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THE

BURMA LAW TIMES.

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CHIEF AND LESSER WIVES.

(Contributed.)

The latest decision on the point in Upper Burma appears to be that in *Kin Kin Gale vs. Kin Kin Gyi* (U. B. R. 1910, p. 42). It was held that the Buddhist Law recognized polygamy and that a Buddhist might marry at the same time two or more women all of whom have the status of a wife and not that of a concubine, that the woman first married was the chief wife and that as long as she was not divorced her status could not be lowered by any conduct of her husband, except perhaps if she were barren. It was also held that wives were entitled to equal shares of their husband's *atet* property, and that the rules laid down in Ss. 231 and 234 of the *Attathankepa* that a superior wife takes three shares and an inferior wife two shares, have reference to the caste system and have no application to Burman Buddhists. In this case all the available authorities on the subject have been collected and discussed.

The learned District Judge found that Kin Kin Gyi was the wife of the late U Kyaw Gaung, Mobye Sitke, but of inferior position to Kin Kin Gale who was his chief wife though Kin Kin Gyi was the woman first married and that before her husband's death the latter lived entirely separate from him and had no share whatever in the management of his property or affairs, and following the ruling of Mr. Burgess in Ma Shwe Ma's case (2 U. B. R. 92—96, p. 145), held that Kin Kin Gyi is only entitled to $\frac{2}{5}$ths of the share awarded to Kin Kin Gale. On appeal it was held that if Kin Kin Gyi was U Kyaw Gaung's wife, that is, a wife in the proper sense of the term, her status could not be lowered by the introduction of Kin Kin Gale into the house or by any other means, and the manner in which the husband treated the latter could not alter the former's status.

Reference was made to certain passages from the *Manugyè* and the *Attathankepa* in which wives and concubines are mentioned. It was pointed out that in many passages in the different Dhammathats

the word *Mayangè* is used as distinct from the word *apayaung* with reference to a wife contemporaneous with the chief wife. But a careful examination of the texts collected in the Digest V. I. tends to show that they lend no support to this view. Chapter XV deals with partition between chief and lesser wives.

Section 276 gives the rules for partition between the chief wife and concubines with or without children. With the exception of the Manugyè, all the Dhammathats quoted in that section refer to a concubine known as *tawbyaung*. According to these texts such a wife is given a very liberal share and she is described as a lesser wife in the *Rajabala* and the *Manu*. The text from the *Manu* is more explicit and runs as follows :—

"If the chief wife survives her husband, she shall receive four shares and the *tawbyaung maya* three. A free concubine who is taken to wife but not purchased is called a *tawbyaung*. So there are two classes of lesser wives—one who is taken to wife (by a man) during the lifetime of the chief wife and the other who is married after her death."

The *Manu* quoted in S. 277 also defines *tawbyaung* in the same way. She is one of the six concubines described in that section, but she is treated as a wife superior to all the other concubines who can retain only such property as has passed into their possession. Such a wife is to all intents and purposes a lesser wife (Mayangè), but she does not "eat out of the same dish" with her husband and therefore stands next in rank to the chief wife who gets a larger share according to the texts cited in S. 276 (Cf. S. 81, Bk. X, Manugyè).

The learned Additional Judge of the Appellate Court was misled no doubt chiefly by looseness of published translations of the Dhammathats into thinking that a lesser wife (Mayangè) is distinguishable from a recognized concubine (apyaung).

For instance, wherever the expression "ordinary concubine" or "free-born woman" occurs in the translation, the expression "*tawbyaung*" or "lesser wife" is used in the original text (vide S. 276). Again the translation of the *Manu* passage in S. 277 is inaccurate.

The translator used the word 'slave' in the translation for the word "Mayangè" (lesser wife) in the Burmese, apparently because the other texts which describe the six kinds of concubines, speak of the first five as slave-wives, she being a free woman, not bought, who does not eat out of the same dish with her husband. Such a woman is known as *tawbyaung* as above defined. But the texts dealing with slaves have become obsolete since the abolition of slavery, and the Courts have no occasion to define the rights of slave-wives. It may here be pointed out that there are many mistranslations in the published translations of the Dhammathats, mistranslations which have been responsible for conflicting rulings.

Again S. 16 of the Digest describes the six kinds of sons who are entitled to inherit, of whom the second or third is the son by a

lesser wife or concubine. The expression "Mayangè" is used in the *Vinicchaya*, the *Pakasani*, the *Manu*, the *Amwebon* and the *Cittara*. The *Dhamma* and the *Manugyè* speak of her son as the "child by a woman who does not eat out of the same dish with the husband and known as *hetthima*." The word *Maya* or *meinma* (wife) is used in the original text for the word "concubine" in the translation. The term *apyaung* is defined in S. 81, Bk. X, of the Manugyè. The published translation of the *Manugyè* passage quoted in S. 15 of the Digest is a gloss. The Burmese will not bear the meaning given to it. The following is a more correct translation of the passage: "Children by a woman who does not eat out of the same dish with the husband are known as *hetthima*: the woman who is taken to wife publicly during the lifetime of the chief wife and who does not eat out of the same dish with the husband is called an *apyaung*. Her children are styled *hetthima* because they are (born of a woman) subordinate to the chief wife."

A similar definition is given in the *Rasi* and the *Amwebon*. The latter refers to such children as those of an *apyaung* who is described as a lesser wife because she is subordinate to the chief wife. The word used for the son of such a woman in the remaining texts is *hetthima*, though he is spoken of as the "son by a concubine." According to the *Vinicchaya* (Note) the term *hetthima* means the son of a *mayangè* or a lesser wife.

It will be seen that of the six kinds of children who can inherit, the first is the *orasa*, that is, the "child born of a union contracted by parental authority" as distinguished from an illegitimate child. This is obviously the child of a chief wife, for the son of a lesser wife or concubine, *hetthima* as he his called, is also mentioned as one of the six heirs entitled to inherit. The inference is that the Dhammathats make no distinction between a *mayangè* and an *apyaung*, and it seems immaterial whether one is called a lesser wife and the other a concubine.

From consideration of these texts there seems no reason to doubt that when an *apyaung* is mentioned in the Dhammathats it means a lesser wife or a concubine other than a slave-wife who is known as *Kyunpyaung* or *Kyunmaya*. There is no need to draw a distinction between a *mayangè* and a free concubine. Such a wife occupies a position inferior to that of the chief wife who has special privileges. The latter's status is superior to that of a lesser wife or concubine and she is the only wife who has the right to eat out of the same dish with her husband. Hence she is styled a *letsonsamcya*, *i. e.*, a wife who lives on terms of equality with her husband, and eating out of the same dish is "the chief *indicium* of such equality." In a word her position among wives is not unlike that of an *orasa* child among children, and as there cannot be two *orasas* in a family so there cannot, it seems, be two chief wives in one family—that is, wives who are on equal footing. Thus, if a man has more than one wife, the first married wife who lives and eats with him is his senior wife and the rest are his junior wives. That being so, the so-called lesser wives are in reality concubines and they are entitled to inherit only if they live

with their husband, as pointed out by Mr. Burgess in the case quoted above. This view was accepted by Mr. (now Sir George) Shaw in Ma Shwe Ma vs. Ma Me (U. B. R. 1912, p. 114.)

The only Dhammathat which lends any colour at all to the contrary view is the *Manugyè* in which there are certain passages which seem to indicate that there is a difference between a lesser wife and a concubine (vide Ss. 37-38 and 40-42 Bk. X). But as pointed out by Mr. Burgess, those passages have reference to Hindu usages and can no longer be applied to modern conditions. This view has, however, been dissented from in the case now under discussion. It was held that a Burman Buddhist may have at the same time two or more wives who are on equal footing, though one of them may be styled the head wife whose status may be superior to that of a free concubine, and that when a *mayangè* is mentioned in the Dhammathats it is such a wife that is referred to and not a free concubine. In support of this opinion, the rulings in Ma Ka vs. Mg. Thet. (S. J. L. B. 6) and in Ma U Byu vs. Ma Hmyin (2 U. B. R. 07-01, p. 160) are quoted. In the former case it was held that on the death of the husband his second wife has a right to share with his first wife in his property, although none of it had been acquired since the second marriage, and that her share in the joint property of the first marriage would be one-fourth as compared to three-fourths falling to the first wife's share. The division is based on S. 7, Bk. X of the *Manugyè* which is quoted in S. 237 of the Digest. But a reference to the texts cited in that section shows that they relate to a case where the father on the death of the first wife marries again and where both father and step-mother die leaving offspring by the first and second marriages, whereas Ma Ka's case refers to a woman whom a man took to wife in the lifetime of his first wife about a year before his death, and the property to be divided was acquired before the second marriage. The husband did not bring the second wife to his own house where he lived with his chief wife for about 30 years. But it is said that he visited her and lived with her as his wife in her own house. The Lower Appellate Court held that the second wife had no right to share in the estate as she had brought no property at her marriage and none had been acquired during coverture. This decision was based on S. 38, Bk. X of the *Manugyè*, but in second appeal it was pointed out that the text relied on does not support the view taken, as it does not lay down that a second wife has no right to share in the property acquired by the husband before or during his first marriage such as the property in suit. This text is quoted in S. 236 of the Digest which deals with partition among several wives living with the husband and "eating with him out of the same dish" (*letsonsamaya*). Obviously that section does not apply to the circumstances of the case in question.

Again S. 287 refers to partition between two wives belonging to different classes. The wife who is superior shall receive three shares and the one who is inferior two. But it seems to relate to the jointly acquired (*Dhammathatkyaw*) and not to the *payin* property of the

husband. A similar division is made in Ss. 231 and 234 *Attathankepa*. The case that seems most nearly analogous to Ma Ka's is that referred to in S. 276 already discussed, eliminating the portion which relates to slave concubines. The position of the second wife in that case resembles that of a *tawbyaung* as defined in the *Manu*, and whether such a wife is called a lesser wife or concubine it is clear that the authorities cited in S. 276 which provides for partition among the chief wife and concubines allow her a generous share.

The last case cited in Kin Kin Gale's case is that of Ma U Byu which lays down that a second wife is entitled to share in the estate of her husband with the first or chief wife when she has clearly the status of a wife properly so-called. It will be seen that in that case the husband has lived indifferently with both his wives and neither of them can really be considered as having lived separately from him. It appears that the status of both wives is precisely the same and they are therefore treated on equal footing, though one of them is the first married but not necessarily the chief wife.

It may, however, be noted that no text was quoted in the last mentioned case. The only cases cited are those of Ma Gywe vs. Ma Thi Da and Ma Hmon v. Paw Dun. It was pointed out that the principles enunciated in those cases apply only to a wife of a distinctly inferior class, who is in the position of a concubine and who has a separate establishment, and who has therefore no claim to inherit a share in her husband's estate.

It was also pointed out that S. 232 of the *Attathankepa* does not apply to that case. But whether or not the decision in Ma U Byu's case is in accordance with the Dhammathats, it would seem that that case is distinguishable from the present. As already observed, the last mentioned case was different. The husband lived sometimes with the first wife and sometimes with the second wife, and it appears from his conduct that he always regarded and treated both his wives as equals. This being so it can hardly be said that the status of one wife is superior to that of the other, and it was therefore held that both wives lived on terms of equality with their husband.

From the facts deposed to in the present case as disclosed in the learned judgment of the High Court, it appears that U Kyaw Gaung had several wives as was customary with the officials of the late Government, and that Kin Kin Gyi was not his first wife he being an *eingdaunggyi*, though she lived with him as man and wife prior to the introduction of Kin Kin Gale into the house about a year afterwards. But when the latter was brought to U Kyaw Gaung's house, she became his favourite wife, and gradually superseded Kin Kin Gyi who subsequently left the house after she had given birth to a child, probably because she did not relish the idea of having to take second place. Kin Kin Gyi lived apart from her husband for about 3 years before his death, but she frequently visited him during that period, and she continued to visit him up to the

time of his death. It is clear, therefore, that even supposing that the old gentleman never broke off relations with Kin Kin Gyi, she was not regarded as his chief wife as evidenced by his conduct. This view derives support from the facts that he visited other officials with Kin Kin Gale, that she joined with him in religious works, that she attended a garden party at Government House with him and so on. All these facts which prove the estimation in which she was held cannot be ignored in considering the question whether she or Kin Kin Gyi was a *letsonsamaya*, or whether the status of one is precisely the same as that of the other as held in Ma U Byu's case. There can be only one answer to this question if the decision turns on the position which one wife occupied relatively to the other after Kin Kin Gale's arrival in the household. But it was held that the question must be decided only by the way in which a previously married wife was treated before a subsequently married wife arrived.

It was urged that if Kin Kin Gyi was U Kyaw Gaung's wife when he married Kin Kin Gale and having once obtained that status she could not lose it except by divorce. This is a plausible argument and it would have been very convincing had Kin Kin Gyi continued to live with her husband till he died. It involves the proposition that a man already married cannot take another wife and make her his chief wife. No authority has been cited for this proposition and no text of Buddhist Law precisely applicable can be traced. But it seems unnecessary to consider this question as the decision of the case turns on another point.

It is contended that even if Kin Kin Gyi were a wife, she is not entitled to inherit as she is an "*eingya maya*", *i. e.*, a wife living separately from her husband, by leaving her husband's house and living separately. There is much force in this contention and an examination of the texts and authorities indicates that it is well founded. But it was pointed out that there is no such separate class of wives, and that there is no authority for the proposition that a wife may be disentitled to inherit by separate residence from her husband. It was further pointed out that the rule laid down in Ma Hmon vs. Paw Dun (2 U.B.R. 07-01, p. 138) is that a wife who lives in a separate house from her husband is disentitled to inherit not because she lives separately from her husband but because she is not a wife at all but a concubine, and that separate residence merely raises a presumption which may be rebutted that such a woman is a concubine and not a wife.

With great deference to the learned Judge one ventures to express the opinion that the Dhammathats do provide for a case like the present. The case seems to be provided for in Ss. 283 and 284 of the Digest which deal with partition among wives living separately from their husband. There is only one text quoted in both sections and it lays down that such wives shall keep *only* what has been given to them and is already in their possession. It is laid down in S. 284 that the property of one wife shall not be taken from her and given

to another. This is also laid down in the Attathankepa (S. 232) and S. 291 of the Digest (Cf. S. 37, Bk. X, Manugyè).

It was, however, held that the rule stated in the Attathankepa does not refer to the husband's estate at all. This inference was apparently drawn from the published translation which is inadequate, since it does not give the full meaning and effect of the original. The translator overlooks the word *thahlin* (only) and thus loses the point of the passage. The same may be said of the translation in the Digest (Ss. 283-284). The Burmese in the disputed passage may be rendered thus: "It is *only* the property which has passed into their possession that such wives are entitled to get."

It clearly implies that they are entitled to no other property. This interpretation is borne out by a portion of the text from S. 2 of the Manu Wunnana which lays down: "Wives who live in separate houses from the wife who eats together with the husband should only get the things which were given to them and should not get things not in their possession." This is quoted in Ma Gywe vs. Ma Thi Da (2 U. B. R. 92-96, p. 194 at p. 196) which is the leading case on the subject. The following extract is also quoted:—

"Wives who may have been living apart in separate houses shall also keep what has been given to them and is already in their possession; *but they cannot be made joint heirs to a share in the inheritance.*

As pointed out by Mr. Hodgkinson in the same case, these passages warrant the conclusion that, although the women living separately from their husband are to be classed as wives, they hold a position as regards his property very different from that possessed by those who live and eat in the same house with him.

The text from the Manu Wunnana quoted above, as a reference to the Burmese shows, was reproduced without alteration in S. 280 of the Digest. Here again the published translation is inadequate, since it does not show clearly that the text refers to wives living in separate houses other than those living and eating together with the husband.

The translator's rendering is this:—"Wives who are maintained by the husband, but live separately from him, shall retain only such property as are in their actual possession."

A more correct translation of the passage is this:—"Wives living separately (from their husband) other than those who eat and live (with him) shall get *only* what they have already obtained."

The rule is also laid down in the Dhamasara quoted in S. 280. From the above extracts and quotations it seems quite clear that there are two factors in determining the position of a head wife: (1) that such wife is the *letsonsamaya*, that is, she "eats out of the

same dish" with the husband, and (2) that she lives in the same house with him. This view is not really opposed to the ruling in the leading case last cited. It was there held that living and eating together is not an essential of marriage but merely a formal proof of its validity. But it was also held that wives who live in separate houses from that of the wife with whom the husband takes his meals are not entitled to obtain on his death more property than they have already obtained from him. Ma Gywe's case was one of a lesser wife living separately and merely receiving the husband's visits. It lays down that in such a case the presumption is that the woman has not the status of one entitled to share in the inheritance which can be rebutted by proof of the existence of a superior status. If the status of such a woman is disputed, it must be proved in the ordinary way. Similarly if a woman living separately from her husband claims to be a head wife and if her status is denied, she must prove her case and it cannot be assumed until the contrary is proved that though living separately her status is equal to that of another wife who admittedly lived with the deceased husband. The result is to throw the burden of proving that she is a superior wife on Kin Kin Gyi by reason of her separate living.

In the face of texts and authorities like those quoted above, it cannot be said that an *eingya maya* is unknown to Buddhist Law. On the contrary it is a common expression used to apply to a lesser wife who lives in a separate house from her husband, and in this respect both the written law and public opinion coincide in giving her a status inferior to that of the chief wife. All students of Buddhist Law know that the Dhammathats lay a great stress on the joint living and the consequent acquisition of property by joint labour. It forms a test for determining whether one of several wives has a superior status and is the basis of the right to inherit in the case of children, natural or adoptive, in spite of rulings to the contrary. Of course there are exceptions to this rule, *e.g.*, in cases where the separate living is a matter of mutual convenience or by the license or desire of the husband or the father, as the case may be.

In the present case, however, it was not alleged nor even suggested on behalf of Kin Kin Gyi that her separate living was by her husband's license or desire or for joint convenience. Her separate residence therefore affords a presumption that she is no longer a wife entitled to inherit, at any rate she is not the chief wife she professes to be, even assuming that she was one at one time. This presumption has in no way been rebutted. The fact that she visited her husband frequently or even constantly after she had left his protection and that she received maintenance from him up to the time of his death, does not disprove the established facts that she took second place after Kin Kin Gale's arrival, and that she left the house of her own free will because she was taken but scant notice of by her husband. If she had been U Kyaw Gaung's chief wife she was supposed to be before he married Kin Kin Gale, she should have objected to his bringing the latter to his house and she should not have left the house as she did.

This undenied fact is incompatible with her having been the chief wife, and if, as an invalid, she was then unequal to fighting for her proper position, can it be doubted that she would have submitted all these years to the treatment accorded to her after Kin Kin Gale's arrival, had she been the chief wife as she claimed to be? No explanation was offered as to why she took no action whatever to establish her disputed position as such before her husband's death as one would expect, and why she remained content with visiting him and receiving maintenance from him from time to time till his death. This circumstance and the circumstance that she lived apart from her husband for some years before he died, are hard facts against which the statements of interested relatives, however respectable they may be, cannot possibly have any important weight.

If Kin Kin Gyi allowed Kin Kin Gale to live and eat with her husband during his lifetime and thereby to hold herself out as the senior wife, the former cannot be permitted to say that the latter is not such a wife. In any case, her conduct amounts to an acknowledgment of Kin Kin Gale's position as a wife whose status is superior to hers and she is therefore estopped from denying her rival's superior status. The position of Kin Kin Gale is not unlike that of an honoured wife known as the *pwedet* or *pwewin maya* under the late regime. As pointed out by the learned Judge this was the only wife recognized by the King and received at the palace. But the other so-called wives were not recognized by the royal family and they were treated with scant respect by the official class amongst whom polygamy was more common.

Lastly it would seem that the rule laid down in the Manugyè (S. 38, Bk. X) and the *Attathankepa* that of wives who have borne an equal number of male children the chief is the one first married applies only to a case where they are living together with the husband.

It is to be noted that in this discussion it has been assumed that Buddhist law recognizes polygamy as held in the present case. It appears that the learned Judge in this case somewhat receded from the view taken in the well known case of Ma Ka U which was sent up to the Chief Court Full Bench in which it was unanimously held that a senior wife is entitled to an order for separate maintenance, though she refuses to live in the same house with her husband and a lesser wife. The opinion expressed in his order of reference in the capacity of Sessions Judge tends to confirm the view that if a man has two or more wives, there can be only one chief wife, the rest being his lesser wives who do not have the same status as that of the principal wife. (*vide* also 4 L. B. R. 340.)

With some diffidence as to disputing the view of such an experienced Judge, it is submitted that if Buddhist law favours polygamy at all, it does not contemplate that the second or lesser wife (Mayagé) is to be treated on an equal footing with the first or chief wife, and it is nowhere laid down that the former is entitled to share

on equal terms with the latter. If there is anything in the Manugye which lends support to the contrary view, it is overridden by many other texts which give the chief wife the largest share in the estate and her status is therefore superior to that of any other wife.

The question of polygamy has been fully discussed in the first volume of Mr. Tha Gywe's treatise on Buddhist law. In view of the Privy Council ruling in Ma Shwe Ma's case already referred to which lays down that the Buddhist law allows polygamy, any further discussion as to its soundness or otherwise is not desirable and will not serve any useful purpose at present. So long as the decision remains in force and is not re-considered by their Lordships it is binding on Courts in Burma, whether or not it lays down the law as found in the Dhammathats.

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Power of a Burmese Buddhist Parent to Dispose of the Family Property.

(*Contributed.*)

There is a conflict of opinion and authority as to the extent of a Burmese Buddhist widow's interest in the family property. The Law on the subject was fully discussed in a very recent case in which the question for decision was whether on the death of a husband the widow has an absolute right over the whole property, or only a limited interest in it with power of sale in case of necessity for the benefit of her children. It was there held that the oil-well in suit became the widow's absolute property to do what she would with it on her husband's death, and that her daughter acquired nothing more than a contigent interest in it which interest she lost on her mother selling the property. (Ma Saw Myin vs. Ma Shwe Thin, U. B. R. 1912, p. 125).

In view of this ruling it becomes necessary to reconsider the doctrine that a widow can only spend her deceased husband's property in a case of necessity. The decision in Ma Saw Myin's case is in accordance with that of Mr. Burgess in Ma Min Tha vs. Ma Naw (2 U. B. R. 92-96, p. 581), in which it was ruled that the heir of a deceased husband under Buddhist Law is his widow, and not any of his children (except the eldest son in respect of his fourth share) until the death of the widow, and the children have no such interest in the estate as is contemplated by S. 91 of the Transfer of Property Act.

It will be seen that the Upper Burma Rulings on the point are opposed to those of Lower Burma. The latter are based on the opinion of Sir J. Jardine expressed in Shwe Yo vs. San Byo (S. J. 108) on this particular point; but as pointed out by Mr. McColl it seems to have escaped the notice of the Special Court in Ma On vs. Shwe O (S. J. 378) that the same learned Judge to a great extent receded from this view in Po Lat vs. Po Le (S. J. 212). Since then new authorities have become available (see also The Gwye's Treatise on B. L. Vol. II, pp. 38-42).

The last paragraph of the headnote to the ruling in the Upper Burma case of Ma Min Tha before mentioned, says: "The relative positions of a Hindu widow succeeding as her husband's heir and of the reversioner, are in some ways analogous to those of a Buddhist

widow and her younger children, and at least serve to illustrate the nature and extent of the respective rights of the latter."

This analogy was also pointed out by Sir Charles Fox in Ma Gyi vs. Po Myin (3 B. L. T. 45 at p. 46) in which a reference was made to Mr. Mayne's Hindu law (para. 646), where he says that "the next reversioner, that is, the presumptive heir in succession, has only a contingent estate." In this case the learned Chief Judge entertained a doubt whether the Special Court in the Lower Burma case above cited meant to lay down that the children other than the *auratha* did not acquire a vested interest in the sense expressed in S. 19 of the Transfer of Property Act or S. 106 of the Indian Succession Act. In the same case it is stated:—

"Whether it be a vested or a contingent estate, I think that there can be no doubt that on the death of one parent the children of Burmese parents take an interest in the joint property of their parents which will be recognized by the Courts. If the surviving parent can only dispose of a part of the property in case of necessity, the reversioners must have the right to prevent that portion from being alienated when there is no necessity and possibly a right to prevent the property from being wasted. Although they cannot obtain a share in the property themselves, they could, it appears to me, safeguard their rights as presumptive heirs by a suit for a declaration under section 42 of the Specific Relief Act, for their position is similar to that of the presumptive heir in illustration (c) to that section."

There is thus a considerable divergence of opinion among the High Court Judges concerning the extent of the widow's absolute ownership of such an estate. It may be said without fear of contradiction that in Upper Burma the existence of such a thing as a vested interest on the part of children in parental property during the lifetime of either parent has never yet been established. On the contrary in Ma Sein Nyo vs. Ma Kywe it was not disputed that "under Buddhist Law a child has no vested interest in the father's property and cannot interfere to prevent him from disposing of it" (2 U. B. R. 92-96 at p. 165). But the view has been accepted in Lower Burma that the children have some kind of interest along with the mother, who is not at liberty to deal with the whole of the family property as her own except for a legal necessity for the benefit of her children. In other words, the widow has the right of absolute disposal of her own share and only a power of sale in case of necessity in respect of the remainder. This is the ruling of the Special Court in the leading case of Ma On which was followed in several cases by the Chief Court of Lower Burma.

The doctrine is based on S. 5, Bk. X, Manugye, which deals with the partition of the estate between mother and son on the death of the father. But it lays down clearly that "if the property is exhausted by the mother, nothing shall be said about it," that is, she is at liberty to use or expend the whole of the family property during her lifetime. There is nothing in the text to suggest that the widow's right of disposal over the property is limited to the case of necessity. That text is quoted in S. 30 of the Digest in which the *Amwebon* also gives the same rule. It was the translation that introduced a new

meaning into the passage. The translator evidently inserted there the words "for necessary subsistence" (*i. e.* in case of necessity) because he found the words which convey the same idea in the previous section (4) of the Manugye. This section relates to the partition between mother and daughter on the death of the father. The words used there mean that if there should remain insufficient property for the maintenance of the widow and younger children, she is at liberty to spend the entire estate including the portion which would otherwise be allotted to the eldest daughter. That text was reproduced without alteration in S. 31 of the Digest and corresponds with that from the *Amwebon* which is one of the numerous Dhammathats quoted in that section.

It will thus be seen that the rule as to family necessity is stated in the one instance and not in the other, and the reason for this distinction has to be sought. The principle of the rule is to be found in Ss. 30-33 of the Digest. They all deal with the partition between the surviving parent and the eldest son or daughter on the death of the father or mother. A distinction is made between the case in which the parties to the division are mother and son and the case in which they are mother and daughter. In the former case, when the father dies the eldest son gets certain specified property, while the mother gets other specified property; $\frac{1}{4}$th of the remainder goes to the son and the rest to the mother. With the exception of the Manugye and the *Amwebon*, nothing whatever is said in any of the other Dhammathats about the mother having the right to dispose of any property except her own. The inference is that in this case the $\frac{3}{4}$ths share which goes to the widow is her absolute property with which she can do as she pleases and that even in case of necessity she has no right to dispose of the specified property or the one-fourth share which goes to the eldest son (s. 30).

In the latter case, the rule is that on the death of the father certain specified property is allotted to the eldest daughter and the remainder is at the widow's absolute disposal, but that in case of necessity the widow is at liberty to spend even the specified property which goes to the daughter for the maintenance of herself and her children (S. 31).

The reason of this distinction as given in the Dhammathats is that the eldest son (especially if he be the eldest child) is obtained through the prayers of the parents and has helped in the acquisition of the property, whereas the eldest daughter is completely under the control of her mother on the death of the father.

It follows from the foregoing that the question of necessity can only arise when the widow deals with the property in which she and the children have a joint interest, that is, the property in which she has a life interest and over which she has not an absolute right but only a power of sale when there is not sufficient property for the maintenance of herself and her children.

The point decided in the case under review is that the rule for partition between mother and daughter on the death of the father is to be found in S. 31 of the Digest and that the texts of the Dhammathats on which the doctrine of necessity is based, refer to the spending

of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate. The same rule holds good in the case of partition between father and son on the death of the mother (S. 32). But the rule is different in a converse case where partition is effected between mother and son on the death of the father (S. 30), or between father and daughter on the death of the mother (S. 33). In either case the question of necessity does not arise.

As already observed, the three-fourths share which goes to the widow or widower is her or his absolute property and even in the case of necessity the surviving parent has no right to dispose of the specified property which goes to the eldest child or the one-fourth share which is his or her portion. Why should this difference be made? The answer is given by the Dhammathats quoted in Ss. 30 and 33 of the Digest. The eldest son is entitled to a fourth share on the death of his father and the eldest daughter on the death of her mother, because the son and daughter perform the family duties of the father and mother respectively. The son or daughter enjoys this special privilege by right of primogeniture only when he or she fills the position of the deceased parent. If the son has done his duty as a son, he succeeds to his father's office and responsibilities on the latter's death. The same remark applies to the daughter on the mother's death. The Dhammathats recognize the eldest son's or daughter's right to a fourth share on the death of the parent of the same sex. The reason is obvious. The eldest son takes the position of the deceased father just as the eldest daughter takes the place of the deceased mother. In return for the performance of such duties the right of the eldest son or daughter, standing *in loco parentis*, to a share of the inheritance in the lifetime of the surviving parent is recognized reasonably enough. If the mother dies first, there is no object in giving a share to the eldest son as the father is still alive, nor can the eldest daughter claim her share during the lifetime of the mother, the reason being that the eldest son or daughter, as the case may be, is to keep up the position of the family and to discharge the duties of its head only when the parent of the same sex dies. Sections 31 and 32 seem to be a clear authority in favour of this view.

The only event mentioned which would entitle the daughter or the son to a fourth share when the parent of the same sex is alive, is when partition of the family property takes place upon the mother or the father re-marrying (Ss. 44-45 Digest).

Interpreted in this way, the rule of primogeniture, which before was obscure, becomes at once intelligible. It is, moreover, a reasonable rule and is in accordance with the spirit of the law which favours the eldest child not so much for priority of birth as for the assumption that the eldest son or daughter takes a more prominent part than other children in the acquisition and preservation of the family estate (Ss. 60-61 Digest).

It may here be noted that, the question whether the eldest son can claim a fourth share from the father or whether the eldest daughter can demand a share from the mother when the surviving parent does not marry again, has been never definitely determined though discussed in several cases. All the reported decisions on the point seem to be

obiter dicta with the doubtful exception of the case of Ma Saing vs. Ma Kun (S. J. 115), in which Sir John Jardine held that younger daughters cannot claim their shares on the death of the father until the mother is dead. The judgment there perhaps conveys the impression that the eldest child, be it son or daughter, has a right to sue on the death of either parent. But that was not the point really decided by that judgment. The case does not, it seems, extend so far as it would appear to do from the head-note, which is "by Buddhist Law on the death of their father no child other than the eldest can claim a share of the inheritance from the surviving mother."

The learned Judge was of opinion that "none of the children, *excepting perhaps* an eldest son or eldest daughter, could claim a partition until both parents were dead." This was pointed out by Sir John Jardine himself in Po Lat vs. Po Le (S. J. 213) and he was inclined to adhere to that opinion. But since then new authorities are available and Ma Saung's case is not a binding authority in Upper Burma as the point was not actually in issue in that case and the ruling was, moreover, delivered in Lower Burma. The tendency, however, of the decision in Lower Burma has been to prefer the eldest child, male or female, *i. e.*, to treat the eldest son and eldest daughter as having equal rights in all cases, except where there are both sons and daughters in the same family, in which case the eldest competent son is preferred to any daughter. There is abundance of authority in favour of this view.

To any one not unfamiliar with the customs, usages and traditions of Burman Buddhists, the rules laid down in the law-books to which they are accustomed to look for guidance are intelligible enough. It has been seen that a Burmese widow or widower is the absolute owner of all but the portion of the eldest son or the eldest daughter as the case may be, and can dispose of all but such portion as she chooses, irrespective of family necessity or the interests of the children. This may appear to Europeans or non-Buddhists not to be either just or equitable. But the rule appears to be reasonable when one reads the following explanation given in the Pyu, one of the numerous Dhammathats quoted in S. 32 of the Digest :—

"The principle underlying the rules of inheritance is, that while both parents are living, it is they who endeavour to acquire wealth, the father trying to earn and the mother trying to save. *The parents acquire property so that they may do what they like with it during their lifetime*, and leave it to their descendants on their death."

Again, why should the mother get three shares and the *orasa* son one share? The answer is given by the same Dhammathat among many others:—

"Because, during the early days of her wedded life while family property was being acquired, the son was not yet born, and whatever was acquired by his father, the mother took care of and laid by. Hence, the mother shall get three shares, she being the principal agent in the acquisition of the family property. And as the son continues the family he shall get one share." (S. 30 Digest).

Applying these principles to the subject under discussion it follows that the Upper Burma view is supported by the law as found in the

Dhammathats, namely, that on the husband's death, a Burmese Buddhist widow has an absolute interest in the whole of the family property which she can dispose of irrespective of family necessity, with the exception of a portion which goes to the eldest son or the eldest daughter, and that she is at liberty to spend the portion set apart for the eldest daughter in case of necessity. The inference from the languages of the Dhammathats seems plainly to be that children (except the eldest in respect of a fourth share) cannot stop their parents from doing as they choose with their property during their lifetime. If it were otherwise, parental authority, which holds so prominent a place in the Burmese law, might be set at defiance, as pointed out by Mr. Burgess in Ma Min Tha's case already mentioned. (Cf. Sein Nyo's case quoted above).

The precepts of the Dhammathats are generally followed in the common affairs of life, and they are recognized as good guides in respect of religion or morals. They are practically acted upon by the people in their ordinary concerns. In spite of their faults and defects in occasional passages, on the whole the spirit of the texts which relate to matters of marriage and inheritance is based on reasonableness and on respect for moral duties. The law laid down in the texts bearing upon the question seems to fit with the ordinary circumstances of life and it must be followed irrespective of whether it is a good or bad law, so long as there is no established custom inconsistent with such law.

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Shares of grandchildren representing deceased parents.

(*Contributed.*)

It is a settled principle of Buddhist Law that only those closely related should inherit, the nearer relatives excluding the more remote, *e. g.*, children exclude grandchildren. But there are exceptions to this rule. If a child dies after his parents but before partition of their property leaving issue, his children inherit his share because he died after he was *within reach of the inheritance* (S. 105 Digest). But if he should have died before his parents leaving issue, he would have missed *reaching the inheritance*, and the grandchildren, his offspring, would not be allowed to come into competition with his brothers and sisters on the same level, unless he was the eldest child (*orasa*), in which case his children take among them a share equal to that of his younger brother or sister, other grandchildren taking among them a fourth of the share that would have come to their parents. The reason for this rule is stated and the authorities for it cited in *Ma Gun Bon* vs. *Po Kywe* (2 U. B. R. 97-01, p. 66) which is the leading case on the subject of representation. " If the eldest son or daughter die before the parents, the children are given the share of a younger brother or sister on account of the superior claims of the *aûratha* heir. But the share of the children of a deceased brother or sister other than the *auratha* is reduced to a quarter of a brother or sister's share" (p. 74, Ibid). The rule is also stated in *Mg. Hmaw* vs. *Ma On Bwin* and *Ma Pu* vs. *Ma Le* (I. L. B. R. 93 and 104).

Such grandchildren are called " out-of-time grandchildren," because their right of inheritance has been discounted through the death of their parents in the grandparents' lifetime (S. 213, Attathankepa).

The law of representation is briefly stated in Tha Gywe's Treatise on Buddhist Law at pages 67 to 77, Volume II.

The rules as to the shares of grandchildren in the estate of their grandparents when their own parents have died before reaching the inheritance are contained in Ss. 162-164 of the Digest.

If the eldest child predeceases his parents, his *orasa* son or daughter strictly so called, receives the same share as their youngest uncle or aunt. There is no indication that it has any reference to the eldest surviving grandson or granddaughter, unless he or she is technically the *orasa*. On the contrary, the majority of the texts, as a reference to the Burmese Dhammathats shows, clearly imply that the rule relates to the *orasa* grandson or granddaughter, strictly so called, the expression used meaning the *orasa* or *first born* grandchild (*auratha mye* or *mye u*). The Vilasa and the Kyetyo are more explicit on the point and they explain in an unmistakable manner the principle of the rule (S. 162 Digest). This interpretation is also borne out by the following extract from the Manu-Vannana :—

" If the *orasa* son predeceases the parents his (eldest) son shall receive as much as his youngest brother. If the eldest grandson should also die, then the younger grandson, if any, shall receive a fourth of the share to which his father would have been entitled." (See also S. 163, Manu-Vannana).

There seem to be two factors in determining the rights of the favoured and privileged grandchild : (1) that such grandchild is the representative of the *orasa* heir, and (2) that he is entitled as being the *first born* child.

Thus among out-of-time grandchildren, the only one who ranks with the surviving uncles and aunts is the *orasa* grandchild, *i. e.*, the first-born child of the deceased's *orasa* heir. The eldest surviving grandson or granddaughter other than the first-born grandchild, or the surviving grandchildren collectively, take one-fourth of the share that their parents would have got had they lived.

The question was discussed in *Saw Ngwe* vs. *Thein Yin* (I. L. B. R. 198). The principle enunciated in this case is that the only out-of-time grandchild who is entitled to rank with the surviving uncles and aunts is the eldest representative of the eldest child, and that such grandchild shares equally with the uncles and aunts in the estate of his grandparents, the others only taking ¼th of the share their parents would have received had they survived. The rule is based on Section 15, Book X of the Manugye and Sections 12 and 212-213 of the Attathankepa. The subject also received discussion in *Po Sein* vs. *Po Min* (3 L. B R. 45). As explained in that case, the rule is strictly confined in all the texts to the *orasa* son or daughter properly so called, and has no reference to the eldest surviving son or daughter, unless he or she is technically the *orasa*, *i. e.*, the eldest child.

The question what is an *orasa* son had been examined in an earlier case, *Tun Myaing* vs. *Ba Tun* (2 L. B. R. 292) and it was there held that the eldest-born son is the *orasa* by right, but he does not attain the complete status as such till he attains his majority and becomes fit to assume his fathers's duties and responsibilities. If he dies in infancy or if he is incompetent, the status of *orasa* devolves on the next eldest competent son when he attains his majority.

But whatever may be the rule as to the devolution of the status of an *orasa* son, there is no authority for holding that the eldest surviving son or daughter who succeeds to the position of *orasa* can transmit the superior right of inheritance to his or her own issue, unless he or she is the eldest child. It is only an *orasa* who is actually the first-born of the family that can do so. This view is in conformity with the rules contained in the Dhammathats as above explained.

But a contrary view was taken in a recent Lower Burma case, *Ma Hnin Gaing* vs. *Tha Li* (4 B. L. T. 74). In this case, the plaintiff was the daughter of the eldest surviving son who was the second child among a family consisting of two sons and one daughter, the latter being the youngest child.

The eldest child who was a male having died in infancy it was held on the authority of *Tun Myaing* vs. *Ba Tun* (2 U. B. R. 292) that the status of *orasa* devolves on the next eldest competent son, and that the plaintiff as the daughter of an *orasa* son should share equally with her aunt (defendant) in her grandfather's estate.

The case of *Po Sein* vs. *Po Min* (3 L. B. R. 45) is cited among others as an authority for the latter proposition. But as already remarked the rule stated in that case applies only to the child of the *orasa* son or daughter strictly so called, which is not the plaintiff's position.

The plaintiff therefore could only get $\frac{1}{4} \times \frac{1}{2} = \frac{1}{8}$th of the estate as an ordinary " out-of-time " grandchild.

In *Ma Thin* vs. *Ma Nyein E* (3 B. L. T. 6) it was held that the eldest surviving daughter of the eldest child is entitled to a share equal to that of her aunts. The case of *Ma Saw Ngwe* vs. *Ma Thein Yin* (I. L. B. R. 198) is quoted as an authority for this proposition. It was there ruled that "among grandchildren whose parents have predeceased their grandparents, the only one who ranks with the surviving uncles and aunts is the *eldest representative* of the eldest child."

Ma Thein Yin was the daughter of the eldest daughter who was the second child but not the eldest survivor among a family consisting of two brothers and two sisters, the eldest child being a son who was one of the defendants. She sued her two uncles and the children of her deceased aunt for a one-fourth share of her grandmother's estate. Her mother and her aunt predeceased her grandmother, and the only point for determination was whether the plaintiff could claim an equal share with the younger children of her grandmother, her mother not being the eldest child. It was held that she was only entitled to one-fourth of what her mother would have got had she survived.

But the circumstances of the two cases are not alike and it is not quite clear that in Ma Saw Ngwe's case Mr. Justice Birks intended to lay down the rule as stated in Ma Thin's case.

It has been seen that a grandchild whose parents have predeceased their parents is entitled to rank with the surviving uncles and aunts only if he is the eldest child of the *orasa* heir, the

other grandchildren taking only one-fourth of the share that their parents would have enjoyed had they survived.

Applying this principle to the present case, the first plaintiff who was the eldest surviving child of her parents and her 7 brothers and sisters 3 of whom are not a party to the suit, would be entitled between them to one-fourth of their mother's share which was one-third. In this case the first plaintiff was admittedly not the eldest-born child of her parents, their first child having died in infancy, and she was, therefore, not entitled to any preferential treatment on partition. The following extract from the Vilasa bears out this statement :—

"The eldest son of a deceased brother, if he is the *orasa*, shall receive as much as the youngest of his uncles. Of the sons of the deceased, his eldest-born son, that is, the first-born *orasa* grandson (*Mye U orasa*) shall receive as much as the youngest of his uncles. But the grandson next to him shall receive only a quarter as much. Because a son is a nearer kin than a grandson, the latter shall not receive as much as his uncles and aunts, *i. e.*, the brothers and sisters of his deceased father" (Section 162 Digest, see also Cittara and Kyetyo in Sections 162-163 Digest).

The point arose again in *Ma Ein Thu* vs. *Mg. Hla Dun* (5 B. L. T. 1912, p. 73.) In this case the mother of plaintiff (Hla Dun) was the eldest daughter of her parents, but she was not the first-born child, the eldest child who was a son having died in infancy. The only other child was a daughter (Ma Ein Thu.) It was contended that the plaintiff's mother was not technically the *orasa* child within the meaning of the texts quoted in Section 163 of the Digest, and Po Sein's case was cited in support of the contention. But it was pointed out that that case was different. The learned Judge distinguishes it on the ground that in that case the plaintiff's mother was the fifth child in a family consisting of 4 brothers and 3 sisters and that at the time of her mother's death she had an adult brother surviving and competent to assume the headship of the family; whereas, in the present case the only children arriving at maturity were two daughters, their brother who was the eldest child having died in infancy.

Following the rulings cited in Ma Hnin Gaing's case already quoted, it was held that if the deceased eldest child were a daughter the status of the eldest daughter would have devolved on the plaintiff's mother as the next competent daughter, and that the fact that the eldest child was a son made no difference, no other son being born who could fill the place of the deceased *orasa*. It was further held that the plaintiff's mother was an eldest daughter as contemplated in Section 163 and that the plaintiff as her son was entitled to a share equal to that of his aunt, the defendant.

The latest decision on the subject in Lower Burma appears to be that in *Po Zan* vs. *Mg. Nyo* (6 B. L. T. 105). In that case a grandson claimed an equal share with a son, his uncle, in the property of his deceased grandparents, his mother who predeceased his grandfather being the eldest child. He was awarded a half share on the authority of the texts collected in Section 163 of the

Kinwun Mingyi's Digest, but on appeal the Chief Court held that these texts were not intended to be applied where there is or has been an "orasa" son. He was only allowed a quarter of his mother's share which was one half.

The following cases were quoted with approval :—

1. *Ma Mya Thi* vs. *Po Thein* (P. J. 85).
2. *San Dwa* vs. *Ma Min Tha* (2 L. C. 207).
3. *Ma Saw Ngwe* vs. *Ma Thein Yin* (1 L. B. R. 193).
4. *Tun Myaing* vs. *Ba Tun* (2 L. B. R. 292).

The first case is an authority for holding that where there are both sons and daughters in a family, the eldest son, if competent, is preferred to any daughter. In that case the youngest son was held to be the orasa although he had two elder sisters.

The ruling in Ma Mya Thi's case was followed in the case of *San Daw* vs. *Ma Min Tha*. The plaintiff in that case was the sixth child of his parents and he was the eldest surviving son upon his father's death. It was held that he was entitled to a fourth share of the parents' estate.

The case of *Ma Saw Ngwe* vs. *Ma Thein Yin* relates to shares of grandchildren representing deceased parents as noted above. It is the only case which bears on the point.

In the case of *Tun Myaing* vs. *Ba Tun* the term *orasa* was considered as already stated, but the point really decided in that case was that a grandson cannot sue the grandfather on his re-marriage for a share in his grandparents' estate so long as there are surviving sons who are his uncles.

Thus it will be noticed that, with the exception of one case, the above-mentioned cases are not directly in point. The decisions in those cases are based on texts dealing with the rights of the *orasa* son at a partition among several sons and daughters on the death of their parents. In such a case the superiority of the son to the daughter is recognised by the Dhammathats so long as he is competent to perform the duties of an *orasa* or to take the position of such although he may be the youngest child in the family. But the rule as to the shares of grandchildren in the estate of their grandparents is different.

The case of *Po Sein* vs. *Po Min* (3 L. B. R. 45) was distinguished in Po Zan's case on the ground that the plaintiffs were not the sons of the eldest female child as the plaintiff was in the latter case. But the Court seems to have missed the true point in the case. It appears that the fact of there being an adult brother (Po Min) was not made the basis of decision in Po Sein's case. It was merely pointed out that the second daughter who was also the fifth child could not become an *orasa* so long as there was a surviving brother competent to assume the headship of the family. There is nothing in that case from which it can be inferred that a son other than the *orasa* in a family consisting of sons and daughters should be preferred to the eldest daughter who is the

eldest child. On the contrary it was held that the Dhammathats emphasize the *eldest child's* right and lay stress on the eldest son or daughter being the "first-born" child to entitle his or her children to a share equal to that of their uncle or aunt. This interpretation derives support from the following extract from the judgment.

The learned Chief Judge referring to Sections 162-164 of the Digest, says: "There is an unusual unanimity in the texts. If the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together, receive the same share as their youngest uncle or aunt. But this is strictly confined, in all the texts, to the children of the *orasa* or eldest son or daughter. In my opinion, the rule relates to the *orasa* son or daughter, strictly so called. There is no indication that it has any reference to the eldest surviving son or daughter, unless he or she is technically the *orasa*. Nor has any authority been cited which would give colour to that suggestion. As to the children of younger sons or daughters who die before their parents, they receive one-fourth of the shares to which their parents are entitled."

It is said that "in Section 163 the text of the Kyannet expressly makes the right of the eldest sister's son dependent on the eldest brother being childless." (6 B. L. T. 107). The published English translation of the Digest supports that view but the the Burmese is perhaps open to another construction. It would be remarkable if the Kyannet stood alone against several other Dhammathats, the language of which admits of no misconstruction on the point with which that Section deals.

It is significant that in *Po Sein's* case no reference was made to *Tun Myaing's* case in which Sir H. White himself was a party to the judgment. There is no reason to suppose that such an important case was overlooked, and the only inference is that it was not referred to because it has no bearing on the subject.

A contrary view, however, was expressed in *Min Din* vs. *Mi Hle* (2 U. B. R. 04-06, B. L. I. p. 11).

Plaintiff Mi Hle sued for one-seventh of her grandparents' estate as the only child of their eldest son who survived his father but predeceased his mother. Defendants (with the exception of Min Din) are her uncles and aunts, Min Din being the daughter of another aunt who died before her parents. It was contended that plaintiff, if entitled to share at all, was only entitled to $\frac{1}{4}$th of the share her father would have got if he had lived, *since he was not the eldest child*. Mr. (now Sir George) Shaw, however, held that the plaintiff's father, though not the eldest child, was the *orasa* son and that he was entitled to his full share, namely, one-seventh and not one-fourth of that share. Reference was made to Sections 162 and 163 of the Digest, the texts directly in point.

With some diffidence as to disputing the view of such a distinguished authority on Buddhist Law, it may be pointed out that the decision seems to conflict with that of Sir H. White in Po Sein vs. Po Min before mentioned. As already observed the

Lower Burma case lays down that the rule in Sections 162 and 163 of the Digest is not applicable to the eldest son or daughter who is not the *orasa* by right. That case was not referred to in Min Din's case and the omission was probably due to an oversight.

In the Upper Burma case, the question what is " the eldest-born son " was examined. The learned Judge after considering the texts dealing with partition among several sons and daughters came to the conclusion that such a son means the eldest son and not necessarily the eldest child. It is submitted that the rules applicable to children do not necessarily apply to grandchildren. The case is provided for in Sections 162-164 of the Digest, and the Dhammathats cited in those sections declare the right of the child of one of several brothers and sisters to represent his or her deceased parent in a division of the grandparents' estate.

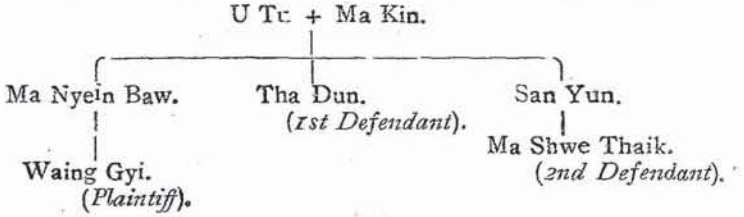
In the last mentioned case the learned Judge dissented from the ruling in the case of Mi Saw Ngwe quoted above, in that there can be only one *orasa* child in a family. But in the case of Tun Myaing already cited the ruling was concurred in, and there can be no doubt that there cannot be both on *orasa* son and an *orasa* daughter at the same time. In the most recent case decided by Mr. Justice Hartnoll it was pointed out that the contrary view would in certain cases mean that special treatment must be allowed to two branches in one family which " is contrary to the rule of decision adopted in interpreting the Dhammathats " (6 B. L. T. 107). That would no doubt be the case if there could be two *orasa* children in the same family.

One ventures with the utmost respect to express the opinion that the eldest daughter contemplated in Section 163 is the first-born child who is the *orasa* by right, and she cannot be superseded by any other child even though he be an adult son competent to assume the position of an *orasa*, provided that she is affected by none of the disabilities or disqualifications mentioned in the texts on the subject. Any other view would nullify the salutary provisions of that section altogether, and thus defeat the aims and objects of the law which had been specially framed for the benefit of the *orasa* child (whether son or daughter), and its issue.

One ventures to think that in these decisions the learned Judges overlooked the distinction between the rules as to the shares of " out-of-time " grandchildren in the estate of their grandparents and those which give a preference to the *orasa* child at a partition among several sons and daughters of their parents' estate. No doubt grandchildren are not in the same position as children and the only child who is given the share of an uncle or aunt is the eldest child who is given special treatment on account of the superior claims of the *orasa* heir, as pointed out by Mr. Burgess in *Ma Gun Bon* v. *Po Kywe* (2 U. B. R. 97-01, p. 74).

A similar view was taken in a recent Upper Burma case, *Tha Dun* v. *Waing Gyi* (Civil 2nd Appeal No. 302 of 1909 of the J. C.'s Court dated the 18th July 1910), in which *Mi Min Din's* case was cited but not followed.

The parties are related as shewn in the following table :—



Ma Nyein Baw was the eldest child and daughter of U Tu and Ma Kin. She survived her father but predeceased her mother. The plaintiff is her son and the 1st defendant is her younger brother and the 2nd defendant is the daughter of her youngest brother who died before his mother.

Plaintiff sued for a third of his grandmother's estate and he based his claim on his being Ma Nyein Baw's son and heir. The defence was that though she was the eldest child she was not an *orasa* daughter as she had brothers, the rule being that the eldest competent son is preferred to any daughter, and that therefore as she had died before one of her parents the plaintiff was only entitled to ¼th of what he claimed.

In support of this proposition, the case of Min Din is cited as an authority. The learned Additional Judge dissents from the ruling in that case, and referring to the rule stated there says :—

"But in the present case we are not concerned with the special position and privileges of an *orasa* son or eldest daughter but with the share which the son of an eldest daughter who predeceased her parents is entitled to inherit. Section 163 of the Kinwun Mingyi's Digest deals with the point. In every text quoted the child of the eldest daughter is given the same share as his youngest aunt. There is nothing to suggest that families consisting of daughters only are referred to and the text of the Vannana clearly refers to families consisting of both daughters and sons".

The sole legal point for decision in second appeal is whether the plaintiff's share of his grandmother's estate should be one-third or one-twelfth. Mr. McColl held that as the only child of the *orasa* daughter, the plaintiff is entitled to one-third of the estate under Section 163 of the Digest, i. e., he receives the same share as any of his uncles.

It may here be noted that the same opinion was expressed by Mr. Justice Twomey in the case of Ma Ein Thu already referred to (5 B. L. T. 73). In that case it was held that the texts cited in Section 163 of the Digest give the issue of the eldest daughter a share equal to that of the youngest of his aunts and that there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only. In the earlier case of Ma Thin before mentioned, Mr. Justice Parlett applied the same rule in a case which relates to a family consisting of brothers and sisters (3 B. L. T. 6).

There can be no doubt that the reason for giving special treatment to the eldest child of an *orasa* son or daughter who predeceases his or her parents is on account of the superior claims of the *orasa* heir. It is true that Sections 162 and 163 do not deal exclusively with the eldest born child. But with the exception of one or two texts, the others give special treatment only to the eldest grandchild, the other grandchildren taking only one-fourth of their deceased parents' share, and as has been shewn, an *orasa* must of necessity be the eldest born son or daughter to entitle him or her to a preferential treatment. Several of the texts in one section or the other clearly refer to families consisting of both sons and daughters. The Manugye, for instance, deals with partition between uncles and aunts on one side and the son or daughter of an *orasa* who predeceases his or her parents on the other. A reference to the Burmese shows that the translator used the word "coheirs" for the words "uncles and aunts" in the original text.

Most of the Dhammathats give special treatment to the child of both an *orasa* son and an *orasa* daughter, and at first sight it appears that they refer to the special position and privileges of the eldest son and of the eldest daughter as co-existing. This would mean that there could be two *orasa* children in one family, but that this cannot be the case is proved by the fact that there are two separate sections dealing with the point. Section 162 refers to the child of the *orasa* son, while Section 163 speaks of the eldest daughter's child, and it is clear that the latter is entitled to the same share as that given to the former, namely, a share equal to that of the youngest uncle or aunt. The fact that there is or has been a son competent to perform the duties of an *orasa* in the same family seems to make no material difference, unless he is the *orasa* by right, in which case Section 162 applies. Otherwise Section 163 may be rendered nugatory.

A little reflection is sufficient to afford a reason for this view. Among brothers and sisters the eldest brother and the eldest sister are spoken of as representing the father and mother respectively (See the Manugye and the Amwebon in Sections 162-163). The reason is obvious. The Dhammathats recognize the eldest daughter's right to a preferential treatment on the death of the mother which the eldest son possesses on the death of the father, because he or she takes the position of the deceased parent in the family. Similarly the same remark applies to the child of an eldest son or daughter when the latter dies before his or her parents, the reason being that as an *orasa* by right he or she can transmit the superior right of inheritance to his or her own issue.

Any other view would be opposed to the spirit, if not the letter, of the Burmese law as above interpreted. From a considerations of the texts and rulings one may deduce the following principles :—

1. The doctrine of special treatment of a child applies to the child of an *orasa* son or an *orasa* daughter.

2. There can be one *orasa* child in a family.

3. It is only an *orasa* who is actually the first born of the family that can transmit the superior right of inheritance to his or her own issue.

It must be admitted on all hands that the language of certain texts is obscure and what adds to the difficulty of interpreting then is that the published translations are inaccurate—mistranslations which to a great entent, have been responsible for conflicting rulings.

In interpreting the Dhammathats, the spirit of the ancient law might properly be applied under special circumstances, though the letter may be somewhat departed from, and in ascertaining the meaning of an obscure passage in any one text the spirit of the rules laid down in the old law books should always be considered ; otherwise (in the words of Sir John Jardine) " the Courts will be authors of innovations which may be as contrary to equity and public policy as to the usages of the people ". (Nga Lon vs. Ma Myaing, S. J. 210).

BOOK REVIEWS.

The All India Digest 1811-1911 (Civil) by T. V. Sanjiva Rao, Vol. V. Idol—Limitation. Published by the Law Printing House, Madras.

We welcome the Vth volume of this very useful digest. In method, manner and general get up the present volume like its predecessors leaves nothing to be desired. The use of various types facilitates reference and saves the time of the lawyer who is in a hurry to find out his reference. The volumes of the Digest deserve a place on the shelf of every legal practitioner who studies his cases well.

The case—noted Civil Procedure with explanatory notes based on reported and unreported cases. By Trikamlal R. Desai, B.A., LL.B., Vakil High Court, Bombay. Third Edition pp. 501, Bombay, Price Rs. 3-8-0.

The book is handy enough and useful for students and lawyers. The notes are brief and to the point and are expository of the sections and rules. The get up is neat and attractive. The price is very moderate.

The Negotiable Instruments Act 1881. Published by T. A. Venkasawmy Rao and T. S. Krishnasawmy Rao, Proprietors, Lawyer's Companion Office. The Law Printing House, Mount Road, 1912. (Pages 286, Price Rs. 2-8-0.

The new edition has given all the important references dealing with the sections of this most important act. In the appendix, are set out in full the provisions of the English Bills of Exchange Act on which the sections of the Indian Act are based. Rules for the guidance and control of Notaries Public are also reproduced as a whole. The printing and the general get up of the book deserve mention. We think this book will prove of great use to students and practitioners in law.

Digest of Privy Council Rulings up to the end of 1912. 3rd Edition Vol. I. A to H. By C. S. Somanath Sastri, P.A. B.L., Published by Law Printing House, Madras, 1913.

This is a digest of the rulings of the highest judicial tribunal the Privy Council and is a welcome addition to the lawyer's law library. The first Edition was brought out by the late T. V. Sanjiva Rao in 1890, the second in 1903 and now this third Edition appears after exactly ten years. This edition contains all the Privy Council Cases reported in Moore's Indian Appeals, Indian Law reports and also the Privy Council Judgments edited by Moore, Knapp, Sutherland, Saraswati, Baldeo Ramdave, etc., which had not been incorporated by Sanjiva Rao in the 2nd edition.

The main cases have been digested under appropriate headings and subheadings and copious cross-references have been given to facilitate the task of searching them up. The notes are arranged in the order of the Provinces to which they belong so as to show at a glance the view taken by the highest Court of each province. These volumes will prove of great use to advocates and judges. The get up is as usual very nice. We have every hope that the legal profession will accord it the welcome it deserves.

The Law of Joint Property and Partition in British India. By Ramcharan Mitra, M.A. B.L., High Court Vakil, Calcutta. 2nd Edition, Published by Messrs. R. Cambray and Son, Calcutta 1913.

The volume before us contains the lectures delivered by the author as Tagore Law Professor for the year 1896 in the University of Calcutta on the subjects of joint property and partition and cover a pretty large field in both Hindu and Mahomedan laws. The acknowledged text books have given these subjects only a limited space and the practitioner will therefore derive much benefit from a treatise devoted entirely to these subjects. The author has given several recent cases that contain a full discussion of the incidents of joint property and has included in this edition the latest provisions made by the legislature for the partition of revenue paying estates. The book is indispensible to those who have to handle cases involving topics of Hindu and Mahomedan Laws. There is a separate chapter dealing with Limitation and Procedure obtaining in such cases.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS No. 261, 262, 263, 264, 265, 266, 267, 268, 269 AND 270 OF 1913.

1. PAN THIN (*alias*) PO MYA. 2. PO THWE. 3. NGA KYE. 4. NGA TUN. 5. NGA CHIN.	6. PO TAIK. 7. NGA NYO. 8. NGA WA. 9. NGA KALA. 10. NGA E.	v. KING-EMPEROR.

Dated, 1st day of July 1913.

Against convictions under Section 121, Indian Penal Code.

Appeals from the order of the Additional Sessions Judge of Bassein, dated the 11th day of March 1913 passed in Sessions Trial No. 5 of 1913.

JUDGMENT.

The ten appellants have been convicted of waging war against the King under Section 121 of the Indian Penal Code and have all been sentenced to death. There is no doubt that on the morning of the 18th September last, a party of men armed with dahs fought against a body of police led by the Township Officer Maung Po Saing in the vicinity of the village of Mayoka in the Zalun township of the Henzada District. There is voluminous evidence of this fact. Those of the appellants who admit being in the party that was fired on by Maung Po Saing and the police state that they were innocent villagers and were going to do honour to the body of a dead pongyi—that that was the reason why they were dancing and dressed up: but there is nothing to support such a story and in face of the evidence the allegation is beyond doubt untrue. The evidence shows how no shot was fired by the Township Officer's party until all warnings proved useless. Further the dress of the party fired on,—a distinctive uniform different for the leaders and for the rank and file—the long sharp dahs with sword knots and whip cord handles, the finding of the exhibit proclamations Exhibit V, the cutting of the telegraph wire and the finding in Kyauk Lon's house of the book Exhibit 24 which contains according to Saya U On Gaing charms to make people invulnerable, all go to show that the party fired on by the Township Officer's party was engaged in no innocent pursuit but was one that deliberately attacked that officer and his party after being called on to surrender.

The proclamations read as follows:—

Sakkya Thihamin's Royal Order.

1. I, the Glorious King Sakkya Thiha, Ruler of many kingdoms, hereby, issue the following order viz:—

Whereas it is expedient, that (you) must especially support the religion and assume the responsibility of a Commander-in-Chief and make an immediate march from Zalun to Chindwin via

THE

BURMA LAW TIMES.

VOL. VI.] JAN. & FEB., 1913. [NO. 1 & 2.

PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—

LORD CHANCELLOR. | LORD MOULTEN.
LORD MACNAGHTEN. | SIR JOHN EDGE AND
LORD ATKINSON. | AMEER ALI.

THE SECRETARY OF STATE ... APPELLANT.

v.

J. MOMENT ... ... RESPONENT.

FOR APPELLANT—SIR ERLE RICHARDS.
FOR RESPONDENT—L. DEGEUYTHER.

Dated 10th December 1912.

Lower Burma Town and Village Lands Act—Act IV of 1898—S. 41 (b)—ultra vires—S. 65, 66 and 67 of Government of India Act of 1858,—S. 22 of the Indian Councils Act of 1861.

Held that the effect of Section 65 of the Act of 1858 was to debar the Government of India from passing any act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in the East India Company; that the section is not, like the two other Sections 66 and 67, a merely transitory Section and that its purpose was to make it clear that the subject was to have the right of suing and was to retain that right in the future or at least until the British Parliament should take it away. *Held*, therefore, that Section 41 (*b*) of the Act IV of 1898 was *ultra vires* of the powers vested in the Lieutenant Governor of Burma.

Previous history:—The case was an appeal from the Chief Court of Lower Burma. The appellant had in a former case Civil Regular No. 301 of 1909 sued the respondent to recover possession of a house and land in the Cantonment of Rangoon. Appellant succeeded in the court of first instance, but on appeal by the respondent the Appellate Bench of the Chief Court reversed the decree of the learned judge on the Original Side and dismissed the suit. (3L. B.R. 165) Meanwhile, appellant had evicted respondent in execution of that decree, and had sold at auction the house and a number of stables attached thereto (respondent being a livery-stable keeper) with a condition that the purchasers should demolish and remove them within 14 days. Such demolition was proceeding, when it was stopped by appellant in anticipation of the Appellate Court's judgment. After such judgment,

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appellant restored possession to respondent, but refused him any compensation. Respondent petitioned the Chief Court on its Original Side for mesne profits and damages. That court, held in a preliminary order that the partial demolition of the buildings was "a separate wrong, apart from the decree", for which respondent's remedy was by regular suit. Respondent thereupon instituted the present suit (Civil Regular No. 304 of 1906 of the Chief Court of Lower Burma), in which he claimed Rs. 2,406-8-0 made up as follows :—Rs. 2,010 depreciation of the buildings as at the date when the land was restored to him ; Rs. 300 further damage since that date ; and Rs. 96-8-0 interest on Rs. 2,010 up to date of filing suit. The Miscellaneous proceedings were infructuous, Bigge J. holding that although the respondent might have made a profit from his occupation of the land, by carrying on the various branches of his business, as a livery-stable-keeper, riding master, etc., the appellant could not be expected to carry on any such business, and that the house, though respondent had formerly occupied it, was of no rental value. Respondent appealed, but his appeal was dismissed by the Appellate Bench of the Chief Court (Fox C. J. and Hartnoll J.) on the ground that his claim to compensation was inextricably connected with his claim to retain possession of the land, and that they were debarred from entertaining it by reason of section 41 (b) of the Lower Burma Town and Village Lands Act (Burma Act IV of 1898) which provides that "no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government." (Vide 1 Burma Law Times p. 17) Meanwhile appellant had filed his written statement in the present suit and had advanced the plea "that the Honourable Court is debarred from entertaining the plaintiff's claim on any part thereof by reason of the provisions of section 41, Lower Burma Town and Village Lands Act." The question "Is the jurisdiction of this court as to the whole or any part of the claim excluded by section 41 of the Lower Burma Town and Village Lands Act ?" was tried as a preliminary issue, and Moore J. following the judgment of the Appellate Court in the Miscellaneous Proceedings reported at 1 Burma. L .T. p. 17 found this issue in appellant's favour and dismissed the suit. Respondent appealed, contending that the case was one of tort and had no connection with the nature of his title (if any) to the land ; that section 41 of the Lower Burma Town and Village Lands Act had, therefore, nothing to do with the case. He further contended that the Act did not apply to the Cantonment of Rangoon, and further, that claim (b) of section 41—which was the part of section 41 relied on by the court—was *ultra vires*. The Appellate Bench of the Chief Court referred for the decision of the Full Bench the following question :—Is Clause (b) of section 41 of the Lower Burma Town and Village Lands Act *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma? The reference was heard by a Bench of four judges, of whom three (Fox C. J. and Hartnoll and Parlett J.J.) held that Section 41 (b) was *ultra vires* and one (Robinson J.) that it was *intra vires*. The ground of the decision of the majority was that the said clause affected section 65 of the Government of India Act, 1858 (21 and 22 Vict. c. 106). Vide 5. L. B. R. 163.

