,001, was barred by limitation. The High Court held that the amendment was rightly allowed. The grounds of its decision are that "all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties." After referring to certain authorities it held (p 649) that "amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim." It was then held that "in other words the defence of limitation was a defence to which the appellants were never fairly entitled, and the allowance of the amendment only withdraws from them an advantage which they ought never to have received." (p 651).

As to the conditions subject to which all amendments should be allowed I have no hesitation in accepting this authority. The second is obviously satisfied in the present case. As to whether it did or did not work injustice to the other side the question turns, as indeed it turns in all cases of the present type on the character of the claim as originally made, and that of the amended claim. If the latter is an entirely different cause of action or is something totally fresh and distinct from the claim as originally made, and was one that was not heard of before limitation expired the amendment would cause injustice by depriving the other party of a legitimate defence. If however it is nothing more than the original claim in another form, and is one that the other party has had already to meet, no injustice is caused, the result being merely as was said in Kisandas Rupchand's case (4) to withdraw from defendants an advantage they ought

(3) 36, A. 370. (4) 33, B. 644.

never to have received. The first court had already decided before limitation expired that defendant was liable to repay this money. In such circumstances it would surely have been inequitable to dismiss plaintiffs' suit and leave them to bring a fresh suit for repayment of the loan which would have been successfully meet as regards the major portion of the amount claimed by a plea of limitation.

There is the highest authority for this view. In Mohummed Zahoor Ali Khan *vs.* Rutta Koer (5) their lordships of the Privy Council say—"And they have felt some doubt whether inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the appellant to bring a new suit against Rutta Koer upon this bond, treating it as a money bond. Considering however, that such a suit would probably have been met by a plea of the Act of Limitation, that in the circumstances of this case such a defence would be inequitable, and that the respondent not having appeared, their lordships are not in a position to put her on terms as to her defence to a fresh suit, they have come to the conclusion that the fairer course is to do what the judge of first instance might, under the Code of Procedure have done at an earlier stage of the cause, namely, allow the appellant to amend his plaint."

The order therefore allowing the amendment was in my opinion just and proper. I do not think it is open to me to question it, and respondents should have moved by way of review at the time.

As to the merits, the claims as to Rs. 450 and 60 are not disputed, but as to Rs. 1,470 it is, though not to any great extent, the argument being really confined to the question of limitation. For the appellant it is contended that there are concurrent findings of fact, but the position is somewhat peculiar. The first court tried the suit as one on a promissory note. Consideration was presumed, there was no issue as to it, the onus being on the defendants. The lower appellate court held that the promissory note was not executed by Ko Kan Baw, and so did not go into the question of consideration. On the remand the amended plaint was not filed in the original court, though in that suit the onus was on the plaintiff. There cannot therefore be said to be concurrent findings of fact, and I have considered the evidence. I am satisfied that consideration did pass, and that the money was lent.

The suit must therefore be decreed for Rs. 1,470|- and Rs. 450 and Rs. 60, with interest on the two sums as prayed, and costs in the first court, in this court, and in the lower appellate court on remand.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 143 OF 1919.

MAUNG THA LIN AND ONE .. .. APPELLANTS.

vs.

P. K. P. L. PALANEAPPA CHETTY .. .. RESPONDENT.

(5) 11, Moore. I. A. 468 at p. 485.

Before Mr. Justice Maung Kin. Offg. C. J.

For appellant—Mr. Villa.
For respondent—Mr. S. N. Sen.

24th August 1920.

Suit for declaration of title by person in possesion. Burden of proof, evidence.

In a suit for a declaration of title by a person in possession it is for the defendant to prove that the plaintiff's possession is not evidence of title, and that his title is superior to plaintiff's.

Possession is title in itself in the absence of evidence to displace the presumption that arises from it.

JUDGMENT.

MAUNG KIN, OFFG. C. J.—Plaintiff Chetty sued for a declaration that he was the owner of the property in suit by purchase from Tha Din. Defendant Ah Kyin claimed the land by purchase from Tha Lin the second defendant. The plaintiff had been in possession for about seven years at the time of the institution of the suit, and therefore asked only for a bare declaration. The trial court held that the property was Tha Lin's and dismissed the suit. The lower appellate court held that the property was not Tha Din's, the conveyance relied on by the plaintiff not covering the land in suit, but it also held that the land having been in the possession of the plaintiff for a long time the burden was on the first defendant to prove his title to the property and that he had failed to discharge the same.

There appears to be no doubt that the plaintiff has failed to prove that the property was Tha Din's when he bought it from him. It is equally clear that the first defendant has failed to prove that the property was Tha Lin's.

The oral evidence tendered by Tha Lin is that of a man of no standing. All that he can be said to have proved is that he might at one time have worked some part of the land, but that he appeared to have abandoned whatever he had worked. For seven years he had not been on the land. I do not think I need pursue this question of fact any further. It was not pressed on me that the findings of the lower appellate court were wrong. The only point on which argument was seriously directed was as to whether the plaintiff should be allowed to succeed in a title suit without being able to prove his title, all that he had proved being long possession, but for less than twelve years.

Counsel for the appellants relied on Shama Churn Roy *vs.* Abdul Kabeer (1) and Kedar Nath *vs.* Raj Nath (2). In the former it was held by Ameer Ali and Pratt, J. J. that where a person has been dispossessed of his land and brings his suit after the expiry of six months from

(1) 3, C. W. N. 158. (2) 3, C. W. N. 497.

the date of dispossession, he must prove his title and cannot succeed merely on the proof of long possession. In the latter case it was held by McPherson and Stevens, J. J. that where the plaintiff sets up a title and asks for possession of a piece of land he must prove his title and that on his failure to do so it is not necessary to put the defendant to any proof of the title set up by him.

But previous to these two cases their lordships of the Privy Council held in Ismail Ariff *vs.* Mahomed Ghous (3) that lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever and who is a mere trespasser. Gangaram *vs.* The Secretary of State (4) is on all fours with the present case. There the plaintiff was in possession of certain land, and sued for a declaration that the defendant had no title to it and that it was his own property. Neither side was able to prove his title to the land. But the plaintiff had been in possession for ten years and had built a shed on it. It was held that no declaration of the plaintiff's title could be made but that on the authority of the Privy Council case above cited the plaintiff was lawfully entitled to the land and the shed thereon and a decree was passed in these terms. In Bhagwansing *vs.* The Secretary of State (5) it was held that possession is itself title in the absence of proof displacing the presumption that arises from possession. The man in possession starts with this presumption and it is, therefore, for the other side to show, not only that the former's possession is not evidence of his title but that the latter has a superior title.

For these reasons I would hold that that the plaintiff is entitled to a decree declaring hat he is lawfully entitled to the land, and to this extent I would vary the decree of the lower appellate court. As the defendants—appellants have not made out their claim to the land, they will pay costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 191 OF 1919.

U. NI TA .. .. APPELLANT.

vs.

KO MAUNG .. .. .. RESPONDENT.

Before Mr. Justice Robinson.

For appellant—Mr. May Aung.

2nd February, 1920.

(3) 20, I. A. 99; 20, C. 834.
(4) 20, B. 798.
(5) 10, Bom. L. R. 571.

Burmese Buddhist Law. Inheritance. Right of eldest son to one fourth share of joint estate on the death of the mother, when the father does not remarry.

The eldest son has no right to a fourth share in the joint estate on the death of his mother, unless the father remarries, and he has to perform the duties of the father.

Shwe Po *vs.* Maung Bein 8 B. L. T. 25 distinguished.

JUDGMENT.

ROBINSON, J.—U Ni Ta and his wife Ma Dun had four children Ma The Byu, Ko Maung, Ko Kyain, and Ko Twe. Ma Dun died about eight years before the suit leaving her husband and the four children surviving her. The joint property of U Ni Ta and Ma Dun is said to consist of a piece of paddy land worth about Rs. 1,900, and a piece of garden land worth Rs. 400/- There was no division of the property after Ma Dun's death between the surviving parent and [illegible]. U Ni Ta, Ma The Byu, and Ko Kyain sold the paddy land for Rs. 1,900, by a registered deed of sale to the fourth and fifth defendants apparently without plaintiff's consent. Plaintiff Ko Maung pleads that he is the eldest son of the family, and as such has a vested interest in the paddy land sold to the extent of one fourth since the death of his mother Ma Dun, and while reserving his right to sue for his alleged one fourth share in the garden land, he prays for a decree declaring that he is the orasa son, and that he is entitled to a fourth share in the paddy land, and that the sale is inoperative to that extent. He further asks for partition and delivery of this one fourth share. The first defendant U Ni Ta while admitting the allegations of fact set out in the plaint denies that plaintiff had any vested interest in the land in suit, or that the sale was invalid to any extent. He pleads that plaintiff is not entitled to split up his cause of action by reserving his right to sue for one fourth of the garden land, and lastly he pleads that if plaintiff is entitled to any share, he (the defendant) is entitled to deduct from that share two sums of money paid by him to two creditors of the plaintiff on plaintiff's behalf. Several difficult questions of Burmese Buddhist Law arise. It is to be noticed that in this case it is the mother who has died, and that the eldest child is a daughter, and lastly that the father has not re-married.

The first court relying on the case of Shwe Po *vs.* Maung Bein (1) held that U Ni Ta had an absolute power to dispose of half of the property, and that as only two out of the remaining children gave their consent, the sale is ineffective over the remaining fourth. The authority cited however was dealing with a case where the father had married again, and while there is no question that the eldest son could have claimed one fourth share on his father's second marriage, it is no authority for the proposition that he is entitled to claim this share when his father has not remarried.

(1) [illegible] L. B. R. 115.

The lower appellate court pointed out this necessary distinction in respect of the ruling, and held that the present case would not be governed by it, and was governed by the case of Maung Seik Kaung and Maung Po Nyein (2). Unfortunately that was also a case in which the father had married again. At page 25 of the report it is said "The point of law still to be decided may be narrowed down to the question what share can the eldest son claim in the joint property of the parties, when the mother is dead, and *the father marries again,* and when there are, as in this case, daughters as well as sons." In concluding their judgment the learned judges say (page 28):—"It may not be very clear from the Dhammathats now available that a son can claim a one fourth share from his father when he lives separately, and when the father does not marry again, though this has been held; but we do not think it open to reasonable doubt that when the father does marry again, the eldest son, especially if he be the eldest child, can claim a one fourth share of the general joint estate of the parents. This is in accordance with paragraph 2 of section 2 of Book X of the *Manukyi,* and as shown above, it is not contradicted by the other Dhammathats." The learned judge of the lower appellate court says in his judgment that he has not been able to discover where it has been held that the eldest son can claim his one fourth from the father when the father has not remarried. U May Oung who appears for the appellant also states that he has not been able to trace the authority referred to, and I have not been able to discover it. There is thus no authority for the proposition that where the mother dies, and the father has not remarried the eldest son can claim a fourth share of the joint estate of his parents from his father. The Dhammathats in section 32 of the Kinwun Myingyi's Digest, and the extract from the Manukyi provide that "the eldest son shall get one male slave, one pair each of buffaloes, one goat and one sheep, and one piece of land, and if there is no such property he shall get forty seven and a half ticals of silver, being their aggregate value, but he cannot insist on such payment if the father has no silver. Should the estate consist only of lands the son shall get the land, but shall not insist on getting the other kinds of property, or the value thereof. This is the law of partition when the father does not marry again." It is to be noted that nothing is here said about his being able to claim one fourth share of the general joint estate left by his parents. The other Dhammathats quoted in this section are all more or less to the same effect, and none of them speak of one fourth share of the joint property. Several refer to his getting only such property as was given to him during the lifetime of his parents. In the absence, therefore, of any authority to the effect that the eldest son can claim the usual one fourth share of the joint property of his parents, if his father survives and does not remarry, it appears to me to be impossible to hold that he has any such vested right in the land that has been sold as would support the present claim. He is allotted that share because his father being dead, he is supposed to take his place, and perform his father's duties and this

(2) 1, L. B. R. 23.

ground does not exist when his father still survives. If the eldest son is in a position to be able to claim a fourth share in the general joint estate, it is no doubt true that he is entitled to make the claim at any time within the period of limitation governing the suit, and if the surviving parent disposes of the estate it may be open to him to claim that the sale or mortgage is invalid to the extent of his fourth share, but where, as in this case, he cannot enforce his claim to a fourth share during he lifetime of his father, he has no such vested interest as would support the present claim.