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The Appellate Bench, following this decision, allowed the appeal and remanded the suit for trial on the merits. At the trial, Robinson J., awarded the respondent Rs. 562 (about £38) under the first head of his claim, the other two heads being disallowed. Government appealed but unsuccessfully. They then applied for and obtained leave to appeal to the Privy Council. Owing to the absence in England of the advocate who had formerly appeared for him respondent was not represented on this application; and the point that the amount involved was much below the statutory limit of Rs. 10,000 (£666) provided for Privy Council appeals from India, was not therefore, raised. The respondent was not in a position to meet the expenses of contesting the appeal; but funds for that purpose were provided by the Rangoon Chamber of Commerce at the instance of Messrs. J. W. Darwood and Co. of Rangoon. Respondent's case, as originally filed, supported the decree on the ground that the Full Bench decision was correct. Before the hearing, respondent gave notice that it would be supported on the following further grounds: 2. That if section 41 (b) be not ultra vires, then on a true construction of the statute, the Civil Court did have jurisdiction to entertain and decide the present suit. 3. That the appeal was incompetent and the ground upon which the right to appeal was rested did not of necessity arise for determination. Appellant opposed the addition of these reasons, and owing to the course which the case took, no reference was made to them at the hearing.

Section 65 is as follows:—"The Secretary of State in Council shall and may sue and be sued as well in *India* as in *England* by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

SIR ERLE RICHARDS, K. C. (WITH HIM MR. A. DUNNE) for appellant submitted that section 65 of the Government of India Act, 1858 (21 and 22 Vict. c. 106) was a mere transfer section. A partial transfer from the Company to the Crown was effected by the Charter Act of 1833 (3 and 4 Will. IV. c. 85) and this was completed by the Government of India Act. Those sections which begin with section 65 have generally been held to effect the transfer with regard to suits and actions. (Counsel read sections 65-67 and referred to section 68.) These sections have always been regarded in India as mere machinery for effecting this transfer; as merely intended to prevent the Government of India from raising those defences which are open to the Crown in this country. In this case the Chief Court of Lower Burma have said that these words are a fetter on the legislation of India.

Lord Moulton: What have the Indian Legislature done?

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Sir Erle Richards: The particular Act concerned is an Act of the Burma Provincial Legislature, Burma Act IV of 1898. Section 41 of that Act lays down that no Civil Court shall have jurisdiction te determine any claim to any right over land against Government. This is no novelty. Taking away the decision of questions as to the right to land from the Civil Courts, and vesting it in the Revenue Courts, is part of the general policy of the Government of India. To prevent land speculation the Government, in the districts of Burma to which this Act applies have kept all the waste lands to themselves, and have reserved to themselves the power of determining who is to occupy those lands. The matter is of considerable importance, as other Acts, besides the present one—the Contract and Limitation Acts for instance, will be affected if the construction put upon this section by the Chief Court of Lower Burma be upheld and if the judgment stands, imperial legislation will be necessary.

Lord Haldane: I gather that this man brought a suit respecting land.

Lord Moulton: It appears to be a case of tort. You don't suggest the Company could have resisted such a suit?

Sir Erle Richards: No, but the Company could have legislated so as to deprive the subject of his right of suit. It would have been extraordinary if this fetter had been imposed by those sections. If it had been intended to fetter the Indian legislature, the intention would not have been expressed so equivocally.

Lord Moulton: Do you say they could have said the Secretary of State could not be sued for tort?

Sir E. Richards: Undoubtedly.

Lord Moulton: Why?

Sir E. Richards: Because before 1858, they could have done it. The rights which the subject had at that time were subject to the legislative power of the Government of India, and they continued to be so subject; no change was effected or intended. Counsel then dealt with the facts of the case). I think the Crown did sue in the wrong court.

Lord Moulton; Before this Act, they would have had the right of suit in a Civil Court.

Sir E. Richards: Yes.

Lord Moulton: And this demolishes it.

Sir E. Richards: Yes (Reads part of the judgment of Fox C. J.) I will not not go into the question whether the East India Company were liable to be sued. I assume that before 1858 a subject could sue the East India Company?

Lord Atkinson: Doesn't "same suits" mean suits of the same character?

Sir E. Richards: Yes, I admit it must be suits of the same character.

Lord Moulton: Then what meaning do you give this?

Lord Haldane: Your whole point is that this is merely a section in a transfer act.

Sir E. Richards; It has never been said before that it was anything else. It has been left to the Chief Court of Lower Burma to say that it is a fetter on the legislature. To adopt such a construction would have a very serious effect; it would stereotype the law and would prevent any change being effected, however necessary.

Lord Haldane: Does that mean to stereotype?

Lord Moulton: It does not say that the law is not to be changed, but only that the Government of India cannot change it; that it can only be changed by Parliament.

Sir E. Richards: I rather doubt if the Company could have said that the subject should have no right of suit at all, but that is very different from saying how and where he is to sue.

Lord Haldane; Could they have regulated procedure?

Sir E. Richards: Yes.

Mr. Amir Ali: Doesn't it mean the right of the subject to sue in Civil Court?

Sir E. Richards: It does not matter whether the procedure is to be in the Civil Court or the Revenue Court. It is quite open to the legislature to say that the law is to be different as regards the Crown.

Lord Atkinson: You would read into the section some words like these, "until the same are taken away by legislation."

Lord Moulton: The other construction is to sterotype except by Imperial legislation.

Sir. E. Richards: The first Act which gave the Government of India the legislative power, was 13 George III c. 63, section 36 of which gave the Governor-General in Council, the widest possible power to make laws and regulations, not being repugnant to the laws of the realm, and provided for the regulations to be registered in the Supreme Court, and for an appeal to the King in Council.

Lord Haldane: It might be said that a provision like this was repugnant to the laws of the realm.

Lord Moulton: He couldn't have said nobody shall sue you in the Civil Court.

Lord Haldane: Anyhow, you could sue the East India Company in a Civil Court.

Counsel referred to the Act of 1833 (3 and 4 Will. IV c 85), and especially to the Preamble and sections 1, 9, and 10. (Read section 43). That was the general power of legislation which existed at the time the Act was passed, and it was wide enough to cover a case like this.

Lord Moulton referred to section 10 and pointed out that the power of legislation was "subject to the provisions of this Act."

Sir E. Richards: That section is very similar to section 65. The next statute of importance is the Indian Councils Act of 1861 (24 and 25 Vict. c. 67) Under section 22 of that Act, the Government of India cannot by legislation affect any provision of the Government of India Act, 1858, and I admit that if section 65 of the latter Act has the effect contended for by respondent, section 41 of the Lower Burma Town and Village Lands Act infringes it; but I submit it has not that effect, and I can at all events point out that no such effect has previously been attributed to it by the court. The effect of the

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section was considered by Sir Barnes Peacock in P. and O. Steam Navigation Co. v. the Secretary of State for India in Council. (5 B. H. C. R. Appendix) (Reads extracts from judgment in that case). That judgment merely lays down that the Secretary of State is liable in tort. Damage was done by some employees of the bullock train, and Government was held liable for it.

Lord Atkinson referred to a passage at page 15 as shewing that an action of ejectment could havebeen maintained against the East India Company.

Sir E. Richards: I know of no direct authority upon this point, but two cases have come before this Board in which the decision assumed the construction for which I contend. I admit this point was not raised. Both cases dealt with the interpretation of the Pensions Act (XXIII of 1871). Cites Vasudev Sadashio Modak v. Collector of Ratnagiri, 4 Jud. App. 119.

Lord Haldane: The point was not discussed.

Sir E. Richards: No, I admit it was not discussed.

Lord Haldane: It seems what was done here was to affect pensions, and what was done with regard to remedies was merely subsidiary.

Sir E. Richards: That may be so, but it would have been a complete answer to say that section 4 was ultra vires.

Lord Haldane: I don't think this is an authority. The Board may have treated this as a substantive question dealing with rights.

Sir E. Richards cited the Bengal Rent Act (X of 1859): That Act was passed in 1857, before the Government of India Act, 1858, but became law only after that Act, in 1859. I can't say that is an authority—the Indian legislature may have made a mistake—but those Acts have stood on the Statute book a long time, and this particular Act was vigorously opposed by Sir (then Mr.) Barnes Peacock, who never took any such objection. Cites Field's Landholding, 2nd Edn. p. 781 (reads S. 445). Serious consequences will ensue if this decision be upheld. All the General Acts will no longer be binding on the Crown if this decision be right; the Contract Act, the Limitation Act, the Code of Civil Procedure, will all be affected. I submit on the other hand, that these are procedure sections. They are sections for effecting the transfer from the Company to the Government. Every single provision in these four sections except this one is a mere procedure provision and I submit that this one is no more.

Lord Haldane: The section refers to the future. That shows that it is more than a mere transfer section. A transfer section doesn't stereotype. If that were all the new Government could repeal the statute the next minute. Doesn't it mean that the Secretary of State was not to be a priviliged person at all?

Sir E Richards: It is a very obscure section if this be so. No doubt it may be said the construction I contend for leaves Government very wide powers, but you must credit the Government with some regard to public interests. I am bound to admit the section must deal with the future, or it would be idle.

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Mr. Dunne on the same side: My submission is that the whole section is subject to the power of Legislation, which existed before and was not taken away.

Lord Haldane: You say the East India Company had the power to alter things by legislation?

MR. DUNNE: They say that in so many words, (reads sections 1 and 2 of 21 and 22 Vict. c 106). I say they not only had the right, but they expressly declared it. The words are of the most general kind, and the rights of the subject must be subject to legislation like everything else.

Lord Haldane: You see, 21 and 22 Vict. c. 106 says that they can't affect any of the provisions of the Act of 1858. You are driven to say "subject to the inherent power of the East India Company to legislate." Is it clear that the East India Company could do this—that they could enact that they could not be sued in any Civil Court?

Mr. Dunne: I don't know of any Act in which they actually said that, but whether or not they exercised their power, they had it.

Lord Haldane: Was it under their Charter?

Mr. Dunne: I am not sure as to the exact way they acquired it. There are instances where they transferred the right of suit from Civil Courts to other courts.

Mr. Amir Ali: That is different.

Lord Haldane: Under section 36 of the Act of 1773 (13 Geo. c 63) they could only make laws so long as they were not "repugnant to the laws of the realm." Is it not "repugnant to the laws of the realm" to oust the jurisdiction of the Civil Courts?

Mr. Dunne: It does not prevent them from setting up special courts.

Lorp Moulton: To shut out the Civil Courts altogether would be insufferable.

Mr. Dunne: The words, I submit, are not appropriate to avert the mischief your Lordship points out. Even if the Government of India can do such a thing, it is certain they never would do it. You must not think that I am defending the action of the legislature in passing this particular Act. That is a matter not of law but of policy. They may have had some administrative reason not known to me.

Lord Haldane: If they appoint a court for Government and for subjects, it might be said to be right, but there you are differentiating between the liability of the Government to answer in courts and that of private persons. You are quiet right in your admission, Mr. Dunne. You must contend that the East India Company had that power to legislate.

Mr. Dunne: I understand that your Lordship puts it that there may be a right to make changes in procedure, so long as the subject has the right to go to a Civil Court.

Lord Atkinson: I notice that the sections always say "subject to the provisions of this Act". They were settling things, and what

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is there unnatural, after all, in their withdrawing from the Government of India the power to alter this subject—the remedies of the subject against itself?

Sir John Edge: Are you asking us to read into the section some such words as these—"provided that the Gevernor-General of India in Council may deprive every subject of all his suits, remedies and proceedings?"

Mr. Dunne: My answer is that the Act never intended to deal with these things at all. It merely prevents the subject from having to apply by petition of right

Sir John Edge: If you are right in your construction of this section it comes to very little.

Lord Atkinson: I have been looking through the Act, and I cannot see that it provides any other tribunal to which the subject can resort. What I want you to tell me is this, what suit, remedy or proceeding has Moment got?

Mr. Dunne: He has none. I say he has no legal right or remedy at all.

Lord Atkinson: Where is he to go to get redress?

Mr. Dunne: I am not prepared to tell you that. The construction of the section I contend for is irrespective of the alternative remedy. In conclusion, I would refer to section 66, which relates to pending suits, and expressly provides for their trial by the same courts.

Lord Haldane: That is a true transfer section.

Mr. Dunne: It is somewhat different in its tenour from section 64, and I submit that coming so close to the other, this is some indication that suits other than pending suits were not necessarily to be in the same courts.

After an interval of two or three minutes their Lordships intimated that they did not at present wish to hear Counsel for the respondent (Mr. Leslie De Gruyther, K. C.) with him Mr. E. U. Eddis and Mr. A. P. Pennelll (of the Rangoon Bar).

JUDGMENT.

LORD CHANCELLOR:—This Appeal raises the question whether the Government of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against the Government to any right over land. The question is obviously one of great importance. The proceedings out of which the appeal arises related to an ordinary dispute about the title to land, in the course of which there emerged a claim to damages for wrongful interference with the Plaintiff's property. The only point which their Lordships have to decide is whether Section 41 (*b*) of the Act IV. of 1898 (Burma), was validly enacted. A majority of the Judges of the Chief Court of Lower Burma have held that it was not, and the Secretary of State appeals against the Judgment.

The Section enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government. In the Court below it was held that this enactment was *ultra vires* as

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contravening a provision in Section 65 of the Government of India Act, 1858, that there is to be the same remedy for the subject against the Government as there would have been against the East India Company.

Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the Judgment of Sir Barnes Peacock, C. J. in *The Peninsular and Oriental Company* v. *The Secretary of State for India* reported in the Appendix to Vol. 5 of the Bombay High Court Reports, and the only question is whether it was competent for the Government of India to take away the existing right to sue in a Civil Court. This turns on the construction of the Act of 1858, and of the Indian Councils Act of 1861. Their Lordships have examined the provisions of the Acts of 13 Geo. III., c. 63, and 3 & 4 Wm. IV, c. 85, to which reference was made in the course of the argument, but these statutes do not appear to materially affect the argument.

The Acts of 1858 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a Council, and to him were transferred the powers formerly exercised by the Court of the Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of Section 65 enact that "the Secretary "of State in Council shall and may sue and be sued as well in India "as in England by the name of the Secretary of State in Council as "a body corporate; and all persons and bodies politic shall and may "have and take the same suits remedies and proceedings, legal and "equitable, against the Secretary of State in Council of India as "they could have done against the said Company." Section 66 is a transitory provision making the Secretary of State in Council come in place of the Company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Section 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not been passed.

By Section 22 of the Indian Councils Act of 1861 the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of Justice. But a proviso to this Section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act 1858.

Their Lordships are of opinion that the effect of Section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. They think that the words

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cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The Section is not, like the two which follow it, a merely transitory Section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of Section 65 of the Act of 1858 renders such legislation *ultra vires*.

It was suggested in the course of the argument for the Appellant that a different view must have been taken by this Board in the case of *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri*, 4 Indian Ap. 119. The answer is that no such point was raised for decision.

Their Lordships will humbly advise that the Appeal should be dismissed with costs.

Solictors: For Appellant:—the Solicitor to the India Office. For Respondent:—Messrs. Sanderson, Adkin, Lee and Eddis, instructed by Messrs. Ginwala and Lambert of Rangoon.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 7 OF 1912.

W. E. HARDINGE ... ... APPELLANT.

v.

H. E. HARDINGE AND ANOTHER ... RESPONDENTS.

FOR APPELLANT—VILLA.

FOR 1ST RESPONDENT—DEGLANVILLE.

FOR 2ND RESPONDENT—HANCOCK.

Before the Chief Judge and Justices Hartnoll, Ormond and Towmey.

Dated 2nd December 1912.

Indian Divorce Act—s. 55 of Act IV of 1869—appeal from a decree refusing to allow a dissolution of marriage, of a District Judge in Upper Burma—Can it lie to the Chief Court, Lower Burma?

Held by the *Full Bench* (Fox C. J. and Hartnoll, Ormond and Towmey J.J.) that as the Upper Burma Civil Courts Regulation of 1896 does not provide for any appeal

from a decree or order of a Divisional Court passed in the exercise of original civil jurisdiction there is no court to which an appeal lies from a decree or order of such court under the Indian Divorce Act and therefore no such appeal lies to this court.

Previous History :—Appellant in this case filed a suit in the district court of Mandalay for dissolution of marriage and that was dismissed. The case came on in appeal before their honours Mr. Justice Hartnoll and Mr. Justice Young and the case was argued for several days. At the last moment the point was raised as to whether this court had jurisdiction to entertain an appeal from the district court, Mandalay. The question was whether an appeal lay under the Indian Divorce Act to this court from the court of the district judge, Mandalay. Section 55 of the Indian Divorce Act gave a right of appeal. It recited that "all decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced may be appealed from, under the laws rules and orders for the time being in force; provided that there shall be no appeal from a decree of a district judge for dissolution of marriage or nullity of marriage, nor from the order of the High Court confirming or refusing to confirm such decree; provided also that there shall be no appeal on the subject of costs only."

ORDER OF REFERENCE.

The following is the reference order by a Bench of the Chief Court composed of Mr. Justice Hartnoll and Mr. Justice Young in the appeal of W. E. Hardinge v. Henrietta Hardinge and H. Hoogwerf, co-respondent.

The appellant presented a petition to the judge of the divisional court, Mandalay, in his capacity as district judge under the Indian Divorce Act (IV of 1869) praying that his marriage with the first respondent be dissolved and making the second respondent co-respondent and claiming damages from him by reason of his having committed adultery with the first respondent. The petition was dismissed. This appeal has accordingly been filed in this court. No objection has been taken by the respondents that this court has no jurisdiction to hear the appeal; but it seems to us that there are grave doubts as to whether we have jurisdiction looking at the wording of section 55 of the Act. We can only find one case in which the meaning of section 55 has been discussed—that of Percy v. Percy, I.L.R. 18. All 375. Having in view the importance of the question raised we have been asked to refer it to a Full Bench and we consider that we should do so. We, therefore refer to a Full Bench the following question: "In the event of a judge of a divisional court in Upper Burma acting in his capacity as district judge under the Indian Divorce Act, dismissing a petition presented under section 10 of that Act, does an appeal from such order of dismissal lie to this Court?"

MR. VILLA for appellant :—He admitted that appeals in the ordinary course did not lie from the divisional court of Upper Burma to the Chief Court, Lower Burma but submitted that the Divorce Act, drew no distinction between Upper and Lower Burma. First of all,

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they had the definition of what was a High Court in Burma and that was the Chief Court of Lower Burma. The definition of a District Judge was that he was the Divisional Judge. In Lower Burma there was provision for appeals from divisional and district courts but in Upper Burma there was no provision for an appeal from a divisional court. He argued that it cannot be the intention of the legislature to have given a right of appeal to people living in Lower Burma and no right of appeal to people living in Upper Burma.

MR. DEGLANVILLE for the 1st respondent:—If the Indian Divorce Act gave no right of appeal expressly to this court, no consideration of chaos or absurdity or any consequences had to be considered by the court. That was a matter for legislation and not for the court to consider. The principle that a right of appeal must be expressly given before it lay has been laid down quite recently in the Botatoung cases by their Lordships of the Privy Council see (5 Burma Law Times page 207.)

JUDGMENT.

FOX C. J.:—If an appeal lies it must be by virtue of section 55 of the Indian Divorce Act. That section says,—

"All decrees and orders made by the court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules, and orders for the time being in force. Provided that there shall be no appeal from a degree of a district judge for dissolution of marriage, or nullity of marriage, nor from the orders of the High Court confirming or refusing to confirm such decree. Provided also that there shall be no appeal on the subject of costs only."

By section 3 of the Act, the Judges of Divisional Courts throughout Burma are District Judges under the Act.

In Lower Burma an appeal lies to this court from a degree or order of a Divisional Court exercising original jurisdiction by virtue of section 28 (1) (d) of the Lower Burma Courts Act.

In Upper Burma Divisional Courts have jurisdiction to hear and determine suits and original proceedings by virtue of section 10 (d) of the Upper Burma Civil Courts regulation 1896, but the regulation does not provide for any appeal from a decree or order of a divisional Court in any original case heard and determined by it.

Since section 55 of the Indian Divorce Act provides for an appeal only to the court to which an appeal lies from a decree or order passed in the exercise of original civil jurisdiction and no appeal lies from a decree or order of a Divisional Court in Upper Burma passed in the exercise of such jurisdiction, the result is that there is no court to which an appeal lies from a decree or order of such court under the Indian Divorce Act and the answer to the question referred must be in the negative.

Hartnoll, J.—I concur.

Towmey, J.—I concur.

Ormond, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 220B OF 1912.

HOCK CHENG & Co. ... ... APPELLANT.

v.

THA KA DO ... ... RESPONDENT.

CRIMINAL REVISION No. 221B OF 1912.

THE COLONIAL TRADING Co. ... APPELLANT.

v.

MG. MYA THEE ... ... RESPONDENT.

FOR APPELLANTS—McDONNELL.
FOR RESPONDENT—HALKAR.

Before the Chief Judge and Justices Hartnoll, Ormond and Twomey.

Dated 8th January 1913.

Indian Penal Code—s. 405—Breach of Trust—Advances to Brokers for supply of paddy—absence of Pronotes—undertaking to apply advances to purchasing paddy for advancing firm—Do such advances amount to loans or trusts ?

Held by the Chief Justice and Justices Ormond and Towmey (Hartnoll J. dissenting) that, where money was advanced to appellants on the undertaking that they should buy paddy at what rate they could and should sell to the advancing firm at the market rate on the day of delivery, the property in the money passed to the appellants and their contract to use the money in a particular way did not operate to create a constructive trust.

Held that the presence or absence of the pronotes does not alter the character of these transactions.

As the appellants had to make good the loss of money in any circumstances and as they had to bear any loss on a fall in the market price and to profit by any rise, the property in the money passed to them and no beneficial interest remained with the miller.

FACTS:—In the first of these cases the western subdivisional magistrate, Rangoon, dismissed the original complaint by Hock Chong and Co. charging the accused with criminal breach of trust, relying on the ruling of the Chief Court in the case of Wong Yon Main v. K. E (2) The matter was taken up before the district magistrate, who dismissed the application for revision of that order. In the second case the district magistrate dismissed the complaint of the Colonial Trading Co. charging Tha Ka Do with criminal breach of trust. Both the cases now came before the Full Bench on revision from the orders of the lower court discharging the accused in both matters.

MR. MCDONNELL for the petitioners in both cases said:—the first was identical with the second case and any observation that he had to offer in the one would equally apply to the other case. These two cases were the echoes of important decisions given by their honours in the case of Po Seik (1) in which this court had decided that certain decisions in previous orders were incorrect. He pointed out these two

(1) 6 L. B. R. 62; 5 Bur. L. T. 143. (2) 6 L. B. R. 46; 5 Bur. L. T. 11.

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cases might be differentiated from the case of Po Seik (1) and also from the case of Wong Yone Main (2) which was decided by Mr. Justice Ormond and which was the original case in which difficulties arose. The difference might be summed very shortly thus. In Po Seik's and Wong Yone Main's cases there were promissory notes. In the present cases there were no promissory notes. Further than that, the agreement, counsel thought, was identical. There was a receipt in both cases by the broker to the firm. He used the term "broker" in a popular sense, as their honours knew that in the ordinary way he was not a broker. But further than that he thought it right to point out to their honours that no admissions were made by him in respect of the transactions which took place between the parties. He did not, however, wish to place any reliance on that. There were paddy advances in Po Seik's and Wong Yone Main's cases. In the former case three of the five judges who sat in full bench regarded the execution of the promissory notes as an important factor in the case. He should also mention that in the second case, their honours considered the existence of the promissory note as a very important factor tending to show that the money was a debt and not held on trust. Their honours here could not go beyond the terms of the document. In the two cases cited their honours would see considerable reliance was placed on the fact that there was a debt repayable on demand as shown by the written document. There was an undertaking at the end of the agreement that the money would only be used for the purpose of purchasing paddy supplied to the firm. That undertaking, counsel submitted, was sufficient in the absence of anything else to constitute a trust. Mr. Justice Robinson in an *obiter dictum* in the course of his judgment (3) stated that the mere fact that promissory notes were taken did not prove a lien, and even if a pro-note had been executed he did say that accused should be held as trustee. But he was the only judge of the full bench who had distinctly held that the absence of the promissory note would not assist him.

THE CHIEF JUDGE said this was the real position of a so-called broker: he undertook to sell and deliver so much paddy to the miller and he got an advance for the purchase price.

MR. MCDONNELL said it was so. If he might give an illustration, the position was very much the same as a man who gave his cook every day or say once a month a sum Rs. 150 for bazaar. At the end of the month if the cook were not to account for that sum but was to supply bazzar every day to his master, would not the servant in that case be liable for breach of trust if he did not account for the money?

THE CHIEF JUDGE said the position was not quite the same, because in this case the so-called broker said he suffered a loss.

MR. JUSTICE TWOMEY: The cook does not suffer any loss.

THE CHIEF JUDGE: The broker has to pay for what he delivers at the market price for the day.

(1) 6 L. B. R. 62; 5 Bur. L. T. 143.
(2) 6 L. B. R. 46; 5 Bur. L. T. 11.
(3) 5 Bur. L. T. p. 143 At p. 153.

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MR. MCDONNELL said the agreement here was that the money should be used in a particular way and in no other way. Supposing that after the agreement were executed instead of going to the district to buy paddy the respondent had got on a British India steamer and left for Calcutta, would not a suit for injunction lie restraining him from dispensing all the money in any other way? Counsel submitted that the Indian Trusts Act was worthy of more consideration than it would appear to have received so far, Section 3 distinctly contemplated that the owner should have confidence reposed in him. Counsel based his case really in the absence of a promissory note on a fact that there was an undertaking which constitued a trust.

MR. HALKAR, on behalf of the respondent in the first case, submitted that whether there was a promissory note or whether there was specific purpose indicated, it did not bring the case within the definition of trust. It was only a matter of evidence. A promissory note for the purpose would not make any difference unless the benefit went to a trustor. Their honours would see from the judgment of Mr. Justice Robinson that there was a verbal loan and verbal trust. According to the definition of the section dominion over property should remain with the trustor, though it was in the possession of trustee, and there must be a beneficiary. So that there were three parties the trustor, the trustee and beneficiary. He submitted that dominion over the property remained with the person who received the advance. In support of his submission he cited 6th Vol. Bombay Law Reporter page 1093.

Mr. MCDONNELL briefly replied.

The respondent in the second case in answer to the courts as to why further enquiry should not be held in the case said he took Rs. 2,000 from the Colonial Trading Co. and he purchased with that money over one hundred thousand baskets of paddy. He suffered a loss of Rs. 3,290 on account of advances made to foreign merchants. A sum of Rs. 3,200 was still due to him.

JUDGMENTS.

TWOMEY J:—In each of these two cases a firm of millers advanced a sum of money (Rs. 2,000 in one case and Rs. 3,000 in the other) to the accused on his undertaking to buy paddy and sell it to the firm within a specified time (fifteen days in one case and three days in the other) and to use the money for no other purpose. The amount of paddy to be bought was mentioned as "about 2,000 baskets" and "about 3,000 baskets." The exact quantity was left indefinite and the price also was left indefinite and it was part of the bargain that the accused should buy at what rate he could and should sell the firm at the market price on the day of delivery.

In each case the accused failed to supply paddy according to his undertaking or to account for the money, and the millers prosecuted him for criminal breach of trust. The District Magistrate held the

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cases were governed by the Full Bench ruling in Po Seik v. K. E., (1) that the money was not entrusted to the accused in the sense contemplated in section 405 of India Penal Code, and consequently that no offence had been committed under that section. In Po Seik v. K. E., (1) it was held that the relation between accused Po Seik and the miller who advanced money to him was that of borrower and lender and that the money was not "entrusted" to him. If the money was lost while in the accused Po Seik's possession it was he who had to bear the loss and not the miller. Po Seik was to make any profit he could on buying the paddy and reselling it to the miller. If the price fell after Po Seik had bought the paddy the loss on resale to the miller fell upon Po Seik for, his contract as in the present cases was to sell the paddy to the miller, at the market rate ruling on the day of delivery. I concur in the view of the majority of the Full Bench in Po Seik's case that there was no trust in the above circumstances. The property in the money passed to the accused and his contract to use it only in a certain way did not in my opinion operate to create a constructive trust in the money for the benefit of the miller. As pointed out by Robinson J. loans are often made with conditions of this sort attached to them. A not uncommon example in this country was where a chetty landlord advanced money to his Burmese tenants to enable them to buy paddy seedlings to plant upon the chetty's land. It is never contended that the chetty retains a beneficial interest in the money lent merely because there was an obligation that the money will be used only in bringing the chetty's land under crop. The same may be said of an advance to a contractor for the specific purpose of building a house, a boat, or a carriage for the lender. There is no essential difference between such cases and that of the accused Po Seik in Po Seik v. K. E. (1) There is no authority for holding that in any of these cases the mere contract restricting the use of the money suffices to create a trust. In Po Seik's case the money was really payment in advance of the price of paddy sold to the miller for forward delivery.

It is argued that the money was advanced by the miller only because of the confidence reposed by him in the accused on the strength of his undertaking, and that as that confidence was abused there was a breach of trust. According to this view the words "entrusted" and "trust," in section 405 would have to be construed in their loose popular sense as distinguished from their strictly legal sense, and such latitude was not permissible in interpreting a penal enactment. The illustrations to section 405 are sufficient to show that it is only in the strictly legal sense that the words are employed. The existence of an express or constructive trust must be proved as an essential ingredient of the offence. Looking to the accused Po Seik's liability to make good the loss of the money in any circumstances, and to the condition that he was to bear any loss on a fall in the market price and to profit by any rise, I think the property in the money passed to him and there was no trust.

The circumstances of the two present cases admittedly resemble those of Po Seik v K.E. (1) in all respects, except that Po Seik gave

(1) 6 L. B. R. 62; 5 Bur. L. T. 143.

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pro-notes for the money advanced to him while the present accused did not. In my opinion the absence of pro-notes does not alter the character of the transactions. By taking a pro-note, the miller may be in a better position to recover the money in case of default. But whether a pronote was taken or not the transcation was in point of law a loan, the property in the money passes and no beneficial interest in it remains with the lender.

The only other ground urged in the application for revision was that the Distract Magistrate erred in going beyond the terms of the printed agreement in considering whether there was a trust. Even on the agreement, as it stands, I do not think the existence of a trust can be inferred. In any case the District Magistrate's action in considering extrinsic oral evidence as to the conditions of the advance appears to be fully covered by provisisos 2 to 5 to section 92 of the Evidence Act. I would therefore dismiss the applications.

HARTNOLL J:—the two references have been heard together. They only differ in that in one case a receipt was taken for the money and in the other there was no receipt. It is allowed that they only differ from the case of Po Seik v. K. E. (1) in that whereas in that case promissory notes were executed, in these cases there were no promissory notes. It was further contended that the District Magistrate erred in going beyond the terms of the agreement in considering whether or not there was a trust. As regards the absence of promissory notes my judgement in Po Seik's case covers these references and as regards the further contention my views are expressed in the case of J. Reid v So Hlaing (2) I would set aside the orders dismissing the complaints and direct further inquiry into them.

ORMOND J:—These are two applications in revision from the District Magistrate who discharged the accused in each case. The offence alleged in each case was that of criminal breach of trust.

The facts are similar in both cases. Money was advanced to accused by complainant for the purpose of buying paddy and the accused signed an agreement undertaking that the sum advanced will be used for no other purpose than the purchase of paddy. In one case a receipt was given for the money, but not in the other. In neither case did accused execute a promisory note. The District Magistrate has found that there was no trust, the transaction being a loan.

Counsel for petitioners contends that the fact of the absence of a promissory note in these cases differentiates them from the case of Won Yon Main v. K. E. (3) and also from the case of Po Seik v. K. E. (1) In those cases it was held that the transcations were loans and therefore there was no trust. In my opinion the District Magistrate has rightly applied those decisions to the present case. Petitioner's Counsel contends also that the District Magistrate should not have gone beyond the terms of the written agreement in considering whether or not there was a trust. In my

(1) 6 L. B. R. 62; 5 Bur L. T. 143.
(2) 5 L. B. R. 241; 3 Bur. L. T. 124.
(3) 6 L. B. R. 46; 5 Bur. L. T. 11.

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opinion the agreement in writting does not disclose a trust, and therefore counsel's contention that the magistrate relied upon extraneous evidence or matter in holding that the transaction was not a trust, does not apply to the case. And even if the document did amount to an admission of a trust, it would not be a "contract grant or other disposition of property within the meaning of section 92 of the Evidence Act. I would therefore dismiss both these applications.

The Chief Judge:—Money was advanced by the complainants in these cases on agreements identical in terms with the agreement in the case of Nga Po Seik v. K. E., (1) but in these later cases no promissory notes were taken from the respondents. The question is whether the money so advanced was held in trust by the respondents for the complainants. In my judgement nothing in the agreement constitutes the person who signs it a trustee of the money advanced to him. The agreement does not appear to me to constitute more than contractual relationship between the parties to it. Upon the judgments of the majority of the judges of the bench both applications would be dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 6 OF 1912.

T. GAME ... ... PLAINTIFF.

v.

U. KYE & 1 ... ... DEFENDANTS.

FOR PLAINTIFF—ISRAIL KHAN.

FOR DEFENDANT—HALKAR.

Before the Chief Judge and Mr. Justice Hartnoll.

Dated 4th December 1912.

Legal Practitioners' act—Act XVIII of 1879—S. 28—agreements between pleaders and clients—Does the section apply where work to be done is not Court work?

Held that s. 28 of the Legal Practitioners' act regarding the filing of agreements between pleaders and clients in the District Court or in some Court where the work is to be done applies to agreements for Fees in respect of the practitioner's services where the business does not lie in any Court Civil or criminal.

This was a reference under section 113 of the Civil Procedure Code and the question referred by Mr. Bagley was as follows: "Does section 28 of the Legal Practitioner's Act touch on agreements made by a pleader and client with respect to the former's professional employment, whether the business upon which he is engaged does or does not come into some court?" The judge of the small cause court answered the question in the affirmative, but as he had doubts in the matter he made a reference to the Chief Court:

In this suit the plaintiff sued as pleader to recover Rs. 500 as balance of his fees. The plaintiff's case was that first defendant was

(1) Reference made by the Judge of Small Causes Court, Rangoon under section 3 Code of Civil Procedure in Civil Regular 4332 of 1912 of the S. C. Ct.

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compulsorily retired from Government service and plaintiff was retained to memorialise the Lieutenant-Governor for Rs. 550, the second defendant agreeing to pay that sum. Plaintiff suggested that he fulfilled his contract and incidentally it was mentioned that the memorial was successful, the first defendant being reinstated. He now claimed the unpaid balance of Rs. 500.

The first defendant's case was that plaintiff's allegations in respect of the memorial were entirely false and exaggerated inasmuch as he (defendant) absolutely knew nothing of the transactions. The second defendant was the only and real party who engaged plaintiff's services and entered into certain terms and conditions for payment of only Rs. 50 for such work and not Rs. 550 as alleged.

The second defendant alleged that the consideration of Rs. 50 paid to plaintiff was true. The plaintiff demanded Rs. 100 at first, but defendant pleaded his inability to pay and thereafter plaintiff agreed to do the work for Rs. 50.

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In his order of reference, Mr. Bagley, the Judge of the Small Causes Court said :—

The plaintiff in this suit is a pleader and he sues to recover an alleged balance of his fees. The plaint sets out that the 1st defendant was compulsorily retired from the Government service and that plaintiff was retained to memorialise the Lieutenant Governor for Rs. 550, the second defendant agreeing to pay this sum. Plaintiff suggests that he fulfilled his contract and incidentally it is mentioned that the memorial was successful, the 1st defendant being reinstated. He now claims the unpaid balance of Rs. 500.

As the agreement on which plaintiff relies was verbal, I pointed out that section 28 of the Legal Practitioners Act was fatal to his claim. Under that section a pleader's agreement with his client respecting his fees must be "filed in the district court or in some court in which some portion of the business in respect of which it had been executed," within fifteen days, or it is invalid. But it has been argued on behalf of Mr. Game that the agreement touched a memorial and not a court case. I am of opinion that the contention is unsound for two reasons; (1) A pleader's professional business may embrace conveyancing, drafting, consulting, and that never comes into a court at all, and I cannot suppose that the Legislature intended to differentiate between different kinds of legal business. What it wanted apparently to do was to protect a client in his transaction (professional) with his legal adviser for the relationship was one that afforded considerable opportunities for abuse. (2) The section says that the agreement must be filed either in the district court, or in some court in which some part of the work was to be done. To me this looks as if the district court were expressly mentioned, as the Legislature had chamber work in view. If the clause touched only work that came into court, then surely, it was enough to say that the agreement must be filed in the court or courts in which that work was done. As there is some doubt as to the true interpretation to be put upon the section and as it is a matter of great importance to all pleaders, I think it is a fit case to refer to the honourable judges of the Chief Court.

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The question I refer is "Does section 28 of the Legal Practitioner's Act touch all agreements made by pleader and client with respect to the former's professional employment, whether the business upon which he is engaged does or does not come into some court?" I would answer the question in the affirmative.

MR ISRAIL KHAN for Petitioner:—The work done by his client has nothing to do with any court at all, and that section 28 of the Legal Practitioners' Act does not apply. But the learned judge was of opinion that the section did apply and referred the matter for the decision of this court. Under that section a pleader's agreement with his client respecting his fees must be filed in the district court, or in some court in which some portion of the business in respect of which it had been executed within fifteen days, or it was invalid. Although his client was a pleader he submitted that, according to the section, it was only when work was to be done or had been done in any court that an agreement should be filed either in the district court or any of the other courts in which the work was to be done.

He knew many persons who were not licensed advocates who wrote title-deeds, memorials, conveyances and so forth in other places and he submitted that plaintiff here in doing the work alleged to have been done by him, did not act in the capacity of pleader but as one of those who wrote memorials and other documents. Those persons did not write for nothing. They got fees, and so did his client ask for his fees for the work he did. As regards second and third grade pleaders, the Chief Court had made rules as to what fees they were to charge and everything was laid down in those rules for work to be done in court. The Revenue Court and the Financial Commissioner had made rules for practitioners in Lower and Upper Burma fixing remuneration in revenue offices under the Financial Commissioner. In neither of the rules, either those made by this court or by the Financial Commissioner, was there any rule about work such as was done in the present case. Section 37 was the section under which the rules were made, and there was nothing in it touching the point in issue. He submitted that section 28 did not touch work done by a pleader or by any one else, such as memorial drafting or petition writing to the Lieutenant-Governor. The plaintiff was quite within his right in filing the suit for the recovery of the fee arranged to be paid to him by the defendants.

Mr. Halkar for Respondent said:—Section 28 said that the agreement was to be filed in the district court or in the court or courts in which the work or part of the work was to be done. It did not say "in the court or courts in which the work is to be done." If it only referred to work done in connection with the court, then the words "district court" would be redundant. It was to protect clients from advocates that section 28 was framed and the present case was governed by the section. A quack could give medicine under certain restrictions, whereas a professional medical man was on a different footing. Unless the plaintiff in the present case had the written agreement filed as required under section 28 he was not entitled to file this suit.

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JUDGMENT.

We are of opinion that section 28 of the Legal Practitioners Act, 1879, applies to all agreements between a pleader and his client respecting the amount and the manner of payment for the whole or any part of the former's services, fees or disbursements in respect of any sort of business done or to be done by a pleader for the client.

The contention that the section applies only to remuneration etc. in respect of business done in a court can not prevail, since the section applies also to agreements of the nature specified between mukhtars and their employers and between revenue agents and their employers. Mukhtars may appear, plead, and act in some criminal courts, but revenue agents cannot as such do any business in any court either civil or criminal. Consequently the words in the section after "district court" cannot be availed of by them and the district court is the only court open to them to file agreements in.

We express no opinion as to whether there is a court in the town of Rangoon in which a pleader may file an agreement covered by the section.

The question referred is answered in the affirmative.

FULL BENCH.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 252 of 1912.

FATIMA *v.* CAPTAIN McCORMICK.

FOR PETITIONER—N. M. COWASJEE.

Before Messrs. Justices Hartnoll, Twomey and Ormond.

Dated 2nd December 1912.

Indian Penal Code—S. 363 & 376—Kidnapping and Rape—alleged mixing up of the witnesses for Defence with those for the prosecution—Preliminary inquiry—Indecent assault—outraging of modesty.

Where a Magistrate is inquiring into the truth or otherwise of a complaint he can examine all those who know about the matter and it is immaterial at what stage they are called as long as opportunity for cross-examination is allowed.

An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged.

ORDER.

HARTNOLL J:—This is an application made to revise the order of the District Magistrate, Mergui, dated the 23rd August 1911 discharging one Captain McCormick under section 209 of the Criminal Procedure Code in an enquiry made by him as to whether he the said McCormick had committed an offence or offences punishable under section 363 $\frac{or}{and}$ 376 of the Indian Penal Code. It was filed on the 9th

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August last or nearly a year from the date of the order of discharge and therefore on the face of it it has been filed after a most unreasonable delay. Applicant explains that she is a widow in impoverished circumstances and that she has been waiting for the Government and the police to act and that she has been trying through friends to get the Government to move in the matter. She says that she came to Rangoon and her advocate, who had been engaged by friends, some time ago wrote a petition for her to the Lieutenant-Governor, that her advocate told her that the Lieutenant-Governor would not do anything for her and that he the said advocate could not do anything more for her—that she had no means to engage another advocate and had to return to Victoria Point—that now some of her co-religionists have helped her to engage advocates. An alleged copy of the petition to the Local Government was shown to us at the hearing but it bears no date and so we have no information as to when it was presented nor as to when orders were passed on it. We are not satisfied that any good and satisfactory reason has been put forward to account for such an inordinate delay. The applicant allows that she came to Rangoon and petitioned the Local Government. It would have cost her very little more to have petitioned this Court. Nevertheless, we have heard her counsel at length so as to see whether any injustice has been done and whether there is any good ground for re-opening the enquiry.

The case for the prosecution is that somewhere about April 1911 applicant made an arrangement with one Ma Son, the mistress of one Clarke, who lives at Pulo-ton-ton, some miles from Victoria Point, with respect to her daughter Ainah a child of tender years but who may be taken to be then under twelve years of age. The arrangement seems to have been that Ma Son was to keep Ainah and act as her mother as long as she stayed at Pulo-ton-ton but that if Ma Son left Pulo-ton-ton Ainah was to be handed back to her natural mother. Applicant alleges that McCormick who was a planter in the neighbourhood and whose assistant Clarke is, came one day and took Ainah away without Ma Son's permission. She and her husband subsequently went to McCormick to get their daughter but were not allowed into his premises and were told that if they entered they would be beaten or shot. So they went home. The husband was ill and could not go again. So two relatives Fatima and Rahim were sent to get the child. Fatima also took one Biba with her. When they arrived McCormick was painting his house. He pushed Fatima outside bespattering her with paint and otherwise ill-treating her, and would not give up the child. The husband died some five days afterwards and did not see his child. The applicant laid her complaint to the Sub-divisional Magistrate at Victoria Point on the 12th July 1911. The Magistrate handed over the complaint to the police for preliminary investigation. On the 14th July Inspector Sherard went to McCormick's house and obtained possession of Ainah. She was on the evening of that day and on 15th July—the next day—examined by Daulat Ram the Sub-Assistant Surgeon who found her suffering from a purulent discharge from her vagina, which was not much in quantity and that her hymen was

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ruptured. On the night of the 16th July Ainah laid a complaint of rape before the Sub-divisional Magistrate which was as follows:—

SWORN, STATES.—I was staying with Me Son. Me Son went upstairs. I was seated on the ground outside the house. Abu a young boy was with me. It was about 7 o'clock in the evening. The "tuan b'sar" (Captain McCormick) asked me to come with him. He lifted me and carried me in his arms. He walked with me to his house. When he got me inside he locked me into the room for two days. After this one day he sat down and placed my legs across his and he then had sexual intercourse with me, When his private part entered mine, it hurt me. I cried out. The "tuan" (Captain McCormick) then went downstairs and had a wash. He left me upstairs. He then put on a coat and taking me down to his trap ("Kretà") he placed me in it and drove off to Mr. Hall's place. He then left me down below and went upstairs and saw Mr. Hall. Afterwards he drove me back to his house. He then had his dinner. I also had dinner. After this, I slept upstairs in the house. The next day I was taken to John's house. I stayed in John's house three months. After this the "tuan p'lit" (police officer) came and took me away to Victoria Point where he made me over to my mother Fatima. John's wife gave me medicine for the hurt that I had received from the "tuan." I was given medicine all the time. My private part used to be douched with water. A red medicine used to be put into the water and then my private part used to be douched.

Read over and acknowledged correct.
Mark of Ainah.

A. W. BUCHANAN,
Sub-divisional Magistrate.

VICTORIA POINT, *the 16th July* 1911.

Inspector Sherard continued the investigation till the Superintendent of Police arrived. The latter officer made his investigation and found that no criminal offence under section 363 had been committed and that the charge of rape under section 376 was false. The Sub-divisional Magistrate did not agree with the District Superintendent of Police and considered that *prima facie* cases under both charges were disclosed. He examined certain witnesses and then all the papers were submitted to the District Magistrate. The latter officer decided to hold a magisterial enquiry himself. The witnesses were brought up to Mergui from Victoria Point on the 19th August in charge of the Sub-divisional Magistrate Mr. Buchanan. The enquiry before the District Magistrate commenced on the 21st August and McCormick was discharged on the 23rd August.

The present application alleges that the police investigation was held in an incorrect and improper manner, that the District Magistrate should not have held the enquiry as a fair and impartial enquiry could not be had before him since he was a friend of McCormick, that no attention was paid to the petition objecting to the enquiry by the

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District Magistrate nor to a letter sent to the Commissioner nor to two telegrams sent to the Lieutenant-Governor, that the interpreter used by the District Magistrate was a paid servant or agent of McCormick, that her objection to the employment of this interpreter was disregarded by the District Magistrate, that though applicant and her friends earnestly requested the aid of an advocate to conduct the case and was led to expect that one would be provided by Government no one was so provided nor did the police conduct the case before the Magistrate, that some of McCormick's servants and dependents were called without the consent of applicant as witnesses for the prosecution and they were not cross-examined on petitioner's account and that some of applicant's witnesses were not called at all though they were on her list of witnessess—witnesses who could speak of the circumstances of the said abduction—and were in the vicinity of the Court waiting to be called and that the police failed in their duty in consenting to the trial or enquiry being thus conducted before the District Magistrate and in not filing an application to this Court to set aside the said enquiry as illegal. Revision was therefore asked for on the following among other grounds:—(*a*) that the said trial or enquiry was illegal *ab initio* in that the District Magistrate proceeded with it knowing that petitioner desired it to be transferred and had filed a petition to such effect; (*b*) that the said enquiry or trial was further illegal in that the District Magistrate did not call all the evidence which petitioner desired to call and was ready and willing to call, the said witnesses being in attendance for that purpose; (*c*) that the police having charge of the case and the said District Magistrate trying or enquiring into the matter allowed defence witnesses to give evidence in the case for prosecution and such witnesses were not cross-examined; (*d*) that the discharge of the respondent on the facts and in the circumstances was illegal and improper (*e*) that the facts prove that the said case should be gone into '*de novo*.' In a subsequent affidavit filed on the 9th of this month—four days before the hearing—applicant filed an affidavit stating that she objected to the interpreter Moosaji interpreting and that she made her objection to the District Magistrate in Malay before the enquiry commenced and mentioning specific statements in her depositions as recorded by the District Magistrate which she said were not made by her to Moosaji. She also denied that the witness Haji Rahim was a relative of hers at all. She also says that she told the District Magistrate in Malay before the enquiry at Mergui began that she did not wish him to try the case and had no confidence in him.

I propose firstly to deal with the allegations made as to the interpretation, secondly to examine the case on its merits and see whether there is a case at present existing or whether a case can be made sufficient to charge McCormick with one or other of the offences of kidnapping or rape and thirdly to examine the allegations made as to irregularities and illegalities in the course of the enquiry.

The interpreter used was Musaji. At the hearing, counsel referred to what was said of Musaji in the case of Andrew vs. Arnold (Criminal Sessions Trial No. 41 of this Court). The only means therefore of judging as to whether there is any truth in the allegations

made as to the interpretation are applicant's affidavit, secondly what appears from the records of the above mentioned case and thirdly the surrounding circumstances. The record of Sessions Trial No. 41 shows that the permanent Malay interpreter was one Chean Gee who applied for leave on the 1st September 1911. Musaji was in the usual course of business appointed to act for Chean Gee. The appointment order was made on or about the 21st July, and was subsequently sanctioned by the Commissioner. The Sub-divisional officer Mr. Buchanan himself said in S. T. No. 41 that it was his recommendation that Musaji should act for Chean Gee. But though the appointment had been made, at the time of the enquiry at Mergui Chean Gee had not yet taken leave and so Musaji had not yet actually taken over charge. He however came up from Victoria Point and was interpreter at the trial. It is alleged that McCormick brought him up, but there is no evidence to that effect. On the contrary Mr. Andrew the District Magistrate in S. T. No. 41 swore that his expenses were paid by Government. There is nothing on the record to show definitely the exact circumstances under which he came up. Mr. Andrew said in S. T. No. 41: "When I went on the Bench I had the witnesses mustered and called out their names to see whether they were all present. Mr. Buchanan and the interpreter Chean Gee brought them. Musaji was there; he was standing by the witness-box in the interpreter's usual place. . . . . I did not employ Chean Gee as interpreter because of what Buchanan had said about him in his letter of the 3rd July 1911." In this letter Mr. Buchanan wrote that he believed Chean Gee had had something to do with suppressing the news of this case. Mr. Andrew went on to say: "I thought Buchanan had brought Musaji there in response to my telegram. . . . . Buchanan must have known and seen that Musaji was acting as interpreter." There had been telegrams passing about the interpreter. The District Magistrate asked Mr. Buchanan to bring up one trusted by all parties. Mr. Buchanan replied that he could not do so. He finally wired that he would bring the Court interpreter. It is alleged that Musaji's relations with McCormick are such that he falsely interpreted. From Mr. Buchanan's evidence in S. T. No. 41 it appears that Musaji had been indebted to McCormick. He said in that case: "In July McCormick showed me a document regarding the transfer of some land by Musaji to him for money due and asked me whether it should be registered . . . . . If the land was transferred the debt would be paid." Daulat Ram also says that McCormick told him that Musaji owed him Rs 600. For reasons to be given later I cannot implicitly believe this statement. It also appears that Musaji acted as a forwarding agent for McCormick but he also did so for Clarke and another planter Hall as well. The applicant says that she objected in Malay to Musaji interpreting before the enquiry commenced, the suggestion being that Musaji did not interpret correctly to the District Magistrate what she said. Mr. Andrew in S. T. No. 41 said: "No objection was made by any one to Musaji acting as interpreter. I will swear that the mother didn't." Mr. Andrew does not however know Malay. Applicant in her evidence in S. T. No. 41 after stating

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that she had objected to her case being tried in Mergui went on: "I objected to his (Musaji's) being employed as interpreter. I told the Tuan in Malay. The tuan got very angry and after that I was sent out of Court." This evidence would lead one in the ordinary course to believe that the District Magistrate got angry in consequence of the objection made. I suppose that the suggestion is that Musaji said something other than the real objection so as to make him angry. Now is it at all probable or likely that the applicant would have confined her objection in the manner stated? In S. T. No. 41 she said; "Mahomed Din is a big and influential man in Pulo-ton-ton. He has been friendly with me since the case was brought. He was helping me. He gave me money when my husband was very ill. After the case he brought me, my daughter and others to Rangoon. He paid all the expenses." Mahomed Din was in Mergui at the time of enquiry. So was Mr. Buchanan whom from the petition at page 4 of the record applicant regarded as her friend. If at the time of the enquiry there was a real objection to Musaji, is it not in the highest degree probable that Mahomed Din would have been approached and that he would personally have approached the District Magistrate, also that Mr. Buchanan would have been approached to represent matters to the District Magistrate? It must be also taken into account that it is not until four days before the hearing in this Court that any specific allegations are made as to what the actual misinterpretation consisted of. In the copy handed to us that is said to be a copy of the memorial sent to the Local Government the allegation is: "After the closing of the case we have come to find out that the interpreter did not translate our evidence truly. He changed "no" for "Yes" in Fatima's evidence." and this is a most indefinite one. Mr. Andrew in S. T. No. 41 of 1912 said: "To this day I do not know what Musaji did for McCormick or that he was a servant of McCormick . . . . During the enquiry there were no protests that Musaji was not interpreting correctly." The conclusion that I draw is, that no good and substantial grounds are given for thinking that Musaji misinterpreted or that objection was made to his acting as interpreter at the time. Would the mere facts that he was McCormick's forwarding agent that he had been indebted to him—even that he was indebted to him at the time though I do not consider this proved—be a sufficient ground for thinking that he would lend himself to false interpretation in a case of this kind? He was evidently considered to be a respectable and trustworthy person for the subdivisional Officer Mr. Buchanan had recommended him as acting interpreter. There is no evidence to show that McCormick brought him up: on the contrary according to Andrew the Government paid his expenses. The exact circumstances as to why he came up are not explained; but he had been appointed acting interpreter.

It is possible that he came up with Chean Gee learning his work; but it is useless to enter into suppositions. It is to the highest degree improbable that, if objection was made by applicant to the District Magistrate that the latter would not know that such objection had been made, and if such objections were to be made at the time, it is extremely probable that the District Magistrate would have been

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aproached by Mr. Buchanan or Mahomed Din. Mahomed Din or applicant would have approached Mr. Buchanan,

Even in the Memorial to the Local Government there is no specific information as to what the alleged mistranslation consisted of, and no such is given till 4 days before the hearing of the petition. It seems to me that, even if the case was re-opened, the statements of the Malay witnesses made before the District Magistrate could not be disregarded on the ground that there has been false interpretation but that they would still have to be taken into consideration together with any grounds there are for thinking that there has been false interpretation and that these grounds are of the slenderest nature indeed of so incredible a nature that I think that they should be practically disregarded. Further up to date there have been no specific allegations as to whether any, and if so, what portions of Ainah's deposition to the District Magistrate are incorrectly translated. In the copy of the memorial the allegation seems to be confined to Fatima's evidence.

I now come to a consideration of the merits of the case. In arguing them counsel referred not only to the trial record of the enquiry before the District Magistrate but also to the process record and more especially to the Police papers. It was not suggested that any fresh evidence or facts are forthcoming other than those that appear on the record. I will first deal with the charge of rape. The first witness for the prosecution was Ainah and her examination-in-chief was as follows :—

DEPOSITION OF WITNESS NO. 1 FOR THE PROSECUTION.—The witness having been duly affirmed says—

My name is Aina
My age is—don't know
I am by race a Malay
I profess the Mussalman faith
I was born at Pulo Ton Ton.
My Father's name is Malasa.

on oath
Interpreter Musajee.

"I was left by my mother at Mr. Clarke's house. Me Son who lives there said she would adopt me. I stayed at Me Son's house for three weeks; then Captain McCormick took me to his house. I was outside the house when Captain McCormick lifted me up and carried me all the way to his house. This was a short time after the lamps were lit in the evening. When we got to the house he closed up all the lower storey and put me in a room. I was kept in this room all night and the door was locked on me. This was in the dining room. I slept in the dining room all night and next morning Captain McCormick came downstairs and I said I would go home. The Captain said I must not go home.

"The Captain then carried me upstairs; this was early in the morning, and took me into a room and had intercourse with me. I cried: then the Captain took me to the bath room and put medicine on my private parts. This medicine was red. He put some grains in a vessel and then poured water on and it became red. The medicine was applied by means of a long kind of rope string which had a hole in it

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(Pressed further as to the kind of implement used, witness describes something which I take to be a syringe). He gave me this medicine immediately after having intercourse with me upstairs. I was then taken to Ma Pe Yin's house, and I arrived there about 7 in the morning.

"I stayed in Ma Pe Yin's house about a fortnight. Ma Pe Yin used to give me the same kind of Medicine as Captain McCormick did once a day. I was also given medicine to take internally from a bottle containing white medicine. While I lived at Ma Pe Yin's house, I nursed the baby. I said I wanted to go home, but Ma Pe Yin said I musn't leave the place. I did not go to Captain McCormick's house again. My mother never came to see me when I was at Ma Pe Yin's house. I was finally taken away from Ma Pe Yin's house by the Inspector. I now live at Pulo-ton-ton in the house of my aunt Fatima (my mother's sister), who is married to a Siamese whose name I don't know. I am contented there. I am now free from disease."

The next witness was Daulat Ram. This witness said that Ainah was suffering from rupture of the hymen and the orifice of the vagina was slightly lacerated. He went on to say: "The girl has been probably raped. I should say some man has had connection with her and partial penetration enough to rupture the hymen has taken place. I have rather modified my opinion given on the 18th July to Mr. Sherard (see Police papers) upon subsequent examination of the girl. I then said that the discharge was not due to hurt; now as the discharge went away of itself without treatment, I am of opinion that it probably proceeded from the rupture of the hymen." On the 18th July this witness is recorded as having said to the Police; "In my opinion penetration of the male organ i. e. the penis into the vagina of the girl in question could not possibly have taken place as she is too young and it would have been a physical impossibility but she may have been tampered with as the hymen is ruptured." He also said that the discharge was not due to hurt. He never said then that there was any laceration of the orifice nor did he say so in the first report. He also seems to have changed his opinion on a very important point and that is whether there could have been penetration or not. Fatima in her statement the next day said: "I was not minded to make a case over this but Mahomed Din and the Sub-Assistant Surgeon told me I must make a case." This is not one of the statements which in her affidavit she denies making. For these reasons I am not disposed to completely credit Daulat Ram and so believe him when he said in Sessions Trial No. 41 that McCormick had told him that Musaji owed him (McCormick) Rs. 600. Be that as it may Daulat Ram's evidence puts sworn testimony on the record that there could have been sexual connection with Ainah resulting in partial penetration sufficient to rupture the hymen. He also stated that in May as far as he remembered he gave McCormick a bottle of Aletris Cordial used for uterine diseases in women, and a douche. He went on to say "children do sometimes suffer from purulent discharges. Such discharges occasionally proceed from worms or uncleanliness" and talking of the injury to the hymen he said "It might be caused by the insertion of any hard substance. It might be caused by the

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insertion of a glass syringe. The orifice of the vagina might be lacerated by the same means. It might be caused by masturbation."

The next witness was Fatima, the applicant and mother. Her statement is as follows:—

21st AUGUST 1911. Deposition of Witness No. (3) for the prosecution. The witness, having been duly affirmed, says—

My name is Fatima (i).
My age is—doesn't know.
I am by race a Malay.
I profess the Mussalman faith
I now reside at Pulo-ton-ton.
I am by occuption a cultivator.
My father's name is—doesn't know,

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Interpreter Musajee.

I am the mother of Ainah, complainant. I do not know Ainah's age. I have no idea of Ainah's age. I gave Ainah to Me Son on the understanding that Me Son was to look after her as long as she stayed at Pulo-ton-ton, she was to hand Ainah back to me. This is about two months back from to-day. I gave Ainah to Me Son because Me Son asked for her: and also I was very poor and couldn't keep her. About two weeks after I had handed her over to Me Son, I was one day on my way back from Victoria Point when Me Son told me that Captain McCormick had taken her away. I then went to Captain McCormick's and asked for the child: but Captain McCormick refused to give her up. I met the Captain myself. He said "what do you want to take her away for: she is happy and well fed here," so I went away. I did not ask for money. I then went away, At this time my husband was too ill to leave his bed. I then asked Fatima (ii), my husband's sister, to go and ask for Ainah, but Fatima (ii) came back without Ainah and said on her return that she had been kicked by Captain McCormick. At this time I was big with child and couldn't move about, When I had got up from child-bed I went to Victoria Point and reported the matter to the Subdivisional Officer and asked him to get my child back for me: and then the Inspector of Police brought Aina to me. After she had been given back to me, Ainah complained that she was suffering from illness and that she had caught illness at Captain McCormick's house. Captain McCormick had had intercourse with her and given her disease. I then took Ainah to the hospital and asked for medicine for her. The Sub-Assistant Surgeon told me to keep Ainah in Victoria Point for about six days and he would give her medicine to cure her: and so I kept Ainah in Victoria Point and had her treated. That is all. While Ainah was in the hospital I went to Mahomed Din and asked him to make a case for me. I wanted to make a case of it because unless my daughter was declared innocent in a Court of Law, she would be excommunicated on account of having had intercourse with Captain McCormick. It was Mahomed Din who told me this.

CROSS-EXAMINED BY COURT.—It is two months since I gave Ainah to Me Son. She came to McCormick's house about fifteen days after I gave her to Me Son. I know that you (*i.e.*, myself) stayed at

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Pulo-ton-ton when Captain McCormick was away. Ainah came to McCormick's house before you stayed at Pulo-ton-ton. I did not come and complain because I was heavy with child and couldn't move about. I did not dare to ask anybody else to complain as I was very poor. I asked Fatima (ii) and Biba to go and complain to the Deputy Commissioner, but they said they were afraid. Mahomed Din knew of Ainah being at McCormick's house when the Deputy Commissioner was at Pulo-ton-ton. I asked Mahomed Din to go: he said he could help me and would go. But whether he did or not, I can't say. I afterwards went and complained at the Subdivisional Officer's house at night.

CROSS-EXAMINED.—Mahomed Din and Basiah and Tu Mi Yein went with me. I asked the Subdivisional Officer to get me back my child. I said that McCormick had had intercourse with my daughter. (Witness is here pressed to say how she knew this when she had not seen her daughter: gives no satisfactory reply). Although I had known that I could take action under section 552, Criminal Procedure Code, to get my child back I should still desire to prosecute Captain McCormick for rape and abduction as I was told by my co-religionists that if I didn't I should be excommunicated. I was told this by Mahomed Din, Baseh and La Wi.

CROSS-EXAMINED BY ACCUSED.—I have no property. My husband had bad health before he died. I do not enjoy very good health. I have six children. I find a difficulty in keeping my children. I have given away three or four of my children. I put Ainah to dance in the *pwe* on this account. For this reason I gave Ainah to Captain McCormick about two years ago. I received frequent presents of money, rice and food while she was in McCormick's house. I had nothing to complain of in the way she was treated before. Cassim did not give me presents of food about the time of my confinement. McCormick treated me very well before. I did go back satisfied when Captain McCormick told me that he was looking after my child and treating her well. It was Me Son who suggested that I should send Fatima to ask for the return of the child. I told Me Son what Fatima told me about being kicked when she got back. Me Son said that she dare'nt go either. I did not send anybody else to ask for the child. I was not particularly anxious to have her back. It was about fifteen days after sending Fatima (ii) to McCormick's house that I went to see the Sub-divisional Officer. I had never been to his house before. It was Mahomed Din and the Sub-Assistant Surgeon who first suggested that I should visit the Subdivisional Officer's house at night. I went to the Subdivisional Magistrate at night and next day put in a petition. I consulted Mahomed Din before going to the Subivisional Officer first of all. I got my child back the day after complaining to the Subdivisional Magistrate. Mahomed Din never told me not to put the child in Me Son's house. It is not permitted by Mussulman custom to give a child away to a person of another community. My husband had gonorrhœa, and I have never caught it from him. I know the witness Ma Me. I have pounded rice with Ainah at her house. I did ask for gonorrhœa medicine from Ma Me, but I said it was for my

husband: not for Ainah. I did not get the medicine. My daughter has never complained to me of difficulties in passing her water. Me Son did not tell me that Ainah had venereal disease after I handed her over. Baseh and Mahomed Din were present when Ainah told me that she had been raped by McCormick and the blood had come. It was in a house in Victoria Point that she told us this. The Inspector handed over Ainah at his house. I did not at once ask my daughter what had happened: when we got to the house she told me of her own accord. I spent about Rs. 25—30 on my husband's funeral. This was subscribed by my father and Mahomed Din. I also sold a buffalo. Me Son did not give anything. I did not ask Captain McCormick for a subscription. Neither Masalam nor Matapah were present when I gave over Ainah to Me Son.

BY COURT.—Ainah stayed in Captain McCormick's house about two months. I think about two years ago. I took her away as my relations accused me of selling my children. For no other reason. Ainah has slept away from home dancing with the *pwe* company. My relatives looked after her. I did not go with her. I am not afraid of trusting Ainah in such company.

Read over and acknowledged correct.

G. P. ANDREW,—21-8-11,
District Magistrate.

FATIMA (i), RECALLED, ON OATH, STATES.—I was not minded to make a case over this, but Mahomed Din and the Sub-Assistant Surgeon told me that I must make a case. I did not know that the child was ill when she was in my hands whether she went dancing in a *pwe* or not.

Read over and acknowledged correct.

G. P. ANDREW,—22-8-11,
District Magistrate.

The next two witnesses were Fatima (ii) and Biba. They depose to going to McCormick to ask for the child and to his refusing to give her up, driving them away and kicking Fatima. Biba does not in her deposition go so far as Fatima (ii). It was objected that the District Magistrate did not consider the jacket bespattered with paint.

The next witness is Clarke and it is objected that, as he was clearly a defence witness, he should not have been examined at this stage. The objection that he was not cross-examined cannot stand as the record shows that complainant was offered cross-examination. There is no substance in the other objection. The District Magistrate was enquiring into the truth or otherwise of the complaint. It was his own enquiry as the Police had made up their minds that there was no case. He had to examine all those who knew about the matter and it seems immaterial under the circumstances at which stage they were called as long as opportunity for cross examination

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was allowed. Clarke gave evidence in favour of McCormick stating that it was at his request that McCormick took Ainah to cure her of a disease in her private parts.

The next witness is Me Son. She has been believed by the District Magistrate and it is objected that she is untrustworthy, and that her first statements should have been gone into. I think that the objection is well founded. Her evidence is to the effect that McCormick with her consent took away the child so that it could be cured of its disease. Her first statement on the 14th July to Sherard when he went to get the child was that her mother told her that she had taken the child to John's house as she wished the child to live with John and his wife. On the 21st July when examined by the District Superintendent she is recorded as having modified her statement and saying: "Ainah stayed with me for about a fortnight when one night while Captain McCormick was talking to Mr. Clarke and I was upstairs at the time she (Ainah) went away with him." She should certainly have been asked about these discrepant statements and asked to explain them and if she could not do so satisfactorily the failure to do so should have been considered in deciding on the credibility of her statement or otherwise.

The next witness was Ma Pe Yin. She in her evidence said that Ainah was sent to her by McCormick who told her that there was something wrong with her that he found she had a discharge and treated her for it. The same objection is taken with regard to this woman's evidence as with regard to Me Son and it is also to my mind well founded. She should have been asked to explain her first alleged statements. To Sherard she said on the 14th July that Ainah's mother had brought her to her (Ma Pe Yin) to look on her as a daughter but she then is recorded to have said that the girl was suffering from gonorrhoea. On the 19th July she is recorded to have said to the District Superintendent that Ma Son came to McCormick's house and gave the girl to him saying that she was suffering from a woman's disease. It was also stated that the police papers show that McCormick first said that he did not know who brought the girl to Ma Pe Yin, and that this had been corrected to: "I brought her" and that there was a subsequent correction to "It was I who first brought her" and that this should been enquired into and brought into evidence.

The next witness is Ma Me. She did not give any relevant evidence. To the Police she did not give any evidence in favour of the prosecution. Her statement was in favour of the defence. The next witness was Haji Rahim. He was believed by the District Magistrate. He says that Ainah's mother was his wife's sister and that 7 days before Ainah was handed over to Ma Son her father told him that she was suffering from venereal disease. It is now objected that this man is no relative of Fatima and was an employee of McCormick. There is some ground for thinking from the Police papers that this man was employed by McCormick to do contract work. The record does not show that applicant had an opportunity given her to cross examine him and so his statement

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must be discarded. If applicant was given an opportunity there has been an error in not noting it on the deposition.

The last witness was Mahomed Din. He says that when the Deputy Commissioner was staying at Pulo-ton-ton and from the Sessions Trial No. 41 record this was in April, he went to see him on business and as he returned home, he saw Fatima who told him that her daughter was being kept at McCormick's house that they would not give her up and that she wished to report this to him. He told her to make her complaint at Victoria point and they parted company. He took Fatima to make her complaint on 12th July. He was there when the child was given to the mother and when the child was taken to the hospital. He allows that Government has given McCormick his land. The witnesses not examined were Rahim, Sahut, Bedin, Basir, and Sunani, Ngwe Byu and Shean Gee. Rahim is Biba's husband and he, to the Police, corroborated his wife and said that Aina was healthy when handed over to Me Son. For reasons I shall give I do not see how his evidence would have helped the case. Being a man how could he know Ainah's state of health? Sahut's evidence does not seem to me to help the case. He says that he met McCormick carrying Ainah to his house. He knows nothing of the circumstances under which Ainah left Me Son and does not say that Ainah was objecting. Sunani and Basir depose to Ainah's parents making a report to Masalam the headman shortly after McCormick took Aina to the effect that he had abducted their daughter. In view of Fatima's deposition and Mahomed Din's connection with the case—matters into which I will enter later I do not think that their evidence would have materially helped the case for the prosecution. Shean Gee's statement is of the vaguest description and Ngwe Byu describes how applicant and her husband came to the Court at Victoria point about April and said that McCormick had taken their child to his house and would not give her back and that he was afraid to complain. He says the man came again a month afterwards and went away after waiting for some time. Bedin was Clarke's cook and says that he knew the girl was ill, when at Me Son's he saw her longyi had wet stains on it and that McCormick took her away telling Me Son that he wanted some one to teach him Malay. His statement supports the defence rather than the prosecution as it assumes an implied consent of Me Son when McCormick took the girl. There is one other witness who was not examined and that is Dr Evers. I think that he certainly should have been examined but that it is not essential that he should be examined now. He examined the girl on the 29th July and his report is as follows:—

From Dr. C. G. Evers, Civil Surgeon, Mergui, to the Subdivisional Magistrate, Victoria Point,—dated the 29th July 1911.

Reference your letter No. 778, dated the 28th July 1911. I examined the girl Ainah on the morning of the 28th July 1911. Judging from her physical development and the number of her teeth, 24 in number, I am of opinion that she is between 11 and 12 years of age. She is childish in form, manner and appearance.

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The breasts are not developed and there is no hair on the pubes. There was no purulent discharge from the vagina.

The hymen was ruptured.

The vaginal canal was narrrow and admitted the first two digits (points) of the index finger (lubricated) with some difficulty and gave rise to pain which made her cry. I was not able to introduce the finger further, as the girl could not bear the pain. I was able to touch the tips of the cervix (neck) of the womb with the two digits introduced. The vaginal canal was probably a little more than two inches long.

The vaginal canal is, in my opinion, too narrow and two short to admit the full length of the male generative organ.

I am of opinion, therefore, she could not have lived as a prostitute. Your letter is herewith returned."

If he had been examined it seems very probable that he would have said the penetration was impossible and that would have finally disposed of the question of rape; but supposing he had said that there could be partial penetration even then would a *prima facie* case of rape be established?

To review the evidence, the child Ainah reached her mother on the 4th July. No complaint of rape is lodged with the Subdivisional Magistrate until the night of the 16th July. Was it natural conduct on the part of the mother to wait for two whole days before she allowed her child to complain? Mahomed Din is with her when it is laid. Mahomed Din has taken the greatest interest in this case. He allows that Government has given McCormick his land. Though the child is said to have been kidnapped in April no complaint is laid until July. The reason given is that applicant was confined of a child and that the father died. But the ordinary woman in this country as a rule does not take long over her confinement. And then again Mahomed Din knew in April as it was then that the Deputy Commissioner was staying at Pulo-ton-ton. He must surely have had free access to him. Since he took such an interest in the case in the end, why did he not do so in the beginning? May not his influence explain the evidence of Sunani, Basir and Ngwe Byu if it is correct?

He was perhaps preparing the case against the man who got his land. Assuming that Ma Son, Ma Pe Yin and McCormick have lied as the papers show, is that sufficient to establish a *prima facie* case of rape against McCormick? I think not. A *prima facie* case must be established on good and credible evidence on the part of the prosecution and where is it? Not only is the report made very late after the girl reached her mother; but when it is made, it, on the face of it, gives a most improbable story. After this when she is examined by the District Magistrate, she gives a story that is very different especially as regards times. There seems to be no doubt that she was treated for a discharge in her private part. She says so and, so does the defence but Daulat Ram's evidence shows that this discharge need not have come from sexual intercourse. It is also shown that the hymen could have been ruptured from other causes than sexual connection and in the present case the child seems to have been douched. There is no evidence to show that the discharge was the

result of gonorrhoea. Ma Son's statements in Court to the effect that she sent for Fatima and asked her to go for Ainah to some extent are in favour of the prosecution as they suggest an inference that all was not right and that the girl had been taken away without her consent but can such a conclusion be arrived at on a consideration of all the facts? Applicant says that Ma Son told her that McCormick had taken Ainah away. It may well be that Ma Son was merely telling Fatima what had happened and that with her consent McCormick had taken Ainah to treat her. Fatima in her deposition said, that, when McCormick told her the child was happy, she went away. I have already held that there are the very slightest grounds, if any, for holding that there was any misinterpretation. It was urged that the witnesses some of them deposed or said to the police that the girl was healthy when she went to Ma Son. In view of the suspicion that Mahomed Din may be working a false case I am of opinion that sufficient credence could not be given to such evidence but even assuming that she was, could not the discharge have come on when she was with Ma Son and could not the hymen have been injured in the treatment or in any way other than sexual connection? The more I look at the charge of rape, the more I come to the conclusion that the charge must depend on the statements of Ainah, and on such statements incredible in themselves and varying between themselves made so late after her return to her mother, with Mahomed Din in the background who may be McCormick's enemy I am of opinion that there is no *prima facie* case of rape disclosed against McCormick on the evidence on the record of the District Magistrate's enquiry or on any evidence that can further be put on to it as disclosed by the other papers on the record.

As regards the case of kidnapping to establish it there must be evidence that the minor was taken out of the keeping of the lawful guardian without her consent. Now Ma Son was clearly one of the lawful guardians. Is it or can it be shown that Ainah was taken out of Ma Son's keeping without her consent? Ma Son said at the enquiry she consented. Can it be assumed, that, as she told lies before, she did not consent? I do not think so. If she had told lies it goes to show that her evidence is untrustworthy. If so, it cannot be proved out of her mouth that she did not consent. By my finding on the first charge I have found Ainah herself untruthful. The mere fact that McCormick refused to give her up to Fatima (ii) and Biba and also the applicant if he did so, does not show that he took her without Ma Son's consent. The fact that he so behaved if he did, may go to show that his behaviour was due to Ma Son's consent. If he had not got Ainah for a lustful purpose (and I have held that there is no ground for charging him for such a purpose) then why was he treating her as it seems clear he did? Does it not make his defence probable? and if his defence is true is it not very probable that he had the girl to treat with Ma Son's consent, even though for some purpose of their own, he, Ma Son and Ma Pe Yin tried to conceal the true facts at first? As far as Ma Son is concerned I cannot hold that any *prima facie* case of kidnapping is established.

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The argument was then raised that, as soon as Ma Son parted with the child, the natural guardianship of the mother arose and McCormick kept the child from her—that the mother was always the natural guardian even when the child was with Ma Son—that Ma Son only had the child for a limited purpose. Adopting this view and assuming that the position of applicant, Ma Son and Ainah was a position analogous to that of a parent, school mistress entrusted with a child, and the child itself, according to the agreement come to between applicant and Ma Son I think that it may be taken applicant delegated to Ma Son the power to keep Ainah in, or restore her, to health, and that being so, I do not think that in any case McCormick committed kidnapping, if with Ma Son's consent he took the girl to cure her. If he took her for an unlawful and immoral purpose I think that he would have been guilty of kidnapping, as her mother never parted with the possession of her child to allow Ma Son complete control of the girl; but in such a case section 373 would be applicable and as I have held, there is no evidence to support a charge of an unlawful and immoral purpose.

The last consideration is whether McCormick comitted kidnapping by detaining the girl in his possession. Fatima in her deposition says that when she asked for the child McCormick refused to give her up saying that she was happy and well fed, and so she went away satisfied. This was quite a different story to what she said in her complaint, when she said that McCormick's boy said that he had given orders that no one was to enter or they would be beaten or shot. She also said in her deposition "I was not minded to make a case over this but Mahomed Din and the Sub-Assistant Surgeon told me that I must make a case." "I should still desire to prosecute Captain McCormick for rape and abduction as I was told by my co-religionists that if I didn't I should be excommunicated. I was told this by Mahomed Din, Basir and La Wi." Then there is for consideration the great delay in making the complaint, a delay not in my opinion accounted for by the father dying and the mother being confined of a child in the interval, the more specially as Mahomed Din was conversant with the circumstances from April. I do not think it is even shown that Fatima was non-consenting. If it took place, there was a visit of Fatima (ii) and Biba; but if McCormick had the consent then of Ma Son and the mother, the fact that he did not hand the child up to Fatima (ii) and Biba would not in itself make him guilty of kidnapping. They were not the child's guardians. If he did treat them in the manner alleged I am in no wise desirous of defending his conduct. It is for this Court to consider merely whether he was committing any criminal offence with regard to the child Ainah. I would hold that there is no "prima facie" case of kidnaping made out or that can be made out against McCormick.

There remain the other allegations to be dealt with; they are

(1) That the proceedings before the District Magistrate are illegal *ab initio*;

(2) That he should not have dealt with the case as he was a friend of McCormick.

(3) That he prejudged the case and should not have put McCormick on bail.

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The first allegation is based on the provisions of Section 526 (8) of the Code of Criminal Procedure. Now this sub-Section does not apply to the case as far as the petition on page 4 of the Record is concerned. The petition is not worded in the terms of Section 526 (8). It was presented to the Sub-divisional Magistrate of Victoria Point in the month of July. Moreover by Section 526 (8) the powers of adjournment are to be exercised so as to allow a reasonable time for the application being made, etc., before the accused is called on for his defence. Here the accused never was called on for his defence. The applicant now says that she objected on the day of the hearing. In S. T. No. 41 Mr. Andrew said. "They never put in a single application in my Court bearing on the question." Applicant's bare statement after this length of time has no weight. The argument that the proceedings are bad *ab initio* cannot therefore prevail.

The next point is that the District Magistrate should not have dealt with the case as he is a friend of McCormick. I think that considering the petition at page 4 of the Record was before him the District Magistrate should have asked applicant before he began the case if she desired a transfer and told her that, if she did, she would have to apply to this Court, and given her time to do so.

He could have asked her at Mergui or had her asked at Victoria Point before they all came up to Mergui.

But as to whether he should not have touched the case himself I think that it was a matter between himself and his conscience. If he considered that he could not have dealt with it impartially he should of course not have touched it, but if he considered he could, as far as the Record of S. T. No. 41 goes, I can see no reason why he should not have dealt with it. He says:—

"I always had work in connection with McCormick's grants and other grants down Pulo-ton-ton way and also in connection with laying out the roads, etc. There are no dak bungalows between Victoria Point and Maliwun. There is not a single Pongyi Kyaung or Zayat on the way. There are no houses or Zayats for a European except Planters' houses. There are about 30 Planters in the Mergui District. I have stayed in every estate in the District. I have stayed in every Planter's house in the District."

The allegations that the District Magistrate prejudged the case seem to me to be quite unsubstantiated. The letters that passed between him and his Commissioner exhibit 1, 2, and 3 so far from showing that he prejudged the case go to show that he decided to hold a Magisterial enquiry himself. His letter was written on the facts before him at the time he wrote it. The telegrams show that he even tried to get legal assistance for applicant. Exhibit H is quoted as showing that he prejudged the case. I cannot agree. He had to make up his mind in accordance with the Commissioner's decision on the papers before him at the time; but that does not mean that he could not approach the case with an open mind and decide on the evidence before him. One might as well say that a Sessions Judge always prejudges the case as he reads the Committal Records and Police Papers before hearing the witnesses. He must

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form opinions after doing so; but he keeps an open mind and sometimes finds things turn out quite different to what he expected.

Lastly, I am unable to see that he was wrong in releasing McCormick on bail. An enquiry was going on under Section 202 Criminal Procedure Code, and though the warrant was issued by the Magistrate the District Superintendent wired that he had no objection to bail. McCormick was a European and there is no proper provision for the custody of under—trials at out-Stations.

It was finally urged on us that if we found no ground to re-open the enquiry under sections 376 and 363, yet that offences were established under Section 341 or Section 354 I. P. C.

As regards Section 341 I. P. C. the remarks I have made go sufficiently to show that I do not consider it proved that there was any wrongful restraint.

I have found both Ainah and her mother untrustworthy and that it is not shown that Ainah was not with McCormick and Ma Pe Yin without Ma Sone's and the applicant's consent.

As regards a charge under Section 354 I. P. C. McCormick in the Police Papers is recorded as having stated that he personally examined Ainah, and his statement in Court may perhaps be held to be an admission that he did so. It is not quite clear. In my opinion, if he did do so, he committed a very grave indiscretion and his conduct is quite indefensible; but the question is whether there can be established a case against him under Section 354 I. P. C. That Section is:

"Whoever assaults or uses Criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished etc." If his story is correct and there seems to be a great likelihood that it is, there was no intention to outrage. The other essential "knowing it to be likely etc." may be said to be present if it could be shown that Ainah was non-consenting. In all Criminal force there must be force *without the person's consent*. And the question here is whether Ainah consented. Section 90 says "A consent is not such a consent as is intended by any Section of this Code unless the contrary appears from the context if the consent is given by a person who is under twelve years of age. The question therefore is whether Ainah gave a free consent. Her age seems to have been between 11 and 12 years and so she would be capable of giving an intelligent consent. Her own statement is incredible and so nothing is to be obtained from it towards drawing an inference. If McCormick took her to treat her and she went willingly as seems to be probable, it is extremely probable that she consented to his action especially considering the evidence that he had had charge of her 2 years before. One of the essentials of Criminal force would then be absent and there would be no offence under Section 354 I. P. C.

In the result I would dismiss the application.

Ormond J:—My view of the facts is shortly this:—No credence whatever should be given to the affidavit alleging wrong interpretation and which is filed 15 months after the case. If the allegation were true, Mahomed Din and Mr. Buchanan

who were about the Court premises would undoubtedly have been informed and would have represented the matter to the District Magistrate; and in her memorial to the Local Government which was drafted by her advocate when she came to Rangoon, Fatima would have categorically mentioned the statements in her deposition which she did not make, and would have stated in effect what her correct answers were. I can understand an unscrupulous interpreter inserting a "not" in the answer—"I was particularly anxious to have her back"—but Fatima in her affidavit denies making any of the 8 statements to the Court as recorded in her deposition at the close of her evidence on the 21st July. And although in the 9th para of the petition to this Court, Fatima states that she objected to the interpreter on the ground of his being a paid servant or agent of McCormick's, no allegation is made there against him of falsely interpreting. Moreover if the interpreter falsely represented Fatima as saying that she gave the girl to McCormick about 2 years ago; why did he not represent Aina who gave her evidence on the same day as making statements to the same effect? There can be no doubt that Mahomed Din is the prime mover in this prosecution; and as Government had given McCormick his land, there can be little doubt that he bore him a grudge. He is a well-to-do man and there is no reason why this application for Revision should not have been made long ago.

An insight into the case may be gained by comparing Mahomed Din's evidence as to Fatima's attempt to get the girl back when the District Magistrate was staying in McCormick's house, with the statements and evidence of Fatima on the same point:—Mahomed Din states that he went to see the D.C. (i.e. the D.M.). that he met Clarke there and on his way home he met Fatima crying by the roadside and she told him that her daughter was being kept at McCormick's house and they would not give her up, and that she wished to report it to him and that he told her to make her complaint at Victoria Point. Fatima in her complaint on the 12th July and also in her statement to the police on the 13th July says that she went to McCormick's house to report the matter to the D.C. but was prevented from doing so by Clarke; and on the way home she met Mahomed Din and told him how she was prevented. On the 20th July she states (to the police) that she went to see the D.C. in McCormick's house but Clarke prevented her from seeing him, and later on she states that she met Mahomed Din on the road. "On one occasion when she was going to Ma Pe Yin's house (i.e. a different occasion) when she asked him to go along with her and help her he told her to go by herself as he was afraid". And on 21st August to the Magistrate she says "I did not come and complain to you (the Magistrate when McCormick was away) because I was heavy with child and could not move about, Mahomed Din knew of Aina being at McCormick's house when the D.C. was there. I asked Mahomed Din to go; he said he could help me and would go--but whether he did or not I can't say". Now if Fatima had in fact gone to see the D.C. at McCormick's house and had been frustrated by Clarke, she would undoubtedly have remembered it when giving her evidence to the

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Magistrate : but it seems to me to be clearly a piece of fabricated evidence learned up by the 12th July and forgotten by the 21st August and Mahomed Din must have originated it. The D.C. was at McCormick's house for 4 days in April and Fatima's child was not born until the 10th or 12th June. Fatima did not try to get her daughter back when the D.C. was at McCormick's house; she could not therefore have been really anxious to get her away from McCormick. The reason why the complaint at the instance of Mahomed Din was not filed sooner was I think, because the father Malassa whilst he was alive refused to make a case saying that the child could live where she liked. There seems to be no reason why Me Son should have made a statement to that effect (in her evidence to the Magistrate) unless it was true.

Now as to the charge of rape, the case for the prosecution is that Ainah was handed over in good health to Me Son with whom she stayed 10 days to 3 weeks: that McCormick then took her away and raped her, thereby giving her gonorrhoea and that she was then handed over to Ma Pe Yin. The medical evidence and statements show that the girl had a slight discharge on the 14th or 15th July which might have been gonorrhoea; that her hymen was ruptured which might have been caused by partial penetration of the male organ or by any hard substance e g. the nozzle of a douche etc; that the injuries must have been inflicted more than 15 to 20 days before the 14th July but that it was impossible to tell how long before. Even if the girl was in good health when she went to Me Son, the injuries etc might have been inflicted whilst she was at Me Son's before McCormick took her away. There is only the girl's evidence to implicate McCormick, and her complaint and evidence are so inconsistent and contradictory on material points that it would be altogether unsafe to place any reliance on them. On the other hand the fact that the girl had stayed with McCormick for two months about 2 years previously when her mother took her away, only because her relations accused her of selling her children, would go to show that on this occasion McCormick in taking the girl was actuated by philanthropic motives viz. of curing her.

The fact too that no complaint was laid until 2 days after the girl had been restored to her mother is not what one expects if it were a true case. Fatima in her complaint of the 12th July says she wants her daughter back so as to be able to tell whether she has been meddled with. The natural thing to do would have been to have ascertained from the girl what had happened and then at once to have filed the complaint; and the medical examination would have followed. Mahomed Din who was present when Fatima filed her complaint on 12th July, was also present when the girl was restored to her mother at the Inspector's house on the evening of the 14th July; and from the record in the Arnold case to which Counsel has referred (for the purpose of showing facts which could be proved if this application were granted) it appears that Mr. Buchanan was also present; and he there says that Fatima immediately insisted upon a medical examination. Ainah in her deposition says "I did not tell my mother what had happened to me before I was taken to the hospital . . it was the

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doctor (Sub-Asst. Surgeon) from whom my mother got her information".

As to the charge of abduction :—If the charge of rape is not supportable, the story of the defenee must I think be accepted; i.e. that McCormick took the girl in order to cure her. The girl had been given to Me Son for so long as Me Son should remain in the neighbourhood—an indefinite period. Fatima had given away 3 or 4 of her children and had given Ainah to McCormick 2 years previously. Counsel for the petitioner admits that Me Son must have connived at or consented to the taking away of the girl by McCormick; and McCormick might reasonably have supposed that Me Son had authority from the mother to give him the girl on this occasion in order to be cured of her ailment. And the mother though she knew a day or 2 afterwards, that McCormick had taken the child made no real attempt to get the child back until after the death of her husband, when she was prevailed upon to do so by Mahomed Din. In my opinion if this application were granted, there would be no reasonable possibility of the prosecution obtaining a conviction on either of the above charges or for any minor offence; and I would dismiss the application.

As to the Magistrate not transferring the case and not giving the prosecution an opportunity of obtaining an order for a transfer from the Chief Court:—no doubt if the Magistrate had asked the complainant if she wished to make such an application, it would have tested her *bona fides* but it is sufficient to say that the prosecution had ample time after it was known that the Magistrate was to take up the case, to apply to the Chief Court for a transfer, and no application was made to the Magistrate at or before the hearing for an adjournment to enable the complainant to make such an application. The other points have been fully dealt with by my learned colleague Mr. Justice Hartnoll with which I agree.

TOWMEY J:—I concur generally in the views expressed by my learned colleagues. I wish to add a few remarks on some of the salient points which it is desirable to emphasize.

In the first place, the delay in applying for revision of the District Magistrate's order of 23rd August 1911 throws grave doubt on the applicant's good faith. She is a poor jungle woman and a widow; but it is not the case that she was unsupported. On the contrary, it is clear that her well-to-do co-religionists helped her freely throughout the proceedings. She and they must have learnt soon after McCormick's discharge that the only way to get the case re-opened was to present an application to this Court. The delay of nearly a year betrays the inherent weakness of the case against the accused; and we cannot overlook the significant fact that the application was filed only after the prosecution in the Arnold case had begun. In view of this delay, it would manifestly be unjust to harass the accused by a further enquiry into the charges against him unless we had the strongest grounds for thinking that a miscarriage of justice occurred.

As regards the interpreter Moosajee I find it impossible to believe that Fatima raised any objection at the time. If she really feared that Moosajee, by reason of his business relations with McCormick,

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would misinterpret her evidence, she would not have contented herself with protesting to the District Magistrate in Malay a language which she knew the District Magistrate did not understand, but would have represented the matter through Mahomed Din or Mr. Buchanan. In any case she would have made her objection known to the District Magistrate immediately after her examination. Mr. Andrew's evidence in the Arnold case shows that no objection to the interpreter was made by Fatima or anyone else. I can only regard the allegation as the result of an after-thought. In her deposition to the District Magistrate, Fatima made many admissions damaging to the prosecution, and to challenge the correctness of the interpretation was the only way to destroy the effect of these admissions.

Fatima's allegations that she begged the Deputy Commissioner not to try the case and that he stormed at her, are not probable. In this matter also, it is unlikely that she would have contented herself with an oral application to the District Magistrate. There was ample time to put in a formal application under section 526, Criminal Procedure Code and from the neglect to do so the District Magistrate had good reason to believe that the complainant acquiesced in his hearing the case. It is true that at that time he had the two petitions, one in Malay forwarded by the Subdivisional Magistrate and one in Burmese forwarded by the Commissioner. He ignored these petitions, and he explains that he did so because he did not regard them as genuine, at any rate so far as Fatima herself was concerned. The District Magistrate's view on this point is supported by Fatima's own evidence in the Sessions Trial. The petitions purport to bear her cross marks; but in her evidence she said that she put her thumb marks on them after dipping her thumb in some "medicine". They bear no thumb impressions and it seems doubtful therefore whether she really saw them at all. It may well be that they were sent by Mahomed Din and the other signatories to the Malay petition of their own accord. It is clear that the District Magistrate was not moved to postpone the enquiry under section 526 with a view to an application for transfer being filed in this Court.

But, assuming that in view of the two petitions he ought to have asked Fatima if she wanted a postponement for this purpose, it is desirable to consider whether there was any prospect that such an application to this Court would have been successful. The only grounds for such an application would be that the District Magistrate was a close friend of McCormick's and that the District Magistrate after saying he would employ a pleader for Fatima, failed to do so. She may not have understood that the District Magistrate's failure to engage an advocate for her was due to the Commissioner's refusal to sanction the expenditure. But she probably did understand it for the Subdivisional Officer was asked to acquaint her with the fact on the 12th July. At any rate she had no reason to think that the District Magistrate wished to deprive her of legal assistance. She and her friends had ample time to engage an advocate at Mergui. To my mind it would be absurd to hold that the circumstances could give rise to any reasonable apprehension that the District Magistrate would not deal impartially with the case.

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Secondly, as regards the District Magistrate's friendship with the accused, the relations between them were investigated in the Sessions Case *King-Emperor* v. *Arnold* where this matter was directly in issue. It may be assumed that if the Chief Court had made enquiry into the matter on a petition for transfer, the facts proved in the Arnold case would have been brought to notice and nothing more. From Mr. Andrew's evidence it appears that he was on the same footing with McCormick as with the 20 or 30 other planters in this district. Mr. Andrew made McCormick's acquaintauce in the course of official business. He stayed in McCormick's bungalow once for 4 or 5 days when McCormick was absent in Penang. The absence of dak bungalows, zayats and the like accomodation renders it necessary for the Deputy Commissioner to accept the planters' hospitality. Mr. Andrew had in fact stayed from time to time with every planter in the district. It is plain that there was no such intimacy as would render it improper for the District Magistrate to hold the preliminary enquiry. To decide otherwise would be tantamount to preventing the District Magistrate from enquiry into Criminal charges against any of the planters in his district. On the facts elicited in the Arnold case I think this Court would have refused an application for transfer. There is nothing in the facts to show that the District Magistrate was likely to be prejudiced in McCormick's favour, and furthermore, any apprehension on Fatima's part that the District Magistrate was so prejudiced would in the circumstances be unreasonable.

At the hearing, it was suggested to us that the District Magistrate prejudged the case and in support of this argument the learned advocate pointed to the telegraphic correspondence between the District Magistrate and the Commissioner about the employment of a pleader for Fatima. The District Magistrate recommended that a pleader should be retained because "the complainants are ignorant people and require assistantce". He told the Commissioner that he did not think the rape charge could be substantiated, but that the charge of abduction remained. He was directed not to employ an advocate "if he believed the rape charge to be false". He thereupon informed the Subdivisional Officer that the Commissioner declined to sanction the employment of an advocate for the prosecution. We are asked to infer that the District Magistrate believed the charge of rape to be false before he began the enquiry. Mr. Justice Hartnoll has dealt with this matter and I agree in his remarks. Mr. Andrew had to decide provisionally on the records before him. He construed the orders as prohibiting the employment of an advocate unless there appeared to be a *prima facie* case of rape. He had the Police enquiry and the Police Superintendent's report that the case was false. It was plain that if the Commissioner had that report before him he would have definitely refused to sanction expenditure for a pleader and the District Magistrate rightly decided in the circumstances that he had no authority to incur the expenditure. His letters and telegrams to the Commissioner show that so far from prejudging the case, he preserved an open mind and kept his judgment in suspense until he examined the witnesses himself.

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The action of the District Magistrate in ordering the release of the accused on bail is also referred to as indicating prejudice. Mr. Justice Hartnoll has dealt with this point and I have only to add that the warrant of arrest was clearly unnecessary. There was no reason to fear that McCormick would abscond, and Mr. Buchanan's letter of 19th July (the date of the warrant) to Mr. Finnie shows that the warrant was issued for no such reason. That letter bears out the view of the Police Superintendent that Mr. Buchanan had "lost his head". Mr. Buchanan clearly suffered from the delusion that McCormick was too dangerous a person to be left at large and that if not kept under lock and key he would go about shooting people with his revolver. It is clear I think that the District Magistrate had abundant reasons for ordering the man's release on bail.

There are other circumstances which strongly confirm the view that the District Magistrate was anxious to probe the facts carefully and to do justice. When the police report came before him it was open to him to dismiss the complaint under section 203, Criminal Procedure Code on a consideration of the complainant's statement on oath and the police papers.

In the circumstances the decision of the District Magistrate to hold a judicial enquiry himself was certainly not that of an officer who had prejudged the case. The benevolent if mistaken effort to obtain sanction for a pleader for Fatima is a further indication of his impartial attitude.

Turning to the actual charges against McCormick I think it is evident that he at first made false statements in defence to the police. He denied bringing the girl Ainah to his house. The witnesses Ma Son and Ma Pe Yin also told lies on his behalf when they were first examined. McCormick no doubt got wind of the impending charge of kidnapping and perhaps feared that it would be sufficient for a conviction to prove that he took the girl away even though he did so with the intention of treating her medically. His first impulse was therefore to deny taking the girl at all. It is at least doubtful whether his contradictory statements to the police would be relevant against the accused, and in any case the lies he told the police are not really material now. He admitted to the Magistrate that he took the girl away, and the essential question is as to his intention in doing so. If he took her for an improper purpose, it would be kidnapping even if Me Son consented. For that would be a violation of the mother Fatima's right as natural guardian. In making over the child to Me Son it cannot be presumed that Fatema gave Me Son authority to part with the custody of the child for improper purposes. If, on the other hand, McCormick took the girl, as he says he did, merely to treat her medically for a certain discharge, that would not be an infringement of the natural guardian's right, for it may be assumed that Fatima would have approved of it. The case therefore stands thus. Either McCormick took the child, intending to subject her to sexual intercourse and did actually outrage her, or else he took her with the lawful purpose of treating her medically. In the former case, the charge of kidnapping would fade into insignificance beside the more heinous charge of rape; while in the latter case there would

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be no kidnapping at all. In other words if the charge of rape fails the charge of kidnapping also falls to the ground.

In support of the rape charge we have the girl Ainah's own statements and the medical evidence. Ainah on different occasions gave different and conflicting accounts of the circumstances of the alleged rape and she is plainly an untrustworthy witness. The evidence of the medical officer Dawlat Ram at the magisterial enquiry favours the view that the girl was raped by some one, but it is open to strong suspicion as it is inconsistent with earlier statements of the same witness in which he said that penetration could not have possibly taken place as the girl was too young. He did not qualify his earlier statements by saying that partial penetration could have occurred. He merely said that the girl might have been "tampered with" as the hymen was ruptured, adding that the insertion of a douche would account for this: the Civil Surgeon was not examined by the District Magistrate; but his letter to the Sub-divisional Magistrate on 29th July shows the nature of the evidence he would be prepared to give. His opinion was that complete penetration was impossible. His remarks as to the pain caused merely by inserting the finger suggest further that even partial penetration would result in serious injuries to so young a girl and it is hard to believe that all trace of such injuries would have disappeared even after the lapse of three or four months.

It is equally hard to believe that if the girl had been treated by McCormick in the manner described by her, the matter could remain secret for several months, or that the whole neighbourhood would conspire to shield McCormick from punishment. During the period of three months or longer which Ainah spent at Ma Pe Yin's there is no proof beyond the girl's bare statement that she was under any restraint. During part of that time McCormick was away at Penang, and he asked the Deputy Commissioner to occupy his empty bungalow a strange act of bravado on McCormick's part if the girl Ainah was then recovering from the effects of rape in Ma Pe Yin's house close by. Fatima's alleged visit to demand the girl would be before McCormick went to Penang but would be after the alleged rape. Fatima did not press her demand when McCormick assured her that Ainah was happy and well fed with him. The Deputy Commissioner actually stayed at the house for a few days while Ainah was at Ma Pe Yin's. Nobody said a word to him about Ainah. Mahomed Din, who was on the worst of terms with McCormick, saw and spoke to the Deputy Commissioner but mentioned nothing about this case of kidnapping and rape although he knew that Ainah was at Ma Pe Yin's place then and must almost certainly have known if the girl had been outraged. If there had been any foundation for such a charge Mahomed Din would not have been slow to inform the Deputy Commissioner for McCormick's discomfiture.

Seeing that the girl herself is untrustworthy, that the evidence as to her physical state is insufficient to support a charge of rape, and that the charge is moreover improbable in itself, I think the District Magistrate was right in disbelieving it. The charge of rape

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being untrue, there is no adequate reason to reject the accused's explanation that he brought the girl to his house to treat her medically. This explanation accounts for all the facts proved in evidence. In considering McCormick's motive in taking the child it must be remembered that according to the record the child was given to McCormick by her mother about two years earlier and that the child then stayed two months with McCormick. She was withdrawn from McCormick's care only because Fatima's relations accused her of selling her children. It is not suggested that McCormick had any improper motive in taking the child on that former occasion when she was only 9 or 10 years old. So also there is no *prima facie* probability that he acted from an improper motive in the present instance. McCormick's conduct in examining the girl privately deserves strong condemnation but I am unable to see that it amounted to a criminal offence.

I agree with my learned colleagues and with the District Magistrate in thinking that the charges against McCormick originated in the breast of Mahomed Din who bore McCormick a grudge. It appears that Ainah's father Malasa refused to bring a charge against McCormick; but after Malasa's death, Fatima was persuaded by Mahomed Din to lay a complaint. She was in great straits at the time and would be specially susceptible to Mahomed Din's influence. She admitted to the Magistrate that it was Mahamed Din's influence. She admitted to the Magistrate that it was Mahomed Din and the Sub-Assistant Surgeon Daulat Ram who prevailed on her to take proceedings. She was not particularly anxious to get her daughter back as she was too poor to support the child. She had no mind to bring a case against McCormick at all. She was told that if she did not do so her co-religionists would ex-communicate her for allowing her daughter to stay with McCormick. She therefore brought the charge of kidnapping egged on by Mahomed Din and two days after the recovery of the child she brought the charge of rape under the same influence. Fatima was nothing but a puppet in the hands of Mahomed Din who played upon her fears and thereby for motives of his own induced her to bring these charges.

I concur in thinking that we should dismiss the petition without calling on the respondent to show cause.

[IN THE CHIEF COURT OF LOWER BURMA.]

CRIMINAL APPEAL No. 523 OF 1912.

NGA TUN E. ... ... APPELLANT.

v.

KING-EMPEROR ... ... RESPONDENT.

Before Mr. Justice Hartnoll and Mr. Justice Young.

FOR APPELLANT—DEGLANVILLE.

Dated 12th August 1912.

Accomplices Uncorroborated and retracted confessions of accomplices -Value of such confessions—when to act on them.

There is nothing in law to prevent the conviction of an accused on the uncorroborated and retracted confession of accused, if it be believed against him. They have however to be approached with the greatest caution and care and the most anxious scrutiny should be applied to it in deciding on its truth or falsity respecting the incrimination of others than the one who made it. Yet if after applying every test to it that is available and remembering that it cannot be sifted by cross examination that by it a criminal is incriminating other than himself and all other similar considerations the judge still believes it to be true as against another or others than the man who made it, it is the duty of the judge to act on it.

Queen Empress v. Ashutosh Chukkerbutty 4 Cal 483 dissented from.
Emperor v. Kehri 29 All. 434 approved of.

JUDGMENT.

Hartnoll J :—On the afternoon of February 21, last, a little boy of about 3½ years old name Nyi Bu or Po Shein met his death by drowning in the Mingan tank not far from Mongon village. Two lads, Aung Sein, whose age is estimated to be from 12 to 14 years and Po Tun, whose age is some 8 years old have been convicted of the murder of Maung Nyi Bu. The appellant Nga Tun E, 25 years old, had also been convicted of the murder and sentenced to death. The case against him is that he instigated the lads to do the deed and stood by to see that it was done, so that he was actually present. The evidence against him was that of the confessions of Aung Sein and Po Tun and that of three other persons Ma O Le, the mother of Nyi Bu, Maung Tha Din, the step-brother of Nyi Bu and Maung San Dun. Ma O Le states that she saw Tun E on the evening of the murder come running from the direction of the Mingan tank and that she suspected him of the abduction of her child. She says that she was near the village gate at the time and that it was then just getting dark. Maung Tha Din says that when the child was missed he went to look for him into the fields North of the village and that he then saw Tun E coming hurriedly from the direction of the Mingan tank. He thought his conduct in thus coming alone was suspicious, and he says that it was after sunset. Maung San Dun says that on the evening in question he was returning from Paukkaung and on his way saw Maung Tun E on the road side to the south of the Mingan tank looking towards the tank. He then heard the sound as of a child crying in some jungle to the north-west of where he was and about a stone-throw from him. He

Appeal against the punishment of death inflicted by the Sessions Judge of Prom in Sessions Trial 47—12 on an offence under section 302 *I. P. C.*

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looked round and saw nothing suspicious and so went on. He says that the time was then just before sunset. This man does not belong to the village of Mongon, that of the murdered boy, but he was from Okshitgon. He had been twice convicted of causing hurt. He says that he did not hear of the murder until February 23 and that on the 28th he went to Paukkaung, where he saw Ko Kaing at the witness shed, who told him that Tun E and the two lads were in custody. He then mentioned what he had seen and two days later was sent for and examined. The learned sessions judge has believed the testimony of this man. I see that Okshitgon his village is about a call from Mongon. He has so deposed in the committal proceedings. As his village was so close to Mongon, the probability was that on February 23, when he heard of the murder, he would also hear of who were the accused and yet he says that he kept reticent until February 28. Further his testimony as to the time does not agree with that given by the lads; the latter making the time of the occurrence 3 or 3-30 p.m., the time of cooking the evening meal. Maung San Dun said that he saw Maung Tun E just before sunset, considerably later. Under such circumstances, considering how easy it is to get false evidence in this country, I hesitate to accept his statement, though it may be true. It must, therefore, be discarded.

There are therefore, against Tun E the statements of Mah O Le, and Maung Tha Din and the confessions of Aung Sein and Po Tun. The conviction if it is to be upheld, must, therefore, practically rest on the confessions, as the statements of Mah O Le and Maung Tha Din were corroboration of the slightest. These confessions have also been retracted. It was urged at the hearing that the confessions could not in law be considered at all against Tun E and the case of the Empress v. Ashutosh Chakrabutty (1) was relied on as authority for that argument. With all due respect to the learned judges, who decided that reference, I am unable to agree with certain of the opinions expressed by them. Section 30 of the Evidence Act says "when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself, and some other of such persons, is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession." The word "consideration" has been the subject of discussion and as was held in the case above referred to, I am unable to see how a confession can be taken into consideration in any other way, except as evidence. In the case of Chit Tun v. K. E. (2) the learned Chief Judge held, giving weighty authority, that a man can be legally convicted on his own uncorroborated confession when the confession is believed, even though it be retracted. It is the same section in the Evidence Act which gives the power to take into consideration a confession against the man who made it as well as against those who were co-accused with him. If when believed, even though uncorroborated and retracted, it can be taken into consideration for the purpose of convicting the man who made it, I am unable to see why it cannot be taken into consideration for the

(1) 4 Cal. 483.
(2) 1 B. L. R. 238.

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purpose of convicting the coaccused. The word "consideration" should scarely be given the same meaning in each instance. I therefore cannot agree with the opinion of Jackson, J., in the Calcutta ruling referred to above, that an accused person, other than he who had confessed, could not lawfully be convicted upon such confession alone, nor ought he to be convicted on the ground of such confession corroborated by substantial evidence unless the circumstances constituting the corroboration, would, if believed to exist, themselves support a conviction. The matter was discussed also in the case of Emperor v. Kehri, (3) where the Calcutta case above referred to was referred to and differed from in certain particulars. In this case Richards, J., said: "This High Court has decided that an accused person can be convicted on the unsupported evidence of an approver. I can imagine many cases in which it would be impossible for the court to disbelieve a confession, and I can see no reason why a court could not legally convict an accused person on the unsupported evidence afforded by the confession of a co-accused. At the same time I think that it is very seldom that a court would or ought to convict on the unsupported evidence, afforded by the confession of a co-accused, or the evidence given by an accomplice." It seems to me that in law there is nothing to prevent the conviction of a man on the uncorroborated and retracted confession of a co-accused if it be believed against him, but that on the other hand, the law permits this to be done. The main point for consideration when confessions are dealt with for the purpose of consideration against co-accused, either by themselves unsupported by other testimony or taken together with other corroborative evidence, is the weight that should be attacned to them. They have to be approached with the utmost caution and care. In considering the evidence of an accomplice witness, which, in the great majority of cases cannot be accepted, without corroboration, the court has the advantage of his being cross-examined. His evidence is also given on oath or on solemn affirmation. Again, there is a great difference between a man confessing and incriminating himself and his confessing and incriminating other people. All these and cognate matters have to be recollected when confessions implicating co-accused are being dealt with for the purpose of considering the guilt of such persons. Where there is other good and supporting evidence, a confession when taken into consideration against a co-accused becomes a link in the chain of evidence, if after the most careful consideration it is believed and that is the manner in which it was used in the case of the Emperor v. Kehri. But where it is unsupported by other testimony, it is obvious that the most anxious care and scrutiny should be applied to it in deciding on its truth or falsity respecting the incrimination of others thar the one who made it. Yet if, after applying every test to it that is available, and remembering that it cannot be sifted by cross-examination, that by it a criminal is incriminating others than himself, and all other similar considerations the judge still believes that it is true as against another or others than the man who made it, it seems to me to be the duty of the judge to

(3) I. L. R, 29 All. 434.

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act on it, and with the greatest respect to the eminent Judge Garth, C.J., who delivered his opinion in the case of the Empress v. Ashutosh Chakraburty, I am unable to agree with him, when he said that no court ought to convict a co-accused on a confession unsupported by other testimony, and, that if a person was convicted on such evidence, whether by a jury or otherwise and were to appeal, the conviction ought to be set aside. Such a rule seemed to me to amount to legislation and it is not the function of the courts to legislate, but to carry out the law as it stood. Section 30 of the Evidence Act, in my opinion permits as far as the law is concerned, a confession to be taken into consideration against a co-accused, even to the extent of convicting him on it, though it is unsupported by other testimony. The real difficulty as I have stated is the consideration of whether it is true against co-accused, and in the great majority of cases it is obvious that the court cannot come to the conclusion that it is so true beyond all reasonable doubt; but if in an exceptional case it does it seems to me to be the duty of the court to act on such conclusion.

Applying the views I have expressed to the present case, I think that it would be unsafe to uphold the conviction of Maung Tun E on the confessions of the two lads. I can see nothing in the evidence to show that they were improperly obtained or were made otherwise than voluntarily, but I hesitate to accept them as I think that Maung Tun E may have been wrongly put into them. Both the lads must have been very precocious and forward to have done what they did, and so might be quick to jump at an idea that would tend to minimise their own degree of guilt. If Maung Tun E's name had not been given, what would have been the clear and apparent reason for the murder? Robbery—the obtaining of Maung Nyi Bu's ornaments, which were of value. The murder was committed on Febuary 21. Maung Tun E was suspected that night. The boys were examined by Maung Po, the Ywathugyi and Nyi Bu's father, that night and again the next day. They did not confess until the day after. Aung Sein is Tun E's nephew. They may have been asked about Tun E and may have heard that his movements were suspected and that may have put it into their heads to incriminate him to minimise their guilt. It must be remembered that the court was dealing with abnormal minds, when those were the minds of boys of 12 or so and 8 who can commit such a brutal murder as this was. They might be telling the truth in incriminating Tun E, but they may not. I am therefore of opinion that this conviction cannot be upheld. I would, accordingly, set it aside and acquit Tun E and direct that he be set at liberty as far as this case is concerned.

Young J:—The facts of the case are fully set out in the Judgment of my learned colleague and I agree that the corroboration of the confession is so slight that the conviction of the appellant, if upheld at all would have to be maintained on the retracted confessions of his co-accused. In my opinion, the confession in question is not so convincing as to raise the question whether it would be permissible to convict the accused upon it alone, and without expressing any dissent from the views of my learned colleague, I prefer to defer consideration of the point till it actually arose. I agree with the order proposed.

Before the Hon. Mr. Justice Hartnoll.

CRIMINAL REVISION NO. 179 B. OF 1912.

NAN SAW SHWE. v. MAUNG HPONE.

Dated 1st August 1912.

Maintenance—decree for restitution of conjugal rights without an order for Guardianship of child—payment of amount ordered for maintenance of child to be confirmed—S. 488, Code of Criminal Procedure 1898.

Where the appellant, wife of the respondent obtained an order for the payment of Rs. 3 per month for the maintenance of their child and where the respondent subsequently obtained a decree for restitution of conjugal rights without any order for guardianship of the child and where further the appellant refused to stay with Respondent.

Held that the decree for restitution of conjugal rights did not determine the respondent's liability to pay for the maintenance of the child.

In re Bulakhidas 23 Bom. 485 ; Lutpotee Doomony v. Tikha Moodi 13 W. R. Cr. 52 Nur Mahomed v. Ayesha Bibi 27 All, 483; San Hla v. On Bwin 2 L. B. R. 46.

Hartnoll, J :—Nan Saw Shwe obtained an order under Section 488 of the Criminal Procedure Code on the 6th September 1911, from the Subdivisional Magistrate, Kawkareik, that Maung Hpon pay her Rs. 3 per month for the maintenance of their child. On the 4th October 1911, Maung Hpon brought a suit against Nan Saw Shwe in the Township Court of Kawkareik for restitution of conjugal rights and obtained a decree for such on the 16th January 1912. On the 11th May 1912, Nan Saw Shwe applied to recover Rs. 18 arrears of maintenance due to her. This application was to the Subdivisional Magistrate who passed the order. Maung Hpon contends that he is not liable to pay any arrears as sometime after the maintenance order was passed against him he obtained a decree for restitution of conjugal rights and so he is not liable. He quotes the case of In re Bulakidas (1) as authority for his contention. When the Subdivisional Magistrate heard Nan Saw Shwe's application on the 23rd May 1912 that latter told him that though she was aware of the decree she did not wish to live with Maung Hpon, giving as the sole reason that once he tried to get rid of her and now she will not go back even though he wanted her. The Magistrate then passed an order granting her a sum of Rs. 19-8 as arrears of maintenance and costs. His attention was subsequently drawn to the case of LUTPOTTEE DOOMONY v. TIKHA MOODI (2) and not being satisfied with the correctness of his order of the 23rd May he referred the case to the District Magistrate to take it up on revision and stayed the execution of his order. The District Magistrate has submitted the case to this Court recommending that the order of the Subdivisional Magistrate of the 23rd May be modified by an order for payment of Rs. 3-14 as maintenance allowance due as arrears from the 6th December 1911 to the 15th January 1912 the date of the decree.

(1) I. L. R. 23 Bom. 485.
(2) 13 Southernland's W. R. Cr. R. 52.

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It must be remembered that the maintenance order for Rs. 3 per mensem was granted as maintenance for the child of the parties and not to the wife as her own maintenance. In the case of LUTPOTEE DOOMONY v. TIKHA MOODOI (2) the maintenance order was one for the maintenance of both wife and children. The husband Tikha Moodoi instituted a suit in the Civil Court for restitution of conjugal rights and for guardianship of his children and obtained a decree for such. The Deputy Commissioner on the criminal side refused to release him from the obligation to pay maintenance when he petitioned to be released from such obligation on a date subsequent to his obtaining his decree in the Civil Court, and further subsequently, after he had obtained possession of one of his sons in execution proceedings taken under the decree he had obtained, ordered the return of the child to its mother. The Judical Commissioner in referring the case to the High Court to set aside the orders of the Deputy Commissioner and to direct that the maintenance order should determine from the date of the decree of the Civil Court gave as the grounds that the Deputy Commissioner sitting as a Magistrate acted illegally in passing orders opposed to the decision and process of the Civil Court and further as the ground, upon which the applicant Tikha Moodoi petitioned the Deputy Commissioner as Magistrate to be relieved from payment of maintenance as his wife persisted in her refusal to live with him, appeared reasonable. The High Court set aside both orders of the Deputy Commissioner acting as a Magistrate. The case "IN RE BULAKIDAS" followed the decision in the Calcutta case, but it dealt only with an order that the wife obtained for maintenance for herself. There is yet another case of the Allahabad High Court in which the same principle was followed as in the two above mentioned cases—that of Nur Muhammad vs. Ayesha Bibi (3) but that case again only referred to a case where a wife had obtained an order of maintenance for herself. In the present case the order for maintenance was not one made for the maintenance of the wife but was for the maintenance of the child, and so the circumstances are different to those in the Bombay and Allahabad cases quoted. In the Calcutta case the maintenance order was for the wife and children but the father obtained a decree for restitution of conjugal rights and for guardianship of the children. In the present case there was no decree that the father should have the guardianship of his child, and in my opinion as long as it remains with the mother the statutory obligation on him to maintain it remains still binding on him. That he neglected to maintain it is clear as in the proceedings taken by Nan Saw Shwe under section 488 he even denied paternity. The proviso to sub-section 3 and sub-section 4 of Section 488 of the Criminal Procedure Code would seem to refer to cases where a wife obtains a maintenance order for herself and not where one is made for the children.

(3) (1905) I. L. R., 27 All., 483

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The meaning of the proviso to sub-section 3 was discussed in the Full Bench Case of this Court, SAN HLA v. ON BWIN (4) in which it was held that it was extremely doubtful whether it applied at all to the case of children. As therefore Maung Hpon has obtained no decree from a Civil Court for the guardianship of his child and as it is living apart from him in the custody of its mother I see no reason for interfering with the order of the Subdivisional Magistrate passed on the 28th May last. It will therefore be enforced.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION No. 66 OF 1911.

PETER VERTANNES ... ... APPLICANT.

v.

A. R. M. M. R. M. Mutiah Chetty ... RESPONDENT.

FOR APPELLANT—BAGRAM.

FOR RESPONDENT—SIVAYA.

Before Mr. Justice Parlett.

Dated 27th May 1912.

Review—Contract if legally valid must be enforced—Court not to dictate to parties as to what the terms ought to have been—Indian Contract—section 51 to 54.

The Small Causes Court dismissed the suit which was for work done for defendant on the ground that owing to bad workmanship the work had proved ineffectual. On appeal this finding was reversed but the decree was confirmed on the ground that the terms of the contract being vague plaintiff was not entitled to relief though he had carried out the terms of the contract as it stood. Plaintiff asked for a review on the grounds *inter alia* that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal, that on the contract as it stood plaintiff would not have been justified in delaying his part of the work and that the contract as it stood being valid in law the Court was bound to enforce it.

Held reversing the order dismissing the appeal that the decision in appeal proceeded on grounds not raised at the trial; that the Courts should not dictate to the parties what the terms of their contract ought to have been but if it is a valid contract should enforce it; that the contract did not consist of reciprocal promises to which sections 51 to 54 of the Contract Act would apply, that time being of the essence of the contract the plaintiff could not delay the work and the work being for a lump sum plaintiff could not claim quantum meruit.

This is an application for review of the decree and Judgment of Mr. Justice Twomey in Special Civil 1st appeal No. 65 of 1911. The Judgment of Mr. Justice Twomey was as follows :—

The plaintiff-appellant Vertannes contracted with the defendant respondent a Chetty firm owning a mill at Kyaiklat to carry out

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(4) 2 L. B. R., 46

Application for review of the Judgment and decree of Mr. Justice Twomey in Special Civil 1st appeal No. 65 of 1910 of the Chief Court, Lower Burma.

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certain work for the protection of the river bank near the mill from erosion. The plaintiff had to drive in piles and connect them with cross pieces. The defendants undertook on their part to fill in the timber frame work with earth. The plaintiff was to put a layer of laterite pitching on top of the earth work. Plaintiff has been paid Rs. 2,500 (out of Rs. 4,000) agreed upon for the work and deducting the sum of Rs. 440 for the laterite work which has not been done (owing, says the plaintiff, to the defendant's default) he sued for Rs. 1,060 the balance of the contract sum.

The defendants pleaded that the work was so badly done that the wooden posts driven in by the plaintiff were washed away and that the defendants could not do the earth work filling as there was no proper frame-work to hold it together.

The plaintiff on the other hand pleaded that the posts fell away because of the defendants' failure to do the earth work properly. He says that if the defendants had filled in the earth in the proper way and rammed it, the piles would have been protected, would have kept upright and would not have been washed away.

The learned Judge of the Small Cause Court found for the defendant and dismissed the plaintiff's suit because Vertannes was "quite out of his depth," when he undertook the job and because having regard to Vertannes' want of skill "nothing was more natural" than the disappearance of the work. The Judge did not find that the work done was not is accordance with the plan furnished to the plaintiff by the defendants and remarked "it is quite possible that the work conforming strictly to designs failed to meet the necessities of the case and that it was not the builder but the designer who was at fault." The work may have been washed away because it was not properly designed (in which case of course the plaintiff would not be responsible). But the Judge thought that it may also have been washed away on account of bad workmanship.

Vertannes was supplied with a plan showing the dimensions and positions of all posts and cross pieces and it is not seriously disputed that he carried out the work in accordance with this plan. It was a plan prepared for the defendants by a skilled Engineer. There is no suggestion in the pleadings or in the evidence that Vertannes had not the necessary skill for carrying out the work as shown in the plan and the Judge's remark that Vertannes was "quite out of his depth" in undertaking such a job appears to be unfounded. It is true that "Mr. Vertannes never for a moment suggested that he was a skilled professional man," but he had considerable experience in river work where (as in this case) all he had to do was to carry out a design drawn up by a skilled professional man.

It seems probable that the work was washed away because the defendants failed to do their part in filling in with earth and ramming. On 5th April Vertannes suggested that the earth work should go on simultaneously with the pile driving. On the 3rd May he wrote to the Rangoon Agent Muthia that the earth work was not being properly carried out. On 23rd May he wrote again reporting that the pile driving work was finished and complaining of the delay in the earth work. That there was great delay is shown by the letter

exhibit K from the defendant's advocate in which it is stated that the earth work was not commenced till after receipt of Vertannes's letter of 23rd May.

No complaint appears to have been made of Vertannes's work until the 1st June when the Rangoon Agent wrote that some of the piles had inclined to a certain extent instead of being upright and that in the circumstances the earth filling could not be done. Vertannes replied that the inclination of the piles was due to the delay in carrying out the earth work. The defendants caused no survey to be made of the work but allowed it to be washed away and refused to pay the balance of the stipulated sum on the ground of bad workmanship.

Such being the facts I think it cannot be assumed that the timber work was washed away because of bad workmanship or lack of skill on the part of Vertannes. I find however the same difficulty as the Lower Court in decreeing payment for work which was entirely ineffectual for the purpose in view and which in the words of the Small Cause Court Judge "succumbed to the forces which it was intended to resist."

It is plain on the plaintiff's own showing, that the success of the protection scheme depended on the earth work being done *pari passu* with the pile driving and other timber work. Unless the earth-work was done promptly and properly the piles would necessarily fall out of the perpendicular and the timber work would be washed away. Knowing this I think the plaintiff should not have gone ahead with his timber work when he saw that the defendants were not doing the earth work. It was clearly useless to drive in piles when no earth work was being done to protect them. I think the plaintiff was not justified in going on with the wooden frame work when he saw that the Chetties were not doing the earth work. The timber work was by Vertannes' own showing dependent on the earth work and I cannot hold that he was justified in going on with the former irrespective of the latter and without regard to the necessary consequence that the timber work would be washed away.

He would have been justified in stopping the timber work though I am not prepared to say that in that case he could claim compensation for non-performance of the contract as he made no stipulation at the outset that the timber work was dependent on the simultaneous performance of the earth filling and ramming. It seems to me that he has only himself to blame for not insisting on the earth work being done by himself or making a definite stipulation as to the time and manner in which the defendants were to do it. In my opinion the result of leaving this essential part of the contract vague and undefined is that the plaintiff can recover nothing. He fails because of this inherent defect in the contract.

The appeal is dismissed with costs.

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The Following were the Grounds of Application for the Review:—

(1) For that the decision in the said appeal is not based on the pleadings in the case.

(2) For that the case made in the judgment for the respondent was never his case and was not in the contemplation of either party in the Lower Court as also in the appellate Court.

(3) For that the points made in the judgment after the hearing of the appeal were decided without giving your petitioner's Advocate an opportunity of arguing on them.

(4) For that the petitioner is advised that if such an opportunity had been given, his Counsel would have satisfied the learned judge that there was no authority in law to impose on him duties outside the specific terms of the contract and that the contract as it stood being a perfectly valid contract was enforceable in law.

(5) For that the judgment of this Honourable Court ought to have been based on the strictly legal rights of the parties as contained in the contract between them and not on an equitable construction distinct from its legal construction.

(6) For that the learned judge, having found that the petitioner had carried out his part of the contract as reduced into writing ought to have given full effect to the provisions of law and not read into such a contract new terms.

(7) For that the learned judge in dismissing your petitioner's appeal overlooked the provisions of section 10 of the Contract Act in as much as the writen agreement between the parties was a valid contract in law as it stood (expressum facit cessare tacitum).

(8) For that the learned judge erred in law, in holding that your petitioner was not justified in going on with his timber work—when the chetties were not doing the earthwork for, such a condition of things could only arise when the contract consisted of reciprocal promises, as is provided by sections 51, 52, 53, and 54 of the Contract Act, and not otherwise.

(9) For that the learned judge overlooked that time was of the essence of the contract and if your petitioner did not go on with the work and complete it within the stipulated period he would be in default and expose himself to have the Contract recinded by the promissee under section 39 and damages claimed under section 75 of he Contract Act and lose all benefits under it as provided by section 55 of the Contract Act as well as become liable in damages for a breach under the provisions of section 73 of the said Act.

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The application came for hearing before Mr. Justice Parlett who delivered the following judgment:—

JUDGMENT.

PARLETT J:—Plaintiff sued for Rs. 1060 balance due for work done under a contract. The defence was bad workmanship. The Small Cause court held the defence proved and dismissed the suit. On appeal this Court held that the work was ineffectual not on account of plaintiff's bad workmanship but on account of defendant's failure to do the earth-work *pari passu* with plaintiff's pile driving, but that plaintiff ought not to have gone on with the pile driving when he saw defendant was delaying the earth work, and further that as plaintiff did not insist on a stipulation for the simultaneous performance of the two descriptions of work being inserted in the contract, he could recover nothing. The appeal was therefore dismissed.

This is an application for review of the judgment in appeal on the grounds that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal; that on the contract as it stood plaintiff would not have been justified in delaying his pile driving work though the earth work was not being done; and that the contract as it stood being valid in law the court was bound to enforce it.

I have received very little assistance from the arguments for the defendant they being confined to the point that both courts have held the work done was ineffectual for the purpose for which it was intended, and therefore of no value to him. As to this the case of *Chanter* vs. *Hopkins*[1] is in point. This court has held in appeal that the failure of the work was not due to plaintiff's bad workmanship. He was merely employed to carry out work designed by a professional engineer, and he carried it out according to the design and in the proper, workmanlike manner; and it was not on account of his workmanship that it failed to answer the purpose for which it was intended.

As to the first ground for review it is clear that the decision in appeal proceeded on grounds not raised at the trial. Nor is it disputed that the court should not dictate to the parties what the terms of their contract ought to have been, but if it is a valid contract, should enforce it. As to the plaintiff stopping his work when he said defendant was delaying his, it is pointed out that the contract did not consist of reciprocal promises to which secs 51 to 54 of the Contract Act would apply. Also that plaintiff had expressly agreed to complete his pile driving and timber work within 2½ months from 5th April and that as is obvious from the note on the plan Ex. A and from the admitted fact that when the rains set in erosion would increase, time was of the essence of his contract and that failure on his part to complete it in time would render it voidable at the option of the defendant besides making him liable to the defendant in damages. Moreover

(1) 4 Meeson and Welsley, 399.

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the contract being to do work for a lump sum, until the work was completed, the price of it could not be recovered, nor could anything be recovered by way of quantum meruit if part only of the work was done (*Sumpter* vs. *Hedges* [2]).

In my opinion these arguments are sound and if there had been an oppurtunity of advancing them at the hearing of the appeal they would have been accepted. The defence of bad workmanship having been held not proved, I am of opinion plaintiff was entitled to a decree. I therefore reverse the order dismissing the appeal and grant plaintiff a decree for Rs. 1060 and costs in both courts together with the costs in this review.

(2) Q. B. D. 1898-673.

THE

BURMA LAW TIMES.

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IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL No. 89 OF 1910.

VOGIAZIS ... ... APPELLANT.

v.

PAPPADEMITRIOU ... ... RESPONDENT.

For Appellant—N. M. Cowasjee.

For Respondent—Giles.

Before the Chief Judge and Mr. Justice Hartnoll.

Dated 22nd May 1912.

Damages—Malicious Prosecution—Reasonable and probable cause—Honest belief—meaning of—Malice—'Malus Animus'—Damages calculated on magnitude of solatium and Court expenses.

In order to succeed in a suit for malicious prosecution the plaintiff must show that the defendant had maliciously prosecuted him without reasonable and probable cause.

Reasonable and probable cause may be defined to be "an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

BHIM SEN *vs.* SITA RAM 24 All. 363 followed.

There must be (1) an honest belief on the part of the complainant in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accused to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds, that is such grounds as would lead any fairly cautious man in the Defendant's situation so to believe; (4 the circumstances so believed and relied on by the complainant must be such as would amount to reasonable grounds for belief in the guilt of the accused.

"The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of '*malus animus*,' and as denoting that the party is actuated by improper and indirect motives."

BHIM SEN *vs.* SITA RAM 24 All. 363 followed.

Held that applying the tests indicated in these definitions given above to the present case the requirements of law for a plaintiff to succeed had been fulfilled, as the defendant could not have honestly believed that the plaintiff had entered his premises with any criminal intent; nor could he have honestly believed that under the circumstances

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under which the words were uttered the plaintiff used the words "you no gentleman" intending that they should provoke him to commit a breach of the peace or to commit some offence and because the motive of the defendant in instituting the prosecution against the plaintiff was not the furtherance of justice and was not only improper but actually spiteful and malicious.

Damages in this description of cases are given on two bases, first on the ground of *solatium* for injury to the feeling of the party prosecuted, and secondly as a reimbursement for legitimate expenses incurred by him in defending himself. In considering what should be allowed, the conduct of the plaintiff himself in this transaction which led to his prosecution may also be considered.

Held that as the plaintiff's conduct on the day was far from blameless a very small amount should be allowed him as *solatium* for his injured feelings, and that as to the moneys he spent, he is only entitled to compensated for reasonable sums and that, therefore, a decree in his favour of Rs. 500 with costs on that amount will be amply sufficient to cover the *solatium* for his reasonable expenses of defending himself.

JUDGMENT.

Fox C. J.—It is unnecessary to recapitulate the facts of the case which are set out in the judgment of the Original Court. There is no good ground for differing from the views of the learned Judge regarding them.