For these reasons I must accept this appeal, and reverse the decisions of the courts below. The suit is dismissed with costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 21 OF 1920.

V. P. T. REDDYAR .. .. APPLICANT.

vs.

V. R. M. ARUNACHALEN CHETTY .. .. RESPONDENT.

Before Mr. Justice Robinson, Offg. C. J.

For applicant—Mr. S. N. Sen.
For respondent—Mr. Doctor

12th August, 1920.

Civil Procedure Code (Act V of 1908) s. 73 (1) (b) rateable distribution of proceeds of execution sale. Rights of mortgagee in property sold in execution free of mortgage.

When property liable to be sold in execution of a decree is sold free from mortgage under section 73 (1) (b) of the code of civil procedure the mortgagee has the same interest in the proceeds of the sale as he had in the property sold. But to enforce his interest he must proceed by way of suit, and he cannot obtain an order for payment of the amount alleged to be due on the mortgage until he has obtained a decree.

JUDGMENT.

ROBINSON, OFFG. C. J.—Ramasawmy Chetty obtained a money decree against the present petitioner. In execution certain immoveable property was attached. Respondent claimed a mortgage on that property. The mortgage was admitted and the land sold free of the mortgage. Petitioner however denied the correctness of the amount claimed to be due. The court held quite rightly that this was a ques-

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tion that need not be gone into at that stage. Then respondent applied for leave to bid and to set off the amount due to him. The court held that as the sale was to be free of the mortgage, he could not be allowed to set off, but permission was given him to bid. He repeated his application later, and the order was that without going through the accounts it was impossible to say what the exact amount due was. Leave to set off was refused, it being pointed out that he was not a decree-holder. The property was sold and respondent was the highest bidder. He paid the amount into court. On 2nd January 1920 the court sanctioned the payment out to him of the amount he claimed as due on the mortgage. This was without any notice to the petitioner. Petitioner applies for revision of this order.

It is not denied that the order must be set aside as the mortgage amount is disputed, and there has been no enquiry as to what is due, but Mr. Sen for petitioner urges that respondent must repay the money drawn and cannot obtain an order for payment until he has obtained a decree. Mr. Doctor argues that an enquiry as to the amount due can be held in these execution proceedings and that there is no necessity for respondent to bring a suit.

Section 73 is intended to avoid the necessity for each one of several creditors who hold decrees, separately applying for attachment and separately selling the property. Its object is to avoid a multiplicity of proceeding and to insure an equitable distribution to all the creditors by putting them on the same footing. But it does not contemplate a rateable distribution between decree holders and any persons claiming to be creditors but who have not established their claims by proving them and obtaining a decree. Here even though the mortgage be admitted, the amount is strenuously denied, and yet the mortgagee has been paid the full amount he claims without any enquiry into it, and without the mortgagor being given any opportunity of being heard. Proviso (b) to the section lays down what the result of a sale free of the mortgage is to be, and it gives the mortgagee the same interest in the proceeds of the sale as he had in the property which is converted into money. He has therefore a mortgage lien on the proceeds and no more. To enforce that lien he must proceed in the ordinary manner by way of suit.

Mr. Doctor refers me to two cases Purshotam Sidheswar *vs.* Dhondu Amrit (1) and Vishnu Dikshit *vs.* Narsingrav (2). These cases merely lay down that the executing court can enquire into the merits of the mortgage claimed, and that, although the amount claimed is in excess of the pecuniary limits of his ordinary jurisdiction. He does this in order to apply one or other of the provisoes. But these authorities do not lay down that as a result a mortgagee who has not proved his mortgage claim, and merged it in a decree, can share in the sale proceeds. When the mortgage is denied the enquiry will be necessary in order that the sale proclamation may be properly drawn up. Hla Baw *vs.* S. K. R. Muthia Chetty (3). The order

(2) 6. B. 584. (3) 3, L. B. R. 275.

is therefore set aside, and the money should be refunded. If respondent fails to do this petitioner has his remedy as laid down in subsection (2) to section 73. This application is accepted with costs; advocate's fee two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 6 OF 1919.

V. VAZ .. .. PLAINTIFF.

vs.

MADDOX .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. Barnabas.
For defendant—Mr. B. Cowasji.

22nd March, 1920.

Provident Funds Act (IX of 1897) s. 4 (2) Protection to deposits in provident funds, rule 10 (3), assignment of provident fund—meaning of "children."

All sums of money standing to the credit of a subscriber to a government or railway provident fund at the time of his decease, and payable to the widow and children of the subscriber vest in the widow and children free from any debt or liability incurred by the deceased, or his widow or children.

Under Rule 10 (3) of the General Provident Fund Rules the government is not bound to recognize any assignment of the funds to any person other than the widow or children.

Semble. The word children in the Provident Funds Act and Rules means legitimate children.

JUDGMENT.

RIGG, J.—The present dispute relates to a sum of Rs. 8,459-15-8 being the amount accumulated to the credit of the late J. A. Maddox in the General Provident Fund. This sum has been paid into court by the accountant-general and is claimed by Mr. and Mrs Vaz, the executors, of the will of the late J. A. Maddox, to whom probate was granted in Civil Regular No. 6 of 1919. The other claimants are John Robert Maddox, an illegitimate son, to whom the provident fund was assigned by the deceased on the 25th December 1915, and his widow and two daughters who claim they are entitled to it under the rules regulating the General Provident Fund framed under Act IX of 1897.

An objection to the claim of the widow and her daughters has been taken by the executors to the will on the ground that the appllication has not been verified as required by Order VI rule 14. Order VI

rule 14 only applies to pleadings, that is to say, to plaints and written statements (see Order VI, rule 1). Apart from this objection however I think the present application should be treated as one falling within the scope of section 47 of the Civil Procedure Code which provides for settlement of disputes relating to the execution, discharge, or satisfaction of decrees between parties to the suit. The widow and children were caveators in Civil Regular No. 6 of 1919, and as the money deposited in the General Provident Fund is now in the hands of the court there is no objection in my opinion to this being dealt with as though it were a matter to be determined in execution of a decree in suit No. 6. The sum in dispute is not mentioned in the will itself. Its devolution on the death of the deceased is regulated by rules under Act IX of 1897. According to rule 10 of the rules corrected up to the end of March 1915, in the event of an officer's death before his retirement, sums to his credit should be divided between his widow and children in accordance with any request he may have submitted in the prescribed form, or be handed to such trustees as he may appoint by will to administer for the benefit of his widow or children, (b) failing such a request it is to be divided between his widow and children to the exclusion of adult sons or married daughters whose husbands are alive. Sub-clauses (c) and (d) of rule 10 are not relevant to the present decision. The notes to that rule lay down that a husband may be permitted to make a special application for the exclusion of his wife from the benefits of the fund, if she has been judicially separated, but in the absence of such application the widow should be treated like an ordinary widow and the sum to her husband's credit should be divided in accordance with sub-clause (b). Sub-clause 3 of rule 10 provides that government will not be bound by or recognise any assignment which the subscriber may make for the disposal of the funds standing at his credit to any person other than his widow or children, if any wife or child be then alive, unless there are no children, and only one wife from whom the subscriber has been judicially separated.

In the present case the deceased J. A. Maddox has requested that the whole of his money be paid to an illegitimate son. This was a request he was not entitled to make under rule 10, even if it be assumed that an illegitimate son is a child within the meaning of these rules. If he has not made a request for the division of the fund between his widow and the children the fund is to be divided in equal shares between the widow and the children in accordance with sub-clause (2). The present request made by the late J. A. Maddox is *ultra vires* in that he has altogether ignored the existence of his widow. I therefore hold the sum accumulated to his credit in the General Provident Fund should be divided between his widow and his children provided they are not adult sons or married daughters with husbands who are still alive. The costs of the application will come out of the Provident Fund. Advocate's fees, two gold mohurs.

An appeal from this judgment being Civil First Appeal No. 78 of 1920 was dismissed by a Bench on the 26th July 1920—Editor B. L. T.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS No. 104 OF 1917.

HO SYEW WAING .. .. .. APPLICANT.

vs.

P. R. P. L. CHETTY .. .. .. RESPONDENT.

Before Mr. Justice Young.

For applicant—Mr. Villa.
For respondent—Mr. Brown.

5th July, 1917.

Civil Procedure Code (Act V of 1908) O. XXI r. 58. Investigation of claims to attached property. Powers of court.

In proceedings to investigate claims to property under attachment the duties of the court are confined to investigating who was in actual possession at the time of the attachment, and the court cannot go into the question whether the possession was fraudulent or void.

ORDER.

YOUNG, J.—This is an application to remove an attachment. Mr. Brown for the respondent says that prior to the attachment his judgment debtor, father of the applicant transferred the property to his son. He has a perfect right so to do, though the transfer may be found to be void under the provisions of the Transfer of Property Act. But I do not think it is for this court in a miscellaneous proceeding, when its duties are confined to ascertaining who was in actual possession at the time of attachment, to go into the question as to whether that possession was fraudulent or void. I think that is a matter for a regular suit.

Mr. Villa has got several witnesses, and the attachment must be removed, and the respondent must pay the costs of these witnesses, and one gold mohur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 150 OF 1919.

A. L. S. V. CHETTY .. .. .. APPELLANT.

vs.

MAUNG KYIN KE .. .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Chari.
For respondent—Mr. Mya Bu.

19th July, 1920.

Contract Act (IX of 1872) s. 73. Compensation for breach of contract, measure of damages. Contract for sale of goods. Purchaser's delay in taking delivery.

In a contract for sale of goods where the purchaser is unable to take delivery on the day on which he was bound to take delivery under the contract, and the vendor is unable to give delivery on the day on which the purchaser is ready to take delivery, the measure of damages is the difference between the contract rate and the market rate on the day on which the purchaser was bound to take delivery under the contract.

JUDGMENT.