The letter sent to the defendant on the 13th April was no doubt calculated to aggravate him. His conduct towards the plaintiff's servants and his long delay in taking any steps to hand over the plaintiff's hides if they were in his godown were calculated to aggravate the plaintiff. Both parties lost their tempers and the results that followed are not unnatural.

By the 16th April however the defendant had had sufficient time for any ordinary man to have recovered mental equilibrium. On that day he laid a petition of complaint before a Magistrate which owing to glaring suppression of the real facts which the defendant was then fully aware of, was a perversion of the truth, and on this misrepresentation he charged the plaintiff with having entered his property with the intention either to commit an offence or to intimidate, insult or annoy him, and with having grossly insulted him without any provocation whatever, by the use of filthy and abusive language, intending or knowing it to be likely that such insult would cause him to break the public peace or to commit some offence.

As to the charge of house tresspass, the defendant knew and must have known that the plaintiff had gone to his godown with the sole object of recovering his strayed hides. As to the charge under section 504 of the Penal Code, the defendant must have known that all that he had on which to found the charge against the plaintiff of gross insult and the use of filthy and abusive language towards him, was that the plaintiff had said to him "you no gentleman" after he (the defendant) and Rajanas had been indulging in excited language and calling one another opprobrious names. If the evidence of the disinterested witness is correct, and there is no good reason for not believing it to be so, the defendant must also have known that the plaintiff had almost immediately modified his statement to "I don't mean you no gentleman. I mean you do not act like a gentleman."

In order to succeed in the suit the plaintiff had to show that the defendant had maliciously prosecuted him without reasonable and probable cause. In, Bhim Sen vs. Sita Ram [(1902) I. L. R. 24, All.

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363] the Allahabad High Court adopted the following definition of reasonable and probable cause *viz*. "An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser the conclusion that the person charged was probably guilty of the crime imputed." There must be (1) an honest belief of the accuser in the guilt of the accused (2) Such belief must be based on an honest conviction of the existence of the circumstances which led the accused to that conclusion; (3) Such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as could lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as would amount to reasonable grounds for belief in the guilt of the accused. In the same judgment the following definition of the term malice was adopted *viz*:—The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of "malus animus," and as denoting that the party is actuated by improper and indirect motives."

Applying the tests indicated in these definitions to the present case I am of opinion that the requirements of law for a plaintiff to succeed have been fulfilled.

The defendant could not, on consideration, have honestly believed that the plaintiff had entered his premises with any criminal intent, nor could he have honestly believed, that under the circumstances under which the words were uttered the plaintiff used the words "you no gentleman" intending that they should provoke him to commit a breach of the peace or to commit some offence.

It is self-evident that the motive of the defendant in instituting the prosecution against the plaintiff was not the furtherance of Justice. This is negatived by his wilful suppression of most material facts and his gross exaggeration of what the plaintiff had done, combined with charging him with offences for which a warrant of arrest would be ordinarily issued by a Magistrate.

The motive for the prosecution of the plaintiff appears to me to have been not only improper but actually spiteful and malicious.

The defendant cannot shelter himself behind the advice of the advocate he employed. Possibly if the facts stated in his petition to and examination by the Magistrate had been true and had been the only facts, his charges against the plaintiff would have been justifable, but they were not the only facts and were not the whole truth or anything approaching to it.

On the above grounds I would allow this appeal, set aside the decree of the Original Court and grant the plaintiff a decree for damages.

Damages in this description of cases are given on two bases, first, on the ground of *solatium* for injury to the feelings of the party prosecuted, and secondly as a reimbursement for legitimate expenses

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incurred by him in defending himself. In considering what should be allowed, the conduct of the plaintiff himself in the transaction which led to his prosecution may also be considered.

His conduct in allowing a letter to go from his office threatening the defendant with the police unless be gave up the hides at once was wholly unjustifable: so was his action in following up the letter by going to the police, although a foreigner as he is, he may have thought that the police were the authorities to apply to for remedy in such a case.

His conduct on the day was far from blameless, and a very small amount should be allowed him as *solatium* for his injured feelings. He says he spent a very large sum in defending himself, but he is only entitled to be compensated for reasonable sums. His claim is an extravagantly large one.

I think a decree in his favour for Rs. 500 with costs on that amount will be amply sufficient to cover the *solatium* for his injured feelings, and his reasonable expenses of defending himself.

I would give him such decree, and his costs on Rs. 500 on this appeal.

HARTNOLL, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 3* of 1912.

F. G. WILLIAMS & 2 OTHERS ... APPELLANTS.

v.

T. KING ... ... RESPONDENT.

For Appellants—Giles.

For Respondent—McDonnell.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Dated 2nd September 1912.

Waiver -Effect of such waiver on the liability of sureties—Pleader's statement with clients' consent when pleader fails to file power—Indian Contract Act, s. 137 -Forbearance to sue—distinguished from waiver.

The only point for decision in this appeal was whether the respondent waived her claim against the principal, the first defendant, Arthur Abreu, and whether such waiver had discharged the other defendants, the present appellants who were Abreu's sureties.

The entry on the diary sheet relating to the waiver was dated the 11th October 1910 and was in the following terms; "Maung Po Yin Si says the first defendent cannot be found and he will waive claim against him."

It was urged that as Po Yin Si, a pleader, filed no power he could make no legal appearance and so could not waive the claim against Abreu, no power authorising him to appear on behalf of respondent was traceable on the record but it appeared from his affidavit that he was appearing with respondent's consent and knowledge and that the respondent expressly consented to the waiver.

Held that the non-filing of a power was a mere irregularity and did not nullify his action

* Appeal against the decree and judgment of the District Court of Ahmerst in Suit No. 188 of 1910, dated the 17th November, 1910.

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It was also argued that it was only Abreu, who could object and he had not appealed.

Held that the appellants were parties to the decree and could appeal against it so far as it affected their liability.

It was urged that there never was any order dismissing the suit against Abreu, so that respondent had a *locus penitentia* and could get Abreu added again.

Held that the claim having been once definitely waived could not be revived again.

It was urged that the District Judge suggested the waiver.

Held that the respondent was not bound to follow the suggestion.

The real point to be considered is whether the case should be deemed to come under the provisions of section 137 of the Contract Act.

Held that the mere forbearance contemplated in Section 137 of the Contract Act did not extend to actual waiver, which has the effect of discharging the principal and that forbearance means something short of that.

Ranjit Singh vs. Naubat. I. L. R. 24 All., 504 followed.

FACTS:—On 20th July 1906 The District Court of Moulmein granted probate of the will of one James M. deRoche to one Arthur Abreu, an executor named in the will. It was subsequently revoked as being void by the Chief Court by its order dated 8th November 1909. Letters of administration to the estate of the deceased were then granted to Mrs. Cecilia King (deceased's sister) who applied to the District Court to call on Arthur Abreu to deliver up the probate, to order him and his three sureties (the present appellants) to deliver the assets of the estate to her under the terms of the surety-bond executed by them and failing that to assign the bond to her to enable her to sue upon it. Arthur Abreu could not be found. The three sureties were duly served and the bond was assigned to Mrs. King by the District Judge.

Mrs. King brought this suit on 16th September 1910 for the recovery of Rs 1,000 from Arthur Abreu and his sureties as being the damages done to the property of the deceased by alienation and waste by the said Arthur Abreu.

After attempt had been made to serve Arthur Abreu and it had been found that he had absconded and there was no chance of finding him the plaintiff respondent's advocate told the judge that he would waive claim against the principal and would only obtain decrees against the sureties. The advocate for the appellants in the court below then contended that as the plaintiff waived her claim against the principal, the case against the sureties must also fail under section 134 of the Indian Contract Act. He also cited the case of Maung Po Tha vs. Ko Min Pyu **I. L. B. R.** 150 in support of his argument.

The District Judge thought it wiser to have Abreu added again as co-defendant and in default of appearance after service had been effected by substituted service to proceed against him exparte. He therefore ordered that Abreu be added as a defendant again.

The sureties then appealed against this order contending that the District Judge had no power of reviving the right against the sureties which the plaintiff respondent had lost by having waived her right against the principal.

The appeal came on for hearing before Messrs. Hartnoll and Young, J. J., who passed the follwing:

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JUDGMENT.

HARTNOLL J.:—The one point to be decided in this appeal was whether the respondent by her counsel waived her claim against the principal, the first defendant, Arthur Abreu, and whether such waiver had discharged the other defendants, who are the present appellants and who are Abreu's sureties. The entry on the diary relating to the waiver is under date October 11, 1910, and is to the following effect: "Maung Po Yin Si says first defendant cannot be found and he will waive claim against him." It is argued that the words used are "will waive" and not "has waived." So that there has been no waiver. The affidavit filed by Po Yin Si shows that there is no force in this argument and that respondent did waive her claim against Abreu. It was further argued that as Po Yin Si, a pleader, filed no power, he could make no legal appearance and so could not waive the claim against Abreu. No power of Po Yin Si authorising him to appear on behalf of respondent was traceable on the record, but from the affidavit, filed para 18, it appeared that he was appearing with respondent's consent and knowledge, and so I am of opinion that the mere non-filing of a power was a mere irregularity and would not nullify his action. But apart from that, from the same paragraph of the affidavit it appears that respondent expressly consented to the waiver. It was also argued that it was only Abreu who could object and he had not appealed. I do not understand the argument. The appellants are parties to the decree and they can surely appeal against it so far as it affects their liability. It was urged that there never was any order dismissing the suit against Abreu so that respondent had *locus penitentiae* and could get Abreu added again. I cannot accede to this view. Having once definitely waived the claim, I do not see how it could be revived again. Again it is said the learned district judge suggested the waiver. That was unfortunate, but respondent was not bound to follow the suggestion. There seems little difference between this case and that of a person who ignorantly promises to give time to the principal debtor without the surety's assent, and so brings into operation section 135 of the Contract Act. It can be no answer that the consequences were not foreseen. The real point to be considered is whether the case should be deemed to come under the provisions of section 137 of the Contract Act, and I am in accord with the decision given in the case of Ranjit Singh v. Nauba' (1). I do not think that the mere forbearance contemplated in section 137 extends to actual waiver. It must mean something short of that, as actual waiver has the effect the legal consequence of which is the discharge of the principal debtor whereas in this case, the claim was waived against him. On the claim being waived in my opinion it would not be revived again, nor was it necessary that a decree should be at once made dismissing the suit against Abreu. The effect of the waiver would in the ordinary course be embodied in the decree made in the suit when the time came ripe for making a decree.

I would, therefore, allow the appeal and direct that as regards appellants the suit stands dismissed, their names being expunged from the decree. I would also give them their costs in both courts.

YOUNG J.—I concur.

(1) I. L. R. 24 All., 504.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS* No. 15 OF 1912.

S. P. L. S. VADUGANATHAN CHETTY... APPELLANT.

vs.

E. G. FOY ... ... RESPONDENT.

For Appellant—Burjorjee and Dantra.

For Respondent—Lentaigne, McDonnell and Clifton.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Dated, 4th September 1912.

Auction sale in execution of a decree—adjournment by bailiff without Court's permission—a mere irregularity—will not vitiate an auction sale.—No damages without proof of loss to judgment-debtor.

In this case certain land was duly auctioned in pursuance of a decree on the 26th August 1911 but the highest bidder only offered Rs. 10,000 and the bailiff requested permission of the Judge to adjourn the sale. The Judge passed no orders till the tiffin interval, when he ordered the sale to proceed. The sale began at 12 noon, when there was only one bidder, and the tiffin interval, would not be till 2 p. m. The bailiff not getting any order from the Judge adjourned the sale till 2 p. m. on the next day but one, being a Monday, on his own authority.

The applicant petitioned the District Judge to set aside the sale on the ground that it was made without any proclamation or proper notice to the intending purchasers.

Held that no fresh proclamation was necessary as the sale was adjourned for only two days.

The District Judge held that it was an irregular sale, but that the applicant had failed to prove the necessary, resultant damage to himself.

Held that the District Judge was quite right. In this appeal the applicant contended that Monday's sale was not a sale at all in accordance with law and that there was more than a material irregularity.

The question therefore was whether the adjournment without leave was an irregularity which would vitiate the sale, if damage was proved, or an irregularity which nullified the sale apart from such proof.

Held that the case must be treated, as the applicant himself treated it, *viz.* as one of material irregularity, to which order XXI Rules 69 and 90 applied, and that there was nothing to show that the irregularity had caused any loss to the appellant.

Jassaduk Rasul Khan vs. Ahmed Hussain I. L. R. 21 Cal. 66 followed.

FACTS.—On 22nd August 1910 Respondent obtained a preliminary mortgage decree against one Abu Zaffeer Koreishee for Rs. 30,000 for principal, Rs. 4,800 for interest and Rs. 13,891 for costs of the suit. After the decree became final after six months the mortgaged property was proclaimed and the auction sale was fixed on a Saturday at 12 noon. On that day, the plaintiff's attorney bid for the plaintiff for Rs. 10,000. This bid was the highest. The Bailiff reported to the Judge suggesting that the bidders were few and so the sale should be postponed and he postponed the sale till 2 p. m. But as his suggestion was not accepted by the Judge when he passed orders at tiffin time and as it was late for that day the Bailiff postponed the sale till 2 p.m.

*Appeal against the order of the District Judge, Hanthawaddy in Civil Misc. No. 166 of 1911, dated 4th October 1911.

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on Monday. On this occasion the property fetched Rs. 16,000. The appellant who is the 2nd mortgagee of the garden sold now seeks to impeach the postponement of the sale by the bailiff without the Court's permission. The District Judge dismissed his application holding that the Bailiff's action caused no material loss to appellant. On appeal the matter come before Messrs. Hartnoll and Young J.J. who passed the following order.

JUDGMENT.

YOUNG J.—In this case certain land was duly auctioned in pursuance of a decree on August 26, 1911 but the highest bidder only offered Rs. 10,000 and the bailiff requested the permission of the Judge to adjourn the sale. The judge passed no orders till the tiffin interval, when he ordered the sale to proceed. The sale began at 12 noon there was only one bidder and the tiffin interval would not be till 2 p.m. The bailiff not getting any order from the judge adjourned the sale till 2 p. m. on the next day but one, being a Monday, on his own authority.

The applicant petitioned the learned Judge to set aside the sale on the ground that it was made without any proclamation or proper notice to the intending purchasers. No fresh proclamation was necessary as the sale was adjourned for only two days. The learned Judge however held that it was an irregular sale, as indeed it was, for, the Bailiff had no power to adjourn it without the leave of the Court. He however held that applicant had failed to prove the necessary resultant damage to himself. I agree with him. On Saturday the highest bid was Rs. 10,000, which however was only accepted conditionally. On Monday the property fetched Rs. 16,000. If therefore the judge's order had been complied with, the applicant, a 2nd mortgagee would have been in a still worse position. Before us the petitioner contends that Mondays' sale was not a sale at all in accordance with law and that there was more than a material irregularity.

The question therefore is whether the adjournment without leave was an irregularity which would vitiate the sale if damage was proved or an irregularity which nullified the sale apart from such proof.

The Privy Council have held a sale held prior to the expiration of 30 days a mere irregularity (v. Jassaduk Rasul Khan vs. Ahmad Hussein I. L. R. 21, Cal. 66) observing as follows "the decree holder failed to comply with the full requirement of Section 290 but both on principle and authority their Lordships are of opinion that the case must be treated as the respondents themselves treated it viz. as one only of material irregularity. Various other instances of contravention of the law might be cited which are held to have been mere irregularities. It is quite evident that the Judge and the applicant treated this as an irregularity to which O-21 R. 69 and 90 applied. The applicant did not ask that the sale might be declared void, but asks that it may be set aside and a resale ordered. The Judge demanded proof of material damage under R. 90 and the applicant complied without demand. The only defect in the procedure was that the Bailiff who would have had no power to adjourn the sale if it had been held outside the Court-house adjourned it without leave

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though held within the Court-house which was a contravention of the law. The language of the Privy Council in the case already cited seems directly in point and the appeal must be dismissed with costs 2 gold mohurs Advocate's fee.

HORTNOLL J.—I concur.

I cannot agree that the error committed was more than an irregularity. No fresh proclamation was necessary O-21, R. 69 (2). The only error was that the bailiff did not get the leave of the Court to sell on the 28th August.

The appellant has clearly not proved that such irregularity occasioned him substantial injury. He did not even attend the sale on the 26th, and had no authority to bid himself. As he did not even attend the sale on the 26th he could not have known of the order being passed that the sale should be proceeded forthwith. There is nothing to show that the irregularity has caused any loss to the appellant. As a matter of fact the price realized on the 28th was Rs. 6,000 more than that realized on the 26th, when the sale was conducted without any irregularity.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL* No. 654 OF 1912.

NGA PYA vs. KING EMPEROR.

Before Mr. Justice Parlett.

Dated 16th November 1912.

Concurrent sentences—Criminal Procedure Code Sec. 256—Recalling prosecution witnesses.

The accused was tried in 4 separate trials under four distinct charges and sentenced to various terms ranging from six months to six years and it was ordered that all the sentences should be served conterminously.

Held that such an order could not be legally passed and that even if it was meant that the sentences were to run concurrently the order was illegal as the sentences were passed at separate trials and not at one trial.

King Emperor *vs.* San E and 3 others 4 L.B.R. 147 (followed).

The learned Judge refused to grant the accused's application for recalling all the prosecution witnesses under section 256 Criminal Procedure Code for cross-examination on the ground that the accused had the fullest opportunity of cross-examination and apparently did not want to elicit anything new.

Held setting side the conviction and ordering a new trial that the section gave the Magistrate no discretion in the matter and the fact that there has been some cross-examination before the charge had been drawn up did not affect the privilege of the accused.

I. L. R. 22 Cal. 469 (followed).

Mr. Justice Parlett:—The magistrate's order that the sentences passed upon the appellant in the three other cases against him should be served conterminously with the sentence passed in this case was entirely without jurisdiction. Interpreted literally it would mean that the sentence of two years was not to commence for another four years, that of one year not for five years and

*Prisoner's appeal against the conviction and sentences passed by Mr. G. P. Andrew, District Magistrate, Mergui on an offence under S. 307 I. P. C.

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that of six months not until five and a half years have passed. Of course, no such order could be legally passed. Apparently the magistrate's meaning was that the sentence of six years which he passed should run concurrently with the other sentences. This order, too, was illegal, as the sentences were passed at separate trials (see King-Emperor v. San E and three others,) (1.) Were this the only irregularity it might have been remedied by a reduction of the present sentence, but a perusal of the record has led me to the conclusion that it is not possible to decide the fact in this appeal upon the district magistrate's record as it stands. It appears that after all the prosecution witnesses had been examined and an opportunity given to the accused to cross-examine them; a charge was framed to which he pleaded not guilty, and stated that he wished to recall all the witnesses for the prosecution. Thereupon the magistrate recorded the following order:—"I do not consider the request should be granted as apparently accused does not want to elicit anything new, and he has had the fullest opportunity of cross-examination." The provisions of sec. 256 are clear and give the magistrate no discretion in the matter. If the accused says he wishes to cross-examine any of the witnesses for the prosecution they shall be recalled. The fact that there has been already some cross-examination before the charge has been drawn up does not affect this privilege. (See Nilkankto Singh,) (2) This disregard of an express provision of law might by itself be sufficient to vitiate the trial. But it is clearly impossible to hold that accused may not have been prejudiced thereby. He was entitled to reserve the whole or any part of his cross-examination till after the charge, and to complete it then, and if the procedure prescribed by law had been followed it may be that he might have succeeded in breaking down some or all of the evidence against him. The conviction therefore cannot stand. It is reversed and accused will be retried by the district magistrate who is the successor of the Magistrate who tried him before.

(1) 4 L. B. R. 147. (2) 22 Cal. 469.

IN THE CHIEF COURT OF LOWER BURMA.

CRMINAL APPEAL* No. 573 OF 1912.

NGA PO AND NGA PO MOUNG } vs. KING EMPEROR.

For Appellants—Mr. Wiltshire.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Dated 27th August 1912.

Indian Evidence Act S. 33 and 32 (1)—Dying declaration—Common intention must be looked to where it is doubtful which of the accused caused the mortal injury—murder—grievious hurt.

The statement of the deceased was taken down in the absence of the accused. Subsequently in the presence of the accused the statement was read over and the accused were allowed to cross-examine the dying person.

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*Appeal against the Judgment and order of Mr. S. Keith, Sessions Judge, Delta Division convicting both the appellants to death under S. 302 I. P. C.

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Held that the statement was not a dying deposition under section 33 of the Indian Evidence Act and was not admissible under section 32 (1) unless it was proved by examining the Magistrate who recorded it or some one who heard it made.

Where stabbing took place all of a sudden under a fit of uncontrollable rage and annoyance and where the accused were in all probability in liquor and it was not clear which of the accused inflicted the wound,

Held altering the conviction for murder to one under section 326 that it could not be held that the accused who did not give the stab had the common intention of murder and both the accused must be held to have the common intention to cause grievious hurt.

JUDGMENT.

HARTNOLL J:—On the evening of January 14 last about sunset one Nga Kyaw Thein received the injuries from which he died. He had two stabs in the abdomen from one of which the viscera protruded. He also had an incised wound on his left arm one inch deep and another on his right buttock two inches deep. He died on January 29 from septic petitonitis which set in owing to one of the wounds in the abdomen. The two appellants have been convicted of his murder and sentenced to death.

A dying declaration of Maung Kyaw Thein was taken by a magistrate on January 15 at the hospital and the learned Sessions Judge has admitted it in evidence. It is argued that it has been wrongly admitted and this seems to be the case. It cannot be held to be admissible under section 33 of the Evidence Act, as it was not taken in the presence of the appellants. It was taken down in their absence. The accused were subsequently brought into the presence of Maung Kyaw Thein and then the statement already recorded was read out. The accused were then given the opportunity of cross-examination and they asked three questions. In that the statement was not recorded in their presence it would not be evidence within the meaning of section 33. The statement would come under section 32 (1) of the Evidence Act, but it has not been proved. It could only be proved by examining the magistrate who recorded it or someone who heard it made who could testify to its having been made and to its correctness. This had not been done. It has therefore been wrongly considered as evidence and two courses remain open—either to judge the case leaving it completely out of consideration, or to send the proceedings back for it to be proved and properly put in evidence. If there was sufficient other evidence on the record on the part of the prosecution that shows exactly what took place and so to allow a correct judgment to be formed it is unnecessary to send it back to be proved. If it would be of material assistance to the appellants to prove it, it should of course be proved, but I have been through all the proceeding—police and otherwise—and I am unable to see how if regularly proved it would be of any benefit to the appellants. I do not therefore propose that it should be sent back to be proved, but would decide the case leaving it entirely out of consideration.

The prosecution case is that Kyaw Thein, Po Yin and Po The were talking by the side or in the vicinity of Po Yit's house on which were Po Yit, Po Sin and Nga Paw. The time was about sunset and it was not yet dark. The appellants came up and addressed Kyaw Thein, Po Yin and Po The. They abused the three and it is

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probable that one or more of the three abused back. The appellants then came for the three with clasp-knives. Po Yin and Po The ran away and got clear. Kyaw Thein fell and was then stabbed by both appellants.

The defence is that Po Maung and Nga Po did go to Po Yit's threshing floor where they met many persons. Nga Po told Po Yit to look after his employer's cattle as they had been eating his (Nga Po's) paddy, when Nga Po said: "As it is his food, the cattle eat the paddy. What does it is matter?" Nga Po abused. Kyaw Thein came running towards him and when he and Kyaw Thein were fighting his (Kyaw Thein's) men came running and struck him (Nga Po). Kyaw Thein and he (Nga Po) fell and then he heard Kyaw Thein say that he was stabbed with a knife. Po Maung says that when Nga Po and the prosecution witnesses were locked in a struggle, he asked them what was the matter, when Po Yin, Nga Paw and Po Sin struck him on the back with a stick and he ran away. He does not know why Kyaw Thein and Nga Po quarrelled as it was all of a sudden, and does not know how Kyaw Thein came by his injuries. Kyaw Thein must have been stabbed by those who were beating Nga Po.

Po Yit, Po Sein, and Nga Paw deposed to the truth of the prosecution story and said that they saw the appellants stab Kyaw Thein. It is urged that there are discrepancies in their statements and that they should not be believed. There are certain discrepancies and I have considered the weight that should be attached to them. It is not denied that Po Yit, Po Sin, Nga Paw, Po Sin and Po The were there. The appellants are said to have attacked suddenly with their knives and then Po Yit, Po Sin and Nga Paw were in the house. Great confusion would arise and each man could not be expected to describe the movement of the others exactly. The story told by the appellants is most improbable as it does not account for how Kyaw Thein got his injuries. It is clear that he could not have been stabbed four times by his own party. It is objected that Bu Le has not been called, but Maung Say Bo said that he stated that he had not witnessed the quarrel. Moreover, the defence had the option of calling him. After looking at the police papers I can see no reason to think that he can help the appellants. Maung Say Bo, the headman, and Maung Lugyi say that on the night of the occurrence appellants had stick marks on their backs, and that they were drunk. There is no good reason for disbelieving these men, but the marks must have been very slight as neither Maung Say Bo nor appellants mentioned them to the police. It is not clear that these marks were marks of a beating received by them when Kyaw Thein was stabbed. It seems to me beyond doubt that Kyaw Then received his wounds from one or both of the appellants and it is not suggested by them that they were beaten and then acted one or both in self-defence. They may have been hit by some of Kyaw Thein's companions after the stabbing, but this is unlikely, as they would not attack a man or men armed with a knife or knives unless to disable them altogether and it is clear that no severe injury was inflicted on either of the appellants. If they were merely hit on the back and they were either

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or both armed with a knife one would have expected one or more of Kyaw Thein's companions to have been stabbed and this was not so. There is evidence that Po Yit and Maung Paw caught hold of Po Maung and Nga Po after the stabbing and pulled them towards their houses. Po Yit says so. Nga Paw does not. Po Sin has made two statements that Po Yit and Nga Paw pushed appellants before the stabbing and then after the stabbing. In fact the different statements on this point is one of the points most in favour of the defence—namely that the appellants may have been assaulted. But, as I have said, looking at the defence and the whole facts I am unable to hold it proved that they were assaulted when Kyaw Thein was stabbed. It may possibly be that they were hit when or after stabbing Kyaw Thein, but this is improbable. When Po Yin got back he said that Kyaw Thein told him that both appellants had stabbed him. In the face of appellants' inability to show how Kyaw Thein received his wounds I accept the story of the prosecution witnesses and hold it proved that the appellants inflicted on Kyaw Thein the wounds that caused his death.

The remaining point is:—of what offence were they guilty? The man who caused the wound that was the cause of death is clearly guilty of murder for he must be presumed to have had the intention of causing bodily injury sufficient in the ordinary course of nature to cause death when he delivered it; but it is not clear which of the appellants inflicted this wound. It has to be considered whether when the two rushed on Kyaw Thein with their knives there was a common intention on their part to murder him. I think that such is hardly proved. The stabbing took place all of a sudden under a fit of uncontrollable rage and annoyance, and when the appellants were in all probability in liquor. They must be held to have had a common intention to cause grievous hurt, for they were not so drunk as to be unable to form that intention; but as regards the man who did not deal the fatal blow and if he did not inflict the other stab in the stomach, his honour hardly considered it proved that he had a common intention to murder. I would put his intention to be one to cause grievous hurt. As it is not clear therefore which appellant caused the wounds in the stomach I would not confirm the convictions for murder, but would alter them to convictions under section 326 for grievously causing hurt by means of a dangerous weapon and would alter the sentences to transportation for life.

YOUNG J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 6 OF 1911.

1. MAUNG SEIN
2. MA MYA GALE } vs. NGWE NU.

Ba Dun—For Appellants (Defendants).

Halkar—For Respondent (Plaintiff).

Before Mr. Justice Twomey.

March 6th, 1912.

Mortgage—priority of registered mortgage—oral mortgage—defective pleadings—determination of legal rights—section 48, Registration Act, 1908—section 73 and Rule 33, Order 41, Civil Procedure Code, 1908.

A held a registered mortgage of the property of **C**. **B** held an oral mortgage of the same property. Although **A** sought certain relief on the ground that **B**'s mortgage was fraudulent—a ground which was not proved—it was held that in spite of the defective pleadings the legal rights arising out of the priority of **A**'s mortgage under section 48, Registration Act, could be determined, regard being had to the provisions of Rule 33, Order 41, Civil Procedure Code, 1908.

Although the property had been sold in pursuance of B's oral mortgage as it had been sold subject to A's mortgage, the sale was annulled.

The first and the principal question raised in this appeal is whether the lower Appellate Court having found against the respondent's plea that the 2nd appellant's mortgage was fraudulent should not have dismissed the respondent's suit forthwith instead of making out a fresh case for the respondent namely, that her registered mortgage took effect before the 2nd appellant's oral mortgage. Although the claim of priority under section 48, Registration Act, was not expressly set up in the plaint the Divisional Judge considered that he was bound to deal with it as it concerned an obvious legal right. I think this view is correct. An appellant is not allowed to raise in the Court of Appeal a plea which he did not raise in the lower Court where the nature of the plea is such that if raised originally the respondent might have been able to rebut it. But the priority of the respondent's mortgage in this case is clearly not a point on which any rebutting evidence could be forthcoming. It is beyond dispute that the appellant's mortgage is postponed to the respondent's by the operation of section 48, Registration Act. Having regard to the provisions of Order 41, Rule 33, Code of Civil Procedure, I have no doubt that the Divisional Court was right in determining the respective legal rights of the contending mortgagees with reference to the Registration Act in spite of the plaintiff-respondent's defective pleading.

The only other matter for consideration is whether the respondent was not too late to assert her priority after the property had already been sold in pursuance of the appellant's oral mortgage. The sale took place on the 29th June 1909 and was carried out without reference to the respondent's mortgage although a sale decree had been granted on that mortgage on 22nd December 1908 by the same Court. The action of the Court in selling the property without

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reference to the respondent's mortgage was highly irregular. Under section 73, Code of Civil Procedure, the Court could sell the property free of the respondent's mortgage only with the mortgagee's consent (giving the mortgagee the same rights against the sale proceeds as she had against the property sold). Seeing that the respondent's consent was not asked for or obtained the property should have been sold subject to her mortgage. The irregularity was sufficient to justify the Court in annulling the sale. Instead of doing so the Divisional Court has ordered that the purchaser shall redeem the respondent's mortgage or suffer the land to be resold in satisfaction of that mortgage. But the auction purchaser may lose by this order. The amount realized on resale may not cover the respondent's mortgage debt plus the sum of Rs. 230 paid by Maung Sein.

In modification of the Divisional Court's decree I direct that the auction sale shall be annulled and that the respondent is entitled to have the land sold in pursuance of her mortgage decree free from the 2nd appellant Ma Mya Gale's mortgage.

The respondent's costs in this Court will be borne by the 2nd appellant.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL MISCELLANEOUS APPLICATION NO. 38 OF 1912.

G. W. HENDERSON vs. KING-EMPEROR.

Dawson—For Applicant.

Government Advocate—For King-Emperor.

Before Sir Charles Fox, Chief Judge.

September 26th, 1912.

Bail—grant of bail in non-bailable cases—contradictory statements of an accused person—general rule applicable to Magistrates—High Court's absolute discretion—exceptional circumstances—sections 497, 498, Code of Criminal Procedure, 1898.

In deciding the question of granting bail to persons accused of non-bailable offences, Magistrates must follow the provisions of section 497, Code of Criminal Procedure 1898. It says nothing about taking into consideration the likelihood or unlikelihood of the accused person absconding or any other matter except whether or not there are reasonable grounds for believing that the accused has been guilty of the offence charged against him.

A High Court is not limited within the bounds of that section, but as the Legislature has placed the initial stages of dealing with crimes with Magistrate and has in effect enacted that such persons shall be detained in custody except when no reasonable grounds in the opinion of the Magistrates dealing with the case, exist for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule and not to depart from it except in very special circumstances.

FOX, C. J.—I understand that the accused was arrested by the police because the uttering of four forged currency notes (each for Rs. 1,000) was traced to him. He is charged with an offence punishable under either section 489 B. or section 489 C. of the Indian Penal Code.

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He was brought before a Magistrate and the police applied for a remand to complete their investigation. The accused applied to the District Magistrate to be released on bail pending the investigation and trial. The District Magistrate refused the application. The part of the Magistrate's order which mentions that the accused had made contradictory statements appears to me to have been unfortunate, as possibly tending to prejudice the accused in his defence when he comes to be tried. It is still more unfortunate that statements as to the accused having made contradictory statements should have been published. The statements could only have been made to a police officer or officers, and the law is that no self-incriminating statements by an accused to a police officer, such as contradictory statements must tend to be, can be proved against an accused person at his trial.

One of the offences charged against the accused is non-bailable, consequently the District Magistrate was bound under section 497 of the Code of Criminal Procedure to refuse to release the accused on bail if there appeared to him to be reasonable grounds for believing that the accused had been guilty of the offence charged against him.

The other part of his order shows that the Magistrate considered in effect that the tracing of the four forged notes to the accused afforded reasonable ground for believing that he had been guilty of the non-bailable offence charged against him.

In my judgment the District Magistrate was justified in his conclusion and in refusing to release the accused on bail.

Certain dicta of judges in England on the subject of releasing on bail have been referred to as showing the governing principles on the subject but in this country any case in which the subject arises must be decided in Magistrate's Courts in accordance with what the Legislature has enacted in section 497 of the Code of Criminal Procedure until that section is altered by the Legislature. The section says nothing about taking into consideration the likelihood or unlikelihood of the accused person absconding, or any other matter except whether or not there are reasonable grounds for believing that the accused has been guilty of the offence charged against him.

It is no doubt the case that a High Court is not limited within these bounds, and that it has absolute discretion in the matter, but the Legislature having placed the initial stages of dealing with crimes with Magistrates, and having in effect enacted that persons accused of non-bailable offences shall be detained in custody except when there are, in the opinion of the Magistrate dealing with a case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court, in my judgment, is bound to follow the general law as a rule, and not to depart from it except under very special circumstances, especially so in the initial stage of a case. I see no such circumstances in this case, and I dismiss the application.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 206 of 1911.

MA YI BY HER GUARDIAN ad litem THET PON v. MA GALE.

Maung Kin—For Appellant (Plaintiff).

Palit—For Respondent (Defendant).

Before Mr. Justice Hartnoll and Mr. Justice Young.

September 2nd, 1912.

Buddhist Law : Inheritance—dissolution of marriage—claim of children—absence of filial relationship—similarity of status under adoption and after divorce.

A was the daughter of **B** and **C** who had separated and after a period remarried—**B** marrying **D**.

A through her mother **C** sued **D** for a portion of the inheritance of the deceased **B**.

It was held first that the marriage between **B** and **C** was dissolved : and secondly that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. In the cases of divorce and adoption it is the will of the parents which decides the disposition of the children.

Thein Pe v. *U Pet*, 3 L. B. R., 175 ; *Mi Thaik* v. *Mi Tu*, S. J. L. B., 184, 2nd edition : *Ma Paw* v. *Ma Mon*, 4 L. B. R., 272 ; *Ma E Me* v. *Po Mya*, 11 Bur. L. R., 316 ; *Ma Pon* v. *Maung Po Chan*, 2 U. B. R. (1897—01) 116 ; *Ma San Mra Rhe* v. *Mi Than Da U*, 1 L. B. R., 161 ; *Maung Hmat* v. *Ma Po Zon*, P. J. L. B. 469 ; followed ;

Maung Pe v. *Ma Myitta*, 2 Chan Toon's L. C., 220 ; *Ma Thet* v. *Ma San On*, 2 L. B R., 85 ; referred to.

HARTNOLL, J.—In this case Ma Yi by her next of kin and natural mother Ma Thet Pon sued Ma Gale under the following circumstances. Ma Yi's father was Maung Chan Tha, who married her mother Ma Thet Pon about the year 1255 B. E. Ma Yi was born to them in the year 1257 B. E. In that year Ma Thet Pon sued Maung Chan Tha for divorce in the Civil Court and lost her case. She and Maung Chan Tha did not come together again but lived separately. Then in or about the year 1261 B. E. they both re-married, Moung Chan Tha marrying the defendant Ma Gale. Maung Chan Tha died in the year 1272 B. E. leaving as his issue with Ma Gale one child of tender years. Ma Yi sues Ma Gale for her share of the inheritance. She claimed on the grounds that there was no division of property at the time of her mother's divorce from Maung Chan Tha and because that even up to the time of bringing the suit she had not attained the proper age to carry out the duties of a child. Ma Gale contested the suit on the grounds that Maung Chan Tha had been living separately since 1257 B. E., that since then Ma Yi had been living with her mother Ma Thet Pon, that she never once visited her father Maung Chan Tha till the year 1272 B. E. and has never carried out the duties due to her father, and that as she had always been living with her mother she was not entitled to inherit her deceased father's estate. The learned District Judge found that Ma Yi was entitled to inherit and awarded her a five-eigth share in the property Maung Chan Tha brought to his marriage with Ma Gale and a one-eigth share of the lettetpwa property of that marriage. On appeal the learned Divisional Judge held that

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Ma Yi was not entitled to inherit any of her father's estate and dismissed her suit with costs;

She appeals from this decision and takes two points:

(1) that the marriage between Maung Chan Tha and Ma Thet Pon was never dissolved;

(2) that even if it was, she is entitled to inherit her father's estate as there was no division of property when her parents separated and as she being a minor at the time of the separation and up to the time of Maung Chan Tha's death had no opportunity of exercising her choice to live with her father and perform the duties of a daughter to him. It is admitted that there has never been any filial relationship between Maung Chan Tha and Ma Yi. Concerning the first point I have no doubt that the marriage tie was dissolved between Maung Chan Tha and Ma Thet Pon. The law on the subject was discussed in the Full Bench Ruling, *Thein Pe v. U Pet* (1). There was mutual abandonment of each other for more than the prescribed periods and both remarried. When Ma Thet Pon remarried that was clearly an act of volition on her part showing that she considered the marriage tie with Maung Chan Tha dissolved and, when Maung Chan Tha took no steps against her and her second husband to assert his rights as her husband, it seems clear that he finally abandoned her as his wife. They each started a new home and I must answer that first point by holding that the marriage tie was dissolved between them in or about the year 1261 B. E.

The second point has been one of considerable discussion. The first case relating to it is that of *Mi Thaik v. Mi Tu* (2) and the last that of *Ma Paw v. Ma Mon* (3). Many of the intermediate cases are discussed in the last ruling. In the last mentioned case that of *Ma E Me v. Po Mya* (4) was not referred to. In this case the same grounds were taken as in the present one and were not allowed. It seems to me that appellant has no right to inherit for, when the marriage tie between her parents was dissolved, she was taken by her mother and has remained with her ever since and this must have been with her father's consent. As has been pointed out in the various cases parents have a right of control over their children, and in the case of a divorce a position very analogous to that of adoption arises. In adoption parents give away their children to others and unless filial relations are resumed the children so given away lose all rights of inheritance from their natural parents. In the case of young children their wishes are not consulted. It is the will of the natural parents and those who adopt them which decides the matter. Similarly in a case of divorce where the children are of tender years it is the will of the parents which decides the disposition of the children and I think that it must be held similarly that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. The remarks of Mr. Thirkell White in the case of *Ma Po v. Maung Po Chan* (5) and of Birks, J., in the case of *Ma San Mra Khe v. Mi Than Da U* (6) quoted in the case of *Ma Paw v. Ma Mon* (3) above

(1) 3 L. B. R., 175.
(2) S. J. L. B., 184, 2nd Edition.
(3) 4 L. B. R., 272.
(4) 11 Bur. L. R., 316.
(5) 2 U. B R., (1897—01), 116.
(6) 1 L. B. R., 161.

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referred to seem very appropriate, as also those of Mr. Copleston, J. C., in the case of *Maung Hmat v. Ma Fo Zon* (7) when he said:

"A child removed from the father's family and continuously resident with her divorced mother, after she is of an age when she might assist in the affairs of her father's family appears to be in the position nearly of a child adopted from the father's family and while she acquires or retains rights in her mother's or new family's property, she loses rights in the family whence she came."

It is true that in the case of *Maung Pe v. Ma Myitta* (8) a daughter, who had lived with the divorced wife was given a share of her deceased father's estate, but in that case it was held the father was on very affectionate terms with the daughter, had her to stay with him and never regarded her as cut off from his family—in other words that there were filial relations subsisting. Similarly in the case of *Ma Thet v. Ma San On* (9) where a similar decision was given it was found that filial relationship between the daughter and father was resumed and continued for many years after the separation. In the present case there never were any filial relations between father and daughter and I am of opinion that the daughter has no right of inheritance to the father's estate.

I would therefore dismiss this appeal with costs.

Young, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS NOS. 514, 515, 516, 517 AND 518 OF 1912.

1. PO LAN
2. PO THWE
3. PAN NYUN
4. YA GYI
5. NGA SHEIN

v. KING-EMPEROR.

Before Mr. Justice Hartnoll and Mr. Justice Young.

Dated 19th August 1912.

Kidnapping—with a view to murder—with a view to ransom—law applicable—insufficiency of punishment—sections 364, 365 *and* 387 *Indian Penal Code, distinguished—section* 71 *and* 383, *Indian Penal Code—section* 35, *Criminal Procedure Code.*

Where a person has been abducted in order that he may be held to ransom, his abductors can be convicted under section 365, Indian Penal Code, as the intent secretly and wrongfully to confine is always present but there can be no conviction under section 364, Indian Penal Code, unless the intent to murder or so to dispose of as to be put in danger of being murdered is strictly proved as such an intent is not a necessary consequence of abducting to hold a ransome: Section 387, Indian Penal Code, was also held to apply to a case of this nature; but under section 71, Indian Penal Code, read with section 35, Criminal Procedure Code, 1898, separate sentences cannot be passed under both section 365 and section 387, Indian Penal Code. The punishment provided by law may be insufficient but Courts can only administer the law as they find it.

Full Bench Ruling—*Queen-Empress* v. *Aw Wa*, 1 L. B. R., 33, followed.

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(7) P. J. L. B., 469.

(8) 2 Chan Toon's L. C., 220. (9) 2 L. B. R., 85.

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Po Lan, Po Thwe, Pan Nyun, Ya Gyi and Nga Shein v. King-Emperor.

HARTNOLL, J:—On the night of the 4th increase of Pyatho last (23rd December 1911) Maung Pein, son of one Maung Tun, and Maung Tun's cooly Maung Po Lin were sleeping at Maung Tun's threshing floor outside the village of Kayu-chaung when they were seized and blindfolded by a gang of men and taken away. After going some little distance, Maung Po Lin was released with instructions to go to Maung Pein's father Maung Tun, and to tell him to bring Rs. 3,500 to Titidusan. Maung Po Lin told Maung Tun as requested. Maung Tun relates how he went to Okkan and borrowed Rs. 2,000 on the 5th increase. The next day—the 6th increase—he went to Titidusan with the Rs. 2,000 but found no one. He went again in the evening without result. On the 8th increase Tun Hla and Nawa brought him three threatening letters, two of which Tun Hla states he found on Maung Tun's land fastened in a cleft bamboo and one of which Nawa states that he found near his threshing floor. The one Nawa found threatens Nga Pein with death unless the ransom Rs. 3,500 were paid. The other two purported to come from Nga Pein though they were not in his handwritting and are to the effect that he will have to die unless ransomed. Maung Tun made another attempt by going to the place appointed—Gindeiksan—but nothing transpired. The same night owing to the action of Maung Shwe Ya, Ywathugyi of Sibin, a village in the vicinity, Maung Pein was rescued. There was a hut outside Sibin occupied by another Maung Tun the inmates of which Maung Shwe Ya suspected. He made enquires accordingly. In the evening of the 8th increase he saw appellant Maung Shein in the village and questioned him. Maung Shein is the cousin of Maung Tun's wife—the Maung Tun who lived in the suspected hut. Maung Shwe Ya had information that on the 8th increase he had been with three others occupants of the hut. Maung Shein then admitted that he, Po Lan, Ya Gyi, Po Thwe, Pan Nyun and Po Kyaw had abducted Maung Pein, that he and Ya Gyi, Po Lan and Po Thwe had gone to demand the ransom and that Pan Nyun was watching Maung Pein in the Kangale jungle. Maung Shwe Ya sent out a party to arrest Pan Nyun and find the boy. This party did not find the boy at the spot indicated in the Kangale kwin but on the way they met Pan Nyun, Po Kyaw and Shwe Nyun Gyi. These men were taken to Maung Shwe Ya. Pan Nyun and Po Kyaw were arrested. Shwe Nyun Gyi offered to point out the boy and was sent off with a party to do so. He pointed out Maung Pein who was in the bed of a creek about 100 feet from where the first party had already been. The lad was in a sitting position with his arms tied tight behind his back round a sapling. He was blindfolded and insufficiently clad. It was the cold weather. He was in a great state of exhaustion. He lost his senses before he reached the village, and certain of the witnesses think that he could not have survived much longer. Maung Po Kyaw has been offered a pardon and he incriminates the appellants. Shwe Nyun Gyi also incriminates Po Kyaw and Pan Nyun; but there is reason to think as he pointed out the lad that he was concerned. Po Kyaw's wife Ma Pwa Shin and Maung Tun, the occupier of the house, also incriminate the appellants. At the sessions Maung Tun did not do so except by implication; but before the committing Magistrate he

did and his deposition before the latter Court was admitted as evidence at the trial under section 288 of the Code of Criminal Procedure. Now Po Thwe and Pan Nyun are Maung Tun's sons. Po Kyaw is his son-in-law. Maung Shein is his wife's cousin. Po Lan and Ya Gyi are his coolies. Po Lan, Ya Gyi, Pan Nyun and Po Kyaw live in his hut and Po Thwe in a hut near by. Nga Shein lived in the neighbouring village of Sibin. Po Kyaw was clearly in the crime for he produced on the 9th increase a concertina and umbrella taken away when Nga Pein was abducted. I can see no good reason for doubting that Po Kyaw has substantially told the truth. There must have been a gang to have taken away the two men. Nga Shein when questioned implicated the same men as Po Kyaw. When his information was acted on, Pan Nyun and Po Kyaw are found near where Nga Pein was recovered. It is natural that those who lived with Po Kyaw and his relatives should be involved. A handkerchief left at the scene of the abduction is identified by Po Thaung, an independent witness, as belonging to Po Thwe. It is of a distinctive character having a crochet border. I believe Maung Tun's statement made before the committing Magistrate. He is not likely to have implicated his sons, cousin and coolies unless they were in the abduction. As regards Ma Pwa Shin it must be remembered that, though she is Maung Po Kyaw the informer's wife, she is sister to Po Thwe and Pan Nyun and related to Maung Shein. The defence is a denial but it is not substantiated in any trustworthy manner, it seems to me proved that all the appellants took part in the abduction of Maung Pein and in the subsequent extortion. As regards the extortion section 34 of the Indian Penal Code applies.

Maung Po Lan has been convicted under sections 364 and 387 of the Indian Penal Code. He has been previously convicted under sections 379 and 380, and he was sentenced to transportation for life for each offence, the sentences to run concurrently. The other four appellants have been convicted under section 364 of the Indian Penal Code and sentenced to transportation for life.

Section 364 is in the following terms: "Whoever kidnaps, or abducts, any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered shall be punished with transportation for life, etc., etc." In the present case it has been found that appellants abducted Maung Pein in order that he might be so disposed of as to be put in danger of being murdered. After the most careful consideration, I have come to the conclusion that the section is not applicable. Maung Pein was abducted in order that he might be held to ransom. If it was a necessary consequence that he would also be so disposed of as to be put in danger of being murdered it might be held that there was the double intent and that section 364 would apply as well as one of the extortion sections when the demand for ransom came to be made. For instance in this class of crime which is of recent growth in Burma there is always present the intent to cause the person abducted to be secretly and wrongfully confined and so section 365 can always be held to apply as well as the appropriate extortion section, for it is always a necessary consequence of the abduction. But it is not a necessary consequence of the crime

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that the victim is always in danger of being murdered, and so that intent has always to be proved. Unfortunately the character of the crime is such that victims are sometimes murdered owing to such reasons as the victim identifying the abductors, or the abductors being enraged at not getting the ransom required; but it cannot be said that the abduction is always in order to murder or so to dispose of as to be in danger of being murdered. That may be an indirect consequence in certain instances. The main object of the abduction is in order to obtain money. In a case I decided a few days ago a little girl was abducted and kept hidden in a forest the whole day. She was released in the evening when ransom was paid. As far as the evidence went she was never in danger of being murdered during the period of her incarceration. I am therefore unable to hold that section 364 is applicable in this case. Maung Pein was abducted in order to extort money from his relatives and as it did not follow as a matter of course that he was in danger of being murdered, the conviction under section 364 cannot in my opinion stand. A conviction however under section 365 is justifiable as though the main object was to extort money yet it necessarily followed that the abductors had the intent to secretly and wrongfully confine him. But under section 365 the maximum sentence is seven years' rigorous imprisonment and according to the learned Sessions Judge such a term is not sufficient in a case of this nature. It is therefore a question for consideration as to whether another section as well as section 365 cannot be made applicable to Maung Ya Gyi, Pan Nyun, Po Thwe and Nga Shein so that an extra sentence can be imposed on them. They were charged under section 387 and that section is clearly applicable to them. Its terms are: "Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished, etc., etc.," and extortion for the purpose of this case is: "Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property commits extortion." The four men can clearly be convicted under section 387; but the question arises whether having in view the provisions of section 71 of the Indian Penal Code and the explanation to section 35 of the Code of Criminal Procedure two sentences can be passed. The question was discussed in the Full Bench Ruling *Queen-Empress* v. *Aw Wa* (1). The first part of section 71 of the Indian Penal Code is: "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences unless it be so expressly provided." In the present case was the abduction a part of the offence under section 387? The abduction was in order to commit extortion. It commenced the process of putting Maung Pein's relations in fear of death to Maung Pein and to my mind is part of the facts constituting the offence under section 387. Illustration (*b*) to section 383 is very opposite in considering the present facts. I would therefore hold that

(1) L. B. R., 33.

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the facts of the case come within the rule stated in the first part of section 71 of the Indian Penal Code and that being so there cannot be separate sentences passed under both sections 365 and 387. It may be that the appellants other than Po Lan in the present case and persons charged in similar cases may not receive sufficient punishment for crimes of this nature and in this respect I am inclined to agree with the learned Sessions Judge for in the present case Maung Pein was wrongfully confined for four days and nearly died and in similar ones there is grave danger of murder and sometimes murder; but the Courts can only administer the law as they find it. If the State considers the punishment for this kind of crime insufficient there can be legislation.

I would reverse the conviction on Maung Po Lan under section 364 and set aside the sentence passed on him under that section. I would confirm the conviction on him under section 387. As he is liable under section 75 of the Indian Penal Code to enhanced punishment and appears to have been the ring-leader in this crime I would confirm the sentence of transportation for life passed under section 387. As regards Po Thwe, Pan Nyun, Ya Gyi and Nga Shein I would alter the convictions on them to convictions under section 365, Indian Penal Code, and alter their sentences to sentences of seven years' rigorous imprisonment.

YOUNG, J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 177 OF 1910.

RAM BULLAB RHIRKAWALA v. { 1. BABU BICKRAJ. 2. BABU SAGAMULL CARRYING ON BUSINESS IN PARTNERSHIP UNDER THE NAME OF BICKRAJ SAGAMULL BY THEIR AGENT BABU. DONGAMAL.

Giles—For Appellant (Plaintiff.)

McDonnell—For Respondents (Defendants.)

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

September 10th, 1912.

Negotiable Instruments—promissory notes—holder—right to sue—adjudicated insolvent—discharge—Official Assignee's right of interference—insolvent's right of maintaining trover.

An adjudicated insolvent who has not obtained either his personal or final discharge may, even if all his property existing and prospective has been vested in the Official Assignee, sue for monies which he alleges are due to him provided that the Official Assignee does not interfere.

B. L.

Ram Bullab Rhirkawala. v. Babu Bickraj. Babusagamull

A holder of a negotiable instrument at the time of the action brought, being the only person who is then entitled to receive its contents, is the only person who can sue on it.

Drayton v. Dale, (*1823*) 2 B. and C 293 ; *Herbert v. Sayer*, (*1844*) 5 Q. B. R., 965 ; referred to.

Fox C. J.—The plaintiff-appellant sued on two promissory notes in his favour said to have been executed in January 1906 which were payable twelve months after date. During the course of the case it appeared that the plaintiff had in 1901 been adjudicated an insolvent by this Court. The record of this Court shows that he was adjudicated on his own petition, and he filed a schedule of debts he owed jointly as a member of a firm ; although he entered nothing in the schedule of separate liabilities and amounts due to him he stated he had then only Rs. 50 worth of separate property.

He obtained an *ad interim* protection order, and after that did nothing. Although required to appear before the Court he did not do so, and a warrant for his arrest was of no avail. He obtained neither his personal nor his final discharge.

The vesting order made in the case vested in the official Assignee of this Court all his property which he had then and all the property which he might thereafter acquire. That order continued and was in force at the time he made the loans sued on and at the time he brought the suit.

The District Judge held that the vesting order was a bar to his suing on the notes. The first question to consider is whether this was so. The plaintiff wished to change his case when his insolvency in 1901 was raised against him, but on the plaint he was suing for monies personally due to him on promissory notes purporting to be in his personal favour and on transactions which took place about five years after his adjudication and the vesting order. Assuming that he stated that the monies he lent had been acquired by him subsequent to the insolvency, then according to the law of Bankruptcy as administered in England, the previous vesting order would have been no bar to his recovering any monies due on the notes unless the Official Assignee interfered. The law is most clearly laid down in *Drayton* v. *Dale* (1) in the following words :—

An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy against all the world but his assignees (corresponding to the Official Assignee in this country), and he may maintain trover for them against a stranger. It is clear, therefore, that the bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property ; and if they do make any claim, it is effectual against the bankrupt and all the world ; but if they do not interfere, then, as between the bankrupt and his debtor, the latter cannot set up their title ; but the bankrupt has a right, in a Court of law, to enforce the payment of his debt.

This statement of the law was re-affirmed by Tindal, C. J., in *Herbert v. Sayer* (2) in the Exchequer Chamber and according to Byles on Bills at page 407 of the 17th Edition, it is still the law.

In the present case the Official Assignee had not interfered and claimed the monies due on the notes ; consequently it was not open to the defendants under the law as stated above to raise the plea that the plaintiff had no right of suit on the notes. Possibly owing to his being

(1) (1823) 2B and C, 293. (2) (1884) 5, Q. B. R., 965.

net with the above plea the plaintiff set up at a late stage that the debts for which the notes were given were really debts owing to the plaintiff's wife, and that the plaintiff in bringing the suit was only acting as trustee for his wife. The District Judge held that in such a case the plaintiff could not succeed unless the plaint was so as to show (persumably) that the plaintiff was suing as a trustee, and the learned Judge considered that the case was not one in which amendment should be allowed.

Under the law of Negotiable Instruments the rule is that the holder of such an instrument at the time of action brought, i. e., the person who is then entitled to receive its contents, is the only person who can then sue on it—see Byles on Bills, 17th Edition, page 359.

The plaintiff was the holder of the notes which were expressed to be in his favour personally, and he was the person who could properly sue on them, the Official Assignee not having interfered or claimed on them.

In my opinion the decree dismissing the suit must be set aside, and the case must be sent back with directions that it be readmitted under its original number and tried.

I would order that the costs of this appeal follow the ultimate decision of the suit.

HARTNOLL, F.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 1ST APPEAL* NO. 139 OF 1911.

M. DORABJEE ... ... APPELLANT.

v.

1. HAVABEE.
2. HAFEZBEE.
3. MARIAMBEE.
4. KHATIZA BIBI.
5. RAHIMABEE.
6. BIBI.

} Minors by their guardian *ad litem* Havabee. { Legal representatives of Dawoodjee Ismailjee Mayeth (deceased). RESPONDENT.

Eggar—For Defendant—Appellant.

K. B. Banerjee—for Plaintiffs—Respondents.

Before Mr. Justice Parlett.

January 3rd, 1913.

Court of Small Causes—Jurisdiction—nature of suit—nature of defence.

As the question for decision was whether the plaintiff, who had applied for a refund of security given, had duly performed his work as manager the defendant was entitled to try to prove that he had not done so. The Court of Small Causes which heard the case was not debarred from going into this question even if it was not competent to go into accounts. Such a Court in determining whether it has jurisdiction or not must look to the nature of the suit as brought by the plaintiff and not to the nature of the defence. A defendant has not power to oust the Court of a Jurisdiction which it otherwise has by the mere raising of a defence.

JUDGMENT.

This was a suit for the return of Rs. 2,000 deposited by the plaintiff as security for the due performance of his work as manager of the defendant's company. The defence in effect was that the money was not payable as the plaintiff had not duly performed his duties: in particular that he had misappropriated certain sums and by negligence suffered defendant's goods to sustain damage estimated at a total amount in excess of the amount of security and had failed to account for his dealings as manager. There was a written agreement between the parties,

* Appeal against the Judgment and decree of Mr. J. E. Godfrey Officiating Judge of the Court of Small Causes, Rangoon in Civil Regular Suit No. 78 of 1911 passed on 25th July 1911.

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M. Dorabjee, v. Havabee, Hafezbee, Mariambee, Khatiza Bibi, Rahimabee, and Bibi.

and admittedly also a subsequent further oral agreement, though the exact terms of the latter are in dispute. The Court of first instance considered that the deposit was merely security for that part of the written agreement (clause 5) which related to the return of the stock account books, press copy books, papers, letters, documents, cash, etc., belonging to the defendant company, and holding that the existence of any such not returned by him was not proved, decreed plaintiff's suit.

I would remark, however, that the written agreement imposed other obligations upon the plaintiff, by clauses 3, 4 and 6, so that mere return of the stock, account books, etc., would not necessarily entitle him to a refund of his security even if it were merely security for the due performance of the written agreement. But the plaintiff admits that it was security for the due performance of his work as manager of the defendant's company, and even if the exact terms of clause 9, which is said to have been struck out of the agreement when signed, were not embodied in the subsequent oral agreement, it is clear that the due performance of his work as manager would entail such conduct on his part as would protect his employers from loss or damage arising from misconduct, neglect or default on his part such as clause 9 refers to.

The question for decision therefore was not merely whether plaintiff had complied with clause 5 of the agreement but whether he had duly performed his work as manager: and defendant was entitled to try and prove that he had not done so. It appears that defendant had filed two suits in Mandalay one for compensation for misappropriation and for damage to his goods caused by plaintiff's negligence; and the other for an account, and execution in this case was postponed to enable them to be concluded. For the plaintiff it is contended that the Small Cause Court could do nothing else, having no jurisdiction over the subject matter of those two suits and not being competent to go into accounts. For the defendant on the other hand, it has been urged that the question of accounts was inseparable from that of the refund of the security, and that the plaint in this suit should have been returned for presentation to a Court having jurisdiction to go into accounts. In my opinion neither contention is wholly sound. Incidentally also I may mention that I consider the defendant's written statement was a defence only, and not a set-off. It is sufficient to say that the filing of the suits in Mandalay would probably have precluded him from pleading a set off in this suit.

The contention that a Small Cause Court cannot take cognizance of a case in which an account is to be taken has been held to be untenable. The Court must look to the nature of the suit as brought by the plaintiff, and not to the nature of the defence, to determine whether or not the Court of Small Causes has jurisdiction. It is not in the power of a defendant to oust the Court of a jurisdiction that it otherwise has, by the mere raising of a defence. Where such a defence is raised the Court of Small Causes has power to inquire into it and determine it for the purpose of the suit which it has jurisdiction to try. I am of opinion that the defence raised did not affect the jurisdiction

of the Court, and that that defence should have been gone into and adjudicated upon.

I reverse the decree of the Small Cause Court and remand the case for further hearing and decision in accordance with the views indicated above, costs of this appeal will be costs in the suit.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL* No. 19 OF 1912.

NGWE HMON v. MA PO.

For Appellant—Agabeg.

For Respondent—Dawson.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Parlett.

Dated 20th January 1913.

Letters of administration—withdrawal of application—erroneous dismissal—cancellation of order—procedure in contentious cases—Order IX, Rule 9, order XVII, Rules 2 and 3 and order XLIII, Code of Civil Procedure, 1908—S.s. 83, 86, Probate and Administration Act, V of 1881.

A applied for letters-of-administration to an estate. The application was returned for amendment. A then applied to be allowed to withdraw the application. No orders were passed on this application and when the case was called at the expiry of the six months allowed for amendment the original application was dismissed. Later, on an application to re-open the case, the Judge allowed the petition for letters to be withdrawn.

When returned for amendment the case came under order XVII, Civil Procedure Code, 1908. The application was dismissed under Rule 2 of that order and the Judge had authority under Rule 9 of order IX to set aside the dismissal. Under order XLIII no appeal lies against his order in spite of section 86 of the Probate and Administration Act which refers only to orders made by virtue of the powers conferred on a Judge by that Act. The section applicable is section 83 whereby the procedure in contentious cases is governed by the Code of Civil Procedure.

FOX C. J.—The respondent applied for letters-of-administration to the estate of Maung Po O. Her application was, on the 21st June 1911, returned for amendment within six months. In November she applied to be allowed to withdraw her application on the ground that she wished to apply for letters to another court. No orders were passed on this application to withdraw. On the 20th December the case was called, the respondent was absent, and the original application was dismissed with costs. The application for withdrawal was apparently overlooked. On the 20th January 1912 the respondent applied to have the order, dismissing her original application set aside, and again asked that she might be allowed to withdraw that application. The District Judge allowed the case to be reopened, thereby in effect setting aside his previous order dismissing the application, and he allowed the petition for letters to be withdrawn.

*Appeal against the order of the District Judge Thayetmyo giving leave to Respondent on 8th February 1912 to withdraw her petition after having dismissed it on 20th November 1911.

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The appellant who oppcsed all the respondent's applications appeals on the ground that the Court acted without jurisdiction in giving leave to the respondent to withdraw her application after it had been dismissed with costs. This involves the questions whether the District Judge was authorized to set aside the dismissal of the original application, and whether an appeal lies against his order setting it aside. From the 21st June the case came under order XVII relating to adjournments. Rule 2 of that order would appear to be more applicable to the order of dismissal on the 20th December than Rule 3 is. If so, the District Judge had authority under order IX, Rule 9, to set aside the dismissal. That being so order XLIII gives no appeal from an order allowing an application to set aside a dismissal. For the appellant however it was argued that section 86 of the Probate and Administration Act gives her an appeal to this court. That section applies to orders made by a District Judge by virtue of the powers, conferred on him by that Act. The order setting aside the dismissal cannot properly be said to be an order made by virtue of any power given by that Act. It was made in the course of procedure, and the procedure in contentious cases is under section 83 of that Act governed by the Code of Civil Procedure. Since that code gives no appeal from an order allowing an application to set aside a dismissal for default of appearance no appeal lies against the order appealed against.

The appeal is dismissed with costs. 2 Gold Mohurs allowed as advocate's fee.

PARLETT J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS* Nos. 93, 94 and 95 of 1913.

MA YI BY HER GUARDIAN *ad litem* THET PON v. MA GALE.

1. PO WIN,
2. TUN BAW,
3. SHWE DON,

} v. KING EMPEROR.

Maung Kin, Assistant Government Advocate.

Before Mr. Justice Hartnoll.

March 14th, 1913.

Robbery-use of deadly weapon by one of a gang of robbers—Ss. 392, 397, Indian Penal Code.

The use of a deadly weapon by one of a gang of robbers does not bring his associates within the terms of Section 397, Indian Penal Code.

Nga I v. King Emperor, 6 L. B. R. 41; 5 Bur. L. T. 9 referred to. *Nga Sein v. King Emperor*, 3 L. B R., 121; *Queen-Empress* v. *Senta*, I. L. R., 28 All., 404; *Queen-Empress* v. *Bhavjya*, Ratnalal's Unreported Cases, 397; followed.

*Appeals against the convictions and sentences of the Special Powers Magistrate Henzada sentencing the appellants to 7 years R. I. for offences under S. 392, 397 I. P. C.

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Po Win, Tun Baw, Shwe Don, v. King Emperor.

ORDER.

The case is a perfectly clear one against the appellants and the appeal was only admitted as Maung Tun Baw and Maung Shwe Don have been convicted under section 392 read with section 397 of the Indian Penal Code. In convicting Maung Tun Baw and Maung Shwe Don under section 392 read with section 397 the Magistrate says that he followed the ruling in the case of *Nga* I v. *King Emperor* (1). That ruling applies to the case of Po Win who had the clasp knife but not to the cases of the other two men. I would refer the Magistrate to the case of *Nga Sein* v. *King Emperor* (2). The case of *Queen-Empress* v. *Mahabir Tiwari mentioned* in this latter case was overruled by the case of *Queen-Empress* v. *Senta* (3), which takes the same view as that taken in *Nga Sein* v. *King Emperor* (2). In the Bombay High Court a similar view is taken in the case of *Queen-Empress* v. *Bhavjya* (4). The convictions on Tun Baw and Shwe Don will be altered to convictions under section 392 of the Indian Penal Code. As regards the punishment since it is not shown that Tun Baw and Shwe Don used any deadly weapon their sentences are reduced to sentences of five years' rigorous imprisonment. Po Win's appeal is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 124 OF 1911.

OWEN PHILLIPS *v.* LIM CHIN TSONG.

Alexander—for applicant (Plaintiff.)