MAUNG KIN, J.—The facts are simple. The point of law involved is novel. I have not been able to find any direct authority on it. There was a contract in writing for sale of paddy dated the 26th July 1918. The plaintiff respondent was the buyer, and the defendant appellant was the seller. The contract contains the stipulation that delivery must be taken within ten days, and that if he could not do that, the plaintiff the buyer, must pay the price of the paddy in full. It is also set out that the paddy was stored in a certain granary and that the plaintiff was at liberty to take from whichever room he chose. The 5th of August was the last day on which delivery was to be taken according to the contract. On that day the plaintiff gave full value for the paddy, but did not take delivery as he did not require the paddy then. On the same day an endorsement was made on the contract to the effect that the plaintiff would take the paddy from the eastern room. The plaintiff took delivery on the 16th September when there was a shortage in delivery of 3,204½ baskets. He therefore sued for damages on the basis of the market value on the 16th September. The defendant contended in reply that they should be assessed on the basis of the market rate on the 5th August. Both the lower courts have decreed the suit. The defendant appeals. The question is which of the two contentions is right.

The position seems to me to be this. The defendant wanted to give delivery on the 5th August, but the plaintiff did not require the paddy then, and said he would take it later. It does not appear to me that the performance of the contract on the part of the defendant was by mutual consent extended so as to constitute a fresh contract between the parties. The extension of the time for delivery was made not for the advantage of the defendant, but to suit the plaintiff's convenience. The plaintiff chose to take delivery on the 16th September when the market was higher than on the 5th August, when he should have taken delivery. Under these circumstances, I think it would be manifestly unjust that the defendant should be held liable in damages on the basis of the market rate on a date other than the 5th August. It is common ground that he was ready and willing to give delivery on that day. The delivery that was given on the 16th September must be treated as if it had

been made on the 5th August. It would be entirely different, if the extension of time could be taken to be the result of a binding contract giving rise to fresh obligations. I cannot find anything in the Contract Act in support of the plaintiff's contention. Under these circumstances I think the defendant is liable in damages on the basis of the difference between the contract rate and the market rate on the 5th August, which was Rs. 110/-. The rate on the 16th September was Rs. 175/-.

I vary the decree of the lower courts by passing a decree for Rs. 193/- with costs. The rest of the plaintiff's claim is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 47 OF 1920.

MAUNG SEIN THWE .. .. .. APPELLANT.

vs.

MA SHWE YI .. .. RESPONDENT.

Before Robinson. Offg. C. J. and MacGregor, J.

For appellant—Mr. May Oung.

3rd August 1920.

Burmese Buddhist Law, inheritance. Rights of step children to separate property of step parents. Breach of filial relations. Burden of proof.

A stepson succeeds to the separate property of his step parents in preference to the parents and other collateral relations by blood.

The burden of proving that a child's rights have been lost by breach of filial relations lies on the person alleging it.

Mere separate residence does not prove, or even set up an inference of breach of filial relations.

JUDGMENT.

ROBINSON. Offg. C. J. and MacGregor, J.—This is an appeal from an order granting letters of administration to the estate of Ma Hla Me, to her first cousin, Ma Shwe Yi. Ma Shwe Yi had once before obtained letters, but they had been revoked on the application of the appellant. Ma Hla Me was married to one Maung Pe. They had no children. On Maung Pe's death she married Po Nan Ya who had a son, the appellant. Po Nan Ya died six months after the marriage and there was no issue. Ma Hla Me's father Maung Shwe Yin survived her but he also is dead now. Ma Hla Me is said to have left a house worth, according to the schedule filed, Rs. 500/-; and according to respondent in her evidence, 1500/- to 2,000/-. This house had been conveyed to appellant by Ma Hla

Me by a registered deed, and appellant asserts that it is his property and that Ma Hla Me owned no property on her death. Even assuming that she left this house, however, appellant claimed that as her stepson he is her sole heir excluding respondent and other collaterals, and that therefore letters could not be, and should not have been granted to respondent.

The learned additional district judge has apparently held that on Ma Hla Me's death her father Maung Shwe Yin was her heir, and he has treated this house as undivided ancestral property and I am unable to follow or understand his reasoning. The house was the separate property of Ma Hla Me and on her death her heir was the appellant. He was entitled to succeed to the exclusion of her parents and collaterals. This was laid down in Ma Gun Bon *vs.* Maung Po Kywe (1) and there is clear authority for it in the Manugye Book 10 section 6.

This being so, it was clearly necessary that the lower court should have come to a finding on the point. Had that finding been in favour of the appellant, letters could not have been granted to Ma Shwe Yi, as under section 23 of Act V of 1881 she would not be entitled to any part of the deceased's estate.

Mr. May Oung points out that there was no evidence that appellant had not lost his rights by separate living and a bench of filial relations. We are not prepared to assent to the view that a man who has proved that he is an heir has further to prove that he has not broken off filial relations in such a case as this. It appears to us that it would have been for Ma Shwe Yi to allege and prove this. There is not only no such plea, but there is an admission by Ma Shwe Yi that appellant supported Ma Hla Me up to her death. Mere separate residence does not now a days and by itself prove, or even set up an inference of a breach of filial relations such as would deprive a child of his rights—Maung Kyaw Yan *vs.* Maung Po Win (2). It is there pointed out that it was for respondent to charge filial neglect. For the above reasons the appeal is accepted and the letters of administration granted to Ma Shwe Yi are revoked. Respondent must pay the appellant's costs in this court and in the court below, advocate's fees, two gold mohurs.

Macgregor, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 361 OF 1919.

ASHA BIBI .. .. .. PLAINTIFF.

vs.

MA KYAW YIN and others .. .. .. DEFENDANTS.

(1) U. B. R. 1897-01, II. 66.
(2) U. B. R. 1904-06 Buddhist Law. Inheritance. 1.

Before Mr. Justice Rigg.

For plaintiff—Mr. Burjorji.
For defendants—Mr. B. Cowasji and Mr. Chari.

26th February, 1920.

Mahomedan Law. Inheritance, rights of non Mahomedan heirs—Freedom of Religion Act. (XXI of 1850)—Scope of the Act.

Under Mahomedan law only Mahomedans can inherit from a Mahomedan. The Burmese Buddhist relations of a Burmese Buddhist who had adopted Mahomedanism cannot succeed to his estate on his death.

The Freedom of Religion Act (XXI of 1850) repeals the provisions of Hindu and Mahomedan Law which inflict forfeiture of rights or property by reason of renunciation of religion, or expulsion from caste, but it does not give any person rights be never possessed under Hindu or Mahomedan Law.

Khunni Lal *vs.* Gobind Krishna 38. I. A. 87; 33, A. 356 referred to.

JUDGMENT.

RIGG, J.—The preliminary issue for decision in this case is whether Burmese Buddhists are entitled to share in the estate of a Mahomedan deceased. The plaintiff claims to be the sister of the deceased. She is a pure Burman by birth and professes to have adopted the Mahomedan faith. The first five defendants are her mother, and her sisters, and brothers who are Burmese Buddhists. It is admitted that according to Mahomedan Law these five persons are not entitled to inherit any portion of the estate of the deceased by reason of their religious disability. The only point argued at the bar is whether that disability has been removed by the provisions of Act No. XXI of 1850. Mr. Chari argues that as sisters and brothers of the deceased the defendants would be entitled to inherit were it not for their religious disability. Section 9 of Regulation VII of 1832, of the Bengal Code, provides that "Whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu, and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled." The principle of this enactment was extended throughout the territories subject to the Government of the East India Company by Act XXI of 1850 by which it was enacted as follows:—"So much of any law or usage now in force as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the courts of the East India Company." Mr. Chari contends that it never could have been

the intention of government to curtail the principle of section 9 of Regulation VII, when Act XXI of 1850 was enacted. I am of opinion that this contention cannot be sustained. As explained by the preamble, the object of Act XXI of 1850 is not to confer on any party or parties a status which they would not have had by Hindu or Mahomedan law, but to prevent a party or parties from being deprived of any property which but for the operation of such laws they would be entitled to receive. The Act in my judgment relates to cases of perverts or converts or persons who are degraded by reason of their apostacy. The defendants would only be entitled to a share as sisters because they originally came under the Mahomedan law and professed the Mahomedan religion, and not merely because they stood in a certain relationship to the person whose property they claim a right to inherit. Mr. Chari has been unable to quote a single case in which a person, who has never been a Mahomedan or Hindu, or who cannot claim through a Mahomedan or Hindu has been held entitled to succeed in inheriting as a Hindu or Mahomedan. The scope of Act XXI of 1850 is clearly defined by their Lordships of the Privy Council in Khunni Lal *vs.* Gobind Krishna Narain (1). Their Lordships say, "The intention in both enactments is perfectly clear; by declaring that the Hindu or Mahomedan Law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the legislature virtually set aside the provisions of Hindu law which penalize renunciation of religion or exclusion from caste." Mr. Chari's claim on behalf of the Burmese Buddhists sisters fails because he is unable to show that they ever had any right to succeed otherwise than as Mahomedans. I decide the first issue fixed in the negative.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 86 OF 1919.

MAUNG DAW NA .. .. .. APPELLANT.

vs.

MA KAYA and one .. .. .. RESPONDENTS.

Before Mr. Justice Maung Kin.

For appellant—Mr. Ray.
For respondant—Mr. Chari.

17th January, 1921.

Limitation Act (IX of 1908) s 5 extension of time, sufficient cause—s. 14 exclusion of time taken in applying for review.

(1) 38, I. A. 87; 33 A. 356.

The fact that an application was made for review of judgment is not sufficient cause for admitting an appeal after time, unless the application for review was made on good grounds, and was presented and prosecuted with due diligence.

JUDGMENT.

MAUNG KIN, J.—This is an appeal from an appellate decree of the district court of Henzada. The objection has been taken that it is barred by limitation. The appellant claims to be entitled to claim the time taken by the district court in disposing of his application for review of the court's appellate judgment. If such time is deducted, then this appeal is within time.

The appellate court passed a decree in favour of the plaintiff respondents. The application for review which was filed 68 days after the passing of the appellate decree was on grounds which were merely grounds of appeal. The district court summarily rejected the application. In my opinion the summary rejection of the application was correct. The grounds of the application were not grounds for review. Further the application was not presented with due diligence, inasmuch as it was presented 68 days after the passing of the decree.

In Maung Po Lu vs. Maung Kyin (1) it was held by Irwin J. that the fact that an application for review has been made is not sufficient cause for admitting an appeal after time, if the application for review was not made on reasonable grounds. In Gobinda Lal Das *vs.* Shiba Das Chatterjee (2) Mookerjee J. dealt with most of the cases cited by Irwin J. and with some other other cases. On the facts of the case he came to the following findings: (1) that the application for review was presented with due diligence, (2) that it was prosecuted with due diligence, (3) that it would have been heard, and disposed of within the time allowed for the appeal from the decree sought to be reviewed but for the fault of the judge, (4) that the grounds on which the review was asked were neither frivolous nor vexatious, but *prima facie* proper and reasonable, and (5) that the appeal from the decree was presented with due promptitude. On these facts he held that it would be a proper exercise of judicial discretion to allow the appeal to be admitted. Both Mookerjee, J. and Irwin, J. cited with approval the Punjab case Karm Baksh *vs.* Daulat Ram (3). In the Privy Council case of Brij Indar Singh *vs.* Kanshi Ram (4) their lordships adopted the general rule laid down in the Punjab case for the exercise of the court's discretion in deciding what may be "sufficient cause" within the meaning of section 5 of the Limitation Act. The general rule laid down in the Punjab case is as follows:—"The true guide is whether the appellant has acted with reasonable diligence in the prosecution

(1) 1, L. B. R. 313.
(2) 33, C. 1323.
(3) P. R. 1888 No. 183.
(4) 44, I. A. 218; 42. I. C. 43.
(5) 19, C. W. N. 1113.

of his appeal. He ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence, a proper application for review of judgment, the period between the date of the decree appealed from, and the date of presenting the appeal does not exceed the period prescribed for preferring an appeal. "It is clear that the application for review must have been a proper one, and it must have been prosecuted with due diligence. In Sudhakar Raut *vs.* Sadasiv Jhatap Singh (5) it was held by Holmwood and Walmsley J. J. that the time taken by the appellant in an infructuous application for review will not be excluded, if the grounds of review were only grounds of appeal.

In my judgment this point is concluded by authority. The appellant having filed an application for review on totally insufficient grounds, the time taken by such an application for review cannot be excluded. It would be an improper exercise of the court's jurisdiction to admit the appeal. It is therefore dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 83 OF 1919.

HAN SU .. .. .. APPELLANT.

vs.

A. T. K. P. L. M. CHETTY .. .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

For appellant—Mr. Ba U.
For respondent—Mr. A. B. Banerji.

17th January, 1921.

Transfer of Property Act (IV of 1882) s. 91 (f) who may sue for redemption, rights of attaching creditor.

Under section 91 (f) of the Transfer of Property Act, an attaching creditor is entitled to redeem the attached property, but he has no lien or charge on the property under attachment, as against a purchaser of the property at a sale under a mortgage decree to which he was not a party.

JUDGMENT.

MAUNG KIN, J.—The plaintiff respondent obtained a money decree against Ma Myo and Ma Chit and in due course applied for sale of the property in suit in execution. The defendant appellant claimed to hold a mortgage on the property from Ma Nyo and Ma Chit and applied to the court to have the property sold subject to the mortgage. The court held an enquiry and rejected the application on the ground that the mortgage was not proved to be *bonafide*. About

a month later the defendant filed a suit on his mortgage against Ma Myo and Ma Chit in another court, and obtained a preliminary mortgage decree. In the meantime the plaintiff had proceeded with the execution case, and had bought in the property himself. Just before the sale the defendant asked that the property be sold subject to his mortgage decree. The application was not granted, but by consent the bailiff was instructed to mention at the sale that there was a mortgage decree upon the property, and that the plaintiff in execution of whose decree the property was sold, was not a party to the mortgage suit. After his purchase the plaintiff was put in possession of the property. The defendant took steps to have the mortgaged property sold under his mortgage decree. The sale of the property had however to be postponed in consequence of the present suit.

The plaintiff claims that by his purchase he obtained a good title to the property, and that the defendant was not entitled to interfere with his rights. Both the lower courts passed a decree in favour of the plaintiff.

The lower appellate court held that the plaintiff was a necessary party to the defendant's mortgage suit so long as plaintiff's attachment continued, and that he was entitled to redeem the mortgage, and on the authority of Ghulam Husain *vs.* Dina Nath (1) it held that the defendant's decree should not operate to defeat the right of redemption of persons other than the actual parties to the mortgage suit, and that the attachment created a charge in favour of the attaching creditor, and that such charge enured in favour of the purchaser. It therefore held that the plaintiff's possession should not be disturbed as he had become owner by purchase at the judicial sale. It accordingly dismissed the appeal. On reference to the case cited I do not find the learned judges Banerji and Nelson J. J. holding that in a case like the present the attaching creditor had a charge on the attached property. Banerji, J. cites Suraj Bunsi Koer *vs.* Sheo Pershad Singh (2) where on the facts of the case a charge was held to be created in favour of the attaching creditor, but that was a very different case from the present. What was held by Banerji, J. was that an auction purchaser was entitled to a decree for possession on redeeming the mortgage. This is quite clear from the following passage (at page 471) in his judgment:— "Therefore the plaintiff in this case acquired by his purchase the right which Kali had to redeem the respondents' mortgage on the date on which the property was attached, and that right still subsists in the plaintiff. In this view the decree for redemption passed in favour of the plaintiff by the court of first instance was a right decree." In Titali Venkata *vs.* Vedvla Venkataramayya (3) Sundara Ayyar and Ayling J. J. held to the same effect relying on the Allahabad case above cited. These two cases decide that a private alienation by the mortgagor after the attachment would be invalid as against the attaching creditor. Section 85 of the Transfer

(1) 23, A. 467.
(2) 5, C. 148.
(3) 37, M. 418.

of Property Act requires all parties interested in the property to be made parties to the suit for sale on a mortgage. Section 91 recognizes an attaching creditor as one who has by virtue of his interest in the property a right to redeem the property. A decree for sale in a suit to which he was not a party is not binding on him. He is therefore entitled to bring the attached property to sale under his attachment, but if the mortgage is valid, and prior to his attachment, he must redeem the mortgage if he wishes to have the property.

It will be seen that the present is a different case from those two cases. Here the purchaser at a sale claims to have a charge on the property, and to have the right to keep the property unaffected by any rights the mortgagee may have under his decree. The plaintiff in this suit, the auction purchaser does not ask to be allowed to redeem the mortgage. All he says is that the attaching court refused to order a sale subject to the mortgage, and we are concerned only with the case as presented by him.

In Shananda Chandra Pal *vs.* Sri Nath Ray (4) Holmwood and Chapman, J. J. held that although the attaching creditor is entitled to redeem a mortgage under section 91 of the Transfer of Property Act, he has no interest in the mortgaged property, and a purchaser at the sale in pursuance of the attachment has no right to redeem the purchaser at the sale under the mortgage decree or to resist his possession of the property. On the authority of Frederick Peacock *vs.* Madan Gopal (5) decided by a full bench, and of the Privy Council of Motilal *vs.* Karrabuldin (6) the learned judges held that the attachment only prevents alienation, but does not confer any title, and that the attaching creditor does not by his attachment obtain a lien or charge on the attached property, and therefore *a fortiori* he cannot hand any such charge to the purchaser at auction. The learned judges pointed out that this distinction did not appear to have been put before the learned judges of the Allahabad High Court in Ghulam Husain *vs.* Dina Nath (1), but as stated above, I do not think that the learned judges of the Allahabad High Court decided that the attaching creditor had any charge on the attached property by virtue of the attachment. The Calcutta case emphasizes the fact that the purchaser at the sale in pursuance of the attachment would not be entitled to have the property without any interference on the part of the mortgagee decree holder or the purchaser at the sale under the mortgage decree merely because the attaching creditor who should have been a party to the mortgage suit was not made a party.

For the above reasons the plaintiff's suit must be dismissed, and this appeal allowed with costs throughout.

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(4) 17, C. W. N. 871.
(5) 29, C. 428.
(6) 24, I. A. 170; 25, C. 179.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR No. 109 OF 1920.

M. HAROON .. .. PLAINTIFF.

vs.

M. EBRAHIM .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. Das.
For defendent—Mr. McDonnell.

26th July, 1920.

Barrister, authority to bind client by compromise or consent.

Barristers practising in Indian courts do so, not because they are members of the bar, but because they are entitled under rules for the admission of advocates of the court, and are subject to the same liabilities as other advocates of the court.

A barrister practising in Burma cannot bind his client by a compromise made, or consent given without the client's express authority.

JUDGMENT.

RIGG, J.—At the hearing I stated that I would probably refer the question argued at the bar for the decision of a bench of this court, but after looking into the decided cases I think this course is not necessary. The facts are not disputed. The suit of the plaintiff was one for possession under section 9 of the Specific Relief Act. After the evidence for the plaintiff had been taken, I indicated to Mr. Burjorji counsel for defendant, that I did not desire to hear him unless I was convinced by Mr. Das that he could maintain the suit. Mr. Das in the course of his address argued that his client was entitled to joint possession, to which Mr. Burjorji objected that the suit had been brought under the Specific Relief Act. There apparently had been a partnership between the parties, but they had quarrelled. Finally after some discussion, Mr. Burjorji said that he would consent to a decree for joint possession, if his client was given the costs of the suit, and Mr. Das agreed to this proposal. Before the decree was drawn up Mr. Burjorji's client objected to the compromise on the ground that it was drawn up against his instructions, and without his consent. In the written statement, defendant denied that the plaintiff had any right of occupancy of the premises in dispute, and that plaintiff's rights were subject to his permission. Mr. Burjorji admits that he made a mistake in agreeing to a decree for joint possession, and says that he did not realise at the time that such a compromise was not to his client's interest. He states that his client was not in court when the case was compromised, and that he acted without instructions. The question at issue is whether Mr. Burjorji's

consent binds his client. The position of advocates practising in this court differs in many respects from that of counsel in England. It has been fully discussed in the Full Bench case of A. P. Pennell *vs.* J. A. Harrison (1). Not only are barristers enrolled as advocates of the court, if they comply with certain conditions, but pleaders of the first grade may appear. Advocates often join together as "firms," the members of which may be barristers, or barristers, and, solicitors, or vakils or pleaders. Advocates also perform the duties of solicitors, and solicitors may plead in court. Mr. Pennell claimed the right to sue for fees though he was a barrister, and his right to do so was affirmed. Sir Charles Fox said "*Prima facie* there appears to be no strong reason why one advocate should be under a disability not shared by a fellow advocate. It appears to me that when a barrister comes to this country, he elects to do such work as any other advocate of the court may do, and he undertakes the same liabilities as other advocates are subject to, and he also acquires the same rights as other advocates have." Briefly put the argument proceeded on the ground that persons who practised in the Chief Court did so, not because they were members of the English, Scotish, or Irish bar, but because they were entitled under the rules for admission of advocates of the court, and the court would not recognize any difference between the status and privilegs of one class from those of another. Logically it follows that if barristers are permitted to compromise cases without special instructions or authority, first grade pleaders may also do so. In Jagapati Mudaliar *vs.* Ekambara Mudaliar (2) it was stated that in Madras it has always been understood that a vakil has no implied authority to enter into a compromise on behalf of his client without express authority to do so, and the same rule has been adopted here in the case of pleaders. But the judgment points out that the English rule has given rise to much litigation, and that many of the American courts administering English common law have declined to follow that rule. The American case referred to in the judgment is not to be found in the court library. Mr. McDonnell states that the American system of advocates is very similar to that prevailing in Burma, but I have no means of verifying the correctness of his assertion. Thenal Ammal *vs.* Sokkammal (3) is another case dealing with the powers of vakils to compromise suits. The learned judges referred to the decision in Jagapati's case (2), and said they were inclined to agree that the English practice by which counsel and solicitor are endowed with extensive powers to enter into a compromise should not be imported into India. Mr. Das says that both the Madras cases were decided on the ground that the vakalatnama did not confer upon the vakil the power to compromise the case. The remarks referred to are *obiter*, but they show that two benches of the Madras High Court doubted the advisability of importing the English rule here. A first grade pleader must file his authority to compromise a case, such authority is not regarded as inherent in him. But if he is regarded, *qua* advocate of this court, as being on a similar footing with the