Clifton—for respondent (Defendant.)

Before Mr. Justice Twomey.

13th January 1913.

Wrongful dismissal—seamen—officers—rights of action for wages—restriction imposed by section 35, *Merchant Seamen's Act* (1859)—*Ss.* 35, 55, 56 *Merchant Seamen's Act* (1859)—*Ss.* 1, 73 *of the Contract Act.*

The provisions of section 35 of the Merchant Seamen's Act, 1 of 1859, prevent a Seaman—a term which includes an officer—from being awarded more than one month's wages as compensation for wrongful dismissal if effected before the first month's wages have been earned.

JUDGMENT.

According to the finding of the lower court the applicant, Owen Phillips, who had signed for six months as an officer on the respondent, Lin Chin Tsong's steamer the *Seang Bee*, was discharged without fault before one month's wages had been earned. He was paid

(1) 6. L. B. R., 41; 5 Bur. L. T. 9.
(2) 3. L. B. R., 121.
(3) See the Judgment at foot of page 404, I. L. R. 28 All.
(4) Ratanlal's Unreported cases, 397.

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wages up to the day of his discharge. He sued the respondent for wrongful dismissal claiming as compensation Rs. 780 or four month's wages at Rs. 195 per mensem. The learned Judge held that the provisions of section 35 of the Merchant Seamen's Act, 1 of 1859, prevented him from awarding more than one month's wages as compensation, and accordingly gave the plaintiff a decree for Rs. 195 and costs on that amount. He further ordered the plaintiff to pay the defendant's costs on the amount disallowed.

The plaintiff applies to this court in revision. It is contended that section 35 was merely intended to provide an additional summary remedy and not to deprive seamen of their ordinary rights of action for wages, that seamen are not prevented by section 35 from suing for damages for breach of contract under section 73, Contract Act, and that section 35 should be read subject to Sections 55 and 56 of the Merchant Seamen's Act, 1859.

The view that section 35 merely provided an additional summary remedy appears to be untenable. If it had been intended that the restriction to one month's wages should apply only to cases in which the wages are to be recovered summarily by distress warrant under section 56, the insertion of the words "the Court or" in section 35 would be meaningless. The mention of "the court" in section 35 shows, I think, that one month's wages is the maximum amount which could be granted by way of compensation even by a Court of Civil Judicature under section 57. There can be no doubt, I think, that the restriction was intended to be general in its application. The result is curious, for the restriction relates only to wrongful dismissals before the first month's wages have been earned, and consequently if a seaman is dismissed after the first month of his articles he can sue for damages without this restriction. In the case of an ordinary ablebodied seaman who can probably get employment within a week or two in another ship, the restriction is not likely to cause hardship. But in cases like the present where the seaman is an officer it is no doubt more difficult to get another ship and the restriction may cause hardship. It seems possible that in framing section 35 (and the corresponding section in the English Statute) the fact that an officer is included in the definition of "Seaman" for the purposes of the Act was overlooked. However that may be, the wording of the restriction is clear and effect must be given to it.

The restriction in question is not removed by the Contract Act. Section 1 of that Act provides *inter alia* that "nothing herein contained shall affect the provisions of any statute, Act or Regulation not hereby expressly repealed," and the Contract Act does not repeal section 35 of Merchant Seamen's Act.

The terms of the restriction being express I think that it must take effect notwithstanding any wider rights of action which seamen may have had before the Act was passed.

I therefore concur in the decision of the Small Cause Court.

As regards costs, I do not agree that the plaintiff should be required to pay the defendant's costs on the amount disallowed. The plaintiff had an honest claim in which he succeeded to a substantial degree. The defendant on the other hand set up a defence that the

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plaintiff was rightly discharged, and he failed to prove this plea. In this state of affairs I do not think that costs should be apportioned in the manner ordered by the Judge.

The application is dismissed except that the Lower Court's order for the payment of Rs. 30 by the plaintiff to the defendant is set aside. The costs in this court will be borne by the applicant.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL* NO. 259 OF 1911.

MA GUN v. N. M. C. KARUPPA CHETTY.

Before Mr. Justice Parlett.

For Appellant—Auzum.

For Respondent—Palit.

Dated 7th May 1913.

Buddhist Law—Inheritance—Proof of execution by wife of deeds of mortgage entered into by husband.

The share of the 2nd husband in the *payin* property of his wife will not exceed 1/4th.

Where it appeared the 2nd husband surrendered all his claims to the *payin* property of his wife when she became insane and when he took another woman and where it was found that the 2nd husband had himself affixed what purported to be the mark of his wife who was illiterate and who had become insane and of unsound mind for some time before her death.

Held that it was incumbent on the plaintiff respondent to prove what interest if any the second husband obtained or retained and how he did so.

JUDGMENT.

PARLETT J:—I am unable to agree with the learned District Judge that the adoption of 2nd defendant was not proved. In addition to her own evidence there is that of two lugyis who were present when the adoption took place, and evidence that she subsequently lived with her adoptive mother in Rangoon and then in Pegu, right up to her death, and was looked upon by people as her adopted daughter and was given out as such by her adoptive parents. No grounds whatever appear for rejecting this evidence and against it there is merely the evidence of some Pegu witnesses that they do not know of the adoption. That she lived in the house with Ma Kin till her death is not denied, nor that she has since had possession through her tenant Ma Gun. The fact that there were no administration proceedings goes for very little. In my opinion the adoption was proved.

The plaintiff was suing for a declaration of title to the property and for possession of it, and the burden lay on him to prove his case. There can be no doubt that the house, oil press and site were acquired during the marriage between Ma Kin and Maung Shwe Gan. On

* Appeal against the Judgment and decree of the District Court of Pegu reversing the Judgment and decree of the Township Judge, Pegu.

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Karuppa
Chetty.

Maung Shwe Gan's death Ma Kin retained as her absolute own one half of the property and the other half descended to her adopted daughter subject to her own life interest in it. (Ma On v. Shwe O (1) and Ma Nyo and 5 v. Ma Yauk (2). Her one half became *payin* property of the second marriage with Po Thit and the most he could be entitled to on her death would be one-fourth of this, *i. e.*, one-eighth of the whole. (Ma Ba We v. Mi Sa U (3). There is, however, evidence quite unrebutted that when Ma Kin became insane and Po Thit took another wife he surrendered all claim to any of her property. It was for plaintiff to prove what interest if any in her property Po Thit acquired or retained and how he did so. Po Thit was obviously the best, if not the only witness who could have proved this. Yet plaintiff appears to have taken no steps to call him, but gave a lying excuse for not doing so and completely failed to show that his evidence could not be procured. The District Court says the property was treated as the joint property of Ma Kin and Maung Po Thit, but the only grounds for saying this are that she purports to have been a party to certain deeds mortgaging it. No evidence is given as to her execution of them, or that she was present and consented to their execution, whereas there is evidence that she on one occasion refused to execute a deed which Po Thit wanted her to execute, and that she denied owing money. She was illiterate, the deeds were written and what purported to be her mark was affixed by Po Thit himself, and admittedly she died insane and was of unsound mind for some time before her death. Obviously no inference can be drawn from such materials that Po Thit was a joint owner of the property. Plaintiff totally failed to show that Po Thit had any right, title or interest in the property which he purported to sell to him and his suit was rightly dismissed. I reverse the decree of the District Court and restore that of the Township Court dismissing the suit with costs throughout. Advocates fees—2 Gold Mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 273 B OF 1912.

Review of the order of the 1st Additional Magistrate of Ingabu, dated the 13th day of February 1912 passed in Criminal Regular Trial No. 31 of 1912.

KING-EMPEROR vs. NGA KAN THA.

Charge under Section 384 of the Indian Penal Code.

Before Mr. Justice Parlett.

Dated the 8th day of November 1912.

Indian Penal Code Ss. 16., 44 and 384 — Ywathugyi — Sanction to prosecute — Burma Village Act Ss. 10 and 28 — Burma Gambling Act S. 10.

The terror of a criminal charge, whether true or false amounts to a fear of injury and though to threaten to use of the process of law is lawful, to do so for the purpose of

(1) S. J. 378. (2) IV. L. B. R. 256. (3) II. L. B. R. 177.

enforcing payment of money not legally due, is unlawful and such a threat made with such an object is a threat of injury sufficient to constitute the offence of extortion and not one under S. 161 of the Indian Penal Code.

A Village headman is not empowered to arrest people whom he finds contravening section 10 of the Burma Gambling Act.

K. E. vs. Nga Thu Daw 2 L. B. R. 60 (followed).

Obiter—Section 28 of the Burma Village Act refers to a complaint of an Act which constitutes an offence under the Indian Penal Code if such Act is also punishable departmentally under s. 10 of that Act but not otherwise. In the latter case no sanction is necessary under section 28 of the Act.

ORDER.

The facts found in this case are as follows:—

On 4th October 1911 accused Maung Kan Tha who is a village headman came upon Maung Po Thi and a number of other persons setting cocks to fight near a public road, and seized the cocks. On 9th October he sent for Maung Po Thi and told him that they would all be prosecuted unless Rs. 20 was given to him. Maung Po Thi then collected Rs. 15 and gave it to him and no prosecution was instituted in respect of the Cock-fighting. Accused was then prosecuted before the 1st Additional Magistrate who convicted him under section 384 Indian Penal Code. On appeal the Sessions Judge altered the conviction to one under section 161 Indian Penal Code holding that as the case against him was that he took money as a consideration for not prosecuting certain persons for gambling as he ought to have done there was no question of injury as defined in section 44 Indian Penal Code. With this view I do not agree. There is authority for holding that the terror of a Criminal charge, whether true or false, amounts to a fear of injury, and that though to threaten to use the process of law is lawful, to do so for the purpose of enforcing payment of money not legally due, is unlawful, and such a threat made with such an object is a threat of injury sufficient to constitute the offence of extortion; for that offence consists in using the terrors of the law for the purpose of extracting money. The offence proved therefore amounted to extortion, whereas I do not think that the facts disclosed an offence under section 161 Indian Penal Code. The material part of that section for the purposes of this case is "Whoever being a public servant obtains from any person for himself any gratification whatever other than legal remuneration, as a motive or reward for forbearing to do any official act or for showing in the exercise of his official functions favour to any person, shall be punished etc." The point for consideration is whether in prosecuting the persons found setting cocks to fight the accused would have been doing an official act or excercising his official functions as a village headman. His official acts and functions are enjoined and defined by the Burma Village Act.

Though it is not clear that the cock-fight took place on a public road, there can be no doubt that the prosecution if instituted would have been under section 10 of the Burma Gambling Act. It has been held (King Emperor v. Nga Thu Daw (1)) that a village headman

(1) II. L. B. R. 60.

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is not empowered to arrest people whom he finds contravening that section, and that ruling still applies since the new Village Act and notification which have since replaced the old reproduce the same language. Offences under section 10 of the Gambling Act are not included in section 7 of the Village Act nor, as far as I can ascertain, is there any duly sanctioned order relating to them in force in this District under sub-clause (VI) of clause (c) of that section. A headman therefore is not bound under section 7 to communicate information respecting such offences, nor under section 8 to investigate them. Accordingly if a village headman does either of these things or lays a complaint of such an offence he cannot be held to be thereby doing an official act prescribed or excercising an official function authorized by the Burma Village Act. I therefore think that section 6 Indian Penal Code was inapplicable to this case and that the offence fell under section 384 only.

It appears that after examining the complainant and summoning the accused and witnesses the Magistrate referred the case to the Deputy Commissioner who passed the following order:—

"The alleged offence is punishable under section 10 Village Act. My sanction is therefore necessary to the prosecution under section 28 Village Act. As no departmental complaint or enquiry has been made or held, I refuse sanction". The Magistrate then closed the case.

On 4th January 1912, the complainant applied to the Commissioner to revise the Deputy Commissioner's order and the Commissioner wrote as follows:—

"The Deputy Commissioner was in error in supposing that the case came under section 10 of the Village Act or that his sanction was necessary under section 28. Section 10 refers to purely departmental punishment; section 28 to acts or omissions punishable under the Village Act. In the present case a complaint was made before a Magistrate against the accused headman of an offence punishable under section 161 or 384 Indian Penal Code. No departmental sanction is required for such a prosecution", and on 12th January the Commissioner added "The order of the Deputy Commissioner refusing sanction is set aside."

The Magistrate then reopened the case and disposed of it as mentioned above. The case has now been referred by the District Magistrate on the ground that the Deputy Commissioner's sanction to the prosecution was necessary under section 28 of the Village Act and, it not having been obtained, the proceedings were without jurisdiction. Section 23 enacts that "No complaint against a headman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of or under authority from the Deputy Commissioner". Section 10 provides that "If a headman neglects to perform any of the public duties imposed upon him by this Act or any rule thereunder, or abuses any of the powers conferred upon him by this Act or any such rule, he shall be liable by order of the Deputy Commissioner to pay a fine". As the wording of the present Act is similar to that of the Act in force

when Shwe Yi v. Crown (2) was decided it follows that section 28 of the Burma Village Act refers to a complaint of an Act which constitutes an offence under the Indian Penal Code if such Act is also punishable departmentally under section 10 of that Act. It remains therefore to consider whether the act of the accused in this case was a neglect to perform a public duty or an abuse of his powers punishable by order of the Deputy Commissioner under section 10. As has been pointed out above no public duty in connection with offences under section 10 of the Gambling Act has been imposed on headmen by the Village Act or rules thereunder, and therefore the headman could not have been punished for neglecting to perform it. The District Magistrate however is of opinion that he could have been punished by the Deputy Commissioner under section 10 for abuse of the powers conferred upon him by the Act. He writes—"It is evident that if Maung Kan Tha acted as he was alleged to have acted he did so under colour of his office of Ywathugyi, and that by exceeding his powers in so doing he abused his authority within the meaning of Section 10 Village Act. Section 28 Village Act is intended to protect Village headmen from persecution by recklessly brought charges in consequence of acts purporting to be done by them in their official capacity and to ensure that they should not be required to answer such charges unless and until their official superior has neld some preliminary enquiry and decided that the headman deserves prosecution. It does not matter whether the headman had authority in any particular case to take the action which he did take. If he had no such authority then he has abused his powers in acting as if he had such authority and is liable to punishment under the Village Act and therefore protected by Section 28 of that Act".

It does not apper from the Act itself with what intention Section 28 was enacted, nor is that intention material since effect must be given to that section and the rest of the Act as they stand, but it might equally reasonably be assumed that the section was intended to prevent a headman being punished twice for the same Act, once departmentally and once on conviction. It may be that in acting as he has been found to have acted Maung Kan Tha took advantage of his position as Village headman to do so, and that in that sense he abused his position. But I am unable to agree that the usurpation of authority which he manifestly has not got at all under the Act or rules is an abuse of powers conferred by them. I consider that for an act to constitute an abuse of powers within the meaning of Section 10, it must have been done in the avowed excercise of some power conferred by the Village Act or by the rules thereunder, but that in doing it that power was exceeded, or was excercised in an improper manner, or under circumstances when it was not properly excerciseable. The act proved against him in this case was the demanding and obtaining of money under pressure of threats of prosecution. It is obvious that neither the Village Act nor any rule thereunder confers upon him any power to demand or receive any money at all in such circumstances, and therefore in demanding and receiving it he abused no power so

(2) I. L. B. R. 336.

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conferred upon him. I am therefore of opinion that his act was not punishable under section 10 of the Act consequently that section 28 did not apply. If section 28 had applied however, the further question arises whether it had not been complied with. Section 23 provides that the Commissioner may revise any order made under the Act by a Deputy Commissioner. If the Commissioner in revision modifies or reverses the Deputy Commissioner's order, the Commissioner's order supersedes and replaces the Deputy Commissioner's order. I find nothing in the Act which excludes from the operation of section 23 the order of a Deputy Commissioner under section 28 ordering, or giving or refusing his authority to a prosecution. If therefore Section 28 had applied to the present case, that section had in fact been complied with.

I alter the conviction to one under section 384 Indian Penal Code and confirm the sentence.

The proceedings may be returned.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 780 OF 1912.

NGA TO GALE v. KING EMPEROR.

For King Emperor—Eggar.

Before Mr. Justice Twomey.

November 28th, 1912.

Criminal Procedure Code (1898) ss. 337 and 339—Procedure when pardon forfeited by approver.

The present Code of Criminal Procedure contains no provision for the withdrawal of pardons.

The proper course is to draw up an order setting forth specifically the alleged breach of any condition of pardon and to call upon the approver to show cause on a future date why he should not be tried for the offence as provided in S. 339 of the Code of Criminal Procedure. On the date fixed for the hearing unless the approver admits the alleged breach of condition the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence.

The question whether a pardon has been forfeited is in each case a question of fact and elementary principles of justice and good faith require that this question of fact should be properly tried and determined before the approver is charged with the offence for which he was pardoned. The approver should be given an opportunity of meeting the allegation that he had failed to make the full and true disclosure required under sec. 337.

(On giving through the proceedings the Court refused to order a new trial, set aside the conviction and acquitted the accused—Ed. P. L. T.)

Mr. Eggar for the King Emperor :—The facts were that a dacoity was committed in January 1912 and the appellant was the approver. He was tendered a pardon and accepted it and gave his evidence in the sessions trial and the sessions judge was of opinion

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that he had forfeited his pardon, either by nondisclosure or by false evidence and that he ought to be tried for the dacoity.

There was a document filed which purported to be a withdrawal of the pardon by the Magistrate who granted it under section 339. That was an error, and none of the courts below had noticed it. The present section 339 of the Code had altered the law as regarded the withdrawal of pardons, and there was no provision whatever under the Criminal Procedure Code whereby a pardon once tendered and accepted could be withdrawn. The section was in all respects the same as under the old Code, but in sub-section (2) the word "forfeited" had been substituted for the word "withdrawn." The point was that whereas there were several rulings and a settled procedure under the old Code whereby a pardon ought to be withdrawn by the Magistrate who tendered it and then the accused put up for trial, under the new Code, there was no procedure for withdrawl, and the accused, if the authorities thought he should be tried for the offence, was simply put upon his trial and he tendered his plea in bar and his plea in bar had to be gone into before he could be tried for the original offence. There was no doubt that the accused in the present case had pleaded his pardon in bar in his examination before the committing magistrate, when he said, "I was tendered a pardon by the Government. I gave my evidence truthfully in accordance with the conditions of my pardon." Then again in the sessions court, "I helped the Government to the best of my ability," so that he had pleaded his pardon in bar, and the court could not proceed with the case until that issue was tried.

His honour: What issue?

Mr. Eggar: As to whether he had in fact forfeited, and the proper procedure would be in the committing Magistrate's Court for evidence to be gone into first of all—formal evidence that he was the person who was the approver in the former case, and who gave such and such evidence; and next that he either in one way or the other had forfeited his pardon either in the words of section 339, wilfully concealed something essential to the case or else that he had given false evidence.

His honour: Is there any precedent for this procedure?

Mr. Eggar said there was, and he would point out several cases. There was no precedent for the procedure followed in the present case that counsel had come across. He proceeded to cite 30 Bombay, p. 617 and 619, Upper Burma Rulings, 1907, p. 7, 25 Bombay, p. 675, and 17 Calcutta, p. 845, in support of the fact that there was no provision for cancelling, revoking or withdrawing a pardon. He went on to say that both in the magistrate's court and in the sessions court the point would have to be gone into if appellant still put forward his plea in bar. He thought his honour would have to send back the case for re-trial. The case was clear enough as regarded the dacoity. The appellant admitted that he was one of the dacoits, and there could be no doubt that if the procedure was correctly followed he would be convicted of this dacoity. Counsel asked his honour to send the case back.

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JUDGMENT.

TWOMEY J:—The appellant Nga To Gale was arrested on a charge of being concerned in two dacoities committed on the night of 23rd January 1912 at Ywathit and Ywadaushe in the Thaton District. After his arrest he made a confession and thereupon a pardon was tendered to him on the condition mentioned in section 337, Code of Criminal Procedure. He was examined as an approver against four of his alleged accomplices and made what appeared to the committing Magistrate to be a full and true disclosure. When the case came for trial to the Sessions Court, To Le repeated the evidence given by him to the Committing Magistrate. There are slight discrepancies between the two depositions but in material particulars there was no serious variation. The four accused persons were, however, not convicted. Permission was given to withdraw the charge against them on the following grounds stated in the Sessions Judge's order of 21st June 1912:—

(1). There are serious discrepancies between the evidence of the approve and the other prosecution witnesses firstly as to the number of the dacoits, as to their identity and as to whether they were disguised or not; secondly as to what occurred in Shan Gyi's house when the witness Po Tha visited it; thirdly as to whether, on the occasion of the search for the gun in Shan Gyi's compound, To Gale did or did not display, by his words and conduct, uncertainty as to whether the gun had been buried inside or out side the stone well.

(2). Apart from the evidence of the approver which thus appears to me discredited, the only evidence against any of the accused is the fact of the discovery of part of the dacoited property in situations, which do not in my opinion warrant the inference that they were in possession of the accused in question."

In acquitting the four accused the Sessions Judge recorded his opinion that "To Gale nas forfeited his pardon by giving false evidence, more particularly as to his pointing out to the search party the exact place where the gun was buried and as to his presence at the time when the gun was buried. Since it appears to me clear that he was uncertain whether the gun was buried inside or outside the stone wall and it seems to me incredible that he could have been uncertain on this point if he had acually been present when the gun was buried."

In consequence of this opinion, the Subdivisional Magistrate, Thaton, recorded an order withdrawing the pardon and To Le was accordingly charged with taking part in the Ywathit dacoity. He adhered to the statements already made by him, admitting his part in the dacoity. But before both the committing Magistrate and the Additional Sessions Judge he urged that he had been pardoned and that he had complied with the conditions of his pardon. The learned Judge disregarded this plea, treated the pardon as having been withdrawn and convicting the accused sentenced him to suffer transportaion for 7 years.

The Judge does not seem to have referred to the provisions of law applicable to the matter. If he had done so he would have seen that the present code (1898) contains no provision for the withdrawal of

pardons. Section 339 provides that if a person who has accepted a tender of pardon has either by wilfully concealing anything essential or by giving false evidence, not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered and the statement made by him may be given in evidence against him when the pardon has been forfeited under this section. The question whether the pardon has been forfeited is in each case a question of fact and elementary principles of justice and good faith require that this question of fact should be properly tried and determined before the approver is charged with the offence for which he was pardoned. The mere expression of opinion by the Sessions Judge is not enough. The approver should be given an opportunity of meeting the allegation that he has failed to make the full and true disclosure required under section 337. The proper course was to draw up an order setting forth specifically the alleged breach of the condition of pardon and to call upon the approver to show cause on a future date why he should not be tried for the dacoity as provided in section 339. On the date fixed for the hearing unless the approver admits the alleged breach of condition the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence.

The Assistant Government Advocate who appears for the Crown in this Court does not support the conviction as it stands. It is clearly impossible to sustain it. But I am asked in setting aside the conviction to order a new trial which should be preceded by an enquiry as indicated above concerning the alleged breach of the condition of pardon.

The course suggested to me would no doubt be appropriate if the records disclosed *prima facie* grounds for the opinion expressed in the Sessions Judge's order of 21st June 1912. But the grounds appear to be of the flimsiest description. The only part of the approver's evidence which the Sessions Judge refers to specifically as false is that relating to the discovery of the gun, exhibit 13 near the accused Shan Gyi's house. The approver told the police that he was present when Shan Gyi buried the gun and that he could show the place. The gun was actually found buried within a few yards of the spot pointed out by To Le. It appears that To Le showed some uncertainty as to the exact spot and the Sessions Judge inferred from this uncertainty that To Le could not have been actually present when the gun was buried and that To Le gave false evidence in saying he was present at the time and in saying that he pointed out the exact spot. The allegation is that the gun was buried at night and To Le might easily make a mistake of a few yards as to the exact spot. Also seeing that the gun was found a few yards from the spot first pointed out by To Le, I think it is unreasonable to argue that he gave false evidence in saying that he pointed out the exact place. There are discrepancies between To Le's statements and those of Ma Lon Ma and Ma Pu Si Ma as to the number of the dacoits, as to whether they were disguised with

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soot and lime or not, and as to who they were. Ma Lon Ma and Ma Pu Si said they recognized two men who are not among those denounced by the approver. But the identification of these two men by Ma Lon Ma and Ma Pu Si was discredited by the police and the men were not tried for the offence. The evidence of Ma Lon Ma and Ma Pu Si must therefore be accepted with reserve and their statements as to the number and appearance of the dacoits are of doubtful value. As regards the assemblage at Shan Gyi's house before the dacoity there is no adequate reason for regarding the particulars given by the approver as false even where his account conflicts with the evidence of the witness Po Tha.

In my opinion therefore there are no sufficient grounds for holding that Nga To Le gave false evidence at the trial. He appears to have complied substantially with the condition of his pardon and so long as the pardon was in force he could not be convicted of the offence in respect of which he was pardoned.

The conviction and sentence are set aside and the appellant is acquitted and will be released unless he is liable to be detained on some other charge.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 99 OF 1911.

MAUNG LU GALE .... APPELLANT.

v.

MAUNG PO THEIN & 1 .... RESPONDENT.

Before Mr. Justice Parlett.

Dated 26th November, 1912.

Damages—Defamation—Existence of privilege or qualified privilege—malice—remand to Lower Court for trial of fresh issues——Proof that alleged statements were true or were made on reasonable grounds for belief.

Statements made in answer to a police officer conducting an investigation into the commission of a crime under Code of Criminal Procedure, 1882 were privileged.

Mathuram Dass vs. Jagganath Dass (28 Cal. 794) approved.

A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without the privilege, would be slanderous and actionable.

A police officer was making enquiries with a view to taking proceedings under the preventive sections of the Criminal Procedure Code (Act V of 1908,) and the Respondents were examined by him as witnesses in the course of those inquiries. At their conclusion the officer asked them whether there were any other bad characters in their village, and in reply they made the statements complained of, viz. that plaintiff was a bad character and an associate of criminals.

Held that it was the police officer's duty to ascertain the existence of any persons whom it was necessary in the public interests to require to furnish security under the Criminal Procedure Code (Act V of 1908,) and that it was equally the defendant's duty in the public interests to assist him by giving him information within their knowledge.

Held therefore that the occasion was one of qualified privilege.

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Harrison vs. Bush (25 L. J. Q. B. 29) followed.
Mathuram Dass vs. Jagganath Dass (28 Cal. 794) distinguished.
The reason for holding any occasion privileged is convenience and welfare of society.
Stuart vs. Bell (1891) 2 Q. B. 346.
As soon as the Judge rules that the occasion is privileged, then, but not till then, it becomes material to inquire into the motives of the defendant and to ask whether he honestly believed in the truth of what he stated. Odgers on Libel (5th Ed. 1911) p. 251.
It is for the defendant to prove that the occasion is privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice.
Hebditch vs. Mc Floraine (1894) 2 Q. B. p. 58.
The mere fact that that the words are proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication.
Every answer given by the defendant to any one who has an interest in the matter and, therefore, a right to ask for the information is privileged. But of course the defendant must honestly believe in the truth of the charge he makes at the time he makes it; and therefore must have some ground for the assertion. It need not be a conclusive or convincing ground; but no charge should be made recklessly or wantonly, even in confidence.
Communications imputing crime or misconduct in others must always be made in the honest desire to further the ends of justice and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion.
Held that it lay upon the defendants to prove that the occasion was privileged and that they did so, and it was then for the plaintiff to establish malice on their part and, if he succeeded, it was still open to the defendants to show that their statements were true or that they believed them to be so.

JUDGMENT.

Appellant brought a suit against the two respondents and another man for damages for slander, alleging that they falsely and maliciously stated to a police officer that plaintiff was a man of bad character and an associate of criminals. The respondents pleaded that the statements were made in answer to the Police Officer's enquiries and were therefore privileged, and that they were not made maliciously. The Court fixed two preliminary issues——(1) Whether or not a suit for damages will lie? and (2) If so, can the plaintiff jointly sue the defendants. Having answered both these issues in the affirmative, the court framed two further issues, (3) Did the plaintiff lose his reputation by the act of the defendants? and (4) If so to how much compensation is the plaintiff entitled? In the result a decree was given for plaintiff for Rs. 500 and costs against the three defendants. On appeal the District Court dismissed the suit against all the defendants. Plaintiff now appeals making only the 1st and 2nd defendants respondents. The grounds urged at the hearing were that the District Court should have resettled the issues and remanded the case to the Lower Court, as there was no issue as to malice, or as to the truth of the statements made by defendants or as to their having reasonable or probable cause for making them.

Briefly the case is as follows. A police officer was making enquiries with a view to taking proceedings under the preventive sections of the Criminal Procedure Code, and the respondents were examined by him as witnesses in the course of those enquiries. At their conclusion the officer asked them whether there were any other bad characters in their village and in reply they made the statements now complained

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of. The defendants urged that on the authority of Mathuram Dass v. Jagganath Dass[1] their statements were absolutely privileged. In that case it was held that statements made in answer to a police officer conducting an investigation into the commission of a crime under the Code of Criminal Procedure 1882 are privileged. In the present instance the investigation was not into an offence, and was not being held under chapter XIV of the Code, sec. 161 of which has since been materially amended and therefore the grounds on which the above case was decided do not strictly apply. In my opinion the occasion was not absolutely privileged but was one of qualified privilege. The principle has been thus stated by Lord Campbell C. J. in Harrison v. Bush [2] "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable," and again by Lindley L. J. in Stuart v. Bell.[3] "The reason for holding any occasion priviledged is common convenience and welfare of society."

There can be no doubt that it was the police officer's duty to ascertain the existence of any persons whom it was necessary in the public interests to require to furnish security under the Criminal Procedure Code and equally it was defendant's duty in the public interests to assist him by giving him information within their knowledge. I hold therefore that the occasion was one of qualified privilege.

As soon as the judge rules that the occasion is privileged, then, but not till then, it becomes material to inquire into the motives of the defendant and to ask whether he honestly believed in the truth of what he stated.[4]

It was laid down by Lord Esher M. R. in *Hebditch v. Mac Floraine and others* [5] that "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice." The following extracts from the work of the learned author quoted above [6] are also pertinent to the present case. 'The mere fact that the words are now proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication.' As regards answers to inquiries he writes 'Every answer given by the defendant to any one who has an interest in the matter and therefore a right to ask for the information is privileged. But, of course, the defendant must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have some ground for the assertion. It need not be a conclusive or convincing ground, but

(1) 28 Cal. 794.
(2) 25 L. J. Q. B. at p. 29.
(3) (1891) 2 Q. B. at p. 346.
(4) Odgers on Libel (5th Edn. 1911) p. 251.
(5) (1894) 2 Q. B. at p. 58.
(6) Odgers on Libel (5th Edn. 1911) p. p. 361 to 365.

no charge should ever be made recklessly and wantonly, even in confidence.

As regards communications imputing crime or misconduct in others he writes—'Such accusations must always be made in the honest desire to promote the ends of justice, and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion.'

Applying these principles to the present case, it lay upon the defendants to prove that the occasion was privileged. This they have done, and it was then for the plaintiff to establish malice on their part, and if he succeeded it was still open to the defendants to show that their statements were true or that they believed them to be so. Certain evidence given for plaintiff does indeed indicate malice on the defendants' part but as there was no issue upon the point it cannot be held that he had an opportunity of proving it. Neither had defendants an opportunity of substantiating their statements, or their grounds for making them.

Under rule 25 of order XLI I frame the following issues and refer them for trial to the court of first instance, which shall proceed to try them and return the evidence with its findings thereon and the reasons therefor.

(1) Did Mg. Po Thein or Mg. Ba Yin make the alleged slanderous statements to the police officer maliciously?

(2) Are those statements true?

(3) Had Mg. Po Thein or Mg. Ba Yin reasonable and probable grounds for making them?

FINAL JUDCMENT.

The further evidence and findings have been received and neither side appeared to be heard again. I have read the evidence and accept the findings that appellant failed to prove malice and that respondents had reasonable and probable cause for making the statements they did. The appeal is therefore dismissed with costs, advocates fees 2 gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 159 OF 1911.

PO ZAN v. MAUNG NYO BY HIS GUARDIAN LU HMAN.

Ba Thein—For Defendant (Appellant).

D. N. Palit—For Plaintiff (Respondent).

Before Sir Charles Fox, Chief Judge, and Mr. Justice Hartnoll.

November 11th, 1912.

Buddhist Law—Inheritance—grandchild of deceased, (son of the eldest daughter) claiming as against a son of deceased—Kinwunmingyi's Digest, s. 163.

A Burman Buddhist couple died leaving two heirs, a son, and a grandson, (the son of their eldest child, a daughter). The son, at the time of his father's death, was competent to assume the position of an "orasa" heir.

The grandchild claimed an equal share with the son in the property of the couple, on the ground that he was the son of the "eldest daughter," (relying on the texts collected in section 163 of the Kinwunmingyi's Digest).

Held, that these texts were not intended to be applied where there is or has been an "orasa" son.

Tun Myaing v. *Ba Tun*, 2 L. B. R., 192; *Ma Mya Thu* v. *Po Thin*, P. J. L. B., 585; *San Dwa* v. *Ma Min Tha*, 2 (Chan Toon) L. C., 207; *Ma Saw Ngwe* v. *Ma Thein Yin*, 2 (Chan Toon's) L. C., 210; *Ma Gun Bon* v. *Maung Po Kywe*, 1 (Chan Toon's) L. C., 406, (at 414); referred to.

Po Sein v. *Po Min*, 3 L. B. R., 45; followed.

HARTNOLL, J:—Maung Nyo a minor by his next friend Maung Lu Hman, who is also his father, has sued Maung Po Zan for a half share of the property of his deceased grand parents Ko Hpan and Ma Bok Hton. This he has been awarded and Maung Po San now appeals on the ground that he should only have been awarded an eighth share. The geneological tree is as follows:—

Ko Hpan. (Died in Natdaw 1268, B. E.).		Ma Bok Hton. (Died in Wazo or Tawthalin 1271, B. E.)
Ma Hnin Thet. (Died in Wagaung, 1270, B. E.)		Maung Po San, *Defendant.*
Maung Nyo, *Plaintiff.*	Maung Chit Pon, (Died as a Child).	

It will be noticed that Ma Hnin Thet died after her fathe but before her mother. She married twice but left no issue by her first husband.

Maung Nyo has been awarded a half a share on the authority of the texts quoted in section 163 of the Kinwun Mingyi's Digest of Burmese Buddhist Law Volume I, but it is argued that they do not apply as although Ma Hnin Thet was the eldest born daughter and child of Ko Hpan and Ma Bok Hton, yet she was not *orasa* child, that Maung Po San was the *orasa* child and that there can be only one *orasa* in a family. Therefore it is urged taht he is the

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favoured and privileged one and that Ma Hnin Thet can get no special treatment. The record shows that when Maung Po San gave his evidence on the 9th March, 1911 he stated that his age was 26 years, and that he used to live with his mother. When his parents therefore were alive he was an adult and in the position to assume the duties of an *orasa* son. The term *orasa* was considered in the case of Tun Myaing v. Ba Tun (1). It was there held that if the eldest son died as in this case before he attained his majority his next and younger brother succeeded in his position as *orasa* if he attained his majority and was competent. The cases of Ma Mya Thu v. Po Thin (2) and San Dwa v. Ma Min Tha (3) were quoted with approval. The ruling in the case of Ma Saw Ngwe v. Ma Thein Zin (4) that there can be only one *orasa* child in a family was also concurred in. After studying the texts I can see no reason to differ from the views expressed in the above mentioned cases. Where there are both sons and daughters in a family the son is preferred to the daughter and I have never known the reverse. The texts in section 150 of the Digest clearly show that the son is preferred to the daughter even though he is born after many daughters. The Dhammathat linga, Cittara and Kyannet make him the *orasa*; the first and last of these Dhammathats expressly state that the daughter shall have no claim to the *orasa* share on the ground that she is the eldest born. In the case of Ma Mya Thu v. Po Thin the youngest son was held to be the *orasa* although he had two elder sisters. Applying the principles above quoted to the present case I would hold that Po San was the *orasa* child of Ko Hpan and Ma Bok Hton. He attained majority and was competent to assume the duties of an *orasa* and he must be preferred to his elder sister Ma Hnin Thet even though she happened to be the eldest born. It is shown that he lived with his mother.

The question therefore arises whether Maung Nyo can claim the benefit of special treatment as the son of the eldest daughter on the authority of the texts quoted in section 163 of the Digests and I would hold in the negative. The Dhammathats in several places give special treatment both to the eldest son and to the eldest daughter, but in construing them it has been the tendency of the Courts to prefer the son to the daughter where the son has in fact been the eldest born child or has been in a position to assume the position of the *orasa* son. Where there are no sons, or no son competent to perform the duties of an *orasa* son then the eldest daughter has been given special treatment. The reasons no doubt for giving special treatment to one of the children is because on the death of the parent or parents he or she takes the place of the deceased parent or parents in the family. Similarly the reason for giving special treatment to the children of an eldest son or daughter as laid down in the case of Ma Gun Bon v. Maung Po Kywe (5) where

(1) 2 L. B. R. 292.
(2) P. J. 585.
(3) 2 L. C. 207.
(4) 2 L. C. 210.
(5) 1 L. C. 406 at 414.

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their parents die before their grandparents no doubt was on account of the superior claims of the "Auratha" heir. The reason ceases to exist where as in the present case the deceased parent never was the *orasa* and never could assume the position of such owing to the existence of another child who took the position of an *orasa* in preference to her. Looking at the texts in section 162 and 163 of the Digest it does not seem to me that they exclusively deal with the eldest born child. Several of the texts in section 162 deal with the child or children of a deceased *orasa*, and as has been shown an *orasa* need not necessarily be the eldest born son. In section 163 the text of the Kyannet expressly makes the right of the eldest sister's son dependant on the eldest brother being childless. The case of Po Sein v. Po Min (6) is distinguishable from this one. There the plaintiffs were not the sons of the eldest female child as the plaintiff is in this case. To allow in every case special treatment to the child or children of the eldest daughter if that child is the eldest born would in certain cases mean that special treatment must be allowed to two branches in one family, and this is contrary to the rule of decision adopted in interpreting the Dhammathats nor have I known of such a practice. Looking at the principle underlying the doctrine of special treatment of a child I would hold that where there has been or is an *orasa* son the texts set out in section 162 and 163 of the Digest giving the child or children of an eldest daughter special treatment do not apply.

I would therefore not allow Maung Nyo one half share of his grand parents' estate but would only allow him one quarter of his mother's share which was one half. In other words I would allow him one eighth of the estate. As regards cost I would give proportionate costs in the District Court. In the Divisional Court Maung Po Zan has appealed on a stamp of excessive value. I would give him his costs in that Court calculating them on a stamp of correct value. In this Court I would allow him his costs.

Fox, C. J.:—I concur.

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(6) 3 L. B. R. 45.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 47 B OF 1913.

1. KRISHNA PERDAN
2. NITYA NANDA
} vs. PASAND.

R. N. Burjorjee—for Applicants.

Before Mr. Justice Hartnoll, Officiating Chief Judge.

Dated the 7th April 1913.

Workmen's Breach of Contract Act, 1859—effect of dismissal for default of application under—Code of Criminal Procedure Ss. 247, 403.

An application under section 1 of the Workmen's Breach of Contract Act, 1859 was dismissed for default before any order had been passed by the Magistrate under Section 2 of the Act. Three years later the application was renewed but dismissed by the Magistrate, who held that there were no sufficient grounds for going on with a case determined so long ago.

Held that

(1) No "offence" against the Act having yet been committed there was no "acquittal" and section 403 of the Code of Criminal Procedure did not bar the re-opening of the proceedings.

(2) The delay being due to the applicant's inability to find the offender there was no ground for refusing to continue the enquiry.

King-Emperor v. Takasi Nukayya, (1901) I. L. R. 24 Mad. 660, followed, *Gurudin Teli, v. S. Mutu Servai*, 6 L. B. R., 89 ; 5 Bur. L. T. 133 referred to.

JUDGMENT.

HARTNOLL, J :—From the copy of the Magistrate's order attached to the application it appears that in the year 1909 respondent proceeded against one of the applicants under section 2 of the Workmen's Breach of Contract Act, (XIII of 1859) and that process was issued, but the case was dismissed for non-appearance of the respondent. Respondent sought to re-open the case and alleged that the delay in applying to do so was because he did not know the whereabouts of the applicants. The Magistrate held that there were no sufficient grounds for going on with a case that had been heard and determined nearly three years ago and so he discharged the applicants.

The learned Sessions Judge on application being made by respondent to him found that the order dismissing the case for default could not be regarded as one passed under section 247 of the Code of Criminal Procedure and so the Magistrate was not precluded by section 403 from taking up the case afresh, and that there was no limitation for applications in the Criminal Courts. He therefore ordered further enquiry on the merits.

Applicants now ask that this order be revised and the first two grounds are that the order passed in 1909 fell under section 247 of the Code of Criminal Procedure—that the case is a summons case and the order amounted to an acquittal. As was said in the case of King-Emperor v. Takasi Nukayya(1) the offence created by the Workmen's Breach of Contract Act is not the neglect or refusal of

(1) I. L. R. 24 Mad. 660.

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the workman to perform the contract but the failure by the workman to comply with an order made by the Magistrate that the workman repay the money advanced or perform the contract. In the present case the complainant did not appear and the complaint being dismissed the Magistrate never made any order. Consequently there was no offence under the Act and Chapter XX of the Code of Criminal Procedure and Section 403 of the same Code do not apply.

The only other ground that need be considered is that further enquiry should not be ordered as no action had been taken for nearly three years. If it is a fact the respondent could not discover the whereabouts of the applicants that explains the delay. In the case of Gurudin Teli v. Mutu Servai (2) it was held that although one object of the Act may have been to provide a speedy remedy for employers against the workmen the main object was to provide for the punishment of workmen who have taken advances and have fraudulently broken their contracts to work. I dismiss the application.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS NOS. 536, 537 and 538 of 1912.

1. SHWE HMON,
2. NGA PYON,
3. SHWE SA,

v. KING-EMPEROR.

Before Mr. Justice Parlett.

Dated the 20th August 1912.

Confession—Inducement from person in authority—Magistrate recording confession—duty of Magistrate trying a case—when confession retracted.

Accused Shwe Sa on the 23rd April made certain disclosures to the police and pointed out certain articles to them. On the 25th April he told them he took part in the crime (dacoity) and on his statement one Sin The was arrested next day. Shwe Sa continued to remain in company of the Police but unarrested and went about from place to place with the inspector for three days. Then he was formally arrested and sent to a Magistrate who took down his confession and to whom the accused candidly expressed his hope that by confessing he might secure a pardon and the magistrate acquiesced in the idea and even confirmed it.

Held that the confession was inadmissable as it was quite impossibe to hold that it did not appear to have been caused by some inducement from some person in authority.

PARLETT, J.—On the night of April 21, Maung Shwe Kin's house in Kyiwangyi was attacked by four robbers of whom he recognised two, namely, Shwe Hmon of Kyaukkyiwangyi and Nga Pyo of Kyinwainggyi. On a search being made at Nga Pyo's house he was not found, his wife saying he had gone to see Shwe Hmon at Kyaukkyi Myaung. The Thugyi sent two men there who brought back Shwe Hmon and Nga Pyo in the morning and he kept them in custody till the police arrived about 10 a.m. They were not formally arrested till the next day. They are the first and second appellants.

(2) 6 L. B. R. 89; 5 Bur. L. T. 133.

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They stated that Shwe Sa, third appellant, was in their company on the night in question and the police examined him with the result that at about 4 p. m. on the 23rd he pointed out to the police three bamboo tubes used to carry toddy at the back of Shwe Hmon's house. On April 25th Shwe Sa made a voluminous confession to Maung Ba, Inspector of Police. In consequence of this Sein Me, fourth accused, was arrested on 26th. The Inspector denies that he kept Shwe Sa under confinement, but admits having "called him with him from Kyiwangyi to Kwingauk and from that place to Ingabu." Not till 10 a. m. on April 29th did he arrest him at Ingabu and at 11-30 a. m. he was taken before the First Additional Magistrate, Ingabu, for his confession to be recorded. The Magistrate noted, that though he had nominally been in custody for only an hour and a half, yet he had been with the circle Inspector about four or or five days previous to the arrest." This circumstance ought to have led the Magistrate to take even more than the usual care to satisfy himself of the undoubtedly voluntary nature of the confession before recording it. He should have enquired why accused had spent this long time in the Inspector's company and as to all that occurred during that time. Having ascertained, as he would have done if told the truth, that accused had confessed to the Inspector the first day they met, he should have inquired why the Inspector failed to arrest him immediately thereon and send him before the Magistrate. Instead of that, the Magistrate put the usual question and received the usual answer now so stereotyped in character, that it might almost be printed in criminal form 69. He did, however, ask him. "If you confess in this case, what do you think will happen to you?", and received the answer, "I think that if the Government mercifully pardon me I shall escape; if they do not pardon me, let it be so." The space in the printed form was by then filled up and the Magistrate put no further questions, but proceeded to record the following reasons for believing that accused voluntarily wished to make a confession: "I think the accused thought that he would be leniently dealt with if he makes a confession, so he wishes to make the confession." If that was the Magistrate's view, it was clearly his duty to ascertain the grounds for the accused's belief, and if he found it was based on anything which emanated from the police or anyone else in authority, it was his duty to refuse to record the confession. If he found it was not so based, it was his duty to explain to accused that by confessing he would have no chance of obtaining lenient treatment, but that he would be liable to be convicted and severely punished upon his confession and only if he, then, still desired to confess, should he have recorded his confession His omission to do this operated as an endorsement of accused's belief that by confessing he would be leniently dealt with and thereby creates the appearance of the confession having been caused by an inducement proceeding from a person in authority and sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. The trying magistrate properly summoned and

examined the magistrate, who took the confession. But the examination was of a merely formal nature and did not touch the vital matters referred to above. Herein the trying magistrate failed in his duty, as he also did in not calling upon Inspector Maung Ba to fully explain his conduct with reference to accused Shwe Sa in not immediately arresting him and sending him before a magistrate, when he confessed to participating in the crime, but keeping him with him and taking him about the country for four or five days. The District Magistrate's attention is drawn to the matter.

It now remains to consider whether Shwe Sa's confession can be held to be voluntary and admissible. In retracting it he says he was tutored by Maung Ba to make it. As to that it must be said that Maung Ba had ample opportunity to do so, during the five days accused was in his company. The magistrate did not question Shwe Sa closely about it as he ought to have done, and then attempt to ascertain the truth or reverse of what he stated; nor did he call and examine the other persons said by Shwe Sa to have joined in tutoring him, nor as he was bound by section 342 (1) Criminal Procedure Code to do, did he examine Shwe Sa after the last two prosecution witnesses had given evidence.

To turn now to the facts it is clear that as early as April 23, Shwe Sa made certain disclosures to the police, and pointed out certain articles to them. Presumably he was in their company from that day onwards till his "arrest." It is impossible from the record to say how soon they would have been justified in arresting him. But it clearly became imperative to do so on April 25, when he told them he took part in the crime. Yet what happens? He still remains in their company, nominally at large, though the very next day San Me is arrested, against whom there is nothing but his bare statement. For three days more, he accompanies the Inspector from place to place, then he is formally "arrested" and sent to confess. Even making the difficult assumption that no hint was passed to him, what alone could have been the effect upon his mind of this course of conduct? Two men in whose company he says he was on the night of the crime were under arrest. He has shown the police certain articles to corroborate their being in company, yet he is not arrested. He tells them he himself was concerned in the crime with San Me whom the police at once arrest, but still he himself is not arrested. He accompanies the Inspector from place to place, we are asked to believe, as a voluntary companion free to come and go as he chooses, though from April 27 at least the Police Inspector himself describes him as an accused. Finally on reaching the magistrate's head-quarters he is "arrested" and sent before him. It must have been perfectly obvious to this man that he was not being treated as an accused in such a case should be, and as the other three men were being treated. It was obvious that he had already gained material advantages in reference to the proceedings denied to the other accused and that he might reasonably hope there were more to follow. To the magistrate he candidly expressed his hope that by confessing he might secure a pardon and the magistrate instead of sternly disabusing him of any such idea appeared to have acquiesced in it and even confirmed it. It

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is a further significant fact that all the evidence went to show that four men only were concerned in the crime, which would thus be robbery, in which no pardon could be granted. Maung Shwe Sa's confession for the first time indicated the presence of the fifth man necessary to constitute the crime a dacoity. I cannot understand the magistrate's attempt to get over the fact of only four men's footprints being found by saying that Shwe Sa followed them away later; unless he flew, there would still be five men's tracks.

Under all the circumstances it is quite impossible to hold that Shwe Sa's confession does not appear to have been caused by some inducement from some person in authority and I hold it to be inadmissible.

The evidence against Shwe Sa, amounts to the following: Maung Ne U saw him in company with the other two appellants at 8 o'clock on the morning of the crime. Shwe Hmon's wife, Ma Min Po said he and Nga Pyo came and called her husband away with them before she went to bed on the night of the crime. Maung Pyo's wife Ma Shwe Thin found them all three together in Shwe Hmon's house at day break the morning after the crime. This certainly raises the suspicion that the three men were in company throughout the night of the crime. But, even if we accept the evidence that he pointed out the tubes of toddy and gave information as to Ma Min Po having some money, it at most shows that he was probably cognizant of the intention to commit the crime and of the method in which the proceeds were disposed of; it falls short of proof that he personally took part in it. He is, therefore, entitled to an acquittal. The conviction and sentence on Shwe Sa are reversed and he will be released.

As regards the first and second appellants they are both well known to Maung Shwe Kin, who recognised them both at the time of the affair, and being in hiding he had ample time and opportunity to watch the robbers and as one of them had a lamp, he was able to recognise them clearly and as soon as they had gone he went and reported their names to the thugyi. Inquiry at Maung Pyo's house showed that he was absent and his wife said he had gone to see Shwe Hmon at Kyaukkyinyaung and there they were both found early next morning. Overnight the tracks of two men leading towards that village had been found and measured and it is in evidence that the measurements agree with the footprints of first and second appellant. Shwe Hmon's wife gives evidence that in the early part of the night of the crime her husband went off with Maung Pyo and returned early in the morning and handed to her Rs. 7 but did not say where he got the money from. Among the stolen property was Rs. 23 in cash.

Both appellants denied all knowledge of the crime, but suggest no motive for their being falsely charged. Shwe Hmon denies giving to his wife the money. Their defence is a curious and incredible one, namely that they were engaged that night on a paddy theft in Kyaukkyinyaung. They had entirely failed to establish it. It might be, though strange, that Nga Pyo should run the risk of attacking a fellow villager's house without disguising himself. As to that,

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however, it is in evidence that Maung Shwe Kin was on duty as watchman at the village gate that night and Nga Pyo would count on his absence and might trust to his wife being too alarmed to recognise any one. That was actually the case and had not Shwe Kin come back on hearing the dogs bark, the robbers might have got away unidentified. As it was I consider appellants were fully identified and their identification is borne out by their footprints and by evidence as to their conduct that night. I consider they were rightly convicted. As to the crime however, Maung Shwe Kin and his wife saw only four men and tracks of four only were found. There is no evidence there were more. I therefore, alter the conviction of Nga Shwe Hmon and Nga Pyo to a conviction under section 394 of the Indian Penal Code and reduce the sentence upon each of them to five years' rigorous imprisonment.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 111 OF 1911.

MA NYEIN THU v. P. S. M. L. MURUGAPPA CHETTY.

For Appellant—Palit.

For Respondent—Villa.

Before the Chief Justice and Mr. Justice Hartnoll.

Dated 17th March 1913.

Buddhist Law—Alienation by husband of letetpwa property when binding on the wife—Estoppel.

The status created by a Burmese marriage does not give the husband a power of selling the joint property of himself and his wife except under circumstances in which it can be said that he is acting as her agent. What those circumstances may be is a question of proof in each case. When the husband and wife live together and the former ostensibly with his wife's assent, manages the business of the property on behalf of both, she will doubtless be estopped from subsequently denying that he was authorized to act on her behalf.

(1891) Ma Thu *vs.* Ma Bu S. J. p. 578 followed.

JUDGMENT.

FOX, C. J. :—The question in the case was whether mortgages of property by a husband alone were effective as mortgages of his wife's share in the properties. Some of the property was alleged to be *Kanwin*, and some letetpwa or hnapazone.

The case of Ma Thu *vs.* Ma Bu (1) decided by Mr. Fulton, Judicial Commissioner is the leading case on the subject of a husband's power to alienate the joint property of himself and his wife without her consent or against her will.

The conclusions which the learned Judge came to were that the status created by a Burmese marriage does not give the husband a

(1 (1891) S. J. 578.

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power of selling the joint property of himself and his wife except under circumstances in which it can be said that he is acting as her agent. What those circumstances may be is a question of proof in each case. It cannot be disputed that in many instances the husband manages the business of the family with the assent of his wife express or implied, and where this is the case sales effected by him will bind her. The wife's consent may be implied. When the husband and wife live together and the former, ostensibly with his wife's assent, manages the business of the property on behalf of both, she will doubtless be estopped from subsequently denying that he was authorized to act on her behalf.

These conclusions apply with stronger force to mortgages by a husband.

Applying what is thus laid down to the present case it cannot be doubted that the husband's mortgages were effective as against his wife's share as well as against his own.

Even if it had been proved that some of the property was Kanwin, that property was contributed by the husband towards the joint purposes of the two, and any alienation of such property by the husband would stand on the same footing as alienation of letetpwa or ordinary joint property.

It is not disputed that the plaintiff wife had been continuously living with her husband, and that there was evidence that she was in fact present when two mortgages were signed, although she denied that she had signed the deeds as a witness. It was fully proved that the husband had been managing the property and the business carried on by both.

The husband said she knew he was borrowing money, but he did not tell her the details. One property he bought with borrowed money for which he gave security by mortgaging the property on the same day as he bought it.

Finally the wife never raised any objection to the mortgages until her husband was adjudicated insolvent.

According to the law as laid down in the case above referred to the District Court's decree dismissing the wife's suit was clearly right.

The appeal is dismissed with costs.

HARTNOLI, J.:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 76 OF 1911.

MA NYUN YE v. MG. THET TUN AND PE ON.

Before the Chief Judge and Mr. Justice Hartnoll.

For Appellant—Giles.

For 1st and 2nd Respondents—Burjorjee.

Dated, 13th January 1913.

Buddhist Law—Pre-emption—prompt assertion essential in order to be entitled to the right.

Where a suit was filed to claim the right of pre-emption five years after the sale of the property in question, *Held* that under Buddhist Law the right must be asserted promptly and that it would be inequitable to allow the claim after such a period. The law makes no allowance for the fact that the claimant did not know of the sale at or about the time it took place.

Nga Myaing *vs.* Mi Baw S. J. L. B. 39 (followed).

Mo Thi *vs.* Tha Kwe 4 L. B. R. 128 (referred to).

JUDGMENT.

HARTNOLL, J.:—This is a suit to enforce a right of pre-emption in respect of certain lands. The basis of the suit is a transaction between Ma Mi, the mother of the plaintiffs Mg. Thet Tun and Mg. Pe, and Ma Gyi which took place on the 17th March 1900. The plaint allows that this transaction was a sale, and it is in consequence of it that the right of pre-emption is claimed. The District Court dismissed the suit on the ground that there was no right of pre-emption as the plaintiffs had not asserted their right promptly. The Divisional Court held that as Ma Gyi had not specifically pleaded and urged that there was no prompt assertion of the right no order of dismissal should have been based on it. On the hearing of the appeal in this court the whole question of the right of pre-emption according to Buddhist Law was raised and amongst other matters it was urged that this court had gone too far in the case of Mo Thi *vs.* Tha Kwe (1). It seems to me that it is unnecessary to discuss these matters in order to decide the present suit, as I considered that the District Court rightly dismissed the suit on the ground that the right had not been asserted promptly. In the case of Nga Myaing *vs.* Mi Baw (2) it was held that the right must be asserted promptly and the text of the *Manu Kye* on which the ruling was based is quoted in it. In the present case the sale was on the 17th March 1900 and the present suit was not brought until the 24th March 1905. The text in the *Manu Kye* does not say that the right must be asserted promptly after the claimant becomes aware of the sale. It is merely to the effect that it must be asserted promptly. It throws the burden on the claimant to assert his right promptly and does not make any allowance for him in case he does not know of the sale at or about the time it took place. If he did not know, he should have known.

(1) 4 L. B. R. 128. (2) S. J. L. B. 39.

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And this seems fair as it seems most inequitable that such a right should be asserted after a long delay. In the present case Ma Gyi bought the lands for Rs. 1,000. They are valued in the plaint at Rs. 4,000. It would be most inequitable to force her to part with the lands five years after her purchase for Rs. 1,000 if they are now worth so much more. The fact that it has been found that the suit is not barred by limitation according to the provisions of the Indian Limitation Act does not seem to me to affect the matter. In this case the question involved in deciding the bar of limitation was of a very technical nature; but in any case even assuming that the suit is not barred by limitation it is for the claimant to show that in law he has the right, and one of the conditions is prompt assertion of it. In my opinion it was within the power of the District Judge to consider this condition. Para. 8 of the plaint says that the plaintiffs were unaware of the sale and did not become aware of it until after judgment was passed in the other suit. According to the District Judge this judgment was given on the 30th March 1904 and it has not been said that this date is wrong. Then again this suit was not brought until near the expiration of another year. In the face of para. 8 of the plaint it was not necessary to frame an issue as to whether there was prompt assertion of the right and the fourth issue "To what relief if any are plaintiffs entitled" is sufficient to allow of the court considering whether all the conditions of the right have been fulfilled by the claimants to exercise it. Ma Gyi in para. 3 of her written statement a different para to that in which she alleged that the suit was barred by limitation asserted that she had been in possession of the lands since March 1900, and so she made a point of the period that she had been in enjoyment of the lands. In my opinion it would be wrong in face of the facts not to consider all of them in deciding whether in law the claimants are entitled to exercise their rights the more especially when the law relates to such a right as that of the Buddhist Law as to a right of pre-emption. I would therefore allow this appeal, reverse the decree of the Divisional Court and dismiss the suit with costs to appellant in all courts, the costs to be paid by Mg. Thet Tun and Mg. Pe.

Fox, C. J.:—I agree in thinking that this appeal should be allowed, and that the decree of the Divisional Court should be reversed, and that of the District restored, the plaintiffs being ordered to pay the appellants costs in the Divisional Court and in this court. Even if the right of a Burmese to pre-emption of ancestral or family land involves a question of succession or inheritance within section 13 of the Burma Laws Act 1898, it is clearly an essential part of the Burmese Buddhist Law that the right must be asserted promptly after the sale of the land or share in the land has taken place.

It appears to me that it would be inconsistent with the Burmese Buddhist Law and also inequitable to enforce such a right when steps to enforce it are first taken five years after the sale in a case such as this when all the members of the family must have known of it at or about the time it took place.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 186 OF 1912.

MAUNG NYEIN & 5 OTHERS v. MA SEIN.

For Appellant—MAUNG THIN.
For Respondent—LAMBERT.

Dated, 10th March 1913.

Buddhist Law—Inheritance—step-daughter and next of Kin.

Respondent was the daughter of U Pwe and Ma Gwet who were divorced and started new houses. Respondent lived with the mother and was held not to have resumed filial relations with her father who predeceased his wife Ma Hnin Tha whom he had married after the divorce. There was no child by the second marriage and respondent claimed the estate after Ma Hnin Tha's death excluding the nephews and nieces of the deceased who were the appellants.

Held that the respondent having failed to resume filial relations on U Pwe's death Ma Hnin Tha was his heir and inherited his property to the final exclusion of the respondent and that on Ma Hnin Tha's death her estate devolved on her heirs—the appellants.

1. MA YI *vs.* MA GALE 6 L. B. R. p. 167 ; 6 Bur. L. T. 75 followed.
2. MI NYO *vs.* MI NYEIN U.B.R. (1904-06) Bud-Law. Inheritance p. 151 } Distinguished
3. SEIN HLA *vs.* SEIN HNAN 2 L. B. R. 54. }

JUDGMENT.

HARTNOLL, J. :—The respondent Ma Sein is the daughter of U Pwe and Ma Gwet both deceased. U Pwe and Ma Gwet divorced when Ma Sein was an infant. Ma Sein is now some fifty years old. After the divorce U Pwe married Ma Hnin Tha, and Ma Gwet married one Maung Shwe Thet. U Pwe died in 1272 B. E. and Ma Hnin Tha in 1273 B. E. The appellants are the nephews, nieces and grand-nephew of Ma Hnin Tha. After U Pwe's death Ma Hnin Tha made a deed of gift of the bulk of her and U Pwe's property to the appellants. Ma Sein brings the suit to obtain a declaration that she is the sole heir of Ma Hnin Tha and for an order that appellants hand over to her all the property left by Ma Hnin Tha. The appellants contest the claim by saying that Ma Sein never lived with U Pwe after the divorce from her mother and never resumed filial relations with him and so she is not entitled to inherit. They also rely on the deed of gift.

The learned District Judge held that there had been a resumption of filial relationship between U Pwe and Ma Sein, and that the deed of gift was null and void. He therefore granted her prayer. The learned Divisional Judge held that there had not been a resumption of filial relationship between U Pwe and Ma Sein, that nevertheless Ma Sein was entitled to all U Pwe's separate estate and half the jointly acquired estate during his coverture with Ma Hnin Tha. Holding the deed of gift to be null and void, he gave a decree accordingly. The first point for decision is whether filial relations were ever resumed between U Pwe and Ma Sein, for it is admitted that after the divorce Ma Sein lived with her mother. I can see no reason for

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differing from the conclusion arrived at by the learned Divisional Judge. The burden of proof lay on Ma Sein to show that filial relations were such between her and U Pwe and Ma Hnin Tha that there is no doubt that they received her as their heir and intended her to be so. U Pwe certainly did give her a house to live in, some 10 years before his death and she and her husband have no doubt worked some of his lands; but that seems to be all that is definitely proved, and that is not enough to prove that there was a resumption of filial relationship such as she claims. The witnesses do not know in what capacity she worked the lands. Some of them are her relatives and that lessens the value of their testimony. Ma Hnin Tha in executing the deed she did shows that she did not want her to inherit. I therefore agree with the Divisional Judge's conclusion.

The next point for determination is whether considering that filial relations between her, U Pwe and Ma Hnin Tha are not proved to have been resumed she is entitled to inherit. The latest decision in an analogous case is that of Ma Yi v. Ma Gale, (1) but it is urged that the circumstances in this case are different to those in that one and the other cases quoted in it. It is said that they more resemble those in the case of Mi Nyo v. Mi Nyein (2). Here there is no widow of a second marriage as she is dead. There are also no children of the second marriage but only collaterals of the deceased's second wife. The case of Sein Hla v. Sein Hnan (3) is relied on. Now the texts relied on in the case of Mi Nyo v. Mi Nyein Tha do not seem to me to apply to the present case. They refer to a husband who has divorced his wife and who remains alone—that is does not marry again, and does not start a second home. Here U Pwe married Ma Hnin Tha and started a new home. As I have held that Ma Sein never resumed filial relations in that home she cannot be considered to form a member of it and consequently on U Pwe's death Ma Hnin Tha was his heir and inherited his property to the final exclusion of Ma Sein. On her death therefore her estate would devolve on her heirs the appellants. The case of Sein Hla v. Sein Hnan is not applicable as in that case the illegitimate son lived with his father and his father's wife and formed one of the household. It is unnecessary to express an opinion as to what the position would have been if U Pwe had not married again or if Ma Hnin Tha had predeceased him. I would hold in the circumstances that Ma Sein has shown no right to inherit the property she claims. On this finding there is no need to discuss the validity of the deed executed by Ma Hnin Tha.

I would allow this appeal and dismiss the suit and give appellants their costs in all courts.

Fox, C. J.:—I concur.

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(1) 6 L. B. R. 167; 6 Bur. L. T. 75.
(2) U. B. R. (1904-06) Bud-Law. Inheritance 15.
(3) 2 L. B. R. 54.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 32 OF 1911.

MRS. PANDROFF vs. { 1. MAUNG PO THA. 2. MAUNG KYAW.

Before Mr. Justice Parlett.

For Appellant—Jordon.

For Respondent—Palit.

Dated, 24th April 1912.

Buddhist-Law—one of the parents inheriting property during marriage—Inheritance—Life interest.

During the marriage Ma Shwe Gon inherited certain property. She died leaving Maung Lu Gale, the husband with three children by herself and one by a former wife. Maung Lu Gale after her death mortgaged the property and the mortgagee filed a suit on the said mortgage against the estate of Maung Lu Gale. The children by Ma Shwe Gon contested the suit.

Held that the property inherited by Ma Shwe Gon became her separate property. On her death Maung Lu Gale acquired merely a life interest in it with power to sell it in case of necessity. Any of it not sold under such necessity passed to Ma Shwe Gon's children. Held also that necessity was even disproved by the fact that nearly half the sum taken was lent out to a third party.

MA MYO & 5 *vs.* MA YAUK IV L. B. R. 256 (explained).

MA GALE *vs.* MAUNG BYA IV L. B. R. 189 (approved).

JUDGMENT.