(1) 4, L. B. R. 55, at p. 59.
(2) 21, M. 274.
(3) 41, M. 233.

barrister, is there any reason why he should suffer under any disability to compromise a case without special authority to do so? But I do not think it necessary to decide this question, as I am of opinion that I ought not to uphold the compromise in this case. In Swinfen *vs.* Lord Chelmsford (4) and in Kempshall *vs.* Holland (5) the judges held that although counsel had a general authority to compromise, that power did not extend to collateral matters. As Mr. Justice Blackburn pointed out in Strauss *vs.* Francis (6) this power is regarded as inherent, because counsel is ordinarily retained to conduct a case without any limitation to his power. This rule laid down in these cases was adopted in Nundo Lal Bose *vs.* Nistarini Dasi (7). The conditions prevailing in Calcutta are very different from those in Rangoon. But this is not the only limitation to counsel's power to compromise that has been recognized in Calcutta. In Carrison *vs.* Rodrigues (8) a single judge sitting on the original side held that where counsel after consulting with his attorney and client, compromised the case against the express prohibition of his client, the consent decree must be set aside. In Holt *vs.* Jesse (9) Malins V. C. said "I beg to express my opinion which I believe is in conformity with all the cases that have been cited, that if it shall turn out that by inadvertence of counsel, by the careless consent of plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time * * * * * * that is beyond his authority, and nothing could be more reasonable than that his client should not be bound by such consent inadvertently given." A similar view was taken in Harvey *vs.* Croydon Union Rural Sanitary authority (10). In Neale *vs.* Gordon Lennox (11) the facts were that the plaintiff brought an action for libel against her aunt. She agreed that the action should be referred to an arbitrator on certain terms, but only on condition that all imputations on her character were publicly disclaimed in open court. Her counsel who did not make this limitation of his authority known to the defendant's counsel, agreed to refer the action without any disclaimer of imputations. Their lordships held that as counsel had exceeded his authority, plaintiff was entitled to have the reference set aside. Halsbury, L. C. said. "The court is asked for its assistance when this order is asked to be made and enforced, that the trial of the cause should not go on; and to suggest to me that a court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is to my mind the most extraordinary proposition ever made. * * * * * To tell me that the person whose character is attacked is to be deprived by this unauthorized act of the opportunity of vindicating her character in public seems so gross an injustice, that upon the general jurisdic-

(4) 157, E. R. 1436.
(5) 14, R. 366. C. A.
(6) L. R. I. Q. B. 379.
(7) 27, C. 428.
(8) 13. C. 115.
(9) 3, Ch. D. 177 at p 182.
(10) 26 Ch. D. 249.
(11) 1902 A. C. 465 at pp 469 and 472.

tion that every court has over its own procedure, this court ought to refuse to allow the injustice to be committed." Lord Macnaghten concurred and said "I do not think that the court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement that counsel may make, when the arrangement is not in its opinion a proper one." In Halsbury's Laws of England it is said that in some cases where the matter is within the ordinary power of counsel, the courts have refused to enquire whether there was any limitation to their authority when it was not communicated to the other side, but that the true rule seems to be that the court has power to interfere; that it is not prevented from setting side or refusing to enforce a compromise, and that the matter is one for the discretion of the court, and that when grave injustice may be done by allowing the compromise to stand, the compromise may be set aside. (Vol II paragraph 668.)

Mr. Das argued that the question was one of principal and agent, but that is what Lord Lindley in Neale's case (11) declared to have been the erroneous view of the Court of Appeal. The order made by me was made under the impression that the parties who had been partners were consenting to it. It may be said that this case is distinguished from Neale's case (11), because counsel in that case disobeyed instructions, but the decision of the learned judges proceeded on the ground that a court has a general jurisdiction over its own procedure, and will not give its sanction to an arrangement it would not have made if it had known all the facts. To lay down the rule in Burma that a court will not consider the propriety of a compromise made by counsel who has exceeded his instructions would be disastrous. Mr. Burjorji has reconsidered his consent, and finds that it will injure his client. In these circumstances, I have no hesitation in setting aside the arrangement made by him. His client must pay the costs,—two gold mohurs. Notice will issue to Mr. Das and to Mr. Burjorji for the further hearing of the suit.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS No. 448 OF 1920.

BURMA OIL COMPANY, LTD. .. .. .. PLAINTIFF.

vs.

SAMPSON and one .. .. DEFENDANT.

Before Mr. Justice Rigg.

For plaintiff—Mr. McDonnell.
For defendants—Mr. Giles.

14th September, 1920.

Specific Relief Act (I of 1387) s. 57. Injunction to perform negative agreement. Contract for personal service—Injunction against third party.

Civil Procedure Code (Act V of 1908) O. XXXIX r. 3. Exparte injunction without notice to opposite side.

Where a contract for personal service comprises an express or implied negative agreement, not to serve another firm during the continuance of the contract, the court can issue an injunction to perform the negative agreement. In such a case the court may also issue an injunction against a third party restraining them from employing him.

If the object of granting the injunction is likely to be defeated by delay, the court may grant an exparte injunction without notice to the opposite party.

JUDGMENT.

RIGG, J.—The Burma Oil Company apply for an interlocutory injunction to restrain S. C. Sampson from entering into the service of the Indo-Burma Oil Company in contravention of his contract of service with the petitioners, and to restrain the respondent company from employing him. By an agreement dated 28th February, 1918 Sampson contracted to serve the petitioners for a period of three years, subject to the following conditions relevant to the present case (1) that he shall not directly or indirectly, or in any way whatsoever give service, information or advice, or in any way become connected with any other firm in Burma, (2) that he shall not acquire or seek to acquire any mining, or other property, or right, for, or on behalf of himself, or any other person, company or companies in Burma, (3) in the event of a breach of his obligations, he agreed to pay to the company a sum of £ 300. Petitioners state that on the 30th January 1920, Sampson tendered his resignation which they refused to accept, and on 7th February, the defendant company published a prospectus stating that he has been engaged to develop their Yenangyaung properties. The defendant company was informed that Sampson was still in the employ of the Burma Oil Company, but refused to dispense with his services. These allegations were supported by an affidavit sworn by Mr. Corfield, a partner in Messrs. Finlay Fleming and Company. The defendant company took exception to the jurisdiction of this court on the ground that Sampson was in America, and that the leave granted by the deputy registrar for joinder of defendants under section 20 (b) of the Civil Procedure Code was given without notice to either defendant, and ought to be revoked. An affidavit was filed by the local manager of the defendant company in which it was stated that Sampson was in America, and that it was untrue that he was employed in Burma, and that his work must be in Burma. The defendant further said that he did not know how Sampson came to leave the service of the Burma Oil Company. There can be no doubt from the prospectus of the Indo-Burma Oilfields Company that it is the intention of that company to employ Sampson in the development of their Yenangyaung property,

and the advantages the company expect to obtain from such employment are clearly stated in a letter dated 6th July 1920 from the company's secretary to the shareholders. This expression of their intention is a sufficient foundation for an application for injunction as there is a threatened violation by the defendant company of the exclusive right claimed to Mr. Sampson's services by the plaintiffs. XXXIX rule 2 is as follows:—In any suit for restraining the defendant from committing a breach of contract, or other injury of any kind,.....the plaintiff may at any time after the commencement of the suit apply to the court for temporary injunction, etc. Rule 3 provides that in all cases, except where it appears that the object of granting an injunction would be defeated by the delay, the court shall direct notice of the application to be granted to the opposite party. This rule confers upon a court the power to issue an *ex parte* injunction but only if the delay would defeat its object, if it was not granted. See Hari *vs.* secretary of state for India (1). In the present case the *exparte* injuction against Sampson is asked for on the ground that it is the declared intention of the defendant company to commence proceedings in the early autumn of this year, (see the secretary's letter of the 6th July) and the vacation of this court extends until the middle of November. This is in my opinion sufficient reason for proceeding with the application, as Sampson is not in Burma, and may arrive during the vacation of the court. Mr. Giles urges that the leave of the court to sue Sampson in Rangoon should not have been granted, and that in any case notice should have issued to Sampson. It is said that if Sampson is employed in Burma, his work will be in Yenangyaung which is within the jurisdiction of the courts of Upper Burma. The ordinary rule of law is that where a suit may be filed in more than one court, the plaintiff may select the forum in which to bring the suit. Section 20 does not require notice to issue to the other defendants interested in the litigation, who do not reside or carry on business within the local limits of the court granting leave, whereas section 22 does require notice where a defendant applies for a transfer of a suit to another court, where more than one court has jurisdiction. Such transfers are usually granted on the ground of expense, and inconvenience. The defendant company's offices are in Rangoon, and there is no reason to suppose that the parties will be put to expense and inconvenience by reason of the trial being held at Rangoon. It was obviously impossible to serve Sampson with notice of the application for leave to sue him here. Further, if an injunction is issued against the defendant company to restrain them from employing Sampson, that injunction can be enforced under Order XXXIX rule 2 (3) by attachment of the property of the company, and could therefore not be a *brutum fulmen*. The question arises whether an injunction can be made against the defendant company. Rule 2 provides for restraining defendants that commit an injury of any kind, and I think it is clear that if Sampson is still the servant of the plaintiff company, and the defendants propose to employ him, they are com-

(1) 27, B. 424 at p. 451.

mitting an injury. There is precedent for issuing injunctions in these cases against third parties. In Stiff *vs.* Cassel (2) an injunction was issued to restrain a firm of publishers from employing an author who had contracted to write for another publisher only. In Donnell *vs.* Bennett (3) a fishcurer contracted to sell all his fish to Donnell, and to no other person, but broke his contract, and sold the fish to Bennett. The court granted an injunction against both parties. These cases are authority for the issue of an injunction restraining both parties committing an injury. The issue of such an injunction as that now prayed for is clearly provided for in section 57 of the Specific Relief Act, and illustration (d) is expressly in point. The High Courts of Calcutta and Madras have ruled this. See Burn and Company *vs.* McDonald (4) and Madras Railway Co., *vs.* T. Rust (5) and Subba Naidu *vs.* Haji Badsha Sahib (6). In Charlesworth *vs.* MacDonald (7) in which the cause of action arose in Zanzibar, and which was decided according to English Law, the High Court restrained an assistant who had contracted to serve a physician for three years, from setting up in practice on his own account. I do not think any useful purpose would be served by discussing the various English cases cited, when it seems to me that the law in India has been settled by legislative enactment. But even in England an injunction has been issued to restrain a confidential clerk from leaving his employers during the period of his employment, and serving another firm engaged in similar employment. See William Robinson and Company Limited *vs.* Heuer (8). In that case as in the present one, the company refused to accept the employee's resignation. I think the plaintiff company has shown sufficient ground to justify the issue of an interim injunction against both defendants. There will be an interim injunction against Sampson to restrain him from carrying on or being engaged in any business of the defendant company relating to their property in oil in Burma, and against the defendant firm from employing him until the suit of the plaintiffs has been disposed of. Costs will follow the final result. The hearing of the case should be expedited.

IN THE CHIEF COURT OF LOWER BURMA.

INSOLVENCY CASE No. 91 OF 1920.

In re. MOOLLA DAWOOD AND SONS COMPANY INSOLVENTS.

On the petition of J. AND F. GRAHAM AND COMPANY

Before Mr. Justice Rigg.

For petitioning creditor—Mr. McDonnell.
For debtor—Mr. Giles.

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(2) 106, R. R. 943.
(3) 22, Ch. D. 835.
(4) 36, C. 354.
(5) 14, M. 18.
(6) 26, M. 168.
(7) 23, B. 103.
(8) 1898, 2. Ch. D. 451.

20th July 1920.

Presidency Towns Insolvency Act (III of 1909) s. 94. Power to stay proceedings, sufficient reason, pendency of appeal from judgment.

When a petitioning creditor's debt is founded on a judgment, the pendency of an appeal from the judgment would, if the appeal is bona fide, be a sufficient reason for staying proceedings on an insolvency petition under section 94 of Presidency Towns Insolvency Act.

ORDER.

RIGG, J.—This is an application by J. and F. Graham and Co. for the adjudication of Mulla Dawood and Co. as insolvents. In Civil Regular No. 21 of 1915 the petitioner obtained a decree against Moolla Dawood and Co. for more than thirty four lakhs. The act of insolvency on the part of the judgment debtors is admitted. The questions argued at the bar are (1) whether the court has power to stay proceedings on terms, because an appeal has been filed, and (2) if it has such power whether it should exercise it in favour of the insolvents.

Mr. McDonnell argues that there is no provision in section 13 of the Presidency Towns Insolvency Act that corresponds with section 7 (4) of 46 and 47 Victoria cap 52, and asks me to infer from the omission that the Indian legislature deliberately refrained from conferring on courts in this country power to dismiss or stay a petition by a creditor on the ground that an appeal has been filed. Clause 4 of section 7 refers to acts of bankruptcy resulting from failure to comply with a bankruptcy notice, and such notices are unknown in India. They are specially provided for in clause (g) of section 4 of the English Act, but find no place in section 9 of the Indian Act. This sufficiently explains the omission. Mr. McDonnell further argues that section 13 (4) (b) was not intended to cover the case of a court staying an adjudication order because an appeal is pending. That clause is as follows:—"If the debtor appears and satisfies the court that he is able to pay his debts, or that he has not committed an act of insolvency, or that for other sufficient cause no order ought to be made" the court shall dismiss the petition. In *exparte* Lennox (1) it was held that if it is proved that a decree obtained by a creditor with his debtor's consent was a collusive decree, that would be sufficient cause for the court to exercise its discretion. Other instances of sufficient cause are that the proceedings are being used for purposes of extortion, or improper pressure, or are vexatious or oppressive, or constitute an abuse of the process of the court, or that the proceedings would be useless and adjudication a vain thing. See Baldwin's Law of Bankruptcy 10th edition page 155.

It has been urged that the present proceedings are launched solely in order to prejudice the appeal. The creditors deny this, and the

(1) 16, Q. B. D. 315.

affidavits filed do not afford sufficient grounds for coming to a firm conclusion that the proceedings are merely oppressive. Section 94 of the Act does however provide that the court may at any time for sufficient reason make an order staying the proceedings under an insolvency petition, either altogether or for a limited time, on such terms and subject to such conditions as the court thinks just. The powers thus given are very wide, and I have no doubt that a discretion is conferred on the court to stay proceedings for good reasons if an appeal is pending. In *exparte* Heyworth (2) Baggalay L. J. said that it had always been the practice that when a petitioning creditor's debt was founded on a judgment and an appeal was pending, it was a matter for the discretion of the registrar whether he would at once adjudicate the debtor a bankrupt, or stay the proceedings. He laid down that the essential matter to be considered was whether the appeal was a bona fide one or not, and whether it was possible that at the hearing the debt might be got rid of altogether. Bowen L. J. said that as long as the registrar might reasonably have come to the conclusion that there was a reasonable ground of appeal, it would be monstrous to make a receiving order when the appeal was pending. A similar rule was laid down in *In re* Flatau (3) in which Lord Esher said that when an appeal against a judgment had been lodged, the registrar must take into consideration the circumstances of the case, and say whether in the particular case the lodging of the appeal calls upon him to postpone the hearing of the petition. This discretion is to be exercised judicially. A court of bankruptcy may in certain circumstances go behind a judgment, when it has been obtained by fraud, collusion or mistake, but that does not bind a court to rehear the case as a matter of course. In the present case the trial lasted for nearly five years, and the arguments before my brother Robinson for many days. Graham and Company were agents for shipping rice on Moolla Dawood and Company's account. When they were called to account by Moolla Dawood, and a claim was made against them for twenty five lakhs, Grahams filed a counterclaim for a much larger sum. Graham and Company's books had been falsified, and they relied on accounts compiled by a chartered accountant from the original vouchers, and bills. I think I am correct in saying that Graham and Company admitted that even some of these, may be, did not represent the real transactions between the parties, as for example, a sum was shown as advanced against rice, when no rice was shipped. I do not propose as a judge sitting in an insolvency proceeding to go behind the judgment of Robinson J. It is sufficient to say that in my opinion the case which was a very complicated one, is certainly a case where there should be no interference with the right of appeal. I stay the proceedings, with leave to appeal, and will hear consel as to what terms and conditions should be imposed.

After hearing counsel the following order was passed:—

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(2) 14, Q. B. D. 49.

(3) 22, Q. B. D. 83 at p. 85.

RIGG, J.—The parties have agreed that the terms imposed shall be that Moolla Dawood and Sons mortgage any assets they have in favour of the Chief Judge of this court to secure the carrying out of any orders that may be passed at a later stage of the proceedings. A fortnight is allowed for drafting the mortgage.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 91 OF 1920.

CHAING NA .. .. .. APPLICANT.

vs.

SHWE OK .. .. RESPONDANT.

Before Mr. Justice Maung Kin.

For applicant—Mr. Chari.
For respondent—Mr. Bomanji.

23rd November, 1920.

Succession Certificate Act (No. VII of 1889) s. 4. Proof of representative title a condition precedent to recovery of debts.

Section 4 of the Succession Certificate Act does not authorize a court to dismiss a suit in the absence of proof of representative title in the plaintiff, but it prohibits the court from passing a decree except on production of such proof. A court should therefore allow plaintiff a reasonable time to obtain the necessary proof.

Maung Po Kyi *vs.* Ma Nyein II. U. B. R. 1892-96, 638 followed.

JUDGMENT.

MAUNG KIN, J.—The petitioner sued the defendant on a promissory note. In his amended plaint (paragraph 5) he states that Kyu Shein whose name appears along with his on the promissory note was a minor son of his who had no beneficial interest in the promissory note, but that his name was entered simply as a matter of convenience. Kyu Shein died before the suit.

The parties were heard on the only issue, whether the defendant executed the promissory note, and borrowed the money. At the end of the argument the defendant's pleader raised a point which had never been heard of in the suit, viz whether the plaintiff could get a decree on the promissory note without bringing on the record the legal representatives of his deceased son. The trial court held that as Kyu Shein had no interest in the promissory note, there was no necessity for having his legal representative on the record, and passed a decree in favour of the plaintiff. On appeal to the district court the defendant succeeded on the point above noted.

Section 4 of the Succession Certificate Act says "No court shall pass a decree against the debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or to any part thereof.....except on the production by the person so claiming a succession certificate" or other authority mentioned in the section. In Ma Sein Nyo *vs.* Ma Mai Tu (1) Mr. Justice Fox held that a court cannot pass a decree, provisional or otherwise, against a debtor of a deceased person for payment of the debt to any person who does not hold a probate, or letters of administration or a succession certificate. A ruling of the Judicial Commissioner of Lower Burma was cited in support of the provisional decree, and Fox, J. said "I respectfully decline to follow the ruling above quoted so far as it authorizes a provisional decree being passed contingent on the production of letters of administration or a certificate under the Succession Certificate Act, within a future period," and he set aside the decree. In the case before me there is no such decree. The point is what the lower appellate court should have done after holding that the production of a succession certificate was necessary. I think the lower appellate court should have given the plaintiff an opportunity of producing a certificate within a specified time. I do not think it is permissible to a court to dismiss a suit in the absence of a succession certificate or other authority mentioned in section 4 of the Succession Certificate Act. In C. A. M. Chetty *vs.* Maung Po Yan (2) before Twomey, J. the question was whether the plaintiff could get a decree on the joint claim of himself and his wife who had died, without bringing her legal representatives on the record, or producing a succession certificate. Twomey, J. held that such a decree could not be passed, but observed "seeing that this objection to the claim was not taken in the court of first instance I think the suit should not have been dismissed, but the plaintiff should have been granted a reasonable time to obtain a succession certificate." As pointed out in Po Kyi *vs.* Ma Nyein (3) "section 4 of the Succession Certificate Act does not bar a suit but only prohibits the granting of a decree in the absence of a certificate or other authority as mentioned in the section." Thus it is clear that the lower appellate court should have given the plaintiff an opportunity of getting one or other of the authorities mentioned in the Succession Certificate Act. But I do not think it is really necessary to decide whether the requirements of the Succession Certificate Act should have been complied with in this case to enable the plaintiff to get the decree. The defendant should have raised the defence in his written statement that there being two payees, one of whom was dead, the living payee could not bring a suit without complying with the provisions of the Succession Certificate Act, and he should have put plaintiff to strict proof of his allegation in paragraph 5 of the amended plaint. Having done neither of these two things he must, in my opinion, be taken to have waived the point, and it has never been argued, that if Kyu Shein had no interest in the promissory note, it would still be neces-

(1) 2, L. B. R. 164.
(2) Civil Revision No. 67 of 1913.
(3) U. B. R. 1892—96. 638.

sary to add him or his legal representatives. I think the view of the trial court is correct.

The learned counsel for the respondent urged with repeated emphasis that if there was any error, it was mere error of law, and as such is not subject to revision by this court. I think there was no error of law properly so called, but there was an absence of attention paid to the point which should have struck any court. The learned judge of the lower appellate court, was not aware of the existence of paragraph 5 of the amended plaint at all, because he says that the allegation does not appear anywhere on the record.

The application is allowed, and the decree of the trial court is restored with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL EXECUTION No. 210 OF 1920.

S. R. M. M. C. T. CHETTY .. .. APPLICANT.

vs.

BOWSINGA .. .. .. RESPONDENT.

Before Mr. Justice Rigg.

For applicant—Mr. Rutledge and Mr. Das.
For respondent—Mr. Giles.

8th September, 1920.

Civil Procedure Code (Act V of 1908) s. 38. Court by which decree may be executed, concurrent execution in two courts. O. XXI, r. 26. When court may stay execution.

A decree may be executed in two or more courts, but if simultaneous execution in two courts is likely to result in hardship to the judgment debtor, the court to which the decree has been sent for execution may stay execution under Order XXI, rule 26.

Saroda Prosaud *vs.* Lutchmeeput Singh 14 Moore, I. A. 529 followed.

JUDGMENT.