PARLETT J.:—Maung Lu Gale had three wives; by the 1st he had a daughter Ma Nu, 1st defendant, by the 2nd Ma Shwe Gon whom he married after his first wife's death, he had three children, Maung Nyun, Mo Po Tha and Maung Kyaw, 2nd, 3rd and 4th defendants. During their marriage Ma Shwe Gon inherited the immoveable property in suit. After her death Maung Lu Gale mortgaged it for Rs. 550 at 1 per cent. per mensem interest. Plaintiff sued for a mortgage decree asking for (1) a money decree against Maung Lu Gale's estate (2) Interest up to date of realization, (3) sale of the mortgaged property and (4) in the event of it not realizing the decretal amount, for sale of any estate property in the hands of Maung Lu Gale's heirs. The 1st and 2nd defendants admitted the plaintiff's claim. The 3rd and 4th defendants pleaded that as the property was mortgaged without their knowledge and consent, the mortgage was not valid as regards one half of the property. The Sub-Divisional Court held that Maung Lu Gale had a life interest in the property with power to alienate it in case of necessity, and that such necessity existed, and that therefore the mortgage was valid as regards the whole of the property. It granted a mortgage decree with costs against all four defendants as legal representatives of Maung Lu Gale, and declared that they were not personally liable for any deficiency resulting from the sale of the mortgaged property.

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Mrs. Pandroff v. Maung Po Thaw and Maung Kyaw.

The 3rd and 4th defendants alone appealed on the grounds (1) that property inherited during marriage becomes the separate property of the parent who inherits it, (2) that on the death of that parent and the remarriage of the other, the children acquire an interest in the deceased parent's property and the surviving parent has no right to dispose of it, even for necessity (3) that the surviving parent cannot mortgage the whole of the hnapazon property; and prayed that the decree be set aside as regards their one half share of the property. The Divisional Court held that the property was the separate property of Ma Shwe Gon, that no necessity for the mortgage was proved, and that it was invalid as regards the two appellants' shares, and though that share was in its opinion, less than one half, yet as its extent had not been questioned by plaintiff, the decree was modified by excluding half the property from liability to sale.

Plaintiff now appeals on grounds which may be summarized as follows:—(1) That necessity for the mortgage was shewn, (2) that the property was joint and the mortgage valid against the whole of it (3) that because the 1st and 2nd defendants did not contest the suit, 3rd and 4th defendants did not thereby become entitled one half the property, and (4) that she should not have had to pay costs in first appeal. As to the first point, there can be no doubt that necessity for the loan was not proved: indeed it may be even said to have been disproved by the fact that nearly half the large sum taken was lent out to a third party.

As to the 2nd and 3rd points, reliance was placed on Ma Nyo and 5 v. Ma Yauk (1) which it was argued was authority for holding that one half the property in suit was Maung Lu Gale's own during Ma Shwe Gon's life time, and that on her death he succeeded to a further one fourth. In my opinion the ruling quoted has been misunderstood: it is quite clear that the interest of the widow of a Burman Buddhist in property inherited by him during their marriage, when the children of the marriage also survive, is the same as her interest in her deceased husband's share of the property jointly owned by him and her: that is to say the property descends (in toto) to the children, but she has a life interest in it, with the right to sell it in case of neccessity. It is quite clear that such inherited property is separate property of the inheriting parent, and does not become the joint property of the two parents, during whose marriage it was inherited. In the present case therefore the property was the separate property of Ma Shwe Gon who inherited it. On her death Maung Lu Gale acquired merely a life interest in it, with power to sell it in case of necessity. Any of it not sold under such necessity passed to Ma Shwe Gon's children. The case of Maung Gale v. Maung Bya (2) is further authority for this view. In that case the parent who inherited the property during the second marriage was also one of the spouses in the first marriage, and the children of both marriages were held entitled to share in the property inherited by their common parent. In the present instance however Ma Shwe Gon who inherited the property during the second marriage,

(1) IV L. B. R. 256.
(2) IV L. B. R. 189.

was not a spouse in the first marriage, and therefore Maung Lu Gale's child by his first wife, Ma Nu succeeded to no share of Ma Shwe Gon's property, the whole of which would go to her three children, 2nd, 3rd and 4th defendants. The share of the 3rd and 4th defendants would therefore be ⅔rds. Hence if the Divisional Court erred it was in excluding too little rather than too much of the property from liability to sale.

As regards costs in the Divisional Court, the appellants there succeeded and their decree is being upheld; they were therefore entitled to their costs.

The Sub Divisional Court clearly intended to make the defendants liable under the money decree against them only to the extent of the value of Maung Lu Gale's estate which might have come into their hands, and this the decree should state. With this modification the decree of the Divisional Court is confirmed. Appellant will pay respondents' costs, advocate's fee 2 gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 157 OF 1911.

MAUNG TUN THA *v.* LEONG CHYE.

Before the Chief Judge and Mr. Justice Hartnoll.

For Appellant—Halkar.
For Respondent—Ginwala.

Dated, 9th December 1912.

Transfer of Property Act Sec. 53—Fraudulent Sale.

Where the debtors handed over property worth over Rs. 6,000 for Rs. 3,000, the amount due to the creditor was Rs. 5,000 and the creditor admittedly allowed the debtors to remain in possession of a portion of the property and did not give any satisfactory proof that he had obtained possession of any of it, *Held* that these facts afforded sufficient grounds for the Lower Court's conclusion that the sale of the property was not a *bona fide* one.

(1845) Wood *v.* Dixie 7 Q. B., 892
(1907) Hakim Lal *v.* Mooshahar Sahu 34 Cal. 999. } Referred to
(1910) Maung San *v.* Sit Twan 5 L. B. R., 195.

JUDGMENT.

FOX C. J.:—This is an appeal under section 100 of the Civil Procedure Code, and the only questions which appear to me to be open to the appellant to put forward are whether the Divisional Judge's inferences from the facts were justified, and whether he correctly applied the law applicable to the case. Maung Pan E and his wife had been in debt to Maung Tun Tha for a long period. In August 1910 Leong Chye obtained a decree against them for Rs. 1,700 the amount due on an instalment of a bond for Rs. 20,000 payable by instalments. In October 1910 Maung

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Pan E and his wife executed a deed of sale of all their immoveable property and their standing crops in favour of Maung Tun Tha and his wife for Rs. 3,000 to be taken in part satisfaction of the debt due to him, the principal of which then amounted to Rs. 5,000. The value of the property sold was, in the words of the Divisional Judge, substantially more than Rs. 6,000 but not as much as Rs. 6,700 as found by the District Judge. Maung Pan E and his wife continued to live in a house worth about Rs. 300 where they had previously lived, and which was one of the properties included in the sale deed. There was no satisfactory evidence that Maung Tun Tha ever obtained possession of any of the paddy lands included in the sale deed. No report of the transfer of the land was made until the 2nd December, which was after Leong Chye had attached the land in execution of his decree, and Maung Tun Tha had applied for removal of attachment. Maung Tun Tha admittedly knew when he took the deed of transfer that Leong Chye had obtained a decree against Maung Pan E.

The Divisional Judge regarded the fact that the property was worth much more than Rs. 3,000 as the most important fact in the case. He considered that in fact it was worth more than enough to satisfy the whole debt to Maung Tun Tha and to leave a substantial surplus, and although MaungTun Tha may have put some pressure on his debtors, he thought that if the sale had been a perfectly *bona fide* one it was most unlikely that the debtors would have let Maung Tun Tha take the whole of their property for less than half its value, and still leave themselves heavily in debt to him. He concluded that the intention of all parties to the deed of sale was not merely to protect Maung Tun Tha's rights but also to defeat Leong Chye's claim, and in view of the ruling in Maung San *vs.* Sit Twan (1) he held the sale deed invalid as against Leong Chye. That ruling is founded on Hakim Lal *vs.* Mooshahar Sahu (2) in which the plaintiffs who had obtained a decree against a debtor, sought to have a conveyance by him to other creditors set aside on the ground that it was fraudulent and collusive and without any consideration. The meaning and effect of section 53 of the Transfer of Property Act was much discussed in the case: it was recognised that first part of the section, so far as it applied to transfers intended to defeat creditors, applied only to transfers intended to defeat or delay a debtor's creditors generally. The law in regard to a transfer intended to defeat one creditor only was also discussed, and although some observations in the judgment appear to have been intended to qualify the law as laid down in Wood *v.* Dixie (3) the learned Judges did not dissent from that law. In that case it was ruled that if a conveyance is made *bona fide* (*i. e,*) if it is not a mere cloak for retaining some benefit to the grantor and with a full intention that the property should be parted with, it will not be fraudulent, if made with intent to defeat a pending or an intended execution. So far as the Divisional Judge

(1) (1910) 5 L. B. R. 195.
(2) (1907) I. L. R. 34 Cal: 999.
(3) (1845) 7 Q. B. 892.

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based his decision that the sale deed to Maung Tun Tha was invalid on the ground that it was the intent of all parties to the deed to defeat Leong Chye's claim, I think that in view of the law being that intent to defeat a particular creditor in the case of a *bona fide* sale for value does not *per se* as a matter of law render the conveyance fraudulent, the decision cannot be supported.

But the questions whether the effect of the deed of sale was to defeat or delay Pan E's and his wife's creditors generally, and whether it was a *bona fide* transfer arose in the case. The effect of debtors handing over all their property to one creditor must almost necessarily be to defeat or delay their other creditors; but as pointed out in Hakim Lal *v.* Mooshahar Sahu (2) a preferential transfer of property to one creditor cannot be declared fraudulent as to the other creditors (except under the law of bankruptcy) although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention, provided the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt. In the present case the debtors handed over property worth over Rs. 6,000 for Rs. 3,000; the amount due to the creditor was Rs. 5,000; the creditor admittedly allowed the debtors to remain in possession of a portion of the property, and did not give any satisfactory proof that he had obtained possession of any of it. These facts appear to me to afford sufficient ground for the Divisional Judge's conclusion that the sale of the property was not a *bona fide* once.

I would therefore dismiss the appeal with costs.

HARTNOLL J.:—I concur.

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BURMA LAW TIMES.

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IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 233 OF 1911.

MI NAFIZUNISSA *alias* MA ENDA ... DEFENDANT—APPELLANT.

vs.

BODI RAHIMAN ... ... PLAINTIFF—RESPONDENT.

For Appellant—A. B. Banerji.

For Respondent—Bonnerji.

Before Mr. Justice Parlett.

Dated, 3rd April 1913.

Mahomedan Law—Restitution of conjugal rights—Breach of conditions of a contract entered into by parties at time of marriage—Ill-treatment—Delegation of power of talak—Is there any limitation of time for exercising it ?

Where a Mahomedan husband contracted with his wife at the time of his marriage not to abuse or assault her and also contracted to stay with her in her parents' house for 3 years after the marriage giving her an option of divorce on breach of any of these conditions.

Held that as the girl was only 15 at the time of marriage and at the end of 3 years she might still be under 18 and a minor the condition of three years' residence at her parents house was valid and recognizable by Law.

Afazulla Chowdhry v. *Sakina Bi I. L. B. R.* 351 referred to.

Held also the condition not to assault her was a reasonable one and its repeated breach entitled her to avail herself of the power to divorce created by the contract.

Held further that the option to divorce her husband need not be exercised at once or within a specified time and does not lapse because of her putting up with the husband's ill-treatment for some time.

JUDGMENT.

PARLETT, J. :—The parties are Mahomedans and respondent sued appellant for restitution of conjugal rights. His suit was dismissed by the Township Court but decreed by the District Court.

It appears that they were married on 22nd June 1909 a written contract being drawn up at that time providing, *inter alia*, that plaintiff should not use any indecent, reproachful or abusive language to appellant, should not assault or pain her in other ways;

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and should live with her at her father's house for three years and afterwards at a place of her choice, and continuing. " If I violate anyone of the aforesaid terms, then she will have full power to leave me for ever, to give three *talaks* (irrevocable divorce) to herself and to take a second husband; I delegate my authority of divorce to her; at that time or afterwards whenever she will take another husband, I shall have no claim upon her." The plaint sets out that he lived in the appellant's parents' house till May 1910, when a separate house was built in which they lived until about the middle of October 1910, when appellant left and returned to her mother and declined to come back to plaintiff. It appears that appellant's father is dead, but that her mother built the second house in the same compound as her own house. The written statement sets out that in the middle of October 1910, plaintiff beat the appellant and left the house, and that she availed herself of the authority delegated to her in the marriage contract and pronounced three *talaks* to herself by reason of the conditions having been broken among other ways, by plaintiff having abused and severely beaten and ill-treated her on several occasions and by his failure to live for three years in her parent's house. The Township Court held that ill-treatment was proved, and also breach of the condition as to residence, and that appellant was justified in exercising the power of divorcing herself delegated to her by the contract entered into and that the marriage was therefore dissolved; the suit was accordingly dismissed.

The main grounds of first appeal were that the condition as to residence was unreasonable and void; that the ill-treatment was not proved; and that the divorce, if any was invalid. The District Court held that the condition as to residence was opposed to public policy and void, that the ill-treatment, if any, was trivial; and that as the power of divorce was not exercised immediately upon its being delegated, the delegation became of no effect, and there was no valid divorce. On the first point the District Court was influenced by the ruling in *Tekait Monmohini Jemadai* v. *Basanta Kumar Singh* (1) which refers only to Hindu Law. In the judgment in that case the learned Judges emphasize the fundamental difference between marriages under Mahomedan and under Hindu Law; for whereas under the former it is entirely a contract; under the latter though a contract it is also a sacrament, it is more religious than secular in character. Sir R. K. Wilson in his digest of Anglo-Mahomedan Law (2) points this out and remarks that the above ruling is of little assistance in cases under Mahomedan Law. The note that learned author gives, in para. 56 of the above-mentioned work, is that a condition that the wife shall, though adult, be at liberty to live in the house of the parents is void; and therefore it certainly does not cover a case like the present where the wife at the time of the marriage was

(1) XXXIII Cal. 751.
(2) 4th Edn. p. 140.

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under 15 years of age. The case of *Afazulla Chowdry* v. *Sakina Bi* (3) is however directly in point, and though quoted to the District Judge and binding upon him he does not appear to have considered it. That case expressly lays down that a written agreement such as that now in question is valid under Mahomedan Law, the condition was to remain in force for only three years, when the wife might still be under 18 years of age and a minor. It is however unnecessary to consider whether the plaintiff broke this condition as the appellant's case is that a course of ill-treatment culminated in a severe assault upon her, after which she returned to her mother's house, and that it was this treatment which led her to exercise her power of pronouncing divorce.

The District Judge considered the evidence of ill-treatment exaggerated, which I think it is, though not so much so as he believed, nor do I agree with him in doubting its occurrence altogether. Plaintiff himself clearly lied, in that both in his plaint and in his evidence he stated he had built the house they lived in whereas he had subsequently to admit that his mother-in-law built it. But as regards the other witnesses I am unable to see that they are shewn to have perjured themselves. His witnesses speak to having visited him from time to time up to a short period before they separated and finding them apparently on good terms: this may be so, but it does not disprove that on several occasions he assaulted her, as the defence evidence goes to show he did. Though some of that evidence may be exaggerated, that of Jumigrudin Moulvi, a school master and relative of plaintiff, is not so and may be safely accepted. He says that the girl's mother 3 or 4 times told him that plaintiff had assaulted her: a month before the final scene he was sent for as he had assaulted her and found her weeping and plaintiff admitted having struck her. On the last occasion her mother came to call him again and on his way to the house plaintiff himself met him and told him that he had struck his wife and his mother-in-law was in consequence calling a meeting of elders at the house. It appears that several people assembled there and though plaintiff then denied the assault appellant repeated that it had been committed and that he had often ill-treated her before and did not carry out the terms of the marriage contract, and she therefore gave herself the triple *talak*, whereupon plaintiff used some filthy abuse. I have no doubt that he did repeatedly assault her, and though not so severely as she tries to make out, it must be remembered that at the time of the last assault she was barely 16, and he a man of 25. No doubt she at last could put up with it no longer and on the next occasion determined to avail herself of the authority given her in the contract, and when it arose she sent her mother off at once to call the Moulvi and other persons to witness the formality. Plaintiff seems to have been alarmed and also gone for the Moulvi, perhaps hoping he would smooth matters over as he had done on previous occasions. I consider the condition not to assault her

(3) 1. L. B. R. 351.

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was a reasonable one and its repeated breach entitled her to divorce herself as she did (see *Hamiddolla* v. *Faizan Nissa* (4).

The District Judge however considered that the power must be exercised as soon as conferred, without waiting for any breach of conditions, and therefore the delegation of power became of no effect. He does not quote anything for this. The text books refer to an option being given to the wife which she must exercise if at all, at once, or within a specified time, but they also show that the option may be made exercisable only on the happening of a certain event. This is referred to in the case of *Badarunissa Bibi* v. *Mafiattula* (5) where the following quotation from Baillie Chapter II, page 218 is given. "Repudiation is said to be suspended or attached to a condition when it is combined with a condition and made contingent on its occurrence." And again in *Meer Ashruf Ali and 1* v. *Meer Ashad Ali* (6). "A is said" a discretion to repudiate when attached to a condition need not be limited to any particular period but may be absolute as regards time." For the appellant reliance is placed on *Ayatunina Bibi* v. *Karam Ali* (7) where it was held that "When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power." I cannot agree that the assaults were in the same sense a continuing injury, though they were a cumulative one. No doubt she put up with them for a time till she saw there was no hope of improvement, and on the next repetition of his ill-treatment she exercised her power at once. I am of opinion that the divorce she then pronounced was a valid one.

I reverse the decree of the District Court and restore that of the Township Court dismissing the suit, with costs in all courts. Advocates fees in this court 2 gold mohurs.

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(4) 8 Cal. 327.
(5) 7 Ben. L. R. 442.
(6) 16 W. R. 260.
(7) 36 Cal. 23, (1908).

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 357 OF 1913.*

KING-EMPEROR vs. STELLA.

For Appellant—Maung Kin.
For Respondent—Lambert.

Before Mr. Justice Parlett.

Dated, 12th June 1913.

Excise Act—section 48 (c) Importing cocaine—Inference from facts—Presumptions—Intention.

A registered postal parcel containing cocaine addressed to accused's daughter of 10 years at a place where accused was not living was received by appointment by the accused from the postman in charge and remained unopened for about 10 minutes when the Excise Officers entered and arrested her for importing cocaine. Accused pleaded that she had ordered some toys for her girl; that she took delivery of the parcel thinking it to be the expected one containing toys; that she had asked the parcel to be addressed at her friends' house as she contemplated moving from her own house and that she hesitated to open the parcel as she could not identify the sender's name as being that of the person whom she had ordered the toys from, but offered no proof of any these facts which were peculiarly within her sole knowledge.

Held that, in the absence of evidence that she was at the time expecting a parcel addressed identically with that seized but with different contents, the inference is that the parcel seized was the one expected and its contents what she ordered.

JUDGMENT.

PARLETT, J:—The main facts in this case are clear and undisputed. On the 19th February 1913 a registered parcel arrived from Calcutta addressed to Elsie, at No. 9, 36th Street, Rangoon. The postal authorities opened it and found it to contain cocaine, so they closed it up again and communicated with the Excise Department. On the 21st February accused, who lives at No. 20, Maung Khine Street, came with her daughter, Elsie, a girl of 10, to the Post Office and enquired if a parcel had arrived for them. The postmen being out on their rounds they were told to come again at 2 p. m. instead of doing so accused got a Mrs. McKay, who lives at No. 9, 36th Street, to write a letter for her asking for the parcel to be delivered to her servant. This was not done as there was no parcel addressed to accused herself. That evening the parcel was sent to No. 9, 36th Street, but as the addressee, Elsie, was not there delivery was not made, but the postman arranged to come again at 10 a. m. the following day and asked accused to have her daughter Elsie there at the time. This was done and the parcel was delivered. The Excise Officers, who were below, waited some ten minutes and then entered the house and found the parcel still unopened on Elsie's lap. Accused said it was a parcel of toys. The Excise Officers told her to open it and she did so, disclosing

* Appeal against the order of the 2nd Additional Magistrate Rangoon, dated the 28th February 1913 passed in summary trial No. 176 of 1913 acquitting the present respondent and her daughter Elsie of an offence under Section 47 *(d)* Excise Act.

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King-Emperor v. Stella.

32 bottles of cocaine, a comb, a handkerchief, a skin of wool, and a mouth organ. Accused and her daughter were arrested and prosecuted for importing cocaine and acquitted. This is an appeal against the acquittal of the mother only. Her case is that as she contemplated moving house she told Mrs. McKay that she was having a parcel of toys for her child, for which she had written, sent to Mrs. McKay's address. Her counsel states that she received intimation that it had been so sent. It was this expected parcel of toys regarding which she enquired personally and by letter on the 21st February, but when delivery was taken on the 22nd it was found that the sender's name as written on the parcel was unknown to her, and they were considering whether to return the parcel or not when the Excise Officers entered.

The ordering of the toys, the reason of having a parcel addressed elsewhere then to her own house, her receipt of intimation of its despatch and the identity of the person whom she expected to send it, were facts peculiarly within her sole knowledge, and the burden of proving them lay on her, but she offered no proof whatever of any of them. In the absence of all evidence that she was at the time expecting a parcel addressed identically with that seized but with different contents, or of the existence of any such parcel, the inference is that the parcel seized was the one expected and its contents what she ordered.

Stress was laid on the absence of any concealment in the conduct of the accused. I cannot see how else she could have acted to get delivery of the parcel. Open dealing was the safest way to avoid suspicion. It is also urged that the fact that the parcel was left unopened support's accused's story. As to this, if a parcel arrived addressed exactly as the expected parcel of toys would be it is incredible that a minute examination of the cover should be made before opening it and then a lengthy discussion entered into whether to return it or not. The natural course would be to satisfy her child's curiosity by opening it at once. But even if the sender's name was noticed to be strange and if, despite the correctness of the address, she thought the parcel was not hers, she would have been in time to call back the postman before he got downstairs and either to return the parcel or open it to verify the contents. On the other hand it is unlikely that a parcel of cocaine would be opened till she got safely back to her own house. In these circumstances the accused must be presumed, unless and until she proves the contrary, to have known that the contents of the parcel were what they were. I accordingly reverse the order of acquittal and find Stella, daughter of Boneng guilty of importing cocaine, an offence punishable under Section 48 (*e*) of the Excise Act and sentence her to three months' rigorous imprisonment.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 13 OF 1912.

MA SHWE HPE vs. MAUNG SEIN & ONE.

For Appellant—Maung Thein.

For Respondent—Dantra.

Before Mr. Justice Twomey.

Dated, 13th June 1913.

Mortgage or Sale—Burden of proof where originally there was a mortgage and subsequently a sale—Burden on plaintiff to prove that there was a mortgage at the beginning—Effect of admission—S. 58 of the Evidence Act.

Where the transactions between the parties admittedly began by a simple mortgage and there was subsequently a transfer of possession to the mortgage it lies upon him to prove his right to resist redemption. If he alleges an outright sale, he must prove it.

Before the Transfer of Property Act was extended to the whole of Lower Burma, the burden of proving the initial mortgage lay upon the plaintiff who sought to redeem it. Proof of it was dispensed with under S. 58 of the Evidence Act where it was admitted.

Quere:—Would the admission of an unregistered mortgage after January 1905 cure the defect of want of registration ?

JUDGMENT.

TWOMEY, J:—In paragraph 2 of the plaint the first transaction between the parties is described. It was a simple mortgage for Rs. 300 carrying interest at Rs. 3 per cent. per mensem, the land remaining with the mortgagor. The time of the transaction is given as about Tabaung 1264 B. E. (March 1903) but the plaintiff was unable to give the exact date. The document executed at the time was apparently not in her possession.

In the written statement of the defendants the only objection taken to paragraph 2 of the plaint is as to the date of the mortgage. The defendants say that the date was 3rd Waning of Thadingyut 1264 that is, several months earlier than the time mentioned in paragraph 2 of the plaint. But it is clear that the defendants did not dispute the fact that their first transaction with the plaintiff regarding the land in suit was a mortgage. Neither party produced the document relating to that first transaction. The defendants produced two later documents one, Exhibit I, a document of mortgage executed in Nayon 1266 (May 1904) in which the principal and interest of the old mortgage debt as it then stood are added together and treated as principal, and the other, Exhibit II, a conveyance executed in Tabaung 1267 (March 1906) by which the plaintiff-appellant Ma Shwe Pi purported to make over the lands outright to the defendants as she was unable to pay the mortgage debt. Both these documents are unregistered and are therefore inadmissible in evidence for the purpose of affecting the lands comprised in them (Section 49, Registration Act.)

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The burden of proving the mortgage lay upon the plaintiff. But proof was dispensed with under section 58 of the Evidence Act when the defendants admitted the mortgage of 1264. Whether the document executed at that time was registered or not is a matter of no consequence when the mortgage is admitted. I think this is clear from the authorities cited in the Upper Burma Case *Maung Kat* vs. *Maung So* (1).

It might have been different if the date of the transaction fell after 1st January 1905, when section 59 of the Transfer of Property Act came into operation in rural areas and rendered a registered instrument necessary for the validity of a mortgage where the principal money secured is one hundred rupees or more. Without registration and attestation as required by section 59 it might be argued that there was no valid mortgage for the plaintiff to redeem. It may be doubted whether the admission of a mortgage by the defendants would cure the defect in such a case. But the question does not arise in the present case, for the original mortgage was admittedly prior to the introduction of section 59 into Lower Burma generally.

The learned Divisional Judge made the mistake of supposing that the plaintiff relied on the unregistered mortgage document Exhibit 1. That exhibit was produced by the defendant, and moreover it was not the original mortgage at all.

In a suit for redemption when the transactions between the parties admittedly began by a simple mortgage, even though there was subsequently a transfer of possession to the mortgagee it lies upon him to prove his right to resist redemption. If he alleges an outright sale he must prove it. The law on this point is clearly laid down in *Po Te* vs. *Po Kyan* (2) which was followed in *Ma Dan Da* vs. *Kyaw Zan* (3). The ruling cited by the Divisional Judge (4) is not applicable to a case in which the defendants admit that they were originally mortgagees of the land in dispute.

The defendants are entirely unable to prove the alleged sale of the land to them as the conveyance on which they rely is unregistered and is therefore imperative under section 49 of the Registration Act, and section 54 of the Transfer of Property Act and the defendants are debarred from producing any other evidence of the transaction by the provisions of section 91 of Evidence Act.

In these circumstances, redemption of the mortgage was rightly decreed by the Sub-divisional Court.

The decree of the Divisional Court is set aside and that of the Sub-divisional Court is restored. The defendant-respondents will pay the plaintiff-appellant's costs in all courts.

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(1) U. B. R. 1897-01 P. 379.
(2) 1. L. B. R. 215.
(3) 3. L. B. R. 5.
(4) S. J. 133.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 53 OF 1913.*

MOHAMED IBRAHIM v. A. SUBBIAH PANDARAM.

For Appellant—R. N. Burjorjee.

For Respondent—Giles.

Before Mr. Justice Hartnoll, Offg. Chief Judge
and Mr. Justice Young.

Dated, 16th June 1913.

Order refusing instalments—appealable or not.

In an appeal against the order of refusal by the District Judge to allow the decretal amount to be paid by instalments an objection was raised against the maintenance of such an appeal on the ground that such an order is not a part of the decree but is a separate order passed under Order 20, rule 11 of the Civil Procedure Code.

Held the objection ought to prevail and the appeal could not lie.

JUDGMENT.

H. S. HARTNOLL, C. J.,—The appellant was sued by the respondent for the recovery of Rs. 10,264 due on two promissory notes. He did not deny his liability but asked that payment by instalments be allowed. The District Judge refused to pass an order for payment by instalments, and that refusal is the subject matter of this appeal. Respondent urges that the order refusing the application to be allowed to pay by instalments is not a part of the decree but is a separate order passed under O. 20, R. 11, and that an order under that order and rule is not appealable. The contention appears to us to be correct. The decree is merely one for the payment of Rs. 10,264 and costs. The order on the application for permission to pay by instalments was dealt with under O. 20, R. 11. The appeal is therefore dismissed with costs on the ground that it does not lie.

YOUNG, J:—I concur.

H. S. HARTNOLL, J:—The application for stay is also dismissed but without costs.

C. YOUNG, J:—I concur.

* Appeal against order refusing to allow payment of decretal amount and costs by instalments. Does it lie—Order 20, rule 11 of the Civil Procedure Code.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL Nos. 18 and 19 of 1912.

MAUNG PO HAN v. MA TA LOK.

For Appellant—Tha Din.

For Respondent—Gaunt.

Before Mr. Justice Twomey.

Dated, 26th June 1913.

Buddhist Law—Divorce—Desertion—Ill-treatment—Civil Procedure Code—Order 41 Rule 24—Specific issue.

A Burmese woman sued her husband for divorce on the grounds of desertion and cruelty. The Township Judge framed one issue viz :—"Is the plaintiff entitled to a divorce according to her plaint ?" and granted a divorce on the ground of desertion The District Court however found against the plaintiff on the issue as to desertion but confirmed the Township Courts' decree on the ground of ill-treatment. It was urged that the District Court ought to have dismissed the suit when it found against the plaintiff on the ground of desertion as no specific issue was framed regarding ill-treatment.

Held the action of the District Court was authorised by the provisions of order 41 rule 24 of the Civil Procedure Code and the defendant was not prejudiced by the absence of a specific issue as the plaint had expressly pleaded ill-treatment.

According to Buddhist Texts, even when the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it subject to the penalty that assets and liabilities of the couple are to be divided equally between them.

JUDGMENT.

TWOMEY, J.—The respondent Ma Talok sued her husband the appellant Po Han for a divorce on the grounds of desertion and cruelty. She stated that she resigned all claim to share in the *hnapazon* property and merely asked for a decree for divorce without costs. The decree asked for was virtually what a Burman Buddhist spouse may now obtain in Upper Burma when the other party is without fault and does not consent. This was decided in the important Upper Burma case *Ma Kin Lat vs. Ba So* (1) in 1904. The learned Judicial Commissioner's main ruling in that case does not yet appear to have been adopted fully in Lower Burma, though the case was cited with approval in *Lon Ma Gale vs. Maung Pe* (2) in connection with another question. It is not necessary to consider whether the Respondent Ma Ta Lok would have been entitled to a divorce if her husband had been without fault, for it has been her case throughout that he was guilty of cruelty towards her. The learned District Judge has discussed the evidence as to cruelty and I agree with his finding that it is established. It is urged now that no issue as to ill-treatment was framed by the Township Court which decided the suit only with reference to the charge of desertion, and that the District Judge having found against the Plaintiff-Respondent on the issue as to desertion ought to have dismissed the suit. But though no specific issue was framed as to ill-treatment it was certainly covered by the issue "Is the plaintiff

(1) U. B. R. 1904—06, B. Law Divorce 3.
(2) 5, L. B. R. 114.

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entitled to a divorce according to her plaint?" for the plaint expressly pleads ill-treatment. The action of the District Court in dealing with this matter was authorised by the provisions of Order 41, Rule 24, and I see no reason to think that the Defendant Appellant was prejudiced by the absence of a specific issue. Ma Talok gave evidence of the ill-treatment she suffered at his hands and her evidence was corroborated by the village headman to whom she complained and showed the marks of the beating. No attempt was made to rebut this evidence. On the contrary the Defendant admitted kicking and beating the plaintiff.

The argument derived from the case of *Ma Ein* v. *Te Naung* (3) has no force. It is true that the Judgment in that case appears to countenance the view that a divorce should not be granted to a woman for a single act of cruelty. But in the first place I note that no actual ill-usage was proved in that case apart from the plaintiff's own statement. Moreover it is clear from the texts cited in section 303 of the Kinwun Mingyi's Digest (Vol. II, Marriage) that even where the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it, subject to a penalty, the penalty being that the divorce shall be effected as if both parties desired it and the assets and liabilities of the couple are to be divided equally between them. (See *Ma Gyan* v. *Su Wa*) (4) where this rule was adopted for Upper Burma (1897). In the present case the joint property of the married couple appears to have been appropriated by the husband already.

I think the decree of divorce was rightly granted and I dismiss with costs Po Han's appeals both in the divorce case and in the connected case (No. 97 of 1911 of the Dist. Court) in which he prayed for restoration of conjugal rights.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 42 OF 1912.

MURDIN AND 2 OTHERS v. ASHA BI.

For Appellant—Bilimoria.

For Respondent—Karaka.

Before Mr. Justice Twomey.

Dated, 26th Day of June 1913.

Mahomedan Law—Right of a childless mother of the Shia Sect to immoveable property —Gift—Specific Relief Act—Sec. 42.

The childless widow of a Shiah Mahomedan has no right of inheritance in the immoveable property of her deceased husband.

The suit for declaration under sec. 42 of the specific Relief Act was not barred by the proviso as the evidence showed that the paddy land was let out to tenants by the plaintiff and therefore a suit lay for a declaration of title without consequential relief.

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(3) 5 L. B. R. 87.
(4) U. B. R. 1892-96 p. 28.

L. B.

Murdin and 2 others v. Asha Bi.

JUDGMENT.

TWOMEY, J.—This was a suit for a declaration of title to certain lands brought by the daughter and administratrix of Aga Mahomed Hussein Bindani deceased against his widow Me Ta and two Judgment creditors of Me Ta who had taken out execution against the property. The Defendants-Appellants' Case in the Sub-divisional Court was that the lands were given to Me Ta by her husband shortly before he died and in the alternative that Me Ta had a right title and interest in the lands as widow of the deceased. The Defendant-Appellants pleaded also that the suit for a bare declaration was barred by the proviso to section 42 of the Specific Relief Act.

The Sub-divisional Court held that the suit under section 42 was not barred, that the gift to Me Ta by her husband was not established but that she had some interest in the property by right of inheritance as widow. The court accordingly refused to declare that the property belonged absolutely to the estate of Aga Mahomed Hussein Bindani. The administratix appealed and the Divisional Court decided that Me Ta as the childless widow of a Shiah Mahomedan has no right of inheritance in the immoveable property of the deceased. The decree of the Sub-divisional Court was set aside and the plaintiff's suit was decreed.

The original Defendants have now appealed to this court. Their advocate admits that the decision of the Divisional Court on the question of Mahomedan law is correct, and that the Defendant-Appellants cannot succeed on that ground.

As regards the alleged gift by Aga Mahomed Hussein Bindani to Me Ta, no cross-objection was filed in the Divisional Court against the Sub-divisional Court's finding which was adverse to them on that issue. But though there was no cross-objection under Order 41, Rule 22, the Lower Appellate Court was right to consider whether the view taken by the Sub-divisional Court on the question of the alleged gift was correct. The learned Divisional Judge found as a matter of fact that Me Ta clearly failed to establish her title and I have no hesitation in agreeing with this finding as the *pyat baing* on which Me Ta's claim chiefly rests was shown to be a forgery in the proceedings between Me Ta and Asha Bi under the Probate and Administration Act. (District Court Civil Suit No. 182 of 1908).

There remains only the question whether the suit was barred by the proviso to section 42 Specific Relief Act. This question has been decided in favour of the Respondent in both the Lower Courts. I have read the evidence and can find no grounds for holding that Me Ta was in possession of the lands when the suit was filed. The evidence of the tenant U Chin shows that the paddy land was let out by the plaintiff after the death of Aga Mahomed Hussein Bindani. In the circumstances a suit lay for a declaration of title without consequential relief.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 130 B OF 1913.*

R. S. SHARMA IYER & 4 OTHERS v. KING-EMPEROR.

For the Applicants—Giles.

Before Mr. Justice Twomey.

Dated, 26th June 1913.

Criminal Procedure Code—Chap. XXII—Summary trial of offence not coming under Sec. 260 is illegal—Sec. 451 & 452 of the Indian Penal Code.

Where a complaint was made to a Magistrate under section 452 Indian Penal Code and where there was nothing in the complainant's examination on oath to justify the Magistrate in thinking that the offence fell under Sec. 451, I.P.C., he ought not to have followed the procedure of summary trials laid down in Chap. 22 of the Code as the offence under Sec. 452 is not one of those mentioned in section 260.

ORDER.

TWOMEY, J.—It is clear that the Magistrate's summary proceedings are illegal. The complaint was under section 452, I.P.C., and an offence under that section is not triable summarily. There was nothing in the complainant's examination on oath to justify the Magistrate in thinking that the offence charged against the accused was really the minor offence under sec. 451, I.P.C. The procedure under Chapter XXII of the Code of Criminal Procedure can be followed only when the charge brought against the accused is plainly and directly one of those specified in sec. 260. (See *C. S. Thakoor* v. *Niteloo and another*, (1) *Q. E.* v. *Buzleh ali* (2) *and B. Shaik* v. *S. Moolah* (3). The convictions and sentences in this case must therefore be set aside.

The complainant has put in a petition to compound the case. An offence under sec. 452, I.P.C., cannot be compounded even with the permission of the court.

But after reading the proceedings in this case I do not consider it necessary to order a new trial.

The convictions and sentences are set aside and the bail bonds of the applicants will be cancelled.

* Review of the order of the 1st Additional Magistrate of Insein, dated the 19th day of May 1913 passed in Criminal Summary Trial No. 38 of 1913 convicting the accused of the offence of Criminal Trespass under Sec. 451, I.P.C., and sentencing the first four to two months rigorous imprisonment and the last to one month rigorous imprisonment.

(1) 22 C. W. R. p. 29.
(2) 22 C. W. R. p. 65.
(3) 29 Cal. 409.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 52B OF 1913.*

PARTIAL MAISTRY v. KING-EMPEROR.

For Applicant—Giles.

For Respondent—Vakharia.

Before Mr. Justice Parlett.

Dated, 25th June 1913.

Burma Municipal Act—III of 1898—Section 142 (d) and section 202, Bye laws 19 and 20 framed thereunder—are they ultra vires—Section 180—can punisher .t for breach of bye-law No. 19 come under the provisions of Section 180—Notice must require alterations that are reasonable and possible.

Where it was contended that clause (c) of Bye-law 19 framed by the Rangoon Municipality requiring the owners of lodging houses "to make such alterations in the construction and in the sanitary appliances and water supply of the building as may seem necessary for keeping the building in a wholesome condition" is *ultra vires* in as much as section 142 (d) which authorises the framing of the Bye-laws does not contemplate the framing of rules which will entail structural alterations to the building.

Held that the framing of such a clause is authorized by sub-clause (iii) of section 142 (d) which mentions one of the objects of such bye-laws to be to promote cleanliness and ventilation in lodging-houses and that rules for promoting ventilation must by their nature provide for the necessary structural alterations when the purposes of the bye-law cannot be attained without them.

A notice to be valid must be reasonable and possible to comply with. It is not reasonable to require a house owner to remove the latrines to a site outside and quite separate from the main building when no such site is available nor to require him to close the latrines without the provisions of any others.

ORDER.

PARLETT, J.—Petitioner has been convicted of failing to comply with a notice under rule 19 of the rules for registered buildings, *i. e.*, lodging-houses, framed under section 142 (d) of the Burma Municipal Act of 1898. The notice itself is not on the record but its receipt and requirements and the fact that they have not been complied with are not disputed. The notice required petitioner "to close and remove the latrines from under the roof of the kitchen and erect the same outside and quite separate from the main building within 15 days". It is urged, (1) that the bye-law under which the notice was issued is *ultra vires*, and (2) that even if the bye-law is valid the notice is unreasonable and impossible to comply with.

The bye-law in question was framed under section 106 (d) of the Lower Burma Municipal Act of 1884 which empowered the committee to make rules in connection with buildings let in

* Review of the order of the Honorary Magistrates of Rangoon, dated the 23rd day of January 1913 passed in Summary Trial No 3624 of 1912, inflicting a fine of Rs. 30 for having committed an offence under Bye-laws 19 and 20 framed under section 142 (d) Burma Municipal Act for failing to remove a latrine from under the roof of his kitchen at his premises No. 33A, 114th Street, Rangoon.

lodgings for, among other purposes, "promoting cleanliness and ventilation in such buildings, and generally for the proper regulation of such buildings". The Burma Municipal Act of 1898 by section 2, clause 6 enacted a definition of a lodging-house, which virtually covers such buildings as were referred to in section 106 (d) of the old Act, and by section 142 (d) empowered the committee to make bye-laws in connection with lodging-houses for purposes including all those covered by section 106 (d) of the old Act. Section 202 of the new Act provides for the existing rules to continue in force in so far as they are consistent with the new Act.

Incidentally it was pointed out that, whereas section 107 of the old Act empowered the committee to prescribe a penalty for breach of a rule made under section 106, section 142 of the new Act contains no such provision, but section 180 provides generally for the breach of any bye-law not expressly punishable under any other section of the Act. It was urged that therefore rule 20 under which petitioner was fined is *ultra vires* and any fine should have been inflicted under section 180 of the present Act. No doubt disobedience of the bye-laws is now punishable under section 180 but in-as-much as the penalty prescribed by rule 20 does not exceed that prescribed by section 180, that rule cannot be said to be inconsistent with the present Act, and though it may have become redundant I do not consider its validity was affected by the passing of the new Act.

Rule 19 obliges the owner of a lodging-house, (a) to provide cooking accommodation separate from the dwelling parts of the building; (b) the necessary masonry drains; places for disposal of sulliage; ventilation and bathing accommodation, and (c) to make such alterations in the construction and in the sanitary appliances and water supply of the building as may under the provisions of these rules from time to time to the committee seem necessary for keeping the building in a wholesome condition. It is urged that clause (c) is *ultra vires* in-as-much as section 142 (d) of the Act does not contemplate the framing of rules which will entail structural alterations to the building, and that sub-clause 5 "generally for the proper regulation of lodging-houses" must be construed as referring only to matters *ejusdem generis* with those set out in the four preceding sub-clauses. This may be so, but it is contended for the committee that clause (c) of bye-law 19 is authorized by sub-clause (iii) "for promoting cleanliness and ventilation in lodging-houses". For petitioner it is suggested that by promotion of cleanliness is meant only such matters as daily sweeping of the floor as the other rules provide for. Those rules however further provide for the cleansing of latrines to the satisfaction of the Health Officer; and it is obvious that cleanliness is not secured merely by the removal of visible dirt. It appears to me impossible to contend that a combined kitchen and privy can be regarded as either cleanly or properly ventilated, and clear that a rule directed against such a combination is authorized by sub-clause (iii). As regards the objection that rules under section 142 (d) cannot enjoin

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structural alterations, it appears to me that rules for promoting proper ventilation must by their nature provide for the necessary structural alterations, and I see no reason why structural alterations for other purposes of the rule should not be authorized where such purposes cannot be attained without them. I am therefore of opinion that the bye-law is valid. I would also point out that a notice such as that in question might have been issued under sections 115 and 116 of the present Act.

This brings me to the second point as to whether the notice is reasonable and possible to comply with. It required petitioner to close and remove the latrines and erect them outside and quite separate from the main building within 15 days. It is admitted however that he has no vacant space outside his building on which to erect the latrines, and it is not suggested in the record that he has any occupied space outside his building which could reasonably be rendered available as a site for them. No doubt he might have closed the latrines in obedience to the first part of the notice but it does not appear reasonable that he should be left without any latrines at all, and he would still be liable to be served with a notice under section 115. It appears to me, therefore, not reasonable to require him to remove the latrines to a site outside and quite separate from the main building when no such site is available nor to require him to close the latrines without the provisions of any others. It would, I consider, have been different if the notice had required him to make such reasonable alterations in the construction of the building or buildings on his ground as would provide a suitable site for the latrines. Under the circumstances however I am constrained to hold that the requirements of the notice were not under the circumstances reasonable and I reverse the conviction and sentence and direct that the fine and costs be refunded to petitioner.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION NO. 186A OF 1913.*

KING-EMPEROR v. NGA KYAW.

Before the Hon'ble Mr. Justice Twomey.

Dated, 15th May 1913.

Liquor—Country fermented liquor—Seinbat—Seinye—Preparation and attempt—Excise Act, Section 45.

Where the accused was found in possession of three viss of *Seinbat* which is not country fermented liquor and intended it for the manufacture of *Seinye* which is a kind of country fermented liquor he cannot be punished under Section 45 of the Excise Act for the mere intention. Nor can he be punished for an attempt to manufacture as he had not yet proceeded beyond the stage of mere preparation.

* Review of the order of the (2nd class) 1st Additional Magistrate of Zigon dated the 6th day of January 1913 passed in Criminal Regular Trial No. 14 of 1913, under section 45 Excise Act.

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ORDER.

TWOMBY, J.—The accused admitted possession of three viss of *Seinbat* and that he intended it for the manufacture of *Seinye* which is a kind of country fermented liquor. But *Seinbat* is not country fermented liquor and the mere intention to commit the offence of manufacturing country fermented liquor is not punishable. Nor could the accused be convicted of an *attempt* to manufacture since he had not yet proceeded beyond the stage of mere preparation.

The conviction under section 45, Excise Act is set aside and the fine paid by Nga Kyaw be refunded to him.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 113 OF 1912.

KALI KUMAR SEN vs. N. N. BURJORJEE AND 9 OTHERS.

For Applicant—Palit.

For Respondent—Dantra.

Before Mr. Justice Hartnoll, Officiating Chief Judge, and Mr. Justice Young.

Dated, 6th day of May 1913.

Practice—Procedure—Suits in forma pauperis—Civil Procedure Code—Act V of 1908—Order 33 Rules 2, 3, 5, 7, and 15—schedule of applicant's property with its estimated value.

Where a petition to be allowed to sue *in forma pauperis* was not accompanied by a schedule of the moveable and immoveable properties of the applicant together with the estimated value thereof, the application ought to be rejected under rule 5 of Order 33 as being not framed in the manner prescribed by rule 2.

In view of the express provisions of Order 33, rule 5, Section 141 cannot be held to apply in the case of pauper applications though they are a kind of miscellaneous proceedings.

JUDGMENT.

HARTNOLL, Offg. C. J.—On the 3rd January 1912 applicant applied to be allowed to sue as a pauper. He gave the names of four persons as defendants. No schedule of property belonging to him was annexed to his application, but he stated in it that he was not entitled to property worth Rs. 100 besides his clothing and bedding and the property the subject matter of the suit and that he was a pauper within the meaning of the explanation to Rule 1, Order 33 of the Civil Procedure Code. In an affidavit attached he also made a statement of the same nature. In verifying the application he declared that "what is stated in all the paras of this

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plaint are true to my own knowledge." The District Court did not reject the application under Order 33, Rule 5, but proceeded under Order 33 Rule 6. It was then discovered that the names of the defendants were not correctly given and on the 28th February an amended application was put in, giving the names of 10 defendants. There was the same statement as to property contained in it and the verification declared that "what is contained in all the paras of this plaint are true to my information and belief." The date is given as "this day of February 1912." Notice was then issued to the other defendants under Order 33, Rule 6. On the 15th July 1912 the District Judge rejected the application as neither application was verified as required by Order 6, Rule 15, and so they were not framed and presented as prescribed by Rules 2 and 3 of Order 33. The order was clearly passed under Order 33, Rule 7, and should have been a refusal to allow to sue as a pauper. Against this order this application in revision is made. At the hearing counsel for respondents pointed out that there was no schedule of moveable and immoveable property annexed as required by Order 33, Rule 2.

The verification of the first application dated the 3rd January was clearly defective as from the applicant's statement he could not have known personally of his own knowledge certain of the facts stated in the application as he says that he was only born in the year 1892. The verification of the second application is not strictly in the form prescribed by Order 6, Rule 15; but perhaps it may be held to comply substantially with the rule; but the further question arises as to whether the second application could legally be received in view of the stringent provisions of Order 33, Rule 5, and the absence in Order 33 of any provision allowing amendments and consequently whether orders should not have been passed on a consideration of the first application only. But it does not seem necessary to decide this point as both applications fail to comply in another respect with the provisions of Order 33, Rule 2. There is no schedule of the moveable or immoveable property belonging to the applicant with the estimated value thereof annexed to either application and the statements as to applicant's property which I have referred to cannot be said even to substantially comply with the rule. Hence on the face of the application the applicant is subject to the prohibition specified in Order 33, Rule 5, (*a*). Section 141 of the code cannot be held to apply in view of the express provisions of Order 33, Rule 5.

As for interference in revision there are absolutely no grounds for doing so.

I would accordingly reject the application with costs. A counsel's fee of one gold mohur is allowed.

C. YOUNG:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 90 OF 1913.

YAR MAHOMED KHAN vs. AMIR U DIN.

Before the Hon. Mr. Justice Twomey.

Dated, 4th day of July 1913.

Performance of Contract—Place of payment where no place is fixed for performance at the time of entering into a contract—English Law—Indian Contract Act, S. 49.

Where no place of payment is specified either expressly or by implication the general rule of English Law is that the debtor must seek his creditor *i. e.* he must pay the debt at the place where the creditor is living. Section 49 of the Indian Contract Act is in accordance with this rule and leaves it to the creditor to appoint a reasonable place for payment.

JUDGMENT.

TWOMEY, J.—I think the view taken by the District Judge is correct. The plaintiff failed to satisfy the Sub-divisional Court that there was an express agreement as to the place of payment. But the general rule of English Law is that where no place of payment is specified either expressly or by implication the debtor must seek his creditor, that is, he must pay the debt at the place where the creditor is living. Section 49 of the Contract Act is in accordance with this rule. It leaves it to the creditor to appoint a reasonable place for payment. I gather from the Judgments in this case and from the learned advocate's remarks that the plaintiff who now lives at Kyaikto demanded that the Defendant should pay him there and that the Defendant refused. This refusal constitutes the cause of action and as the money was impliedly payable at Kyaikto I think the cause of action arose there under section 20 (*c*) of the Code.

The appeal is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 55 of 1913.

GAGGERO FRANCESCO vs. KING-EMPEROR.

For Applicant—Harvey.

For Respondent—Gaunt, A. G. A.

Before the Hon. Mr. Justice Twomey.

Dated, 7th July 1913.

Criminal Procedure Code. S. 476—Order passed by Small Causes Court whether triable under S. 25 of the P. S. C. Cts. Act or S. 439 of the Criminal Procedure Code.

An application to revise an order under S. 476 of the Criminal Procedure Code of the Judge of a Provincial Small Cause Court lies under S. 25 of Act IX of 1887 and not under S. 439 of the Code of Criminal Procedure. The power of revision conferred by S. 25 of the Provincial Small Causes Court Act is much narrower than under the Criminal Procedure. It is only when some substantial injustice has directly resulted from a material misapplication or misapprehension of law or from a material error of procedure that the High Courts intervene under S. 25 of the Provincial Small Causes Court Act.

JUDGMENT.

TWOMEY, J.—The Judge of the Small Cause Court acting under S. 476 Code of Criminal Procedure has sent the Applicant Gaggero Francesco to the District Magistrate to be tried under S. 193 I. P. C. for intentionally giving false evidence in a suit in that court. Francesco denied on oath that a certain receipt produced as an Exhibit in the suit was the receipt which had been granted to him by the Defendant, and the learned Judge on grounds which are stated in the order, regarded the denial as false.

Francesco applies to the Chief Court to set aside the Judge's order and I am asked to deal with the application as a matter for revision under S. 439 Code of Criminal Procedure. There was for some time a conflict of Indian rulings on the question whether a High Court acting under S. 439 could deal with orders passed by Civil and Revenue Courts under S. 476. But there is now an overwhelming preponderance of authority (1) in support of the view that S. 439 is applicable only to the proceedings of Subordinate *Criminal* Courts, a view which has already been expressly adopted by this court (per Irwin J. in *Rowzan Ali* v. *O. C. Chowdry* (2). By no stretch of language can the Small Causes Court be treated as a subordinate Criminal Court even when it exercises powers under S. 476 of the Code of Criminal Procedure.

(1) See 11, L. R. 26 All. 249, 28 All. 554 and 26 M. 139, also 17 C. W, N. 647.

(2) 4 L. B. R. 138; 2 B. L. T.

It follows that the present application can be admitted only as an application under S. 25, Provincial Small Cause Courts Act, 1887, and the powers of revision conferred by that section are much narrower than under the Code of Criminal Procedure. The general practice in Small Cause Court revision cases is to refrain from interference unless some substantial injustice has directly resulted from a material misapplication or misapprehension of law or from a material error of procedure. See *Meyappa Chetty* v. *Chokalingam Chetty and others* (3).

No material error of law or procedure has been brought to notice in the present case. With reference to the first four paragraphs of the application it appears to me that the statement alleged to be false is sufficiently described at the beginning of the Judge's order. Paras 6 and 7 of the application contain the elements of a plausible defence to the charge of perjury; but it is not open to me under S. 25 Provincial Small Cause Courts Act to go into the merits of the case in the absence of any material error in law or procedure.

The application is therefore dismissed.

(3) P. J. L. B. 61.

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Henzada and Okpo and for furthering my interests, (you) must be vigilant and annex (towns?) with the least possible delay. And (you) must send forth suitable subordinates, as generals. And it is my command to subdue those who offer resistance under different flags and punish according to your will.

This is the Royal Order of Sakkya Thiha.

And, whoever resists, shall, along with his seven generations, in succession, be burnt in a cage.

2. That all must especially protect and support the religion and whoever fails to do so, shall be regarded as a rebel and the land (in which he lives) shall be desolated as a revolted town. (You) shall also admonish those who have no faith in Buddhism and (you) must make a march with Generals, officers and men to Chindwin.

Whoever resists, shall be utterly destroyed along with his seven generations."

They show that a certain *Setkyathiha min* was at the bottom of all the trouble, and the prosecution have endeavoured to prove (and in my opinion successfully) that this *Setkyathiha min* was a man called the Gamon Saya. The evidence connecting appellants Pan Thin and Po Thwe with this man is a good deal of it tainted: but it is so corroborated by the admissions of Pan Thin and Po Thwe and other facts, and is in itself so intrincically probable that I believe it. It is to the effect that the Gamon Saya is a doctor and was in the habit of treating people with medicine made from the gamon root gratis. He used to take pledges from his patients to keep the precepts, avoid intoxicants and obey his behests. He visited Dawkayangyi in the Hanthawaddy district in this manner and had a Se-thudamma-Yon (Medical Hall) at Syriam. There was also a pongyi—the Miyata Pongyi—who had a Kyaung at Pyayesu in the Pyapon district. There is evidence that in Nayon 1274, B. E. (May—June 1912) this pongyi with appellant Pan Thin, Saya Maung and Kya Gaing from Zalun and also witness Po Thein and others went to visit the Gamon Saya at Dedanaw sleeping 'en route.' There an interview took place between the Gamon Saya and the Miyata Pongyi, when the latter agreed to join the former in his plot. On their return the Miyata Pongyi explained to Po Thein that the plot was to overthrow the Government when the Gamon Saya was to become King under the title of *Setkyathiha Sanda Raza min*. The Miyata Pongyi showed Maung Po Thein the royal order that the Gamon Saya had given him. Subsequently in Wagaung 1274, B. E. (August—September 1912) there was a meeting at the Kyaung of the Miyata Pongyi at Pyayesu, when the Gamon Saya was present. Pan Thin, Po Thwe and Kyaw Tha, who was killed at the fight at Mayoka, and Kyauk Lon, who was also killed at the same time, were there. Po Thein tatooed certain persons with a black hornet. The Gamon Saya took a that-tet-kat-ton ring off his finger and dipped it into water, and then made those tattooed drink it swearing them in to be his disciples and carry out his orders in spite of all. This related to what he had told them that he would rebel and take the kingdom

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and be himself king under the title of *Setkyathiha min* with the Miyata Pongyi as prime minister. He created Po Thwe, Kyaw Tha and Pan Thin princes—Pan Thin under the title of *Ne-thu-yein* and sent them off to take charge of the rebellion at Zalun and push it on. Then there is the evidence of the Mayoka witnesses to the effect that the Gamon Saya and Miyata Pongyi were the persons in the back ground. It is a significant fact that persons in the vicinity of Pyayesu in the Pyapon district and Mayoka in the Henzada district should equally implicate the Gamon Saya and Miyata Pongyi. Maung Hlwa says that he saw the Miyata Pongyi in Zalun in Wagaung 1274, B. E (August—September 1912) when the latter asked him to join in the conspiracy. He is the man who first gave information to the Superintendent of Police at Henzada on September 12th or 13th and his word is I think entitled to credit. Just after the fight Maung On Kin the Additional Magistrate says that Po Thwe admitted the rebellion and when asked about Donabyu said: 'My father the Saya Gamon will attack that place to-night.' In consequence of this statement wires were sent to Deputy Commissioner of Maubin and the Commissioner of Irrawaddy. There is no doubt that Po Thwe did make the statement and it corroborates the evidence as to the Gamon Saya being at the bottom of the movement. Then there are the proclamations themselves. It is not suggested that any one at Mayoka on the day of the fight was the Setkyathiha min. Who was he? The evidence, if believed, explains. There is no reason for thinking that those, who bring in the name of the Gamon Saya, have any grudge against him. Pan Thin allows that he is the Miyata Pongyi's adopted son that he, the Miyata Pongyi and Po Thein did visit the Gamon Saya at Dedanaw, that he was tattooed by Po Thein with the figure of a black hornet on the 8th Waxing Wagaung when the Gamon Saya was at the Pyayesu Kyaung, that he, Po Thwe and Kyaw Tha did come with Kyauk Lon to Mayoka, but that the object was to treat Kyauk Lon's daughter, and that he had a that-tet-kat-ton ring though its charm was only to protect against snake bite. Po Thwe allows that he, the Gamon Saya, Kyaw Tha and Kyauk Lon went to the Miyata Pongyi's Kyaung at Pyayesu, that Saya Po Thein came there, that Kyauk Lon called them away to treat his daughter, that the witness Kyin Ma then accompanied them to the village of Tada, and that he had a that-tet-kat-ton ring. From a consideration of the foregoing facts and admissions I consider it fully proved that there was a conspiracy to overthrow the present Government in Burma and that, as far as the conspirators at Mayoka were concerned, it came to a head on the morning of the 18th September last, when the conspirators attacked and fought the Township Officer's party which had come to arrest them. The evidence shows that this party came out from Zalun to arrest the conspirators as there was information that an attack was being planned on the Zalun police station. On the party arriving at Mayoka the conspirators believing themselves to be invulnerable attacked it instead. The attack constituted the act of waging war, as it was no riot, but the

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culminating act of a deeply laid plot to overthrow the Government of the country.

The point for consideration is whether each of the appellants have been proved to have taken part in the conspiracy, and to be members of it.

As regards Pan Thin and Po Thwe the evidence is overwhelming. They were sent up by the Gamon Saya to organize the outbreak. They are not residents of Mayoka at all. They wore different clothes at the fight to distinguish them from their followers—green velvet trousers and *taingmathein jackets*. They were both wounded at the fight. They have in my opinion been rightly convicted and as they were the persons, who came to organize rebellion at Mayoka, were the local leaders and are the persons responsible for the loss of life which has occurred. I would dismiss their appeals and confirm the sentences of death passed upon them.

As regards Nga Kye he allows that he was amongst the party that attacked the Township Officer's party, though he says that it was a peaceful and innocent one—a plea which I have already disallowed. He was shot. It was he who showed the bag in which were the proclamations (pages 185 and 212). He denies this but I can see no reason to disbelieve the evidence. There was a military parade of the rebels along the bund on the afternoon of the 17th September. The Yebauk Ywathugyi Nga Kala deposes to this and I can see no reason to disbelieve him. He says that 30 men came out of Kyauk Lon's house and went along the bund wearing white clothes with red sashes, being led by 2 men in *taingthamein jackets* and green trousers and followed by another similarly dressed, that they all had dahs and shouted that they would cut off the heads of the Township Officer, Station Officer and the Yebauk Thugyi Maung Kala. Nga Kye allows that there was a procession along the bund on the 17th instant and that he was in it. There are witnesses such as Hla Baw, Shwe Min and Shwe O who say that they saw him in it. He pleads that it was a peaceful procession to worship at a pagoda but it is clear that it was not. In his petition of appeal he says that his witnesses were not examined. The committing Magistrate says that he called none before him, and in the Sessions Court he was represented by counsel. There is a note in the diary that the defence case was duly closed. Maung Po Thaung was examined on his behalf and did not help him. The case is clear against him. He was only one of those led astray by Pan Thin and Po Thwe. I would uphold his conviction but alter his sentence to one of transportation for life, the order as regards the forfeiture of property to stand.

The next man is Nga Tun. He allows that he was on the bund at the time of the fight. H could not very well deny it as he was shot. He is implicated by Shwe Min (W. 22) a man whom I can see no reason to disbelieve and also by Nga Nyo (W. 39) who was forcibly seized and appears to be trustworthy. His defence witnesses do not help him. I would confirm the conviction on him but alter the sentence to one of transportation for life, the order as

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to forfeiture of property to stand. As regards Nga Chin, Po Hmi (W. 46) implicates him as one of the rebels who seized Nga Hmin. He says that he was also seized. It was when forcible recruiting was going on on the morning of the 18th September. Pu Le (W. 47) gives evidence to the same effect. There is no reason to disbelieve these men. He is also implicated by Maung Po Hla, who saw him in the parade on the 17th September and in the recruiting party on the 18th morning. He is corroborated as to the 18th morning by Nga Chein and Po Myit. The Chinaman Alon, whom there is no reason to disbelieve; also implicates him. He says that Nga Chin was amongst the party one of whom cut off the head of his goat. Nga Chin allows that he was amongst the men who went along the bund on the 17th afternoon though he says that it was for an innocent purpose. Several witnesses say that they saw him in the parade. Po Than (W. 21) implicates him and I think may be believed as Nga Chin is one of the names he gave to the Township Officer on the 17th. Nga Chin says that he was at Kyauk Lon's house when the firing took place. He is also fully implicated by Tha Byaw (W. 12) as being in the recruiting party and amongst those preparing to fight. His guilt is clear. I would confirm the conviction but alter the sentence to one of transportation for life, the order as to forfeiture of property to stand.

Po Taik is the next man. There is against him the evidence of Tha Byaw, Po Hmi, Pu Le, Po Hla, Po Myit, Nga Chin and Alon as in the case of Nga Chin. Nga Nyo (W. 39) also implicates him as being in Kyauk Lon's house when he, Nga Nyo was forcibly taken there on the morning of the 18th September, Maung Hmin (W. 70) says that he was amongst the men who seized him. Po Chit (witness 34) identified him amongst the rebels and would know him as he was an ex-policeman. He was arrested by Maung Aung Myat in the Myaungmya District on the 27th September and then said that he had been forced to join the rebels against his will. He had a gun shot wound on him. He allows that on the 17th evening he was in the party from Kyauk Lon's house on the bund, and that at the time of the fight he was at Kyauk Lon's house. His guilt is clear. I would confirm the conviction but reduce the sentence to one of transportation for life, the order of forfeiture of property to stand.

The next man is Nga Nyo. He was also arrested by Maung Aung Myat at the same time as Po Taik and then allowed that he had been with the rebels—as he was forced to join. He had a gun shot wound on him of recent origin, and allowed to Mr. McCarthy on the 4th October that the wound was a gun shot one. He now says that he obtained his injury by falling off a boat: but this is obviously untrue. To the Committing Magistrate he allowed that he was shot as he was going to Kyauk Lon's house on the 18th September in the morning. His story was that his wife was ill and so on the 17th morning he went and obtained some medicine for her from the Saya's at Kyauk Lon's house and that on the 18th morning when he went to report progress he was shot. He is a resident of Pagwe. The defence witnesses he calls prove nothing

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in his favour. The evidence against him is as follows. Maung Shwe Min (W. 22) says that he was amongst a body of men—two of them being the two who were killed at the fight—who on the 17th September tried to persuade him to join in the rising. He says that he also saw him at the parade in the afternoon. I have already said that I see no reason to disbelieve this witness. Shwe O (W. 23) says that he saw Nga Nyo at the parade and I see no good reason for disbelieving him. Po Hmu (W. 40) and Shwe Lu (W. 41) say that they saw Nga Nyo running from Mayoka after the fight. Shwe Lu says that he was in white and had a red band round his chest—the uniform of the rebels and had a 'linkin' dah. There is no good reason for disbelieving these men. Taking the evidence coupled with the gun shot wound and the admission to Maung Aung Myat I consider Nga Nyo's guilt proved. I would connrm the conviction but alter the sentence to one of transportation for life, the order as to forfeiture of property to stand.

The next appellant is Nga Wa. The evidence against him is weak. Shwe Min says that he saw him at the parade. So does Po Mya. Po Pyan is a witness I do not trust much. He is too much of an accomplice. Nga Wa is the son of Nga Kye. Ma Chok says at the time of the fight he was going with her to Apyin, but she is his sister. I hesitate to convict him on the evidence of Shwe Min and Po Mya. They may possibly be mistaken and if they are not, there is only the fact that he was on the bund with the others. As to his keeping away and being arrested in a starving condition I lay no stress on that seeing that his father hau been captured and what had occurred. I would set aside the conviction on him and direct that he be acquitted and set at liberty as far as this case is concerned, the order as regards forfeiture of property being set aside.

Nga Kala's case has now to be considered. He is Kyauk Lon's nephew and on the 18th September was living on his house. Nga Po Than (W. 21) says that on the evening of the 16th September he, Nga Chin and Ba Dun came to his shop and talked over their plans and the approaching rising. Nga Kyauk Lon does not deny going to Po Than's house on the date in question. When Po Than spoke to the Township Officer on the 17th, he mentioned Nga Kala as being in the insurrection that was being planned. I consider Po Than should be believed as far as Nga Kala is concerned. He, Shwe Min and Shwe O say that Nga Kala was at the parade in the afternoon. Nga Nyo (W. 39) whom there is no reason to disbelieve saw Nga Kala at Kyauk Lon's house on the 18th morning. He also says that, when the alarm that the Government party had arrived was raised, all the men in the house took up dahs and went out to fight. He does not exclude Nga Kala. Nga Hla Baw relates how at the fight Nga Kala, Ani and Po La fled in his direction and how he found 3 dahs on their track when he pursued them. Nga Kala does not deny being chased by Hla Baw but admits it. The picking up of 3 dahs suggest that each man chased had one. Nga Kala's story is that he was cutting grass at the time of the fight, ran back to Kyauk Lon's house took

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his child in his arms and ran to Danube. Hla Baw says nothing about his carrying a child. His witnesses are such that they do not prove his defence. His guilt to me is clear.