RIGG, J.—The S. R. M. M. C. T. Chetty firm obtained a decree in Civil Regular suit No. 310 of 1915 against the respondent for Rs. 22,500/- with interest at 6 per cent per annum. On the 27th December 1917, Rs. 2,000/- were paid towards satisfaction of the decree. In June 1919 the decree was transferred to the High Court at Calcutta for execution with the usual certificate and no steps were

taken to execute that decree. On the 25th August 1920, an application was made to this court for execution of the decree by arrest of the judgment debtor, and a further application was made for the attachment and sale of certain properties. In Civil Execution case No. 340 of 1920 Sir Charles Fox in passing orders on an application for execution said "the decree having been sent to another court for execution, it is not in my opinion open for this court to make an order for execution until this decree is returned." The deputy registrar has referred the question of whether the application for execution in Civil Execution Case No. 210 of 1920 can be proceeded with in view of the order of Sir Charles Fox. The applicants contend that the order was passed without the point being argued and is contrary to the decision of the Privy Council in Saroda Prosaud Mullick *vs.* Lutchmeeput Singh Doogur (1) and is not therefore binding on me. It is doubtful whether the order of a single judge on the appellate side is binding on a judge sitting on the original side of this court, as appeals from such decisions lie to a bench of two judges. It is unnecessary to decide this point if the ruling of their lordships applies to execution proceedings under the civil procedure code of 1908, as all courts in India are bound by relevant rulings of the judical committee. In the case cited, which was decided under the Code of 1859, their lordships held that there was nothing in the provisions of that Code to prevent a decree being executed simultaneously in two or more districts. The only other case dealing with the point under reference is, so far as I know, that of Krishto Kishore Dutt *vs.* Rooplall Dass (2) in which the ruling of the privy council was held to be decisive on the question under discussion, and was stated to be in accordance with several decisions of the court. This case was decided under the Code of 1877, and the Code of 1882 made no difference in the procedure, and in Calcutta the practice of allowing simultaneous executions to proceed was followed, subject, of course, to the exercise of the judicial discretion of the court. The objection to the simultaneous execution of a decree in two courts is that the judgment debtor may be harrassed and may suffer injury from unnecessary proceedings. Provision to alleviate any hardship likely to result from simultaneous execution is made in Order XXI rule 26 which enables a judgment debtor to apply to a court to which a decree has been sent for execution to stay its proceedings. It is stated however in a note to section 38 of the code of civil procedure by Messrs. Amir Ali and Woodroffe that although the legality of concurrent execution was recognized, in practice, it was not generally carried out. It is argued that it was intended to abolish concurrent execution, when the present code was introduced, and section 46 is cited as proof of that intention. Section 46 gives the court that has passed the decree power to issue a precept to another court to attach specified property, such attachment to be in force for two months, or any longer period directed by the court issuing the precept. This section merely provides for an interim attachment of property by precept, and such precept could be issued in anticipation of a decree transferred for execution. Order

(1) 14 Moore I. A. 529. (2) 8, C. 687.

XXI rule 5 provides that where a court to which a decree is sent is situate in the same district as the court that passed the decree, a direct transfer of the decree can be made, but in other cases the transfer must be made through the district court. Rule 6 provides the procedure for the transfer of such decrees. It is obvious that the transfer system involves delay, and I do not think section 46 was enacted for any other purpose than to avoid delays and protect decree holders. I am unable to find any thing in the new Code to prohibit concurrent executions. It is a matter for the discretion of the court to direct or to refuse concurrent execution. In the present case the judgment-creditors state that no steps have been taken to execute the decree in Calcutta, and that they will ask for the proceedings there to be closed. In these circumstances there can be no objection to execution of the decree at Rangoon. I make no order as to costs of this reference.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 92 OF 1907.

LUTCHMI AMMAL and one .. .. APPELLANTS.

vs.

NARASAMMA and others .. .. .. RESPONDENT.

Before Sir Charles Fox. Kt., C. J. and Irwin, J.

For appellants—Mr. N. M. Cowasji.
For respondents—Mr. Ormiston.

25th January, 1909.

Administration suit, power of court to decide questions of title to property.

In a suit for the administration of the estate of a deceased person it is not competent to the court to make a declaration as to title to property claimed by parties to the suit adversely to the estate. The proper method of recovering property for the estate would be by regular suit on behalf of the estate in the proper court against the person claiming the property adversely to the estate.

JUDGMENT.

Fox, C. J.—This and the connected appeal No. 93 of 1907 are from an order in an administration suit in which the estate of Mr. R. Narainsawmy Pillay is being administered under the direction of the court. An administration decree was made by consent. Amongst the accounts ordered to be taken was one of the properties both moveable and inmoveable left by the deceased. A commissioner was appointed, it being understood that any question involving rival

claims between the executors and the estate might on the application of either party be referred to this court for decision.

On taking the accounts the commissioner went into the question of whether lands which had been purchased by R. Narainswamy, but the conveyances of which had been made in other persons' names belonged to his estate or not, and reported that they belonged to Narainsawmy and to his estate. Objections were taken to his having gone into questions of title to the lands, and after consideration of the objections an order was made declaring that the lands formed part of and belonged to the estate.

On appeal it is urged that the commissioner should not have gone into the question of whether the lands belonged to the estate, and that the learned judge had no jurisdiction to declare them part of the estate. I do not think the first objection valid. The commissioner had to enquire what the immoveable property consisted of, and if one party alleged that the properties belonged to the estate, and others denied it, it was proper for him to enquire into the matter, and to report to the court the result of his enquiry. The declaration, however, by the court that the disputed lands were part of the estate, appears to me not to have been justified. It is true no doubt that all the parties (except one) claiming the lands adversely to the estate were parties to the suit, but none of the lands were in the possession of the executors as such, or of the receiver, and most of them were outside of the jurisdiction of the court. The proper method of recovering the lands for the estate would appear to be by regular suits, in the proper courts against the persons who claimed, and possessed the lands respectively. Each had a right to have the question of his title to the land he had, dealt with separately, and in due course of law. I would allow the appeal, and would modify the order of the 3rd July 1907, by dividing the schedule into two, one to be for the property about which there is no dispute, and the other to be for the disputed properties. In the declaration as to immoveable property forming part of the estate, the word "First" should be inserted before the word schedule. After the clause containing such declaration a clause as follows should be inserted. "It is further declared that there is ground for believing that the immoveable properties set out in the second schedule hereto form part of the estate of the said R. Narainsawmy Pillay deceased, and that the receiver be at liberty to institute suits to obtain possession of such properties, and any incidental relief in connection with them in such court or courts as may have jurisdiction to entertain such suits." I would direct that the costs of all parties to the appeal be paid by the receiver out of the estate funds in his hands. Ten gold mohurs are allowed as advocates' fees.

Irwin, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 681 OF 1920.

BA SHEIN .. .. APPELLANT.

vs.

KING EMPEROR .. .. RESPONDENT.

Before Mr. Justice Rigg.

For appellant—Mr. Giles and Mr. McDonnell.
For respondent—Mr. Keith.

30th August, 1920.

Evidence Act (I of 1872) s. 92. Exclusion of evidence of oral agreement, promissory note for money advanced, oral agreement to supply paddy.

Penal Code (Act XLV of 1860) ss. 24 and 25 dishonestly, fradulently. s. 417, cheating s. 420 cheating and dishonestly inducing delivery of property.

Section 92 of the Evidence Act applies only to cases where all the terms of a contract have been reduced to the form of a document, and excludes oral evidence to vary the terms.

A promissory note is generally taken as a security for an advance, and does not contain the terms on which the advance was made; and the fact that a payment was secured by a promissory note does not exclude oral evidence of the terms and purpose for which the advance was made.

Po Yon *vs* Mohr Brothers Company 6, L. B. R. 38, and Jadu Rai *vs.* Bhubotaran 17, C. 173 followed.

The word "dishonestly" in section 420 of the Penal Code implies a deliberate intention to cause wrongful gain, or wrongful loss, and when this is coupled with cheating the offence is punishable under section 420 of the Penal Code. The word fraudulently is not used in section 420.

Section 417 covers cases of cheating in which though there is fraud, there is no intention of causing wrongful loss, or wrongful gain.

The word fradulently does not necessarily imply deprivation of property.

JUDGMENT.

RIGG, J.—The appellant Ba Shein has been convicted by the western subdivisional magistrate of Rangoon under section 420 of the Indian Penal Code of having cheated Mr. Ballantyne and dishonestly induced him to deliver a sum of Rs. 15,000/-. Mr. Ballantyne is an assistant in the London Rangoon Trading Company and Ba Shein is a dealer in paddy to whom were advanced large sums of money to buy paddy

for the firm. The complaint sets out that on the 14th March 1919 Ba Shein told Ballantyne that he had 50,000 baskets of paddy in Henzada district for sale and that the paddy was ready for delivery. On this representation Mr. Ballantyne advanced Ba Shein a sum of Rs. 25,000/-. The accused delivered 5960 baskets of paddy against the 50,000 baskets by the 22nd April, on which day he asked Ballantyne for a further sum of Rs. 15,000/- and stated that paddy sufficient to cover Rs. 25,000/- already advanced was on its way to Rangoon and that he required the additional advance to pay for paddy already purchased in connection with the contract. It was alleged that it was untrue that paddy sufficient to cover Rs. 25,000/- was on its way to Rangoon; and, that after receiving the additional Rs. 15,000/- the accused failed to supply any more paddy. The magistrate believed the case for the prosecution, and an appeal against his finding and sentence has been preferred both on the facts and on points of law.

I will deal with the question of admissibility of the oral evidence before discussing the facts of the case. The appellant signed two promissory notes in favour of the London Rangoon Trading Company for the sums of Rs. 25,000/- and Rs. 15,000/ advanced to him, and it is argued that no oral evidence is admissible to prove the contract entered into between the parties, as the contract has been reduced to writing in the shape of these two promissory notes. The case of J. Reid *vs.* So Hlaing (1) is relied upon as authority for this proposition, and it is contended that the later case of Po Yon *vs.* Mohr Bros. and Co. (2) has been wrongly decided. The point referred for decision in the Full Bench case was whether in a case where a prosecution is instituted on the complaint of a private person, section 92 of the Evidence Act precludes oral evidence from being recorded for the purpose of varying, or adding to the terms of a contract between the complainant and the accused when they have been reduced to writing. Sir Charles Fox answered the reference by saying that no oral evidence was admissible for the purpose of contradicting, varying, or adding to the terms of the written contract unless it came under one or more of the provisoes to section 92 of the Evidence Act. I agree with Mr. Justice Ormond in thinking that this decision did not go so far as to decide that the making of a promissory note by way of security for a sum of money advanced or given to the maker would shut out oral evidence about the purpose for which the money had been given. Section 91 of the Evidence Act provides that when the terms of a contract have been reduced to the form of a document no evidence should be given in proof of the terms of such contract, except the document itself. Section 92 provides that when the terms of any such contract have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument for the purpose of contradicting, varying, adding to, or substracting from its terms. It is difficult to see how it can possibly be said in the present case that the terms of the contract between the parties had

(1) 3, B. L. T. 124; 5, L. B. R. 241. (2) 6, L. B. R. 38.

been reduced to writing. The promissory note is silent about the contract for the purchase of paddy, the quantity to be supplied, the market rate, and the time for delivery. It would be impossible to gather from the promissory note that there had been any such contract at all. In Jadu Rai *vs.* Bhubotaran Nundy (3) Mr. Justice Trevelyan remarked that in his opinion section 92 of the Evidence Act only applied to cases where the whole of the terms of the contract have been intended to be reduced into writing. He remarks, "I think this is shown by the words "adding to," which appear in that section. If it were not for those words, I should have been inclined to hold that section 92 only excluded evidence contradicting varying, adding or substracting from such of the terms of a contract as had been reduced into writing." That was a case in which the parties had entered into bought and sold notes for the delivery of some copper. The defence sought to show by oral evidence that the contract was for delivery of the copper if a certain portion of each of the successive deliveries should in the aggregate amount to the quantity to be delivered. It was held on appeal that the oral evidence was inadmissible on the ground that the agreement would be inconsistent with the terms of the notes which were the contract between the parties. The learned judges on appeal did not say that had these notes not contained the terms of the contract, oral evidence would have been inadmissible. Proviso (2) to section 92 of the Evidence Act allows proof of any separate oral agreement about any matter on which a document is silent, and which is not inconsistent with its terms, and it provides that the court must have regard to the degree of formality of the document. The promissory note is not a form of representation of the terms of a contract for the sale and purchase of paddy between parties. These notes are complete contracts in themselves and are treated as security for the advances made. The oral contract for the sale and purchase of paddy is independent of the loan made and is secured by execution of the promissory note. I therefore think that the case of Po Yon *vs.* Mohr Bros. Co. (2) has been rightly decided and that the plaintiff was entitled to prove the oral agreement.