I would confirm the conviction on him but alter the sentence to one of transportation for life, the order as to forfeiture of property to stand.

There remains the last appellant Nga E. Ma Hein (W. 68) and Nga E were husband and wife. They had had a quarrel. Ma Hein's testimony and that of Ma Meik her mother do not agree as to whether the quarrel had been made up. I cannot give credence to their evidence. Maung Kauk Ya again is Ma Meik's nephew. He says that he saw So Pe and Nga E go to Kyauk Lon's house on the morning of the fight. So Pe has been acquitted. Kauk Ya says that he was present when Nga E and Ma Meit were quarreling—that Ma Meit called him. During the rains he lived with Ma Meit and he has no house of his own. I do not think that his testimony should be relied on. If he is to be convicted it must be on the testimony of Po Tha (W. 37) who says that he saw him at the parade, Po Kywe (W. 33) Police Sergeant who says he saw him at the fight and Shwe Lu (W. 41). Po Kywe says he also saw So Pe who has been acquitted. I do not consider that his testimony as far as Nga E is concerned is worth much. I hesitate to lay much stress on Po Tha's statement as he is the only one amongst the numerous witnesses to the parade who says that he saw Nga E. We are thus left with the testimony of Shwe Lu who says that he saw Nga E come running away from Mayoka when the shots were heard. He had a dah in his hands and *ordinary clothes*. He said to his wife: "Some Burmans are killed. Make a bundle of my property". I see no reason to doubt this testimony but by itself it is not sufficient to convict him. Nga E did arrest Nga Chin that evening. Nga E's witnesses do not help him. But I entertain doubts as to his guilt, and consider that it is not conclusively proved. I would therefore set aside the conviction and sentence on him and acquit him and direct that he be set at liberty as far as this case is concerned, the order as to forfeiture of his property being set aside. All Exhibit books, and charms, and exhibits appertaining to the nature of charms will be forwarded to this Court for disposal.

C. YOUNG:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS NOS. 298, 299 AND 300 OF 1913.

1. GAMON SAYA *alias* PO MYA *alias* TUN MYA.
2. MIYATA PONGYI *alias* U WITHOKTA *alias* PAW LU.
3. NGA PAW GYWE.

vs. KING-EMPEROR.

Dated, 1st day of July 1913.

Against convictions under section 121, Indian Penal Code.

Appeals from the order of the Additional Sessions Judge of Bassein, dated the 4th day of April 1913 passed in Sessions Trial No. 17 of 1913.

JUDGMENT.

The appellants Gamon Saya alias Po Mya alias Tun Mya, the Miyata Pongyi alias U Withokta alias Paw Lu and Maung Paw Gywe have been convicted of abetment of waging war against the King under Section 121 of the Indian Penal Code and have been sentenced the first two to death and the last to transportation for life. All the property of each man has also been forfeited. The evidence shows beyond a doubt that there was an armed insurrection at the village of Mayoka in the Zalun township of the Henzada District on the 18th September last. The Township Officer Maung Po Saing describes how he received information that three Minthas at Kyauk Lon's house at Mayoka were preparing to rebel against the Government and attack the police station at Zalun. He proceeded to Mayoka on the 18th September with a party of armed police and was met by a party of some 40 men, who came out in distinctive uniform and were armed with clean, sharp and long dahs, and attacked by them. As they came on they were warned to surrender and drop their arms but all to no purpose. Maung Po Saing's party opened fire on them when they came near with the result that four men fell dead and the rest ran away. Some of the latter were captured and amongst these were men named Pan Thin and Po Thwe, who were also wounded. Amongst the dead men were Kyauk Lon and Kyaw Tha. One Nga Kye was also captured and he produced a bag in which were found two proclamations on one paper purporting to be promulgated by one Setkyathiha Min. They were as follows:—

"Sakkya Thihamin's Royal order.

1. I, the Glorious King Sakkya Thiha, Ruler of many Kingdoms, hereby issue the following order viz:—

Whereas it is expedient, that (you) must especially support the religion and assume the responsibility of a commander-in-chief and make an immediate march from Zalun to Chindwin via. Henzada

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and Okpo, and for furthering my interests, (you) mut be vigilant and annex (towns ?) with the least possible delay. And (you) must send forth suitable subordinates as generals. And it is my command to subdue those who offer resistance under different flags and punish according to your will.

This is the Royal order of Sakkya Thiha.

And, whoever resists, shall, along with his seven generations, in succession, be burnt in a cage.

2. That all must especially protect and support the religion and whoever fails to do so, shall be regarded as a rebel and the land (in which he lives) shall be desolated as a revolted town. (You) shall also admonish those who have no faith in Buddhism. (You) must make a march with Generals, Officers and men to Chindwin.

Whoever resists, shall be utterly destroyed along with his seven generations."

The telegraph wire was also cut. Each of the men killed or captured had a that-tet-kat-ton ring to make him invulnerable. The dahs were like swords, sharp as razors, very clean and on the handles were either cords to give a grip or shark skin. They also had sword knots. All the facts show that the men, who met the Township Officer, were conspiring to overthrow the present Government in the cause of the Buddhist religion, and when they resisted and attacked the armed party of the Township Officer they clearly committed the act of waging war. Their action was not that of rioters, as the proclamations show that their intention was to overthrow the Government.

The case for the prosecution against the appellants is that the first appellant, whom I will call the Gamon Saya, was at the bottom of this insurrection—that he was the prime mover—that he was organizing rebellion on an extensive scale, though there was only one fight that took place in furtherance of it namely the one at Mayoka—that the second appellant whom I will call the Miyata Pongyi was one of his chief lieutenants and aided him—and that the third appellant Paw Gywe was one of those who joined him. A large amount of evidence has been recorded of which a considerable portion may be said to be that of accomplices, some being more heavily mixed up in the affair than others. In many cases of this kind, where there is a conspiracy and plotting against the state there is bound to be a considerable amount of such evidence, and the question is whether it is corroborated or should be believed if uncorroborated.

The first witness I would refer to is Maung Po Han. I consider that his testimony should be believed. In April, 1912, he told Maung Ba Ko, the Subdivisional Officer of Shwedaung, in the Prome District that at Syriam the Gamon Saya and others were conspiring to wage war and take the kingdom from the British. He asked for an order to go and arrest the Gamon Saya and others. Now Shwedaung and Syriam are 170 to 180 miles apart, Po Han's information was put into writing and sent to the police. *He is therefore not a man found after the fight at Mayoka.* He says that as early as Wazo 1273, B. E. (June—July 1911) he

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saw the Gamon Saya giving pledge water and drugs to many people at Syriam where he had a "Se thudama Yon"—Medical Hall—that the Gamon Saya used to call people into his inner room—that he went in himself and the Gamon Saya said: "Are the people gathering for our venture to take the country from the English?" and that the people said: "They will gather". Po Han says that he asked the Gamon Saya for a that-tet-kat-ton ring and said that he was going to be his disciple. After giving information to the Subdivisional Officer Po Han says that in Katson 1274, B. E. (April—May 1912) he went back to Syriam and took Maung Sin from Rangoon with him. He found the Gamon Saya there who said he was going to the Shan States and asked him to collect followers, as he had lots of medicine to render them invulnerable—that he said: "I am of royal stock . . . . . I am the Setkyathiha Min and will rule as king in Burma. When I come back from the Shan States, I will conquer the British and take the country". Maung Sin's evidence, which has been admitted under Section 33 of the Evidence Act, corroborates that of Po Han—I see no reason to disbelieve these men. The man who purports to issue the proclamations found after the fight is the Setkyathiha Min. I should say here that the Gamon Saya says that Po Han is on bad terms with him as when he was treating some people Po Han came up into the woman's apartment and was denounced by him. He has not proved this and I cannot accept the statement. Then there is the witness Maung Maung Hlwa, whose father was a Mingyi in Mandalay in the time of King Thibaw. *He gave information before the fight.* He says that it was on the 12th September. He describes how he saw the Miyata Pongyi at the Kyaungdawgyi. A part of the oath was to serve the Gamon Saya and join the plot and obey him on pain of violent death. The plot was to attack, Zalun, Henzada and fight up to Upper Burma and the country from the British. Now the Gamon Saya admits that he did visit the Kyaung of the Miyata Pongyi at Pyayesu, and allows that *Kyaw Tha and Po Thwe* were there with him. On his trial he allows that Saya Po Thein or the kauk-kwe Saya was there and that he saw him tattooing with medicine as a counter-charm against witchcraft. He allows that he put a ring into water and that the people drank as they said it would guard against danger. He also says that Po Thwe, Kyaw Tha and Pan Thin went with Kyauk Lon and never came back. The Miyata Pongyi also allows that the Gamon Saya came to his Kyaung and that tattooing went on. He said to the Magistrate it was at Kyauk Lon's request he sent Pan Thin with him to treat his daughter. It is also a significant fact that according to U Hlaw Ka, whom there is no reason to disbelieve on this particular point and who says that he lived at the Kyaung of the Miyata Pongyi for 2 Lents, Pan Thin always lived with the Miyata Pongyi and was his own pupil—(tabe ayin). He also allowed that the Nyaungbintha Saya or Po Thein tattooed at his request. The fact, that three of the rebels—Po Thwe, Kyaw Tha and Pan Thin—were at the Pyayesu Kyaung on the 20th August is an important connecting link, and

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from the evidence and statements of the Gamon Saya and Miyata Pongyi it is clear that they were. There are two other witnesses whose testimony appears to me to be untainted—U Thawbita and Shwe Yit. U Thawbita says that he saw the Gamon Saya at the Kyaung at Pyayesu and heard the Miyata Pongyi addressing him as "Naungdaw Paya"—a royal form of address—and saw the people shikkoing him. He says that he also heard the Gamon Saya called Setkyathiha. Shwe Yit corroborates except that he did not hear him called Setkyathiha. Then there are certain other minor grounds of corroboration. (a) When the Gamon Saya was arrested he had a That-tet-kat-ton ring: so had the rebels at Mayoka. (b) The Gamon Saya administers the gamon root as medicine. Gamon roots were found at Kyauk Lon's house and also with the Miyata Pongyi on his arrest. (c) The finding of the proclamations after the fight corroborates the witnesses who say that they saw them given. (d) The suspicions at Zalun last Wagaung (August—September 1912).

The Miyata Pongyi's Kyaung is at Pyayesu in Pyapon far from Zalun. He says that the Miyata Pongyi asked him to join the conspiracy saying: "we have got crowds of men to take the kingdom and to begin by attacking guards". He also says, that, before this he met at Kyauk Lon's house at Mayoka the three Minthas Po Thwe, Pan Thin, Kyaw Tha (killed at Mayoka) and they were raising rebellion. He gives details. There is no reason to disbelieve Maung Maung Hlaw. He is in quite a different position to a man who gave information after the fight. On his trial the Miyata Pongyi allowed that he did visit Zalun and walked along the bund where Pan Thin gave them Rs. 20 travelling expenses at a house. He denied this visit before the Committing Magistrate and perhaps from his petition of appeal he wishes to deny it again. Po Aung and Ba Cho depose to the visit. That he was in Henzada not far from Zalun last Wagaung, is proved by Ni Dut, whom there is no reason to disbelieve. Part of the prosecution case is that on the 8th Waxing Wagaung last (20th August 1912) the Gamon Saya was at the Kyaung of the Miyata Pongyi at Pyayesu, that Po Thwe, Kyaw Tha, and Pan Thin who were in the fight at Mayoka, were there—that Pan Thin, who was a follower or adopted son of the Miyata Pongyi was made a Mintha under the title of Ne-thu-yein and that he and the other two, Po Thwe and Kyaw Tha, were given a royal order of the same import as that found after the fight. At this time it is alleged that Saya Po Thein tattooed men with a black bee and the Gamon Saya swore them in by dipping his ring in water—a that-tet-kat-ton ring set in pinch back—which water was drunk by those sworn in—conduct of the Gamon Saya when he is not alleged to have been actively preaching sedition or rebellion. I refer to the evidence, that, when he administered gamon roots as medicine, in addition to swearing men to obey the five precepts and avoid intoxicants he also swore them to obey his words if called to do good service. The above facts appear to me to give great corroboration to the evidence of the witnesses—who may be said to be tainted as accomplices—such

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witnesses as Po Thein and Lu Gyi and Kyin Ma Than, and I am of opinion that they should be believed, and that the prosecution have proved that there were treasonable acts done on the 20th August at the Miyata Pongyi's Kyaung at Pyayesu—that the Gamon Saya posed there as a royal personage, ordered the rebellion at Zalun, appointed Pan Thin Ne-thu-yein Mintha, and sent him and Po Thwe and Kyaw Tha to carry out the rebellion, giving them a royal order in the name of Set-kya-thiha min. There at that time adherents to his cause were tattooed and sworn in. Not only do I mean that I believe the evidence of the three witnesses I have mentioned above as to the events that occurred on the Kyaung at Pyayesu, but I believe the others who depose to the main events. Another part of the case is that deposed to by the Kyoupadok witnesses—that in Tagu (March—April 1912) the Gamon Saya stayed at Saya Hka's house at Kyoupadok, posed as a royal personage, tattooed certain of the villagers on the outside of the leg below the knee with the figure of a cat in black ink to render them invulnerable and swore them in to obey him and follow his call by dipping his that-tet-kat-ton ring in water and making them drink the water. He then said that he had over 2,000 men and would come down from the Yomas on an elephant. He gave them each a piece of that-tet-kat-ton stone and told them to set it in pinch back and said he would conquer the British and become king under the title of Set-kya-thiha. The witnesses, who depose to such facts, were not tattooed and sworn; and, as I believe the facts that are alleged to have taken place at Pyayesu, I also believe the Kyoupadok witnesses—at any rate as far as the Gamon Saya's doings are concerned. Moreover, with regard to the witnesses who depose to events that occurred at Pyayesu and Kyoupadok and their credibility there is a large mass of evidence, and even if they were not corroborated there is the inherent improbability that they are not telling the truth when they depose to the treasonable events that took place. To suit their own purposes they might give names of villagers as being sworn in which were incorrect, but it is difficult to conceive why they should give false evidence against the Gamon Saya and the Miyata Pongyi. The former was not a resident of Pyayesu or Kyoupadok and was a stranger to many of them, and as regards the latter it is extremely unlikely that a number of Burman Buddhists would for no apparent reason give evidence against an aged Buddhist priest.

I will deal now with the case of the appellants separately.

As regards the Gamon Saya I have said enough to show that I consider him guilty. He is the head of the rebellious movement. He traded on the credulity of his fellow men and got them to believe that he was a supernatural and royal personage, could make them invulnerable and lead them to success in overthrowing the present Government. It would appear that he meant to create a widespread movement. He is responsible for the loss of life that has occurred. His defence, that it is on account of his saying that people who are fond of intoxicants are like animals false evidence has been given against him, is not worthy of consideration. It is not clear

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and is as far as I can see unsubstantiated and untrue that the witness Myat Tha was tutored. In any case Myat Tha seems to try and shield Po Chet and not the Gamon Saya. I would dismiss his appeal and confirm the sentence of death on him.

From my findings already I have shown that the Miyata Pongyi was actively assisting him. It is he who visited Zalun after Pan Thin, Po Thwe, and Kyaw Tha have been sent to cause the rising there. He tries to enlist Maung Maung Hlaw. He visits Saya Maung and Kyauk Lon and sees how matters are going on. The events in his Kyaung on the 20th August have already been discussed. He sends for Saya Po Thein. The evidence as to his first meeting with the Gamon Saya as far as the record is concerned is described by Po Thein and U Thumana. It was in Nayon 1274, B. E. (May—June 1912) and took place at U Wun Bo's house at Dedanaw. There the two men conferred and the Miyata Pongyi agreed to join the Gamon Saya. They swore to work together and drank to their compact according to Po Thein. The latter also says that the Miyata Pongyi on this occasion got an order appointing him generalassimo. U Thumana corroborates Po Thein. Dedanaw and Pyayesu are far away. U Thumana says: "You sleep a night en route." The visit to the Gamon Saya by the Miyata Pongyi is not denied by the latter. He allowed to the Committing Magistrate that it took place. To the Sessions Judge he allowed that he, the Gamon Saya Po, Thein and U Thumana all met at Wun Bo's house when the Gamon Saya asked him to enter the plot whereupon he said: "Tagagyi, if your plan is good I will follow: but, if not, I will not to do so". The Miyata Pongyi then went on: "He then said "The Buddhist religion is on the wane. It is to promote the Buddhist religion". I said: "It is not suited to a pongyi. I then went away". He allowed that it was said the Gamon Saya had given a royal order to Pan Thin but that it did not come into his hand—that he said he was going to seize the country and going to attack Rangoon. In this petition of appeal he endeavours to make out that he was cajoled into making admissions on his trial. There is no good ground for thinking that such is the case. The visit was admittedly made. Po Thein has been believed for reasons already given as to the events that took place at Pyayesu Kyaung on the 20th August. Considering the circumstances I believe him and U Thumana as to what took place at Wun Bo's house. It is unnecessary to go into details of his visit to Rangoon. Enough has been said to show that he was thoroughly implicated and, being an aged pongyi, took an active part. He is in quite a different position to a deluded villager. I would dismiss his appeal and confirm the sentence of death passed on him.

There remains the case of Maung Paw Kywe. There is evidence that he accompanied the Miyata Pongyi when he went to visit the Gamon Saya at Pyayesu. He himself denies that he went though he allows that he showed Saya Kya Gaing and the others the way to the Pyayesu monastery. He says that Saya Kya Gaing and the others were sent by the Gamon Saya to call the

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Miyata Pongyi. It may be that he did go with the Miyata Pongyi to Dedanaw but I do not think that in the face of his denial it is conclusively proved. Maung Po Thein allows that when he came to identify Maung Paw Kywe after his arrest he could only do so after taking him apart from the crowd and examining his tattoo marks which he made himself. U Thumana says that he only knew Paw Kywe when he came with the Miyata Pongyi: so he may be mistaken. I would therefore give Paw Kywe the benefit of the doubt as to whether he accompanied the Miyata Pongyi to Dedanaw. But there is no doubt that on the 20th August 1912 at the Pyayesu Kyaung he was sworn in by the Gamon Saya and joined him. He allowed to the Magistrate that he drank the oath water and though he denied this on his trial I consider it proved that he did do so. He allows that he was tattooed, and with a black bee or hornet (padon-net). His brother-in-law Lu Gyi and Kyin Mathan say that Paw Gywe drank the water. He now professes that he did not know of the treason that was plotted at the Kyaung; but this profession is obviously untrue. In that he was sworn in he became a member of the conspiracy. There are other suspicious facts against him. It was he who took Saya Maung and Kya Gaing, who said they came from Zalun, to the Miyata Pongyi. Mayoka is in the Zalun township. It is at a Saya Maung's house at Zalun where the Miyata Pongyi stayed when he went there shortly before the fight. In Wazo the Miyata Pongyi with certain followers stayed at Paw Gywe's house when he said he was going to Rangoon to meet the 4 princes and raise rebellion. I see no reason to disbelieve his brother-in-law Lu Gyi's evidence as to this, and Paw Gywe allows that the visit took place. It is not alleged that he took part in the fight: nor does it appear that he did do so. The Gamon Saya was arrested in the Lower Chindwin District in Upper Burma on the 7th November 1912. Paw Gywe was arrested on the 9th November—two days afterwards in the some district at a place about six miles away from the place where the Gamon Saya was arrested. This is a suspicious circumstance. Paw Gywe says that he went to the Chindwin to buy planks and worship at a pagoda. He only had some Rs. 50 on him and his story is incredible. The mere fact that he reported his departure from Masoyein to his headman proves nothing. He may have done so in order that this might help him in the future. But though it is suspicious that he and the Gamon Saya were arrested in places not far apart the question remains as to the real reason why Paw Gywe went to Upper Burma. It may possibly be that he went there through fear of what might happen and to disassociate himself with the conspiracy. If, when he went to Upper Burma, he had made up his mind to renounce the Gamon Saya and all his plans, it is certainly very questionable as to whether he is guilty under Section 121 of the Indian Penal Code as when the fight and other doings at Mayoka took place his own act and intention operated to make him a conspirator no longer. It can be argued that he had left the conspiracy from the time he formed the intention to leave it. The

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learned Government Advocate relied on the third clause of Section 107 of the Indian Penal Code as in any case constituting him an abettor in that he was bound to report the plot under the provisions of Section 44 of the Code of Criminal Procedure. That clause only relates to intentional aiding, and there is no evidence that his intention in omitting to report was with a view to aiding the waging of war. He is beyond doubt guilty under Section 121 A of the Indian Penal Code and I think that that is the section under which he should be convicted. I would therefore alter his conviction to one under Section 121 A of the Indian Penal Code and reduce his sentence to one of five years rigorous imprisonment, the order as to forfeiture of his property being set aside.

The learned Sessions Judge is directed to forward to this Court for disposal all book exhibits, charms and anything in the nature of charms amongst the exhibits.

C. YOUNG :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 246 OF 1911.

C. BURN vs. D. T. KEYMER by his attorney E. A. VILLA, Bar-at-Law.

Before Mr. Justice Parlett.

For Applicant—Doctor.

For Respondent—Chari.

Dated, 6th May 1913.

Foreign Judgment whether passed exparte or on merits—Rules of the Supreme Court, Order III Rule 6.

When a writ of summons from the King's Bench Division, England, was properly served on the appellant and his solicitors filed a defence the court granted leave to defend on appellant's paying into court £59-16-11 within 6 weeks. Appellant failed to do so and Judgment was entered for plaintiff. Subsequently a suit was brought on the judgment in the Subdivisional Judge's Court, Toungoo, when the appellant contended that the English Judgment was not given on the merits within the meaning of Section 13 of the Civil Procedure Code, that it is neither conclusive nor res judicata and that a suit based on it must fail.

Held, as the defendant was both summoned and entered an appearance and had an opportunity of defending the action and as he neither applied for extension of time for giving his defence or reopened the case, the Judgment must be held to have been given on the merits of the case.

JUDGMENT.

On the 1st March 1909, respondent took out a writ of summons in the King's Bench Division of the High Court of Justice in England on a statement of claim for £59-16-11 and costs against

Revision of the Judgment and decree of the Divisional Court, Toungoo, confirming the Judgment and decree of the Subdivisional Court Toungoo.

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appellant who was residing in Burma. The writ was specially endorsed under Order III, Rule 6 of the Rules of the Supreme Court, appearance to be made within 90 days of the date of service. It was served on appellant on the 5th of April, and on the 29th of June his solicitors entered an appearance for him. On the 22nd August he swore an affidavit setting out his defence to the action to which on the 15th of September, plaintiff filed an affidavit in reply, and on the 21st of September an order was passed granting appellant leave to defend the action upon paying into Court £59-16-11 within 6 weeks. On the 23rd September his solicitors communicated the order to the appellant and asked him to remit the amount to them if he decided to defend the action. He may not have received their letter in time to send a remittance by post before the 2nd November, and he did not telegraph it, he says, on the score of expense. Instead of doing so, he, on the 18th of October, wrote a letter to his solicitors affecting to believe that the Court's order of the 21st September mentioned 6 weeks by mistake for 6 months. This letter did not reach his solicitors till after the 2nd November, on which date Judgment had been entered for the plaintiff for the amount of the writ with costs £19-3-6 or £79-0-5 in all. Instead of taking steps to get this Judgment in default set aside and to obtain leave to defend the action in accordance with the rules of the Supreme Court, appellant did nothing, again, he says, on the score of expense. The present suit was brought on the 30th March 1911, on the Judgment to recover Rs. 1,185-5-0 the equivalent of £79-0-5. It has been decreed with costs and the decree affirmed with costs on first appeal. The main ground in this second appeal is that the Judgment was not given on the merits of the case within the meaning of Section 13 of the Civil Procedure Code, that it is therefore neither conclusive nor *res judicata*, and that a suit based solely upon it as this one is, must fail. For the respondent it is urged, that the Judgment sued on was not *in absenitem* defendant having entered appearance and having been granted leave to defend on terms, and that being passed after consideration of two affidavits of plaintiff's and one of defendant's, it was given on the merits.

For appellant, paragraph 224 of Hukum Chand's Res Judicata, First Edition, is relied upon, in which occurs the following passage :—

"*In the Delta* (1), Sir Robert Phillimore appears to have held that a Judgment by default is on a matter of form and not on the merits; and therefore not entitled to recognition.

"It appears that in that case there had been an enquiry into the merits. Mr. Piggott says—"this principle is also to be found in many foreign decisions," "but that it should certainly be strictly limited to Judgments coming from countries in which a Judgment by default is a matter of form only, the law there not requiring an examination into the merits." (2) In British India an

(1) L. R. 1. P. D. 393.
(2) Pig. For. Jud. 208.

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exparte Judgment is preceded by an enquiry into the merits and therefore can never be a matter of form only. In *Bikrama Singh* vs. *Bir Singh* (3) the Judgment sued upon had been passed on an *exparte* enquiry, the Punjab Chief Court held that it could not be examined to determine whether it was erroneous on the merits. The decision of the Chief Court in *Jones* v. *Jahru Mal* (4) is not against that view, as it proceeded on the ground that the *exparte* Judgment discussed "none of the merits of the case as regards defendants 1 and 2, and more enquiry should have been made, notwithstanding the non-appearance of defendants 1 and 2"; Mr. Frizelle, in delivering the Judgment of the Court, said: "Had defendants appeared and pleaded in the *Nahan* Court, plaintiff no doubt would have been prepared with further evidence, but their not having done so, does not make the Judgment one on the merits, and the only remedy I can see is that plaintiff should now be allowed to prove his case on the merits, and that there should be a full enquiry and a decision on the merits as if the suit had been originally brought in the Umballa Courts! The learned Judge expressly admitted, however, that to bar an enquiry into the merits, the Judgment should be one on the full merits, and in an *exparte* case as far as they can be ascertained *exparte*."

It appears to me that the Judgment sued on cannot be regarded as a matter of form only. The case of *Bikrama Singh* (3) referred to above is a strong authority in respondent's favour. There as here, defendant had notice and did not avail himself of it, and the suit was decreed against him *exparte*. Plaintiff sured on the Judgment and succeeded. The following passage occurs in the Judgment:—

"The general tendency of the latter decisions is in favour of "the conclusiveness of a foreign Judgment and against its being "open to examination on the merits provided that the court which "pronounced it was of competent jurisdiction, and that the person "against whom it is sought to be enforced had an opportunity of "defending himself before that court."

The case of *Jones* v. *Jahru Mal* (4) decided that "It is a good defence to a suit brought on a foreign Judgment that it has not been given on the merits—,when therefore it appeared that the Judgment sued upon was not passed on the merits at all, and only professed to be so sufficiently to justify the passing of an *exparte* decree, the defendant not having appeared and defended the suit in the foreign court, this was not enough, as even in an *exparte* case the Judgment should be on the merits as far as they can be ascertained exparte, and in the course of the Judgment it is remarked, that if they (defendants 1 and 2) received due notice from the court, and the case had been decided on the merits, they would not be now entitled to plead in the same way as if they had appeared and pleaded in the foreign court."

(3) 1888 P. R. No. 191.
(4) 1889 P. R. No. 66.

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In the *Bank of Australasia* v. *Nais* (5), it was said—"It is open to to the defendant to show that the "Foreign Court had not "jurisdiction over the subject matter of the suit or that he was "never summoned to answer and had no opportunity of making "his defence", and in *Reimers* v. *Druze* (6), that—"A Foreign Judgment sought to be enforced in this country was examinable for the following purposes and for these only, namely, first, for the purposes of showing that the defendant abroad had no notice of the suit and never knew of it until the Judgment was given.

Sree Huree Bukshee v. *Gopal Chandra Samunt* (7) lays down that the rule in the case of Foreign Judgments sought to be executed in our Courts is that they must finally determine the points in dispute and must be adjudications upon the actual merits, and that they are open to impeachment on the ground that the defendant was not summoned or had no opportunity of defence. Here defendant was both summoned and entered an appearance and had an opportunity of defending the action and though the time granted may have been insufficient he neither applied for extension nor to reopen the case and defend the action as he might have done under the rules.

In view of the above authorities, I consider the Judgment must be held to have been given on the merits of the case.

It is more over conceded and indeed urged by the appellant that the Doctrine of Foreign Judgments in the Civil Procedure Code is based on the principle of *res-judicata* and I feel no doubt, that the Judgment sued on is *resjudicata* under section 11 of the Civil Procedure Code. As was laid down in *Boiraj Mohini Dassi* v. *Srimoti Chinta Mohini Dassi*, (8) a defendant cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an exparte decree on proof of his title, or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in court to protect his own interest.

On the main ground I hold that the appeal fails.

A minor ground was raised that the lower appellate court erred in granting advocate's fee in its decree. The plaintiff in England sued by his duly constituted agent and attorney Mr. Villa who happens to be a Barrister. Mr. Villa signed and verified the plaint and was represented in the court of first instance by a pleader and was therefore correctly granted pleader's fee in the decree of that court. In the lower appellate court however Mr. Villa appeared in person and was granted Rs. 59-4 as advocate's fee. This I consider was wrong. Under order III, a party

(5) 1889 P. R. No. 66.
(5) 16, Ad. and El. N. S. 717.
(6) 23, Beav. 150.
(7) 15, W. R. 500.
(8) 5, C. W. N. 877 (1901).

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to a suit or his duly constituted agent and attorney may appear and act personally if he chooses. But the mere fact that he or his attorney happens to be a member of the legal profession entitled to practice in that court does not, I consider, enable him to charge, the other side an advocate's fee.

The decree of the Divisional Court is therefore modified by the omission of the order for appellant to pay respondent Rs. 59-4 costs in that court. Appellant will pay respondent's costs in this appeal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 137 OF 1911.

J. D. PAPPADEMETRION v. ROSE HALLIDAY.

Before Mr. Justice Parlett.

For Appellant—Ormiston.

For Respondent—Dantra.

Dated, 13th March 1913.

Partner—Liability of partner on lease executed by other partners—Obligation of partners specially defined in partnership deed—Effect—Damages for use and occupation—Does a suit for them lie during the subsistence of a lease.

Where applicant entered into partnership with two others to carry on the business of a Hotel under a special agreement that "no partner shall be at liberty to enter into any agreement in the name of the firm but every such agreement shall be signed by each and every one of the partners in his individual name and not otherwise" and where the two other persons executed a lease of the premises for the Hotel which the applicant resolutely refused to sign,

Held that the applicant cannot be held liable on the lease.

Held also that no suit for compensation for use and occupation of the premise would lie during the continuance of the lease.

JUDGMENT.

Plaintiff claimed Rs. 900 as compensation for use and occupation of her premises from 16th October 1908 to 30th November 1908 from defendant as a partner in the firm known as the Amphytrion Hotel, which premises, the plaint set out, were rented to that firm at Rs. 600 per mensem. Defendant denied that the premises were rented to the firm but to De Leo and Vereniki under an instrument in writing to which he was not a party and he pleaded that as that tenancy was in existence, the suit for use and occupation did not lie. He admitted that the premises were used for the purposes of the partnership during October and November 1908. Plaintiff then admitted the lease filed, but claimed that it was abrogated after 5th June 1908.

The points for decision were whether the lease ceased to operate by agreement: if not whether the suit for use and

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occupation lay. The Lower Court held, and the decision is final that the lease was not terminated, but that nevertheless the suit as brought lay, and gave plaintiff a decree as prayed. Defendant applies for revision on the ground that the suit did not lie.

It appears that on 30th January 1908 defendant entered into partnership with De Leo and Vereniki to carry on business under the name of the Amphytrion Hotel. Clause XII of the deed of partnership provides that, with certain exceptions which do not apply to the lease now in question "no partner shall be at liberty to enter into any agreement in the name of the firm, but every such agreement shall be signed by each and every one of the said partners in his individual name and not otherwise." The lease in question was made on 1st May 1908 between plaintiff on the one part and Vereniki and De Leo on the other and was executed by those three persons alone. The name of the firm does not appear in it. Defendant admittedly refused to agree to the terms of the lease or to sign it. On the 5th June 1908 Vereniki left the partnership, which continued between defendant and De Leo till 10th December 1908. For defendant reliance is placed on *R. Gopaldas and others* v. *M. Jutha and others* (1) which in some respects closely resembles the present case. It was cited in the Lower Court but the learned Judge considered it of doubtful authority in view of *C. Ayyangar and others* v. *P. Pillaiyan and others* (2) and also inapplicable as being a suit for rent on the covenant in a lease. It appears however from the report that the claim was in the alternative, for rent or for compensation for use and occupation and it is the decision on the latter claim which is particularly pertinent to the present case. The learned Judge thereon says "The claim for use and occupation arises when immoveable property is occupied by the defendant by the permission of the plaintiff. The plaintiffs in this case have transferred or demised the land for three years to Wagyi and have during the continuance of the lease no power to suffer or permit any one to occupy the shop. They have parted with their interest during the continuance of the lease. The premises if permissively occupied during its currency must be occupied by the permission of Wagyi and not of the plaintiffs." If for the term and the lessee's name were substituted 15 years and De Leo and Vereniki the passage cited might have been written about the present case. It was however upon the other part of the decision regarding the liability for rent of partners not executing a lease made on behalf of the partnership that the Madras High Court dissented from the Bombay case. On this point the Madras case has nothing in common with the present one as the following passage from the judgment shows:—"The question is whether the appellants are liable on the rental agreements executed by the defendants but not by the deceased person whom they represent. It is not denied that the deceased was a partner, nor was it argued in the court below that the executants had exceeded their

(1) XVI Bom. 568 (1892).
(2) XIX Mad. 471 (1896).

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powers in taking the leases. By the agreement under which the partners worked anyone partner was empowered to take a lease and execute any necessary document, such documents being taken to be binding upon all the partners as if executed by them. In result therefore it must be taken that although the other members of the firm are not mentioned in the agreement and did not execute them it was intended that they should operate as if all the members were parties to them."

There is nothing to show an intention to make the executants only liable or to exclude the liability of the other partners. I have referred to the other cases cited in this ruling, but do not find in them authority directly binding on the present case. Here on the contrary it is clear that De Leo and Vereniki had no power under the deed of partnership to execute a lease on behalf of the firm: that defendant resolutely refused to agree to the terms of the lease or to sign it, and it cannot be said that it was intended that it should operate as if he were a party to it, and I hold that he was not. But even if he had been, or if by the deed of the 5th June 1908 he had succeeded to Vereniki's liability under the lease, the demise effected by that lease would have been a bar to a suit for use and occupation during the continuance of the lease.

I therefore reverse the decree of the Small Cause Court and dismiss the suit with costs in both courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 153 OF 1912.

ISMAIL MAWOON DAWOODJI ... APPELLANT.

v.

OFFICIAL ASSIGNEE ... ... RESPONDENT.

For Appellant—Ginwala.

For Respondent—Cowasjee.

Before Mr. Justice Hartnoll, Offg. Chief Judge and Mr. Justice Young.

Dated, 22nd April 1913.

Presidency Towns Insolvency Act 1909—Sec. 56—Fraudulent Preference—Surety—Creditor.

The word "Creditor" in Sec. 56 of the Presidency Towns Insolvency Act, 1899 (which avoids as 'Fraudulent' a payment made by an insolvent debtor in favour of any creditor with a view to prefer such creditor) means any person who, at the date of the payment, is entitled, if insolvency supervenes, to claim a share of the insolvent's

assets under Section 46 of the Act. A surety is included in the latter section and a payment made to such surety, before he has been called upon to pay as surety, may be deemed fraudulent and void as against the Official Assignee.

Paine v. Read (1897) 1 Q. B. D. 122.

In re-Blackpool Motor-car Company (1907) 1 Ch. D. 77.

JUDGMENT.

HARTNOLL, C. J.:—The appellant petitioned for an order that he rank as a secured creditor in respect of a sum of Rs. 8,068 and that certain promissory notes of a face value of Rs. 7,880-5-6 were subject to a lien in his favour. The sum of Rs. 8,068 were made up as follows:—He had stood security for the insolvents to Messrs. Finlay Fleming & Co., and on account of this had paid them Rs. 2,963-14. He had also guaranteed a debt of Rs. 4,500 to A. K. A. M. Sivaraman Chetty and had paid it. The insolvent also owed him Rs. 605 for goods supplied. He was adjudged insolvent on the 25th November, 1910, on the petition of Messrs. Bume & Reif. He did not pay Messrs. Finlay Fleming & Co., until the 30th December, 1910 nor Sivaraman Chetty until the 31st January, 1911. His case is that prior to the insolvency he was pressed by Messrs. Finlay Fleming & Co., and Sivaraman Chetty and that he represented matters to the insolvent who sold goods from their Mandalay shop to certain persons, who in their turn executed promissory notes for the value of the goods in his favour. The notes bear date between the 9th and 18th November 1910.

The official assignee opposed the claim on the grounds that the promissory notes were given without consideration, and that there was a fraudulent preference within the meaning of Section 56 of the Presidency Towns Insolvency Act, and the learned Judge on the original side disallowed the claim on these grounds.

As regards the question of consideration for the notes I am of opinion that between the insolvent and the appellant there was consideration for them. The consideration was the contingent liability of the appellant on his guarantee—a liability which at the time the notes were executed in his name it was undoubtedly clear he would have to discharge in view of the state of affairs of the insolvent.

There remains the question of whether there was a fraudulent preference within the meaning of Section 56 of the Act. The first point is whether appellant was a creditor of the insolvent within the meaning of that section when the notes were executed in his name, for he had not at that time paid Messrs. Finlay, Fleming & Co., and Sivaraman Chetty. The corresponding section of the English Bankruptcy Act is Section 48, and they practically agree with each other. In the case of *In re-Paine Exparte Reid* (1) it was held that the word "Creditor" in section 48 means any person who at the date of payment is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the

(1) L. R. Vol. 1 Q. B. D. (1897) 122.

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bankrupt's estate, that a surety who has a right of proof under S. 37 of the Act in respect of his contingent liability as surety is such a person and that a payment therefore to or for the benefit of a surety before he has been called on to pay as surety may be a fraudulent preference. This decision was followed in the case. "*In re-Blackpool Motor-car Company Limited*"(2) where it was held that a charge given to the surety before he has been called on to pay as surety may be a fraudulent preference. Section 37 of the English Act and Section 46 of the Presidency Towns Insolvent Act, which deal with debts provable in insolvency are practically of the same import and so the English decisions which I have quoted are authority for holding that in Rangoon the word 'Creditor' in Section 48 of the Indian Act includes a surety before he has been called on to pay as surety, and I would hold accordingly, as my views are the same as those expressed in the English cases quoted. It is now for consideration as to whether there has been a transfer of property from the insolvent to appellant with a view to giving the latter a preference over the other creditors. That there has been such a transfer is clear. The promissory notes should have been in insolvent's favour as they were the sellers of the goods but they arranged that they should be made out in the name of appellant—in other words they transferred to appellant the debts due to them from the purchasers on account of the goods. Looking at the facts and circumstances I am also of opinion that the transfer was made with a view to giving appellant a preference over the other creditors.

There is no trustworthy evidence to show that appellant ever put any pressure on the insolvents. Moreover he was not in a position to do so, as at the time of the transfer he had not paid any money on behalf of the insolvents and so there was no liability on their part to him. The parties were uncle and nephew. The very way of making the transfer gives the transaction a clandestine appearance. Mandalay far from Rangoon is taken as the scene of the operations. Other goods of the insolvents are at the same time consigned to Rangoon in the name of another uncle. If the transactions as to the notes were to hold good and the money due on them was all recovered, appellant would recover more than all he has paid to Messrs. Finlay Fleming & Co., and Sivaraman Chetty and so be no loser by his guarantee, whereas, if the purchasers had paid insolvents or given the note in their favour, appellant after having paid the two creditors of insolvents would have only been entitled to share rateably with the other creditors. The notes were made out in appellant's name just before the insolvency and looking at the relationship of insolvents and appellant it is reasonable to hold that they both knew that bankruptcy must come and was imminent.

There seems to me to be no doubt that the facts and inferences to be drawn from them show that the insolvents had the notes put into appellant's name so as to save him from loss on his guarantee

(2) L. R. (1901) 1 Ch. Dn. 77.

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and so to favour him over the other creditors, and that that was the substantial and dominant reason in the minds of the insolvents when they acted as they did. The reason for their action was not pressure.

I would therefore hold that the transfer as evidenced by the promissory notes executed by the purchasers in appellant's favour was a fraudulent preference of appellant by the insolvents within the meaning of Section 56 of the Act and is therefore void as against the official assignee.

The mere undertaking of appellant to be surety for insolvents' debts could not put him in a better position in respect to the estate of the insolvents than other unsecured creditors. To make himself in a better position than others he should have taken effectual means—such as paying the sums due on his guarantee and then pressing the insolvents and so compelling them to pay him or give him a lien on their property.

There is absolutely no reason to declare that appellant is a secured creditor in respect of the Rs. 605 worth of goods supplied to the insolvents.

I would therefore dismiss this appeal with costs—3 gold mohurs.

YOUNG, J. :—I Concur.

THE

BURMA LAW TIMES.

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IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 67 AND 68* OF 1911.

J. E. LOADER ... ... DEFENDANT—APPELLANT.

vs.

THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA ... ... PLAINTIFF—RESPONDENT.

Before the Officiating Chief Judge and Mr. Justice Young.

Dated, 2nd April 1913.

Hundi—Negotiable Instruments Act Sections 37 and 43—Indian Contract Act—Sections 135, 62—Merger—Novation.

A hundi by which defendant promised to pay to one C. Rungasawmy Mudaliar or order Rs. 10,000, sixty days after date was endorsed to the plaintiff Bank by the drawee. The defence was that the bank was not a holder in due course and that the hundi was discharged by a subsequent mortgage given by drawee to the bank by way of merger or novation and also that defendant being liable as a surety was discharged under Section 135 of the Indian Contract Act.

Held that the defendant bank was a holder in due course and that being so under Sections 37 and 43 the defendant was liable as a principal and C. Rungasawmy Mudaliar as a surety and therefore Section 135 of the Indian Contract Act did not apply.

Held also that the defendant not being a party to the novation (*i. e.*, the contract of mortgage) Section 62 of the Act would not help him and there was no recital or evidence that the hundi was considered as discharged on the execution of the mortgage.

Ansell vs. *Baker* 15 Q. B. 20.
Sharpe vs. *Gibbs* 16 C. B. R. 527. } Followed.

JUDGMENT.

HARTNOLL, J:—The respondent bank brought a suit against the appellant to recover Rs. 10,010-12. The bank alleged that appellant by his hundi, dated July 16, 1910, promised to pay to C. Rungasawmy Mudaliar or order the sum of Rs. 10,000 sixty days after date for value received, and that Rungasawmy Mudaliar

*Appeals against the judgment and decree of Ormond, J. sitting on the Original Side in Civil Regular No. 449 of 1910.

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endorsed the hundi to the bank, which was a holder in due course. The bank produced the hundi. The plaint then went on to relate that the hundi became due and payable on September 17, 1910, but that appellant failed to meet it and it was noted for non-payment. A decree was asked for Rs. 10,010-12 (the principal sum due and the cost of noting).

The defence was that the hundi was signed by appellant to accommodate C. Rungasawmy Mudaliar and that appellant received no consideration for the same, that these facts were known to the manager of the bank, and the bank had notice of the fact that the note sued on was merely an accommodation note. The written statement went on to say that on July 20, 1910, Rungasawmy Mudaliar executed in favour of the bank a mortgage for Rs. 2,23,140-5 and that in that mortgage the sum sued on was included, that it was submitted that the execution of the mortgage had discharged the hundi, that even if the mortgage had not discharged the note, the bank by taking the mortgage had varied the contract and extended the time of payment and that appellant was therefore discharged from liability.

The learned Judge on the Original Side after examining Rungasawmy Mudaliar, who could not depose that the bank knew that the note was executed for no consideration and was an accommodation note, refused to grant a commission to examine the manager of the bank, who was in England, to show that he knew from Rungasawmy Mudaliar that appellant was only a surety, saying that Rungasawmy Mudaliar's evidence showed that the manager would not give such evidence and that even if he did, Rungasawmy Mudaliar's evidence showed that the hundi was to remain in force and did remain in force and was not merged in the mortgage. A decree was therefore given as prayed for with costs.

The first ground of appeal is that the judgment and decree is against the weight of evidence. I am unable to hold that it is proved that the bank knew that the hundi was an accommodation note and that appellant had not received consideration for it. The burden of proof was on appellant. He called Rungasawmy Mudaliar who was unable to depose that the bank knew. The evidence given by Mr. Jordan was as to what was said to him by Rungasawmy Mudaliar and appellant could not prove by such testimony that the bank knew, when Mudaliar himself would not depose to such effect. At the hearing of the appeal appellant's counsel wanted to refer to an affidavit the appellant had sworn under O. 37, R. 3 C. P. C., but as it was not received as evidence at the trial we refused to allow him to refer to it. The appellant has clearly not proved that the bank knew that the note was an accommodation note and that appellant had received no consideration for it.

The next three grounds of appeal may be dealt with together. They are that it should have been held that the hundi, having been merged in the later mortgage security, was not enforceable against the appellant, that the later mortgage security operated as

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a novation of the original contract, and the hundi was thereby destroyed as a security and was not enforceable in law, and that the learned Judge erred in holding on the oral evidence produced that the hundi was to remain in force although the deed of mortgage was silent on the point. On July 20, 1910, Rungasawmy Mudaliar did enter into a mortgage with the bank to secure to them the sum of Rs. 2,23,140-5 that he owed them, and in this amount was included the sum due on the hundi as also future loans. This is not disputed. It is recited in the mortgage deed that Rungasawmy Mudaliar was unable to repay the sums due to the bank and he had been requested by the latter to give security for the same which he agreed to do as set out in the mortgage. Rungasawmy Mudaliar gave evidence to the same effect and said that the bank retained the hundi after taking the security and that he understood that he still remained liable on the hundi.

As appellant has not proved that the bank knew that the note was merely an accommodation note and that he had received no consideration for it the position between him and the bank is that laid down in Sections 37 and 43 of the Negotiable Instruments Act. He is liable on the note as principal debtor, and the bank being a holder for consideration can recover from him. It is Rungasawmy Mudaliar who becomes liable as a surety. I am unable to see therefore as was argued on the appeal how Section 135 of the Contract Act has any application in the appellant's case. The mortgage was with Rungasawmy Mudaliar who in the circumstances cannot be regarded as the principal debtor. Section 62 of the Contract Act was then relied on and it was argued that the mortgage operated as a novation of original contract; but appellant was not a party to the mortgage and that alone prevents the argument prevailing—see *Ansell* v. *Baker* (1) followed in *Sharpe* v. *Gibbs* (2). As appellant was not a party to the mortgage there was no merger of the hundi in the mortgage. It was urged that the mortgage deed shows that it was intended that the hundi should be extinguished, and that the deed should have specifically provided for keeping it alive if that was the intention. I am unable to see that it was ever intended that the mortgage should extinguish the hundi. It recites that it is given as security for debts due and future loans if granted, and the fact that the hundi remained in the possession of the bank shows that there was never any intention that it should be extinguished. There being no merger or novation in my opinion, it was open to the bank to proceed against appellant. I would therefore dismiss the appeal with costs.

YOUNG, J :—I concur.

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(1) 15 Q. B. 20 (1850).
(2) 16 C. B. R. 527.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 142 OF 1911.

MA TAH vs. MA KA YIN AND 1.

For Appellant—McDonnell.

For Respondent—Maung Kin.

Before Mr. Justice Parlett.

Dated, 7th November 1912.

Buddhist Law—Payin property changing its character—Presumption.

When *payin* property changes its character during a marriage, the presumption is that it has become *letetpwa* of that marriage.

2 L. B. R. 174 F. B.
2 U. B. R. (1892—96) 159. } followed.
2 U. B. R. (1892—96) 184. Explained.

But this presumption may be rebutted by particular facts of any case.

JUDGMENT.

Plaintiff appellant Ma Tah is the daughter of Mg. Shwe Pu by his first wife. After her death he inherited some 25·51 acres of paddy land. Then he married 1st defendant Ma Ka Yin, by whom he had a daughter, 2nd defendant Ma Lon Ma Gale. During the second marriage he and his wife purchased some 24·51 acres of paddy land adjoining that which he inherited. On the 16th September 1907 the whole block of some 49·52 acres was sold for Rs. 7,428 the vendors being Mg. Shwe Pu, Ma Ka Yin, Ma Tah, and Ma Lon Ma Gale described as a minor and the sale deed being signed by the first three. On 1st November 1907 Mg. Shwe Pu and Ma Ka Yin purchased 34·23 acres of land, the deed giving Rs. 3,000 as the price, but there is some evidence that Rs. 3,300 was paid for it. On Mg. Shwe Pu's death Ma Tah sued for her share in his estate, claiming, among other things, one half of this 34·23 acres of land as being the *payin* of her father, taken to the second marriage. The Subdivisional Court decreed her claim, but on appeal the Divisional Court held that the 34·23 acres of land was joint property of the second marriage, and therefore that Ma Tah was entitled to only one-eighth share of it. She now appeals, and the sole question is whether the land was *payin* or joint property of the second marriage.

In *Ma Ba We* vs. *Mi Sa U and others* (1) a Full Bench of this court held that when payin property changes its character during a marriage, the presumption is that it has become *letetpwa* of that marriage. In that case the statement of the law as given in *Ma Sein Nyo* vs. *Ma Kywe* (2) is followed and the grounds

(1) II L. B. R. 174.
(2) II U. B. R. (1892—96) 159.

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and one.

on which it is based are quoted *in extenso* and approved. It is noted that in *Mg. Chit Kywe* vs. *Mg. Pyo and others* (3) a contrary opinion seems to have been expressed, and it is now submitted that that view is correct, rather than the one adopted by the Full Bench. The very fact however that the report of the case was before and was considered by the learned Judges of the Full Bench, render the strongest possible grounds necessary before any reference could be made which might question the correctness of their ruling. On referring to the report of the latter Upper Burma case (3), however I do not find any necessary conflict between it and the earlier and the Lower Burma cases. This last merely lays down that when a change in the character of *payin* property occurs during a marriage a presumption arises that it becomes *letetpwa*. The latter Upper Burma case only decided that the particular facts admitted and proved therein rebutted such a presumption. It remains therefore to consider whether the presumption has been rebutted in the case now under appeal.

The only piece of evidence offered at all on the point is that of an alleged statement by Mg. Shwe Pu to one Mg. Po O that having children, he must buy a piece of paddy land in place of that which he had arranged to sell. It is suggested that this shews an intention on his part to replace the *payin* land which he was about to sell with other land to be treated as *payin* so that his daughter by the first marriage might be in no way a loser by the transaction. I am unable to see any such meaning can be put on his words, or that they can fairly bear any further meaning than that having a family dependent on him he could not afford to let his capital lie idle. In the next place I am asked to infer that the 34·23 acres of land was brought to replace the 25·51 acres of *payin* land from the circumstances that the latter formed slightly more than half the area sold for Rs. 7,428 while rather less than half that sum was spent on the land subsequently purchased. I am however unable to draw such an inference from purely arithmetical considerations, which may possibly be merely fortuitous. It is admitted that out of the sale proceeds over Rs. 1,000 was spent on a *zayat* and over Rs. 1,000 on paying off a debt. There is also evidence that plaintiff received, and admitted receiving, Rs. 1,000; but even if this be not accepted, and though there is no clear evidence of how Mg. Shwe Pu spent the balance, it is certainly not established that he had much more than Rs. 3,300 left available for the purchase of land and not required for any other purposes. That purchase was no doubt made partly at least in the interests of his family. It may even be that when making it he had in view the advisability of acquiring property which would be available for them to succeed to after his death; but I can see no grounds for believing that he made the purchase with the intention of securing to his elder daughter a large share of the land after his death than she would obtain in his other property. If he had had any such intention he would have clearly

(3) II U. B. R. (1892—96) 184.

L. B. Ma Tah v. Ma Ka Yin and one.

expressed it and it might easily have been carried into effect when he made the purchase, and it is only reasonable to suppose that he would have done so. He failed to do so, and on the evidence before me I am unable to hold any such intention proved. The presumption that the land purchased was joint property of the second marriage remains un-rebutted, and this appeal is accordingly dismissed with costs, advocates' fee 2 gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 1 OF 1912.

MRS. ROSE D'CASTRO ... ... APPELLANT.

vs.

MR. EDMUND CASTRO ... ... RESPONDENT.

Before Mr. Justice Hartnoll, Officiating Chief Judge, Mr. Justice Twomey and Mr. Justice Young.

Dated, 12th May 1913.

Jurisdiction—Dissolution of Marriage—Did parties last reside within the District?—Proper cause in such cases.

The case was sent back to the Divisional Court of Toungoo to take evidence as to where the wife (the Petitioner) was residing at the time the petition was presented.

Held that according to the finding of the Divisional Judge, from which there was no reason to differ, the petitioner did not, when she filed her petition, reside in the Toungoo Division, and that, as it was not suggested that the husband and wife last resided there together, the Divisional Court of Toungoo had no jurisdiction to entertain the petition. The decree of that court dissolving the marriage was not confirmed but set aside and the Divisional Judge was directed to return the petition to the petitioner with instructions that she should present it to a court that has jurisdiction.

JUDGMENT.

FOX, C. J:—An initial question in this case is whether the Judge of the Toungoo Divisional Court had jurisdiction to deal with the petition. Under Section 3 (3) of the Indian Divorce Act "District Court means in the case of a petition under the act, the Court of the District Judge within the local limits of whose ordinary jurisdiction or of whose jurisdiction under this act the *husband and wife reside* or last resided together. The Divisional Court is the District Court under the act for the Toungoo Division. It does not distinctly appear from the petition that the petitioning wife was residing anywhere in the Toungoo Division at the time the petition was presented. The petition states that the parties last resided together at Mergui in the Tennaserim Division, and that from there, the wife came to Rangoon to her father's house. The correspondence filed in the case would appear to indicate that she continued to live in Rangoon. It may be however that

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Mrs. Rose D'Castro v. Mr. Edmund Castro.

before the petition was presented she went to reside at some place in the Toungoo Division. The case must go back to the Toungoo Divisional Court to take evidence as to where the wife was residing at the time the petition was presented. If it is not proved that she was then residing at some place in the Toungoo Division, the case should be sent back under Section 17 of the Act.

If on the other hand it is proved that she was then residing in the Toungoo Division, the Judge should take evidence with a view to satisfying himself on such evidence that none of the matters enumerated in Sections 12, 13 and 14 of the act as matters which may disentitle a petitioner for a decree for dissolution. exist.

The cause of the delay in presenting the petition should be especially inquired into.

HARTNOLL, J.—I concur.

TWOMEY, J.—I concur.

After the arrival of the report of the Divisional Judge, the matter came before a Full Bench composed of the Officiating Chief Judge, Mr. Justice Twomey and Mr. Justice Young who passed the following order :—

FINAL ORDER.

According to the finding of the Divisional Judge, from which there is no reason to differ, petitioner did not when she filed her petition reside in the Toungoo Division and it is not suggested that the husband and wife last resided there together. The Divisional Court of Toungoo had therefore no jurisdiction to entertain the petition. The decree of that court dissolving the marriage is not confirmed and is set aside and the Divisional Judge will return the petition to petitioner with instructions that she should present it to a court that has jurisdiction.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 5 OF 1912.

EVELINE MOMENT ... ... PETITIONER.

vs.

JOSEPH MOMENT ... ... RESPONDENT.

Before Sir Charles Fox, C. J. and Hartnoll and Parlett, J J.

Dated, 24th February 1913.

Marriage—Divorce—Adultery coupled with desertion and cruelty—Section 10 of the Indian Divorce Act—Act IV of 1869—condition of 2 years not fulfilled—Application premature—Fresh application on completion of 2 years of desertion not barred by dismissal of present application.

The petitioner prayed for a decree for divorce from the respondent on the grounds that he had been guilty of adultery coupled with cruelty and desertion. The learned Divisional Judge found the adultery proved, the cruelty not proved and the desertion proved. He accordingly passed a decree for divorce subject to the confirmation of this court.

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Eveline Moment v. Joseph Moment.

The evidence as to the adultery was very meagre, but it was not necessary to come to a decision as to whether it was proved or not, as on another ground the decree could not be confirmed.

The evidence as to cruelty was insufficient as it rested on the uncorroborated statement of the petitioner as to the events of a single day.

As regards desertion it appeared from the evidence that there was a quarrel between the parties on the 23rd July 1910 in consequence of which petitioner left the house which belonged to her; that she stayed with her sister for a month and then returned to the house, the date of her return being a day or two after the 19th August 1910, the date of the letter she found in respondent's pocket. Thereupon respondent left the house and never returned.

Held that the date on which the respondent left her and on which his desertion may be said to have commenced was a date subsequent to the 19th August 1910, or a day or two after that date.

Section 10 of the Indian Divorce Act (1) provides that "any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that . . . her husband . . . has been guilty . . . of adultery coupled with desertion without reasonable excuse for two years and upwards."

Held that when petitioner presented her petition, which was on the 26th February 1912, the period of desertion was not two years, and so she had no cause of action; that she could not get a decree on her petition, as it was presented prematurely. Lapington vs. Lapington (2) followed. Wood vs. Wood (3) referred to.

The decree for divorce was dated the 1st August 1912.

Held that as there had not been desertion for a period of two years up-to-date the decree should not be confirmed, and the petition must be dismissed.

Held lastly that the dismissal of her petition will not prevent the petitioner from presenting a fresh petition, if the desertion should be continued and she should be able also to prove adultery.

JUDGMENT.

HARTNOLL, J:—Petitioner prayed for a decree for divorce from respondent on the grounds that he had been guilty of adultery coupled with cruelty and desertion. The learned Divisional Judge found the adultery proved, the cruelty not proved and the desertion proved. He accordingly passed a decree for divorce subject to the confirmation of this court.

The evidence as to the adultery is very meagre, but it is not necessary to come to a decision as to whether it is proved or not, as on another ground it will be seen that the decree cannot be confirmed.

The evidence as to cruelty is insufficient since it rests on the uncorroborated statement of petitioner as to the events of a single day.

As regards desertion the petitioner alleges that respondent drove her out of the house on the 23rd July 1910, that she went and stayed with her sister for a month, that she then returned to the house whereupon respondent left the house and never returned. She filed her petition on the 26th February 1912. From the evidence it appears that there was a quarrel between the parties on 23rd July 1910 in consequence of which petitioner left the house which belonged to her. In that on that date she left her husband there was no desertion by him then and so his desertion cannot be said to have commenced on that date. She returned sometime

(1) No. IV of 1869.
(2) 14 P. D. 21; 58 L. J. P. and M. 26.
(3) 13 P. D. 22; 57 L. J. P. and M. 48.

subsequent to the 19th August 1910—the date of the letter she found in respondent's pocket. So the date on which the respondent left her and on which his desertion may be said to have commenced must have been a date subsequent to the 19th August 1910. It was probably a day or two after or a few days after that date. She filed her petition on the 26th February 1912. The Divisional Judge in passing his order on the facts on the 8th May 1912 said that it was clear that there had not been desertion for 2 years and so adjourned the proceedings till 1st August for further orders. On this latter date he gave the decree for divorce. He evidently took the desertion to have commenced on the 23rd July 1910; but as I have pointed out, I consider this view incorrect.

I am of opinion that the decree should not be confirmed on two grounds.

Section 10 of the Indian Divorce Act says: Any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that . . . her husband . . . has been guilty . . . of adultery coupled with desertion without reasonable excuse for two years and upwards. Now when petitioner presented her petition the period of desertion was not two years and so she had no cause of action. She could therefore get no decree on her petition as it was presented prematurely. This was the view taken in *Lapington* v. *Lapington* (1). It is true that in the case of *Wood* v. *Wood* (2) in a similar case the petitioner was allowed to file a supplemental petition on which, a decree *nisi* was passed. But I incline to the view taken in *Lapington* v. *Lapington*. Further in the present case a supplemental petition even was not filed, and so action has been taken solely on a plaint that does not disclose a cause of action. Secondly the decree is dated the 1st August 1912 a date on which I hold that there had not been desertion for a period of two years, since I hold that the desertion began subsequently to the 19th August 1910.

I would therefore not confirm the decree for divorce.

The petitioner does not want a decree for Judicial separation only and so I would dismiss the petition.

This will not debar her from presenting a fresh petition, if the desertion has continued and she is able to also prove adultery.

FOX, C. J.—I concur.

PARLETT, J.—I concur.

(1) 14 P. D. 21.
(2) 13 P. D. 22.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 40 of 1912.

S. K. SUBRAMANIAM PILLAY ... APPELLANTS.

vs.

P. GOVINDASAWMY PILLAY AND ANOTHER ... RESPONDENT.

Before Sir Charles Fox, Chief Judge and Mr. Justice Hartnoll.

Xavier for the —Appellant.

Chari for the—Respondent.

Dated, 10th March 1913.

Practice—Procedure—S. 100 of the Civil Procedure Code—and Appeal is against the decision of the Lower Appellate Court—Reference to the Original Court's decision erroneous —Trustee's power to divest himself of his office.

The only appeal open to the appellant is one on grounds mentioned in Section 100 of the Civil Procedure Code (1) which are as follows: That the decision of the Appellate Court.

(a) is contrary to law or some usage having the force of law; or

(b) has failed to determine some material issue of law or usage having the force of law;

or on the ground that

(c) there has been some substantial error or defect in the procedure provided by the Code (1) or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

All the grounds of appeal, which will be found in the judgment, referred to the decisions of both the Lower Courts. Held that on second appeal to this court under Section 100 of the Code (1) the decision of the Lower Appellate Court is the only one which has to be dealt with under clauses (a) and (b) of the section and that reference to the original court's decision in the grounds of appeal is erroneous.

The Divisional Court held that the Plaintiff had divested himself of his rights as trustee and had none left to claim, and that he was in fact no longer a trustee under the will.

Held that the Divisional Judge's decision on the facts was final, but that the question whether the plaintiff could divest himself of the trusteeship was a matter of law.

The only modes in which a trustee can divest himself of his office are the following:

(a) He may have the universal consent of all the parties interested;

(b) He may retire by virtue of a special power in the instrument creating the trust or a statutory power applicable to the trust;

(c) He may obtain his release by application to the Court.

The trust was to apply the income of some land to the purpose of a temple and the worship of a goddess. It was not clear whether the temple was a public or a private one, but the ancestors of the defendant appeared to have been the most prominent supporters of it and the trust was one created by the will of the defendant's grandfather.

The Divisional Judge found that the defendant's father and the defendants had been in possession and control of the temple for more than ten years prior to the institution of the suit.

Held that under the circumstances it appeared justifiable to conclude that all persons interested in the temple and land did consent at the time to the plaintiff's handing over the management and divesting himself of the trusteeship.

(1) Act V of 1908.

L. B.

S. K. Subramaniam Pillay v. Govindasawmy Pillay and Another.

JUDGMENT.

Fox, C. J.:—The only appeal open to appellant is one on grounds mentioned in Section 100 of the Code of Civil Procedure that is to say, that the decision of the Appellate Court

(a) is contrary to law or some usage having the force of law,—or

(b) has failed to determine some material issue of law or usage having the force of law,—or

on the ground that—

(c) there has been some substantial error or defect in the procedure provided by the code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

The grounds of appeal in the case are as follows:—

1. That the Lower Courts had erred in Law in holding on the evidence that the plaintiff—appellant had divested himself of his rights as such Trustee.

2. That the Lower Courts have erred in Law in having omitted to discuss and consider the legal aspect of the Trusteeship, and how under the provisions of the Trustee Act and the principles of Hindu Law plaintiff—appellant was by his conduct estopped from asserting his rights as Trustee.

3. That the Lower Courts erred in law in not holding on the evidence that plaintiff—appellant was forcibly kept out of the trusteeship by the defendants—respondents, and that there was not at any time any formal renunciation by him of his rights as Trustee.

All the grounds referred to the decisions of both the Lower Courts. On a second appeal to this court under Section 100 of the code the decision of the Lower Appellate Court is the only one which has to be dealt with under clauses (a) and (b) of the section. Reference to the Original Court's decision in the grounds of appeal is consequently erroneous.

The Divisional Court did not hold that the plaintiff had estopped himself from asserting his rights as trustee. It held that he had divested himself of those rights and had none left to claim in fact he was no longer a trustee under the will.

The Divisional Judge's decision on the facts is final. He found that the plaintiff had acted as Trustee for a time, but that from not later than the beginning of 1901 Pakirisawmy and the defendants had been in possession and control of the trust property and that since then what work was done on the temple concerns by the plaintiff was done by him as their agent or servant. The learned Judge thought it probable that the plaintiff had voluntarily given up the trusteeship as part of a family compromise but was not prepared to hold that the evidence was sufficient to justify a definite finding to that effect.

His finding however is in effect that the plaintiff handed over to Pakirisawmy the management of the trust property and had abandoned the trusteeship. Whether he could divest himself of the trusteeship is a matter of law. The Indian Acts dealing with

L. B.

S. K. Subramaniam Pillay v. P. Govindasawmy Pillay and Another.

trusts and trustees do not apply to this case, because the trust is neither a public or a private religious or charitable endowment. The matter must be decided on general principles of law and equity and good conscience.