After discussing the evidence the judgment proceeded:—

The next question is whether these facts justify a finding that Ba Shein cheated Ballantyne and thereby dishonestly induced him to deliver a sum of Rs. 15,000/-. The definition of cheating in section 415 of the Indian Penal Code is as follows:—

"Whoever by deceiving any person, fraudulently or dishonestly, induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to cheat."

(3) 17, C. 173, at p. 178 (note).

I am not concerned now with the second portion of this definition, as Ballantyne suffered no harm or damage in consequence of the appellant's conduct. The essential elements of the offence under the first portion of the definition are (1) the practising of deceit, (2) the intention at the time it was practised either to defraud the person deceived or to cause wrongful loss or gain i.e. loss or gain by illegal means; with the result that property is delivered or consent to its retention is obtained. In Queen *vs.* Lal Mahomed (4) Couch, J. expressed the opinion that there is no difference between 'fraudulently' and 'dishonestly' in the definition of cheating. But a distinction between the two terms was recognised by the Calcutta High Court in the Full Bench case of Queen Empress *vs.* Abbas Ali (5) where the learned judges remarked:—"The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation of property. * * * * * If it be held that 'fradulently' implies deprivation, either actual or intended, then that word would perform no function that would not have been fully discharged by the word 'dishonestly' and its use would be more surplusage." In the Penal Code there is a separate definition for each expression, and in many sections of the Code they are used as alternatives. In Queen-Empress *vs.* Mahomed Saeed Khan (6) Bannerji J. cited the remarks of Sir James Stephen in His History of the Criminal Law Vol. II page 121, in which that learned author says:—"I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'with intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of a crime, viz. (i) deceit or an intention to deceive or in some cases, mere secrecy, and (2) either actual injury or possible injury, or an intention to expose some person either to actual injury or a risk of possible injury, by means of that deceit or secrecy. * * * A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent." In paragraph 4,243 of his "Penal Law of India" (2nd edition), Dr. Gour says: "The term 'fraudulently' may be defined to imply an intent to deceive in such a manner as to expose any person to loss, or risk of loss." The term 'dishonestly' implies a deliberate intention to cause wrongful gain or wrongful loss, and when such an intention is proved, and is coupled with cheating and the delivery of property, the offence is punishable under section 420 of the Indian Penal Code, in which the word 'fraudulently' finds no place. A, for example, may by a false representation in-

(4) 22, W. R. 82.
(5) 25, C. 512.
(6) 21, A. 113 at p. 115.

duce B to advance him a sum of money, in such circumstances that A is aware that he is exposing B to considerable risk of loss, but without the intention of causing wrongful loss. A would be acting fraudulently, and if he intended to cause wrongful loss, would be acting dishonestly. In the former case he would be punishable under section 417 of the Indian Penal Code and in the latter under section 420. Now in the present case in March Ba Shein had through his agents paid advances for the supply of paddy, but as the paddy was not paid for within the stipulated time, in some cases the contractors refused delivery. The market was rising. Maung Po says that in Tagu (April) it was about 150/- or 160/- rupees a hundred baskets and was higher in Kason (May). He states that about the 30th March, he returned Ba Shein Rs. 15,000/- as the paddy sellers repudiated their contracts. There can be no doubt that Ba Shein's representations that paddy sufficient to cover the 25,000/- advance was on its way to Rangoon, and that he wanted 15,000/- to pay for paddy purchased in the district were both false and that he knew them to be false. He must also have been aware that he would not have had the advance made to him but for these misrepresentations and that he was gaining an advantage to himself and exposing the London Trading Company to a serious risk of loss by receipt of the advance. He was therefore acting fraudulently, and has committed an offence under section 417. He returned 10,000/- out of the 15,000/- advanced, but he has not shown what became of the remaining 5,000/. His intention at the time he took the advance may not have been to cause wrongful loss to the company, or wrongful gain for himself; he may have hoped for a favouable turn in the market price; and I am therefore doubtful whether section 420 applies to his case, and acquit him of the more serious charge. The conviction is altered to one under section 417 of the Indian Penal Code, and the sentence reduced to one of one year's rigorous imprisonment, and a fine of Rs. 1,000/- or in default three months' further rigorous imprisonment.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 190 B OF 1920.

KING EMPEROR .. .. .. PETITIONER.

vs.

MA LE .. .. .. RESPONDENT.

Before Mr. Justice Maung Kin.

11th August, 1920.

Burma Village Act (Burma Act No. VI of 1907) s. 21, (1) (a). Holding a pwe without a license.

The word "pwe" as used in the Burma Village Act means only "anyein pwes" performed for profit, or by travelling troupes who tour for the purpose of performing such pwes, and does not include the other performances to which the term is lossely applied in the Burmese language.

JUDGMENT.

MAUNG KIN, J.—The respondent has on her plea of guilty been convicted of holding an *anyein pwe* in Thathuka village without a license. In making that plea she said that there was light music such as the beating of drums to which two little girls danced." The Burmese may loosely call such a performance a *pwe* but it does not come within the meaning of *pwe* as defined in section 21 (3) of the Burma Village Act, inasmuch as it is neither a puppet show nor any other theatrical or dramatic performance. Nor is it *Anyein Pwe* as described in General Department Notification No. 135 dated the 3rd May 1915.*

According to that notification *anyein pwes* when performed for profit, or by travelling troupes who tour for the purpose of performing such *pwes* are deemed to be *pwes* for the purposes of the Burma Village Act. The performance in question was neither for profit, nor by a travelling troupe. It seems to me to be quite clear that the policy of the Act is not to control all the amusements of the villagers. An ordinary *anyein* which is a name given to the playing of soft music, or the beating of drums, or a sing song cannot be considered to be a *pwe* within the meaning of the Act. The conviction and sentence are set aside. The fine will be refunded.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 254 B OF 1920.

KING EMPEROR .. APPLICANT.

vs.

A. YANKAYA and others .. RESPONDENT.

Before Maung Kin Offg. C. J. and Rigg, J.

6th September, 1920.

Criminal Procedure Code (Act V of 1898) s. 259, absence of complainant. ss. 494 and 495 (2) withdrawing from prosecution.

It is only in compoundable cases that a magistrate can under section 259 order the discharge of an accused person for want of prosecution. In non-compoundable cases it is only the public prosecutor who can withdraw the prosecution.

*Cf. Burma Village Manual, 1917 edition p. 49.—Editor B. L. T.

King-Emperor *vs.* Aung Nyun 2 L. B. R. 165 overruled.

JUDGMENT.

MAUNG KIN, OFFG. C. J. AND RIGG, J.—We agree with the learned sessions judge that the order of the magistrate discharging the accused for want of prosecution is wrong. The case was a non-compoundable one, triable according to the procedure for warrant cases. Section 259, Criminal Procedure Code permits a magistrate in his discretion to discharge an accused person, when the case is compoundable and the complainant is absent. If it was intended in King-Emperor *vs.* Aung Nyun (1) to lay down any different rule, we dissent from it. Non-compoundable cases can only be withdrawn under sections 494, 495 of the Criminal Procedure Code and not by a private prosecutor.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 498 OF 1920.

M. A. MAMSA .. .. .. APPELLANT.

KING-EMPEROR .. .. RESPONDENT.

Before Mr. Justice McGregor.

For appellant—Mr. Giles and Mr. Khastigir.
For the crown—Mr. Mya Bu.

2nd July, 1920.

Criminal Procedure Code (Act V of 1898), s. 233, joinder of charges, joint trial of cross complaints, illegality.

Under section 233 of the code of criminal procedure there ought to be a separate charge, and a separate trial for each distinct offence.

It is illegal to try two cross complaints between the same parties at one trial, and a conviction at such a trial must be set aside even though the cross cases were so tried with the consent of the parties.

JUDGMENT.

MCGREGOR, J.—The appellant Mamsa filed a complaint No. 323 of 1920 on the 9th April against Sultan E Maung, and On Shwe. On 27th April Sultan and On Shwe filed a cross complaint No. 375 of 1920 arising out of the same occurrence against Mamsa. The magis-

(1) 2, L. B. R. 165.

trate first heard the prosecution evidence and charged the accused in case No. 323 under sections 323 and 325, and noted "the defence will be the prosecution evidence in criminal trial No. 375 of 1920." He then took the prosecution evidence in case No. 375, and charged the accused Mamsa under section 160, and noted on the record "The witnesses in case No. 323 of 1920 are defence witnesses, and have been examined." This seems to have been with the consent of Mamsa, and even at his suggestion. Judgment in both cases, was delivered simultaneously, Mamsa being convicted under section 160 of the Penal Code, and sentenced to undergo one month's rigorous imprisonment, and to pay a fine of Rs. 100/- and the accused in the other case being acquitted.

The learned advocate who now appears for Mamsa argues that the procedure adopted vitiated the trial inasmuch as, besides that it involved hearing Mamsa's defence before any prosecution evidence had been recorded against him, as well as for other reasons, it also violated the provisions of section 233 of the code of criminal procedure, which requires that for every distinct offence there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239. It has also been argued that on the evidence Mamsa ought to have been acquitted. I will decide the case on the point of law alone.

The present case does not fall within any of the exceptions; and although the record of the magistrate's proceedings is bound in two files bearing different numbers, yet the accused in both cases were presumably present together before the court throughout while the evidence was being taken, and it was really one trial, and not separate trials. The learned assistant government advocate has cited Queen Empress *vs.* Chandra Bhuiya and others(1), but there were material differences between that case and this one; and in any case, like the judges in Pran Krishna Saha *vs.* King Emperor (2), I must follow the later decision of the Privy Council in Subramania Ayyar *vs.* King Emperor (3). The trial having been conducted in a manner prohibited by law, which enacts in positive terms that a trial in this mode is not to take place, I set aside the conviction, and discharge the appellant. The fine if paid will be refunded.

(1) 20, C. 537.
(2) 8, C. W. N. 180.
(3) 28, I. A. 257; 25, M. 61.

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