Mr. Lewin says in Chapter XXXVI of his work on Trusts that the only modes in which a trustee can divest himself of his office are the following:—First, He may have the universal consent of all the parties interested; Secondly, He may retire by virtue of a special power in the instrument creating the trust or a statutory power applicable to the trust; or thirdly, He may obtain his release by application to the court. The first of these modes is the only one that needs consideration in the present case. The trust is to apply the income of some land to the purpose of a temple and the worship of a Goddess. It is not clear whether the temple is a public or a private temple but the ancestors of the defendant appear to have been the most prominent supporters of it, and the trust is one created by the will of the defendants' grandfather.

The Divisional Judge has found that the defendants' father and the defendants have been in possession and control of the temple and land for more than ten years prior to the institution of the suit. They could scarcely have been in possession for so long unless all persons interested had consented to the control and management being handed over to Pakirisawmy when this was done, and under the circumstances it appears justifiable to conclude that all persons interested in the temple and land did consent at the time to the plaintiff handing over the management and divesting himself of the trusteeship.

The decree of the Divisional Judge appears to be correct. The appeal fails and is dismissed with costs—5 gold mohurs advocate's fees.

HARTNOLL, J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS NOS. 141, 142 AND 143 OF 1913.*

1. NGA TI.
2. NGA SEIN PE. } v. KING-EMPEROR.
3. NGA BAIK GYI.

Against convictions under Section 395-75 I. P. C.

Before Mr. Justice Hartnoll.

Dated, 28th March 1913.

Indian Evidence Act—Section 32 (1) and (3)—Deceased's statements whether admissible or not.

On Po Thaw Gyi gave information to the Police of an intended dacoity. It was arranged that he should accompany the dacoits and assist the Police and was not to be fired at. By mistake he was shot and died of his injuries after making certain statements. It was contended that his statements were admissible as evidence against the accused under Section 32 Clause 3 or Clause 1 of the Indian Evidence Act.

Held it was not admissible under Clause 3 of the section as it could not be said that the deceased was of the same mind as the other dacoits and that he had the same intention as they had *i. e.*, to rob. It was inadmissible under Clause 1 because the cause of his death did not come into question in the trial except indirectly and incidentally.

JUDGMENT.

The appellants have been convicted of dacoity in that they were members of a gang that attacked Bun Yan's house at Inywa on the night of the 20th September last. That a dacoity took place is certain. Po Ok says that he saw 6 or 7 in the gang. Kalapi saw 5 or 6. The robbery had clearly begun when the robbers found that their presence was known for Kalapi was fired at and Po Ok says that he saw the torches being lit.

The question is whether the crime has been brought home to the appellants. One man amongst the dacoits was Po Thaw Gyi. He was shot by the police who were waiting for the dacoits and subsequently died of his injuries. He made certain statements and these have been admitted in evidence. The question is whether they are admissible. They have been admitted under Section 32 (3) of the Evidence Act on the ground that they would have exposed him to a criminal prosecution. That provision of law seems to me clearly not to apply as after a perusal of the statements of Mr. McDonald and Maung Maung I am unable to hold that they would have done so. Po Thaw Gyi went and gave information that the dacoity was going to take place and it was in consequence of this information that the police went to the spot. It was part of the arrangement that Po Thaw Gyi was to wear white clothes when he accompanied the dacoits and Mr. McDonald says that he must have said that the man in white was not to be fired at. Po Thaw

*Appeal from the order of the Additional Sessions Judge of Hanthawaddy dated the 3rd day of February 1913 passed in Sessions trial No. 3 of 1913.

L. B.

Nga Ti.
Nga Sein Pe.
Nga Baik Gyi.
v.
King-Emperor.

Gyi appears to have been present in his capacity of assistant to the police and it cannot be said that he was of the same mind as the rest of the dacoits and that he had the same intention as they had that is, to rob. He cannot be held to have been one of the dacoits in this view and so Section 32 (3) of the Evidence Act is not applicable. When he made the statements he could not have had the slightest idea that he was going to be prosecuted and so the conditions in his mind that are contemplated by the sub-section were non-existent. It was urged at the hearing of the appeal that Section 32 makes the statements admissible. That sub-section refers to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in *which the cause of that person's death comes into question*. The present case is one concerned with those who were the dacoits who attacked Bun Yan, and it can hardly be said that the cause of Po Thaw Gyi's death comes into question in it directly though it may come indirectly and incidentally; but the trial is clearly not one into the circumstances of his death—as to who caused it and whether an offence was committed by some one in causing it. The provision rests on the doctrine of necessity that is that the injured person is dead and is generally the principal witness and so is likely to know more or as much about the circumstances of his death than or as any other person. In the present instance such doctrine of necessity does not apply as the object of the trial is to ascertain whether certain persons were the dacoits or not—a matter that has nothing to do with the circumstances of Po Thaw Gyi's death. Even if portions of the statements were admissible it would seem that the admissible portions would be confined to those relating to the actual cause and circumstances of the death and not to previous transactions; for the grounds I have given I must hold that Po Thaw Gyi's statements are not admissible at all.

The rest of the evidence remains to be considered.

It is clear that Po Thaw Gyi was with the dacoits as he was shot down while amongst them. I can also see no reason for doubting that portion of the evidence of Po Sin and Po Myit in which they say they saw Po Thaw, Baik Gyi and Nga Te just before the dacoity on the railway line with 4 or 5 others. Such is Nga On's account of Po Sin's words except that he says Po Sin said '4 to 8 others"—an account that Nga On acted on this portion of Po Sin's and Po Myits' evidence is so corroborated that despite Po Sin's bad character in the past and the contradictions between him and Po Myit I believe it. I do not consider, however, that it should be accepted as regards any other of the names given by them as with regard to other names there is no sufficient corroboration. There is sufficient corroboration for believing them when they say that they saw more than five men.

I also believe Maung Aung Pyo when he says that he recognised Maung Te's voice. The test in court shows that he knows the sound of Nga Te's voice as even when Nga Te disguised it he said that it was like it.

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Nga Ti.
Nga Sein Pe.
Nga Baik Gyi.
v.
King-Emperor.

Then there is the evidence of Sein Myin and corroborated as it is by Po Mya I believe it. He met about the dawn after the night of the dacoity Sein Pe, Baik Gyi and Nga Te. They were going towards Yele and so away from the dacoity.

The evidence as to the *alibis* produced by appellants is quite unconvincing and of the weakest character. I cannot hold that they have met the case against them in any way.

Nga Te's guilt seems to me proved. He is found with a gang of men just before the dacoity one of whom was shot at the dacoity. Maung Aung Pyo says that he recognised his voice—evidence that is entitled to considerable weight as I have found from frequently testing myself—and he is found going away from the dacoity the next morning at dawn—the hour of the dacoity being estimated at 2-30 a. m.

The evidence against Baik Gyi seems to me to be also sufficient to show his guilt. He was found with Po Thaw Gyi and Nga Te and others before the dacoity and found with a gang of men at dawn amongst them being Nga Te going away from the direction of the dacoity.

The case against Sein Pe is the weakest. He is seen with Baik Gyi and Nga Te the dawn after the dacoity and going away from the scene of it; but he had a dashe or dah, and he and his companions were followed by 2 or 3 men. He is a native of Yele and cannot explain what he was doing in the early morning in question—where he had been and why he was returning to Yele. The evidence against two of his companions is held to be sufficient to convict them of the dacoity. In the absence of any explanation that is satisfactory on his part, I think that there is no reasonable doubt that he was one of the dacoits. Maung Sein Myin's evidence again goes to show that the gang was five or more men, and taking the evidence as to numbers collectively I think that there is no reasonable doubt that, exclusive of Po Thaw, the gang consisted of five men or more.

I therefore confirm all three convictions. The sentences are appropriate. I dismiss the appeal.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 24 OF 1912.

MA KYIN vs. RAM PERSAD AND 1.

For Appellant—Maung Kin.

For Respondent—Agabeg.

Before Mr. Justice Twomey.

Dated, 16th day of June 1913.

Fraudulent Conveyance—Bona Fides and adequate consideration—Burden of Proof—Section 110 of the Evidence Act—Relationship of the parties—Presumption.

1909.

Ma Kyin
v.
Ram Persad
and one.

The plaintiffs—respondents instituted a suit for Rs. 1,142-6 against Ma Pu on the 12th July 1909. Two days afterwards Ma Pu transferred the land in suit to the defendant—appellant, Ma Kyin, by a registered conveyance, the consideration being stated therein as Rs. 1,000. Subsequently the plaintiffs—respondents, having obtained a decree against Ma Pu, attached the land in execution; but the defendant—appellant, Ma Kyin, objected to the attachment on the ground that the land had been sold to her and that she was in possession at the time of the attachment. Her objection was allowed and the attachment was removed.

The plaintiffs—respondents then sued Ma Pu and Ma Kyin alleging that the sale to Ma Kyin was fraudulent, collusive and without consideration. The Sub-divisional Court dismissed the suit, but it was decreed on appeal by the Divisional Court, when it was held that in view of the relationship of Ma Kyin and Ma Pu and the fact that the alleged sale occurred so soon after the institution of the plaintiffs—respondents' suit against Ma Pu, the burden of proving that the transfer was made in good faith and for adequate consideration lay on Ma Pu and Ma Kyin and that they had failed to discharge the burden.

There was evidence that they lived together at one time; but they were not living together at the time of the sale. Ma Kyin admittedly obtained possession from Ma Pu and was in possession at the time of the attachment.

Held that the burden of proving that Ma Kyin was not the owner lay upon the plaintiffs—respondents.

Kadappa Chetty vs. Shwe Bo (1) and Tun Bye vs. Maung Yon (2) followed.

Maung Tha Dwe vs. Allagapah Chetty (3) distinguished.

Held also that the burden of proving that Ma Kyin was not the owner lay upon the plaintiffs—respondents under section 110 of the Evidence Act (4) and that it also lay upon them according to the principle that he who alleges fraud must prove it; that it was for the plaintiffs—respondents to show that the circumstances under which Ma Kyin came into possession raised such a strong presumption of fraud that she should be required to prove *bona fides* and adequate consideration, and that this they had failed to do.

JUDGMENT.

TWOMEY, J:—The plaintiff—respondents instituted a suit for Rs. 1,142-6 against Ma Pu on the 12th July 1909. Two days afterwards Ma Pu transferred the land in suit to the defendant—appellant Ma Kyin by a registered conveyance, the consideration being stated therein as Rs. 1,000. Subsequently the plaintiffs—respondents, having obtained a decree against Ma Pu, attached the land in execution; but the defendant—appellant Ma Kyin objected to the attachment on the ground that the land had been sold to her and that she was in possession at the time of the attachment. Her objection was allowed and the attachment was removed.

The plaintiffs—respondents then sued Ma Pu and Ma Kyin alleging that the sale to Ma Kyin was fraudulent, collusive and without consideration. The Sub-divisional Court dismissed the suit but it was decreed on appeal by the Divisional Court where it was held that in view of the relationship of Ma Kyin and Ma Pu and the fact that the alleged sale occurred so soon after the institution of the plaintiffs—respondents' suit against Ma Pu, the burden of proving that the transfer was made in good faith and for adequate consideration lay on Ma Pu and Ma Kyin. The learned Judge held that they had failed to discharge the burden.

(1) 2 L. B. R. 152.
(2) U. B. R. 1904—Civil Procedure n. 8.
(3) 4 L. B. R. 211.
(4) No. 1 of 1872.

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The Divisional Judge misread the Sub-divisional Court's Judgment. The Sub-divisional Judge found it "satisfactorily proved that the sale was a *bona fide* one for valuable consideration." The Divisional Judge read "not satisfactorily proved" for "satisfactorily proved." As a matter of fact there appears to be no adequate reason to disbelieve the evidence of the witness Ba U who says that he negotiated the sale and saw the money paid in the Registration Office.

The learned Judge relied on the case of *Maung Tha Dwe* vs. *Allagappa Chetty*. (3) In that case there was a fraudulent conveyance in favour of the Judgment debtor's brother. In the present case the evidence of Ma Kyin's relationship to Ma Pu is doubtful. The witness Martinez to whose evidence on this point the Divisional Judge attached great weight admits that he owes Rs. 400 to the plaintiffs. Tun Maung, Ma Pu's divorced husband admits that he has no personal knowledge of Ma Pu's relationship to Ma Kyin though he says that Ma Pu herself told him about it. If the two women are related to one another it seems probable that the relationship is not so close as that of aunt and niece. There is evidence that they lived together at one time; but they were not living together at the time of the sale. In the case of Allagappa Chetty it does not appear whether possession was given to the purchaser under the fraudulent conveyance. In the present case Ma Kyin admittedly obtained possession from Ma Pu and was in possession at the time of the attachment. It is clear therefore that the burden of proving that Ma Kyin is not the owner lay upon the plaintiffs—respondents. See *Kadappa Chetty* vs. *Shwe Bo* (1) and the Upper Burma case *Tun Bye* vs. *Maung You* (2). It lay upon them under Section 110 Evidence Act (4) and it also lay upon them according to the principle that he who alleges fraud must prove it. It was for the plaintiffs—respondents to show that the circumstances under which Ma Kyin came into possession raise such a strong presumption of fraud that she should be required to prove *bona fides* and adequate consideration. The only suspicious facts are that Ma Kyin is related to Ma Pu the vendor, that they at one time lived together and that the sale took place just about the time that Ma Pu was being sued by the plaintiffs—respondents. But there is nothing to show that Ma Kyin knew anything about the plaintiffs—respondents' suit against Ma Pu or knew that Ma Pu was being pressed by her creditors. Even allowing that the facts raise such a presumption of fraud as would shift the burden of proof to Ma Kyin, I think there is no sufficient reason to dissent from the Sub-divisional Court's opinion that good faith and adequate consideration were proved. The registered deed of sale is produced. There is evidence of payment of the consideration, and it is not disputed that possession was transferred.

It is urged by the learned Advocate for the plaintiffs—respondents that Ma Kyin ought to have been required to show how she came to have such a large sum as Rs. 5,000 at her disposal. She was examined as a witness and said that she had Rs. 4,000 or Rs. 5,000 at the time. She is a trader in oil and other

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commodities. There is no good reason to disbelieve her statements as to her means and the plaintiffs produced no evidence on this point.

For the reasons stated above I set aside the Divisional Court's decree and restore that of the Sub-divisional Court. The plaintiffs—respondents will pay the costs of the defendant—appellant in all Courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 244 of 1911.

MAUNG TUN U ... APPELLANT.

vs.

1. MG. MYAT THA ZAN ...
2. MA NU ... ...
3. MA BWIN ... ... } By their Guardian
4. MG. SAW MAUNG ... } ad-litem Ma Zaw.
5. MA MA GALE ... ... } RESPONDENTS.
6. MA MYA GALE ... ...
7. MA E ME ... ...

For Appellant—Mya Bu.

For 1st Respondent—M. C. Naidu.

Before Mr. Justice Twomey.

Dated, 30th May 1913.

Limitation—Art. 123 of Sch. II of the Limitation Act—Art. 142 and 144—suit barred both under Art. 123 and 144—Burden of proof under Art. 142 and 144—Adverse possession.

Maung Tun U sued for a fourth share of a certain house and house site at Bassein alleging that this property belonged to his grand-parents. The property was in the possession of the 1st defendant—respondent, Myat Tha Zan, who pleaded that it never belonged to the grand parents, but that it was bought by Myat Tha Zan's father, Tun Aung. Myat Tha Zan admitted that for a time the property stood in the names of Shwe Maung and Ma Dun Byu, but explained that Tun Aung put it in his parents' names, so that his parents and sisters "might be able to live together." Tun Aung was contemplating matrimony and did not want to give his future wife the power of turning out his parents and sisters. The property was transferred to Myat Tha Zan's name in 1896 and Myat Tha Zan had been in possession ever since.

Tun Aung died in 1906. In 1908 Myat Tha Zan transferred the property to the names of his minor children, the 4th and 5th defendants.

The Sub-divisional Court dismissed the plaintiff's suit on the ground of limitation and also on the merits. The Divisional Court on appeal confirmed the Sub-divisional Court's decree on the question of limitation alone, and this is the only question in the appeal. Both Courts held that the case was governed by Article 123 of the schedule of the Limitation Act.

It was urged that this article did not apply and that it was necessary to decide the question of limitation with reference to Art. 142 considered with Art. 144.

Held that if Art. 123 applied the suit was barred, for Shwe Maung of whose property the plaintiff sued for a distributive share, died 18 years before the suit, and the twelve years' period of limitation would run from the time of his death.

Held therefore that the Lower Courts were right in applying this article.

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Held that, if the case fell under Article 142, the plaintiff would have to show that he (or his mother, Ma Thi) was in possession (joint or separate) within twelve years of the filing of the suit, but that if Article 144 was the right article to apply, the burden of proving adverse possession for twelve years before the suit would fall upon the defendant—respondent, Myat Tha Zan.

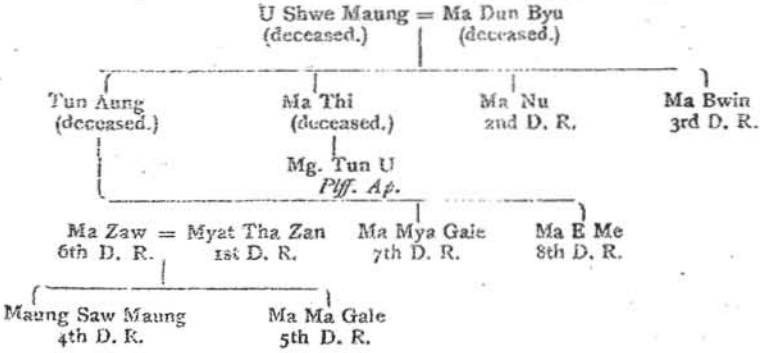
Held also that if Art. 144 applied to the case, the defendant—respondent must be held to have discharged the burden of proof, as he produced evidence showing that the site was originally bought by his father, Tun Aung, and that when the house was built Tun Aung was supporting his parents. The site had stood in Myat Tha Zan's name for 15 years prior to the suit and, so far as the evidence showed, he had been in sole possession during that time.

Held therefore that some doubt cast on his title by an incident referred to in the judgment could not be regarded as sufficient to rebut the strong case of adverse possession made out by the defendant—respondent, Myat Tha Zan.

Held therefore that the Lower Courts were right in finding that the suit was barred by limitation.

JUDGMENT.

Maung Tun U the plaintiff—appellant is related to the defendants—respondents as shown in the following genealogical table.



Ma Dun Byu predeceased Shwe Maung who died in 1893. Tun U sued for a fourth share of a certain house and house site at Bassein alleging that this property belonged to his grand-parents. The property is in the possession of the 1st defendant—respondent Myat Tha Zan who pleads that it never belonged to the grand-parents but that it was bought by Myat Tha Zan's father Tun Aung. Myat Tha Zan admits that for a time the property stood in the names of Shwe Maung and Ma Dun Byu, but explains that Tun Aung put it in his parents' names, so that his parents and sisters "might be able to live together." Tun Aung was contemplating matrimony and did not want to give his future wife the power of turning out his parents and sisters. The property was transferred to Myat Tha Zan's name in 1896 and Myat Tha Zan has been in possession ever since.

Tun Aung died in 1906. In 1908, Myat Tha Zan transferred the property to the names of his minor children the 4th and 5th respondents.

The Sub-divisional Court dismissed the plaintiff's suit on the ground of limitation and also on the merits. The Divisional Court on appeal confirmed the Sub-divisional Court's decree on the question of limitation alone, and this is the only question with which it is necessary to deal. Both courts held that the case is

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governed by Article 123 of the schedule of the Limitation Act. It is urged that this article does not apply and that it is necessary to decide the question of limitation with reference to "Article 142 considered together with Article 144."

It is clear that if Article 123 applies the suit is barred, for Shwe Maung of whose property the plaintiff sues for a distributive share, died 18 years before the suit, and the twelve years' period of Limitation would run from the time of his death. It appears to me that the Lower Courts were right in applying this article. The learned Advocate for the appellant relies on *Maung Ye* vs. *Maung Hlaw and others* (1) as showing that Article 123 is inapplicable. It was held in that case that Article 123 did not apply because the suit was not against the representative of the deceased owner. But in the present case the plaintiff appears to have joined as defendants all persons interested in the estate of Shwe Maung. It is substantially a suit against the legal representatives of Shwe Maung deceased for a distributive share of that intestate's property.

I have considered however whether the plaintiff could succeed if either Article 142 or 144 were applied. If the case falls under Article 142 the plaintiff would have to show that he (or his mother Ma Thi) was in possession (joint or separate) within 12 years of the filing of the suit. On the other hand if Article 144 is the right article to apply, the burden of proving adverse possession for 12 years before the suit would fall upon the defendant—respondent Myat Tha Zan.

No proof whatever is forthcoming that the plaintiff's mother Ma Thi was in joint possession with Myat Tha Zan at any time within 12 years prior to the suit. The incident of Ma Thi's demand for a share of the house and land is mentioned by Ko Lu Gyi 3rd witness for plaintiff, by the Revenue Surveyor 5th witness, and by Myat Tha Zan himself. Ko Lu Gyi puts it at 13 years before the suit, the Revenue Surveyor about 10 years and Myat Tha Zan about 12 years. But it is shown by the evidence of all these persons that Ma Thi and Tun Aung disagreed and that there was no settlement of Ma Thi's claim. The incident certainly suggests that Ma Thi may have had a *bona fide* claim. Maung Myat Tha Zan's explanation in his further evidence dated the 9th March 1911 is hardly consistent with his admission when first examined on 8th February 1911 from which it appears that Ma Thi demanded a definite share of the property, and that her portion was marked off with a saw. At the same time it is clear that Ma Thi did not obtain possession and the evidence given as to the incident of the saw mark could not be held to be a sufficient discharge of the burden imposed on the plaintiff by Article 142. The plaintiff produced no evidence at all in support of his plea that the consent of the co-heirs was considered necessary and was in fact obtained by Tun Aung as a condition precedent to the transfer of the property to Myat Tha Zan's name in 1896. Ma Bwin the 3rd defendant—respondent who is one of the co-heirs says in her written statement that she knows nothing about this alleged agreement by the co-heirs. It cannot be held therefore that Myat Tha Zan was

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put into possession on behalf of the general body of co-heirs of Shwe Maung.

If Article 144 is applied to the case I think the defendant—respondent Myat Tha Zan must be held to have discharged the burden of proof. He produced evidence showing that the site was originally bought by his father Tun Aung, and that when the house was built Tun Aung was supporting his parents. The site had stood in Myat Tha Zan's name for 15 years prior to the suit and so far as the evidence shows he has been in sole possession during that time. Some doubt cast on his title by the incident could not be regarded as sufficient to rebut the strong case of adverse possession made out by the defendant—respondent Myat Tha Zan.

I therefore concur in the finding of the Lower Courts that the suit is barred by limitation.

The appeal is dismissed with costs.

The Sub-divisional Court in dismissing the plaintiff's suit, which was a suit brought *in forma pauperis*, omitted to comply with the provisions of Order 33 Rule 11. It is now ordered that the plaintiff shall pay the sum of Rs. 47-4 being the amount of the court fee which would have been paid by him if he had not been permitted to sue as a pauper.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL *NO. 1079 OF 1912.

AZIMUDDIN vs. KING-EMPEROR.

Dated, 25th day of February 1913.

Criminal Procedure Code Section 233, 239—Joint trial—Meaning of same offence—Section 239 not applicable where charge against each accused is mutually exclusive.

Where two accused were tried together on a charge of having caused grievous hurt to a person and the allegation was that either one or the other committed the crime and the Magistrate discharged one of the two accused and convicted the other.

Held that the words "same offence" in Section 239 of the Code of Criminal Procedure imply that both the accused should have acted in concert or association and do not apply to a case like the present and that the two accused ought to have been tried separately as required by the provisions of Section 233.

I. L. R. 6 Mad. 396 followed.

JUDGMENT.

TWOMEY, J:—The appellant Azim-ud-din has been convicted of voluntarily causing grievous hurt to his wife Fulzanbi with a clasp knife and has been sentenced to rigorous imprisonment for six years. There are two entirely conflicting versions of how Fulzanbi was wounded. According to one version the culprit was Azim-ud-din her husband; according to the other it was Fazal

* Appeal from the order of the Senior Magistrate of Akyab, dated the 12th day of October 1912 passed in Criminal Regular Trial No. 38 of 1912 convicting the appellant under Section 326 of the Indian Penal Code.

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Rahman who is the son of a former husband of Fulzanbi by a former wife. Fulzanbi had a daughter by her former husband (the father of Fazal Rahman) and this girl, Samnia Khaton, now about 8 years old lived with her mother Fulzanbi and step-father Azim-ud-din. It is common ground that on the day in question the child Samnia Khaton went to the house where Fazal Rahman lived with his wife and mother-in-law Hamibi in another village. Fulzanbi disapproved of this and went there to get her daughter back. Fulzanbi states and has stated from the first that Fazal Rahman took her daughter away that morning, that she remonstrated with Fazal Rahman at Hamibi's house and that Fazal Rahman stabbed her on that house. She says that her husband Azim-ud-din did not come to the spot till after the stabbing. The version of Fazal Rahman is that he was not present at the stabbing, that the girl Samnia came to his house of her own accord, Fulzanbi came to call her back; Azim-ud-din came too and opposed Fulzanbi's wishes in this matter saying that he could not maintain Samnia, and that thereupon Fulzanbi quarrelled with Azim-ud-din and he stabbed her.

Fazal Rahman was first arrested and charged with the crime on Azim-ud-din's information but in view of the statements of Hamibi and Samnia Khaton, Azim-ud-din was afterwards arrested and the two men were put on their trial together. The Senior Magistrate discharged Fazal Rahman as there was no trustworthy corroboration of Fulzanbi's evidence against him. He convicted Azim-ud-din on the evidence of four eye-witnesses. It may be remarked that three of the four persons who support Fazal Rahman's version are near relatives of his, being his half-sister, mother-in-law and brother-in-law respectively.

I do not propose to deal with the merits of the case now for I think it is necessary to order a new trial on the ground of misjoinder. The Senior Magistrate appears to have thought that Azim-ud-din and Fazal Rahman were "accused of the same offence" within the meaning of Section 239 Criminal Procedure Code. But the words "same offence" in my opinion imply that both the accused should have acted in concert or association. They do not apply to such a case as the present in which the allegations against the two accused are mutually exclusive. The prosecution case against Azim-ud-din is that Fulzanbi received her wounds in a particular manner. It is not permissible for the prosecution in the same case to allege as an alternative that Fulzanbi received her wounds in another and entirely different manner. The two men should have been tried separatively as required by the provisions of Section 233. I think it probable that the misjoinder has seriously prejudiced the appellant in his defence. But in any case the ruling in *Subramonia Iyer's* * case renders it necessary to order a fresh trial.

The conviction and sentence are set aside and it is ordered that the accused Azim-ud-din shall be committed to Sessions for trial on the charge under Section 326 Indian Penal Code.

* 6 Madras 396.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL* No. 163 OF 1912.

NGA BA THIN ... ... APPELLANT.

vs.

RANGOON ELECTRIC TRAMWAY CO. RESPONDENT.

For Appellant—Agabeg.

For Respondent—Dawson.

Before Mr. Justice Parlett.

Dated, 10th April 1913.

Indian Tramways Act 1886—Bye-laws framed under the Act—Break of journey—Necessity for purchase of fresh ticket.

A passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance; he alighted at an intermediate stopping place, and boarded another tramcar, which was performing the same journey, in order to get to the point which he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket.

Held that the contract of carriage had been determined by the passenger's own act and that he was rightly convicted for travelling on the second tramcar without paying his fare.

Bastafle *v.* Metcalfe (1906) 2 K. B. D. 288 followed.

Ashton *v.* L. and Y. Railway Co., (1909) 2 K. B. D. 313 referred to.

PARLETT, J:—The facts in this case were not in dispute. They are as follows. The accused entered a tramcar No. 61 and purchased a ticket for 2 annas covering the stage from Sule Pagoda to Kemmendine. He alighted at China Street which is but a small portion of the stage and after obtaining refreshments boarded the next car No. 15 going in the same direction. On being requested to purchase a ticket on car No. 15 he refused to do so producing the ticket issued to him on car No. 61 and claiming to continue his journey to Kemmendine on it without further payment. Upon being told that he could not do so he became quarrelsome, left the car at Morton Street, refused to pay anything and eventually aimed a blow with a knife at the tramway inspector. For this he has been convicted and sentenced under Sections 324-511 I. P. C. and no grounds are shown for interfering with that finding and sentence. But he was further convicted of an offence under Section 31 of the Indian Tramways Act (XI of 1886) for having travelled from China Street and evaded payment of toll and has been fined Rs. 10. The appeal was admitted for hearing as regards that conviction and sentence alone.

* Appeal against the convictions and sentences passed on the appellant by the Western Sub-divisional Magistrate, Rangoon under Section $\frac{324}{511}$ of the Indian Penal Code and Section 31 of the Indian Tramways Act and sentencing him to 2 months rigorous imprisonment and a fine of Rs. 10 respectively.

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It is urged that an offence has not been made out under the above-named section as the accused did not evade or attempt to evade payment of toll that having paid the fare from Sule Pagoda to Kemmendine he was entitled to travel the entire distance whether on the same or on different cars. In other words it is urged that he was entitled to break his journey and continue it by another car. For the Company it is contended that he was not so entitled and reference has been made to rules 7 and 8 made by the Company with the previous sanction of the Local Government under Section 24, sub-section 3 and Section 25 of the Act which provide as follows :—Rule 7. Each person shall as soon as possible after entering the car pay to the conductor the fare legally payable for his journey and obtain a ticket therefor. Rule 8 : Each passenger shall when required so to do show his ticket to the conductor or any duly authorised servant of the Company or pay the fare legally demandable for the distance travelled over by such passenger. Rule 2 : Any person infringing rules 7 or 8 shall be fined not exceeding Rs. 10. Section 24 sub-section 3 empowers the promoter or lessee of a tramway with the previous sanction of the Local Government to make rules consistent with the Act and with the order and any rules made under the Act for regulating the travelling in any carriage belonging to him, and Section 25 empowers him to direct that a breach of any such rule shall be punishable with fine which may extend to Rs. 20. This clearly covers power to make such rules as rules 7 and 8 quoted above and to fix a penalty for their breach such as is fixed in rule 2. It was, however, argued that the Act does not empower the authority making a rule to create an offence but that the penalty for breach of the rules is to be recoverable by civil suit. I need merely say that the words " a breach of it shall be punishable with fine " cannot possibly bear any such meaning. No Indian cases were cited but the English case of Bastafle v. Metcalfe, (1) was relied on for the Company and it is almost identical with the present case. There a passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance : he alighted at an intermediate stopping place, walked a quarter of a mile in the direction of his destination, and got on to another tramcar, which was performing the same journey, in order to get to the point to which he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket. Held : That the contract of carriage had been determined by the passenger's act and that he was liable to be convicted for travelling on the second tramcar without paying his fare. It appears in that case that the local authority had framed a bye-law in almost identical terms with those of rule 7, providing *inter alia* that each passenger should on demand pay to the conductor the fare legally demandable for the journey or for the stage thereof for which it should be demanded, and should forthwith take a ticket from the conductor

(1) 2 King's Bench Division 288 (1906).

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for the fare so paid. Another bye-law provided a penalty. In holding that the passenger ought to have been convicted for travelling on the second tramcar without paying his fare the Lord Chief Justice said, "What we have to consider is what is the true view to take when a passenger, without giving notice to the conductor gets out of a tramcar under circumstances which would ordinarily amount to a termination of his transit and then claims to proceed without further payment, not by the same car, but by another. In my view the contract was a contract to carry the respondent on that route on a particular car, and not on a succession of cars; it was not a contract which allowed him to get in and out of the cars on that route as often as he liked. The contract was determined by the respondent's own act." Darling J. said: "I am of the same opinion. I think that when the respondent took his ticket there was a contract made between him and the tramway company by which they contracted to carry him to Holy Rood, 'but that the respondent might, if he chose, determine the contract by getting off the tramcar before the end of the journey. I cannot imagine that the respondent had the right to say, even with regard to the particular car by which he travelled, that he would get on and off whenever he pleased. I think that when he became a passenger, he remained a passenger until he left the car and went away from it; I do not say that if he left it for a mere temporary purpose, such as was suggested in argument, of buying something in a shop while the car was waiting, the contract would necessarily be determined, but I am most clearly of opinion that the contract was at an end when he got off the car and allowed it to continue its journey. If he got on to another car in order to go to the place to which he originally intended to travel it would necessitate the making of a fresh contract, and he could not demand that the corporation should renew without any consideration the contract which he had himself already determined." It had been previously decided in Ashton v. Lancashire and Yorkshire Railway Company, (2) that a contract by a railway company to carry a passenger from one station to another does not in the absence of special terms entitle the passenger to break the journey at any intermediate station, and the reasons of the learned Judges for so holding are applicable to the present case. I am of opinion, therefore, that the accused might have been convicted of a breach of either rule 7 or rule 8 and in as much as he did travel from China Street onwards and evaded payment of toll that his act also constituted an offence under Section 31 of the Act. The appeal is dismissed.

(2) Law Reports, King's Bench Division 313 (1902).

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 137 OF 1911.

MAUNG SHWE PE & 1 ... ... APPELLANTS.

vs.

MA YU MA & 1 ... ... RESPONDENTS.

For Appellant—Agabeg.

For Respondent—Harvey.

Before the Hon'ble. Mr. Justice Twomey.

Dated, 19th November 1912.

Limitation—Possession—Articles 135 and 144 of Schedule II Limitation Act IX of 1908—Minor—Exemption—Sections 6 and 8—Article 148—60 years' Limitation Period.

This was a suit for redemption of land orally mortgaged in usufructuary mortgage by the plaintiff's father, Tun Aung Gyaw, to the 1st defendant, Aung Zan, for Rs. 300 about the year 1885.

The facts as found by the Lower Courts are as follows: Tun Aung Gyaw died about 1890 leaving him surviving his children, the plaintiffs, Ma Yu Ma and Maung Pan, who were minors. About 1893 the 2nd defendant, Po Te, obtained the land from Aung Zan on paying him the mortgage debt, Rs. 300, Po Te was the brother of the mortgagor, Tun Aung Gyaw, and it was with the express consent of his niece, Ma Yu Ma, that Po Te took the land from Aung Zan. This transfer to Po Te is called a redemption and it was clearly intended to be such by Po Te, Aung Zan and Ma Yu Ma. Po Te worked the land for a year and then in 1894 the 3rd defendant, Shwe Pi, got possession of it. Po Te says that Shwe Pi seized the land forcibly for a debt of some Rs. 600 due by Po Te, but there was no other evidence of any force being used. Probably Po Te who admitted owing the money gave up the land to Shwe Pi in satisfaction of the debt. Shwe Pi shortly afterwards sold the land for Rs. 750 to the father-in-law of the 4th defendant, Nya Na. Shwe Pi says that this was about a month after he got possession. From that time upto the time the suit was filed, a period of about 16 years, the land was in the possession of Nya Na's family.

The plea of limitation was not raised and no issue was framed on that subject. But the question of limitation was clearly involved and both Courts have dealt with it in their judgments. The first court held that the 4th defendant had been in adverse possession for over 12 years without stating under which article in the Schedule of the Limitation Act, he conceived the suit to fall, though he probably considered Article 144 to be the relevant Article. The Divisional Court on the other hand held that the suit came under Article 134, being a suit to recover possession of immoveable property mortgaged and afterwards transferred by the mortgagee for valuable consideration, the period of limitation being the same under Article 134 as under Article 144, namely 12 years.

The Lower Courts agreed, however, in applying the provisions of Section 6 of the Limitation Act. The original cause of action arose in 1894. The period of 12 years expired in 1906. The suit was not filed till 1910. But both the plaintiffs were minors in 1894. Maung Pan attained majority about 4 years before the suit was filed and his sister Ma Yu Ma some years earlier, but less than 12 years before the suit was filed. Both courts held that in these circumstances the plaintiffs were entitled under Section 6 to bring their suit within twelve years of attaining majority.

Held that both courts overlooked the provisions of Section 8, which limits the extension of time under Section 6 to three years from the cessation of minority, the Act allowing as a maximum three years from the cessation of minority or the full period from the ordinary starting point of limitation, that is the original cause of action (here, 1894) whichever is more advantageous to the plaintiff.

Held also that in this case the plaintiffs could not invoke Sections 6 and 8 because, when the suit was filed, the statutory maximum of three years from the date of attaining majority had already expired, both the plaintiffs having attained majority more than three years before filing the suit.

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Held therefore that the limitation must be computed in the ordinary way, *i.e.*, from the original cause of action in 1894 and that, as more than twelve years from that date had elapsed when the suit was filed, it was barred by limitation, unless the Lower Courts erred in assigning twelve years as the proper period of limitation for the suit.

In this appeal it was argued for the respondents that the suit fell neither under Article 134 nor under Article 144 but under Article 148, which prescribes a period of sixty years limitation.

The Lower Courts, though each of them held the period of limitation to be twelve years, seemed to have some doubt on the point.

Held that the case cannot be brought within the scope of Article 148, as the transfer by Aung Zan to Po Te, described by both parties as a redemption, cannot be construed as a transfer of the mortgagee's interest to Po Te, but that the same cannot be said of what took place in 1894, as it was clear that Shwe Pi possessed himself of the land without any reference to the subsisting mortgage.

Held, therefore, that it was erroneous to assume that there was a mere transfer of the mortgagee's rights from Po Te to Shwe Pi and that Shwe Pi having invaded the mortgagee's rights his possession became adverse to both mortgagor and mortgagee and that he cannot be regarded as a sub-mortgagee or as an assignee of the mortgagee and that, therefore, Article 148 was inapplicable.

Held also that Article 134 was also inapplicable, as there was no transfer from the mortgagee to bring the case within this Article.

Held finally that the article which really applied was Article 144 and that under that article the suit was barred by limitation, and that it would also be barred if the article applicable were found to be Article 134.

JUDGMENT.

This was a suit for redemption of land orally mortgaged in usufructuary mortgage by the plaintiffs' father Tun Aung Gyaw to the 1st defendant Aung Zan for Rs. 300 about the year 1885. The facts as found by the Lower Courts are as follows. Tun Aung Gyaw died about 1890 leaving surviving him his children the plaintiffs Ma Yu Ma and Maung Pan who were minors. About 1893 the 2nd defendant Po Te obtained the land from Aung Zan on paying him the mortgage debt, Rs. 300. Po Te is the brother of the mortgagor Tun Aung Gyaw and it was with the express consent of his niece Ma Yu Ma that Po Te took the land from Aung Zan. This transfer to Po Te is called a redemption and it was clearly intended to be such by Po Te, Aung Zan and Ma Yu Ma. Po Te worked the land for a year and then in 1894 the 3rd defendant Shew Pi got possession of it. Po Te says that Shew Pi seized the land forcibly for a debt of some Rs. 600 due by Po Te, but there is no other evidence of any force being used. It seems more probable that Po Te who admits owing the money did give up the land to Shwe Pi in satisfaction of the debt. Shwe Pi shortly afterwards sold the land for Rs. 750 to the father-in-law of the 4th defendant Nya Na. Shwe Pi says that this was about a month after he got possession. From that time upto the time the suit was filed a period of about 16 years the land was in the possession of Nya Nas' family.

The 3rd and 4th defendants Shwe Pi and Nya Na pleaded that the land was mortgaged to Shwe Pi in 1892 by Maung Po Te and Ma Yu Ma, who afterwards relinquished the land to him unconditionally as they could not pay the mortgage debt. But the Subdivisional Court held that this mortgage and unconditional transfer were not proved.

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The plea of limitation was not raised and no issue was framed on that subject. But the question of limitation was clearly involved and both courts have dealt with it in their judgments.

The Sub-divisional Judge does not mention under which article in the Schedule of the Limitation Act he conceived the suit to fall. But he held that the 4th defendant had been in adverse possession for over 12 years and I gather therefore that he considered Article 144 to be the relevant article. The Divisional Court on the other hand held that the suit came under Article 134, being a suit to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration. The period of limitation is the same under Article 134 as under Article 144 namely, 12 years.

The Lower Courts agreed however in applying the provisions of Section 6 of the Limitation Act. The original cause of action arose in 1894. The period of 12 years expired in 1906. The suit was not filed till 1910. But both the plaintiffs were minors in 1894. Maung Pan attained majority about 4 years before the suit was filed and his sister Ma Yu Ma some years earlier but less than 12 years before the suit was filed. Both courts held that in these circumstances the plaintiffs were entitled under Section 6 to bring their suit within twelve years of attaining majority. Both courts overlooked the provisions of Section 8 which limits the extension of time under Section 6 to three years from the cessation of minority. The act allows as a maximum three years from the cessation of minority or the full period from the ordinary starting point of limitation, that is the original cause of action (here, 1894), whichever is more advantageous to the plaintiff. In this case the plaintiffs cannot invoke Sections 6 and 8 because when the suit was filed the statutory maximum of three years from the date of attaining majority had already expired. Both the plaintiffs had attained majority more than three years before filing the suit. Consequently the limitation must be computed in the ordinary way *i.e.*, from the original cause of action in 1894; and as more than 12 years from that date had elapsed when the suit was filed it was barred by limitation, unless indeed it can be held that the Lower Courts erred in assigning 12 years as the proper period of limitation for the suit.

It is now argued for the respondents that the suit fell neither under Article 134 nor under Article 144 but under Article 148 which prescribes a period of sixty years' limitation. With reference to this argument it may be noted that while both the lower courts held the proper period of limitation to be 12 years there are passages in each of the judgments which indicate that the learned Judges had some doubt on the point. The Sub-divisional Judge remarked:—"Arguing in the other way the plaintiffs are mortgagors through their father and the defendants 1 to 4 must be regarded as mortgagees one after the other and the plaintiffs are clearly entitled to redeem." The remarks of the Divisional Judge are as follows:—"I hold further that since the plaintiffs were not parties to the various transfers of the mortgaged property which belonged to them as their father's heirs, all that can have been

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transferred to any of the subsequent transferees of the property is Ko Aung Zan's right as usufructuary mortgagee, and that the lower court was right in giving plaintiffs a decree for redemption." In each case the remarks are inconsistent with the finding that the period of limitation is 12 years. For if the 4th defendant, the present holder of the land, merely stands in the shoes of the original mortgagee and is the last of a series of sub-mortgagees or transferees of the original mortgage, then Article 148 would apply and the period of limitation would be sixty years.

I have considered whether the case can be brought within the scope of Article 148 and I am satisfied that it cannot. The transfer by Aung Zan to Po Te is described by both parties as a redemption. Section 91 of the Transfer of Property Act specifies the classes of persons who may redeem. It may be that Po Te was "guardian of the property of minors" (his niece and nephew) and redeemed the land. But there is no proof that he was their guardian or that he redeemed on their behalf. The fact that Mi Yu Ma consented to the transaction does not show that the redemption was on behalf of the minors. It cannot be treated as a redemption in law. It must be construed as a transfer of the mortgagee's interest to Po Te. The same cannot be said of what took place in 1894. Po Te denies that he made any transfer to Shwe Pi; he says Shwe Pi entered on the land forcibly. However that may be, it is clear that Shwe Pi possessed himself of the land without any reference to the subsisting mortgage. Presumably he knew of the original mortgage to Aung Zan, but believed it to have been extinguished by the transfer to Po Te. This was a natural view to take as Po Te was brother of the original mortgagor. In the circumstances it is erroneous to assume that there was a mere transfer of the mortgagee's rights from Po Te to Shwe Pi. Shwe Pi invaded the mortgagee's rights and his possession became adverse to both mortgagor and mortgagee. He cannot be regarded as a sub-mortgagee or as an assignee of the mortgagee and Article 148 is therefore inapplicable. Article 134 also is inapplicable. That article would apply if Po Te knowing that he had acquired only mortgagee's rights by the transfer from Aung Zan nevertheless sold the land outright as his own property to Shwe Pi. But the actual facts are different. Po Te suffered Shwe Pi to take possession of the land and to hold it irrespective of the mortgage. It is clear that Shwe Pi entered on the land unconditionally and his possession at once became adverse as found by the Sub-divisional Court. There was no transfer from the mortgagee such as would bring the case within Article 134.

In my opinion the article which really applies is Article 144 and under that the suit was barred by limitation. It would also be barred if the article applicable were found to be Article 134.

The decrees of the Lower Courts are set aside. The suit is dismissed with costs in all courts.

THE
BURMA LAW TIMES.

VOL. VI.] SEPT.—DEC. 1913. [NO. 9—10.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISIONS NOS. 125B—127B OF 1913

AND

CRIMINAL REFERENCE NO. 25 OF 1913.

1. G. S. CLIFFORD
2. R. E. STRACHAN
3. S. A. MOWER

vs. KING-EMPEROR.

For Clifford and Strachan—Mr. Giles.

For Mower—De Glanville.

For King-Emperor—Mr. MacDonell and Mg. Kin.

Before Mr. Justice Hartnoll Offg. Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

Dated, 20th June 1913.

Held that the summing up of a Sessions Judge must be read as a whole.

Held also that the principal duty of the Auditors is to protect the shareholders and to see that the Directors and the Manager are issuing true balance sheets. The shareholders are therefore entitled to rely on the auditor as a check on the Directors.

Held also that the three separate acceptances of deposits from three persons at different times cannot be said to be parts of one composite offence under the first part of S. 71 of the Indian Penal Code since the dishonest intention which is the gist of the offence of cheating was present not only at the time the balance sheet was issued but also at the time of accepting each of the deposits.

The charges framed by the Committing Magistrate were altered by the presiding Judge as follows:—

G. S. CLIFFORD,
R. F. STRACHAN,
S. A. MOWER.

You are charged as follows:—

FIRSTLY.—That on or about the 30th day of October 1911, at Rangoon, you, R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you, S. A. Mower and G. S. Clifford, being Directors of the said Bank, did, by means of a false balance

sheet, and a false Director's report. and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent, dishonestly induce one Maung Tin Baw to deliver the sum of Rs. 5,000 to the said Bank and that you thereby committed the offence of cheating, an offence punishable under section 420 of the Indian Penal Code and within the cognizance of this Court.

SECONDLY.—That on or about the 9th day of November 1911, at Rangoon, you, R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you, S. A. Mower and G. S. Clifford being Directors of the said Bank, did, by means of a false balance sheet, and a false Director's report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent, dishonestly induce one John Cumming to deliver the sum of Rs. 40 to the said Bank, and that you thereby committed the offence of cheating, an offence punishable under section 420 of the Indian Penal Code, and within the cognizance of this Court.

THIRDLY.—That on or about the 10th day of November 1911, at Rangoon, you, R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you, S. A. Mower and G. S. Clifford, being Directors of the said Bank, did, by means of a false balance sheet and a false Director's Report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent, dishonestly induce one N. Mitter to deliver the sum of Rs. 100 to the said Bank, and that you thereby committed the offence of cheating, an offence punishable under section 420 of the Indian Penal Code and within the cognizance of this Court.

Statement of the 1st Accused G. S. Clifford.

1. I took no part whatever in the preparation of the balance sheet of the 30th June 1911. I signed it as a Director after it had been certified to be correct by the Auditors of the Bank.

2. According to the minutes of the General Meeting held on the 16th December 1911 I stated in my speech to the shareholders that the securities held by the Bank had been scrutinised at the time of the preparation of the balance sheet of 30th June 1911 by the Auditors and the Directors. This is certainly not a correct statement, though I am unable at this distance of time to say whether it is due to an inaccurate report of what I said or an inadvertent inaccuracy on my part when I made the speech. It is the fact that I did not myself scrutinise or even inquire into the securities and no Director other than myself was in Burma at that time.

At or about the time of the Audit Mr. Allan asked me my opinion of the value of the assets of the Moolla Oil Company and the Irrawaddy Petroleum Company and I communicated to him the high opinion which I personally held as to the value of those assets.

3. I was not aware and I made no enquiries how the item of Rs. 6,36,000 was arrived at or of what items it was composed or of the manner in which the contingency fund had been dealt with.

4. Save as regards my firm or the Companies with the management of which I was actively concerned I did not know with whom the Bank was doing business nor was I aware of the debts which had been treated as bad or doubtful for the purpose of arriving at the available profit.

5. I was aware that Government paper of the value of 5 lakhs had been deposited with the Bank of Bengal to secure the guarantee by the Bank of Burma of the loan to the Rangoon Refinery Company. The transaction was not however present in my mind when I signed the balance sheet and if it had been I think that I should most probably have accepted as correct the way in which the Auditors, who must have had knowledge of the transaction, had thought proper to treat it in the balance sheet.

6. Mr. Mower took little or no active part in the business of the firm of Mower and Company, and I, as the only active partner, was very fully occupied at the time with the business of that firm. I had then and have now every confidence both in the ability and in the integrity of Mr. Strachan, the General Manager, and Messrs. Stuart, Smith and Allan the Auditors.

7. I had previously signed many balance sheets of the Bank; but never had gone into, tested or questioned the manner in which they were drawn up. I have been Director of many other Companies and in that capacity signed many balance sheets of such companies but never examined or tested the manner in which such balance sheets had been drawn up unless I was also actively concerned as one of the Managing Agents of the Companies in question.

8. During my absence in Europe my brother, Charles Clifford holding my power-of-attorney, arranged with the General Manager that the credit balance of my private current account should be held by the Bank, as security for the account of my firm. When I returned to Burma I was informed of this and made no objection: but I did not desire to have the balance of my account lying entirely idle at the Bank so I arranged with the General Manager that I might draw upon that account for the purpose of making investments provided that securities representing those investments were deposited with the Bank as security for the account of my firm.

9. I withdrew from this account two sums of Rs. 1,809 and Rs. 9,992-12-0 to pay to share brokers in respect of share transactions. On the 4th September 1911, having prior to that date withdrawn only these two sums totalling Rs. 11,801-12-0 from my account, I deposited with the Bank share certificates of the then market value of about Rs. 20,000, namely:—

600 Burma Investments.
2,100 Burma Rivers Transports.
131 Rangoon Oils.
191 British Burma Petroleums.
1,276 Tavoy Concessions (Rs. 3 paid).
487 Mewaing Gold (Ordinary).

10. On the 4th September 1911 I withdrew a further sum of Rs. 10,000 to reduce my debt to Pandaya which debt was secured upon some of the Mergui Crown Rubbers held in trust for the Bank subject to the payment of calls. Rupees 750 was withdrawn two days later to pay interert to Pandaya on the same loan. I tried to redeem these shares, which would then have become further security to the Bank. Owing to their fall in value and further calls being made upon them the shares had ultimately to be sold to realise the debt secured upon them.

11. Rupees 200 and Rs. 20,000 were withdrawn from the account to pay interest and principal due to the Chetty firm of M. P. A. K. secured upon 5,750 Irrawaddy Petroleums. The shares thus redeemed were immediately deposited with the Bank of Burma.

12. Small items totalling Rs. 130 appear to have been withdrawn from this account for my own private purposes. I cannot now recall the circumstances under which this was done.

13. By arrangement with me Mower Limited remitted through the Bank of Burma to my wife who was in England the sum of £60, the cost of the remittance should have been debited in the usual course to Mower Limited by the Bank and have been subsequently debited to me by Mower Limited. After the Bank had closed, the cost of this remittance was wrongly debited by the Liquidators to my account instead of the account of Mower Limited. I am in no way responsible for this debit in my account with the Bank: it is due solely to an error on the part of the Liquidators brought about, no doubt, by the fact that the draft was in favour of my wife.

14. As regards the Rangoon Refinery claim against the British Burma Petroleum Company, this related to the balance of the expenses of carrying on the Refinery business since the date specified in the agreement for sale. It was inevitable that there should be disputes as to some items of such an account and in my opinion at the time there was room for very arguable, if not successful, dispute as to a mortgage on the tank-steamer "Wistaria" and as to items relating to the Thilwa wharf. The claim of the Rangoon Refinery Company was never in fact repudiated by the British Burma Petroleum Company and knowing, as I knew, that it would be extremely inconvenient for the latter Company to have to meet such a claim at that particular juncture I always regarded the letters and telegrams of the British Burma Petroleum Company, as indicative of that Company's desire to postpone payment. I knew that the Auditors of the British Burma Petroleum Company, specially appointed for the purpose had passed the claim of the Rangoon Refinery Company (in the form in which it was thereafter preferred) as payable by the British Burma Petroleum Company and I knew that the Board of the British Burma Petroleum Company had at once modified their attitude when threatened by the Liquidators with legal proceedings.

15. I was at the time far more concerned at the present inconvenience to the British Burma Petroleum Company than at

the ultimate result to the Rangoon Refinery Company. My proposal that my firm should guarantee ultimate payment of admitted items was made with a view of assisting the British Burma Petroleum Company to postpone payment of the claim to a more convenient time.

16. I am even now confident that had funds been available at the time, the claim of the Rangoon Refinery Company would have been met by the British Burma Petroleum Company.

17. That the claim was in November 1911 settled by the Bank for the sum of £ 5,000 was due to the enormous pressure brought to bear by the Honourable Lionel Holland and Mr. Williamson. The Liquidators refused to abate their claim unless their debt to the Bank was correspondingly abated: the British Burma Petroleum Company refused to carry on unless the liability of that Company was settled upon their own terms. To have refused the proposed settlement would have meant forcing the British Burma Petroleum Company into liquidation and rendering valueless the large number of shares in that Company held by the Bank as security.

18. As regards shares in the Moola Oil Company, Limited, and the Irrawaddy Petroleum Company, Limited I did not know at what value they were taken for the purpose of estimating the securities held by the Bank. But I myself held the very highest opinion of the value of the concessions held by these Companies and would not have sold any of my shares in either of those Companies at par. These concessions had to my knowledge been most favourably reported on by Dr. Bleeck and Dr. Porro and in the middle of the year 1911 they were generally considered of enormous value. I now consider them to be of considerably greater value than the nominal share capital of the Companies.

19. When the Debenture Trust Deed of the British Burma Petroleum Company was being settled I held out for an alteration in the draft clause 37 H in order that the British Burma Petroleum Company might not be compelled to so control the Rangoon Oil Company as to hamper it in the ordinary conduct of its business. The last words in that clause were added to meet by views and I understood at the time that they excluded (as I am sure that they were intended to exclude) from the purview of the Trust Deed not only the borrowing of money by the Rangoon Oil Company, but also the pledge of its assets in the ordinary course of business.

20. So, when the Rangoon Oil Company required further funds for the development of its property I borrowed the required amount from the Bank of Burma in the ordinary course of business and in the ordinary course of business I gave security to the Bank over the assets of the Company. This transaction was immediately reported in the ordinary course to the London Board of the British Burma Petroleum Company. It never occurred to any party concerned and I believe it is not the fact that the power of the Rangoon Oil Company to grant a valid mortgage was limited by a covenant entered into by the British Burma Petroleum

Company. No such suggestion had ever been made until these proceedings commenced.

21. I take my share of the responsibility for carrying on the Bank until the 13th November 1911. I knew in the months of September and October that the Bank's position had been materially altered for the worse since the 30th June 1911 by the continuous heavy fall in the value of securities, but the Capital and reserve funds were not exhausted and to have closed the Bank before that course became necessary would have involved the share-holders in great and unnecessary loss and would, in my opinion, have been indefensible. The position of the Bank was from time to time reported to the Directors by the General Manager and was carefully considered. The reports that were made and my own views upon the position are clearly and truthfully set out in the proceedings of the Directors which have been put in evidence.

22. With the full approval of my co-Directors I went to Calcutta to see whether any arrangements could be made with the Bank of Bengal to relieve the pressure upon the Bank and was fully prepared to entirely sacrifice myself and my firm to ensure that result. When my mission failed I took the best expert and legal advice procurable and was even then left in doubt as to the proper course to be pursued as regards the closing of the Bank. It was only on the way from Calcutta to Rangoon that I was able to come to a conclusion in my own mind and immediately after landing I took action with my co-Directors to close the Bank.

23. Throughout my connection with the Bank I can honestly say that I have had no other object in view than the prosperity of the Bank. My firm were large holders of shares in all of the Companies, the shares of which were largely held as security by the Bank. Such shares were held by my firm not as temporary speculations but as permanent investments and were so held up to the last and the same causes which led to the failure of the Bank of Burma have also resulted in the ruin of my firm and of myself.

24. It is absolutely untrue that I have been party to the issue of a false balance sheet or false Directors' Report. It is absolutely untrue that I was party to fraudulently keeping the Bank open after I knew it to be insolvent. It is absolutely untrue that I have committed or been party to or cognisant of any dishonest act in connection with the management of the Bank.

WRITTEN STATEMENT OF R. F. STRACHAN.

In addition to what was stated in my written statement filed in the Magistrate's Court, I wish to say as follows:—

RANGOON REFINERY COMPANY'S LOAN.

I regarded this loan as secured. Up to the 28th July the Bank held a lien over assets of the Rangoon Refinery Company and that lien was not given up until the Bank obtained a transfer of the 135,000 shares in the British Burma Petroleum Company and a definite lien over the debt due to the Liquidators by that Company.

I fully understood that the Liquidators were spending the money borrowed from the Bank on account of the British Burma Petroleum Company and I did not hear until late in September 1911 that the whole of the balance of the debt was likely to be disputed. I did not see any of the correspondence or telegrams except the letters addressed by or to the Bank.

I heard in conversation and knew from the letter of 27th June from the Liquidators to the Bank enclosing £20,000 that some items were disputed, but that was not unnatural in the case of a debt of Rs. 10,65,000 and I knew on the 29th July that taking the British Burma Petroleum shares at the price of that day, namely, Rs. 5-1-0, the Bank was fully secured including the 5 lakhs guaranteed to the Bank of Bengal even if the British Burma Petroleum Company successfully disputed items to the extent of Rs. 5,00,000, and on the basis of the market price of the shares on June 30th, the date at which the balance sheet spoke, there would be a margin of security of Rs. 1,23,505 even if half the debt were successfully disputed.

I learned in October 1911 that it was suggested to release the Liquidators from all but £5,000 of the debt and I at once went into the matter and put up my note of the 27th October 1911 (exhibit 25) to the Directors in which I called their attention to the seriousness of the position.

The subsequent release of the 10th November 1911 (exhibit *72g*) was arranged by the Directors and not by myself.

Apart, however, from any questions of security I always thought up to the time of the release that the Liquidators' debt to the Bank was absolutely good. The Company had gone into liquidation solely for the purpose of selling its undertaking on very advantageous terms and I to the end regarded the Company in liquidation as a substantial concern.

My letters to the Liquidators of the 16th May 1911 (exhibit *75h*) and 5th June 1911 (exhibit *75b*) were written by me for the purpose of pressing the Liquidators. I knew that they were asking the British Burmah Petroleum Company for payment and I thought these letters would cause them to press their demands more urgently.

RANGOON OIL COMPANY.

I looked upon the letter of lien of the 8th of July 1911, as a valid security for this loan. I knew of nothing which precluded the Rangoon Oil Company from charging their assets. Before that lien was given the Bank held a promissory note executed by the Rangoon Oil Company and Mower & Company and at the date of the lien a fresh promissory note was taken from the Rangoon Oil Company. The lien was subsequeutly released upon the British Burmah Petroleum Company given their guarantee for the payment of the debt.

AUNG BAN OIL COMPANY.

In this case too the Company had gone into liquidation under the same circumstances as the Refinery Company and I looked upon the debt as absolutely good. The Bank held a promissory note which I regarded as being a security for the debt.

MOWER & COMPANY, MOBERLY AND W. J. COTTERELL.

Amongst the shares lodged with the Bank againgst these accounts were large numbers of shares in the Moolla Oil Company and the Irrawaddy Petroleum Company and if those shares were of their par value or any where near it there was a large margin of security in each case. I was satisfied when the balance sheet was published that these shares were worth at least their nominal value. I knew that in June sellers of Irrawaddy Petroleum shares at Rs. 12-8 had been enquired for and none found, and I also knew that shares had been actually sold at Rs. 15 and Rs. 17-8. From enquiries I made I arrived at the conclusion that the properties owned by these Companies were regarded as of great value. The Bank further held promissory notes for the respective loans.

MOUNT PIMA MINING COMPANY LIMITED.

I regarded the letter of the 4th July 1911 (exhibit 15) as a valid and sufficient security for this debt. Mower Limited and Mower & Company were the sole creditors of the Mount Pima Mining Company Limited. Mr. Allan, the Auditor, was one of the Liquidators of that Company. I discussed with him the value of the Company's assets and he informed me that this debt could be taken as secured as he thought the assets would realise sufficient to pay off the amount of the Bank's claim.

ATTIA.

From my knowledge of the position occupied by this man and of the businesses with which he was connected I was satisfied that he was solvent and able to pay his interest and any unsecured balance of his debt. He was trading with his own ship to the Nicobar Islands. He was building river steamers and was associated with influential business people in oil and mining concessions. He was half proprietor of the Delta Navigation Company; Managing Agent for the Madaya-Mandalay Light Railway and for Oils and Minerals Limited and also for the Eastern Navigation Trading Company; Shamuddin Oil Company, Burma Wolfram Company, Limited. He was also the owner of the Pioneer Flour Mill which had cost him close on Rs. 3,75,000. According to my judgment at that time he appeared to be in a large and flourishing way of business and I had no reason for thinking that he either would not or could not pay his debts.

OTHER ACCOUNTS.

Of the remaining accounts referred to in exhibit 13*b*, the following were taken as either doubtful or bad, the principal and interest being provided for in contingencies, namely:

J. A. A. Caunter, W. C. Dennis, W. Gorse, W. Gorse and Rajh, P. Teehan, Michael, Maunder, N. P. L. S. P. Chetty, I. Rajh, J. Reid, D. Rajh, Rangoon Mandalay Trading Company, P. N. Stathacopulos and Fraser and Stephen. Those accounts taking both principal and interest amounted to Rs. 2,93,271-15-1, whereas the total sum standing to the credit of the contingency fund in the balance sheet was Rs. 2,94,992-15-4. I may add that I did not agree with the Auditor that it was necessary to provide as much but I subordinated my opinion to his.

As regards the profit and loss account the matter was dealt with as follows:—

	Rs.	A.	P.	Rs.	A.	P.
Gross amount credited during the 6 months				6,10,109	9	7
Before arriving at the sum shown as gross income in the profit and loss account there was deducted from this for contigencies	71,229	14	10			
And for bad debts	13,670	1	4			
				84,900	0	2
Leaving the amount shown as gross income at				5,25,209	9	5

The result was precisely the same as if this Rs. 71,229-14-10 had been placed originally to an interest suspense account. As regards the balance I considered each account and honestly thought I was justified in expecting that the interest would be paid. Each of the other accounts was also taken into consideration separately by the Auditor, and I answered all questions and gave all information for which he asked.

EXHIBIT 18*a*.

I have dealt above with the principal accounts mentioned in this exhibit. I need not deal with the other accounts shown in that exhibit in detail inasmuch as the figures shown in the audit papers are practically the same as those put forward by the Liquidator.

Against every debt owing to the Bank with the exception of debts to the amount of about Rs. 5,000 there were held promissory notes or other securities and I thought then and still think that so far as such debts were considered good the Bank would have been justified in law under the Acts in showing them under the heading of "Debts considered good for which the Bank holds bills or other securities." The Auditor and I thought however that it would be fairer to show the sum of Rs. 6,36,280 under the heading of "Debts considered good for which the Bank holds no formal security" that being the amount by which the value of securities were short of principal and interest after deducting the amount provided in contingencies.

The provision of Rs. 2,94,992-15-4 insured that the Bank could not lose to that extent and I thought there was nothing

improper in leaving that amount under the first heading above referred to. It was not to my mind a matter of deducting that sum from the second heading and adding it to the first, but a matter of how much it would be fair to deduct from the first heading and show under the second in order to show to what extent payment of the debts was not insured to the Bank either as being actually covered by security or by provisions made by the Bank itself. My opinion was that Rs. 6,36,280 should be so shown and the Auditor agreed with me. The addition of the words "Including contingencies" on the liabilities side of the balance sheet was made by the Auditor without any suggestion from me and the matter being, to my mind, a technical one for the Auditor to decide I did not question the addition.

With reference to the absence of a note stating that 5 lakhs of Government paper was lodged with the Bank of Bengal as security for the Bank's guarantee of the Refinery Company's debt. The amount of the guarantee being included in "Acceptances on behalf of customers" on the liabilities side of the balance sheet, it never occurred to me that such a note was necessary and I did not even discuss the question with the Auditor. Had the question been raised I should certainly at that time have expressed the opinion that no such note was required.

I wish to add that the Directors took no part in the preparation of the balance sheet. They were not consulted by me either as to the figures to be placed therein or as to the way in which those figures should be shown nor did they endeavour to exercise any influence over me as to these matters. I told them that the balance sheet was correct and I believe that they accepted it relying upon the Auditor and myself for its accuracy.

As regards the carrying on of the business of the Bank after the 30th June I repeat what I stated in my written statement in the Magistrate's Court. It is alleged that the object of keeping the Bank open was to get additional deposits to be used in improper ways. In fact the total amount held by the Bank on current, savings Bank and fixed deposit accounts on the 13th November 1911 was less by Rs. 4,23,792 than it was on the 30th June 1911, while between those dates the value of the Government paper held by the Bank was increased by Rs. 2,00,000.

The Written Statement of S. A. Mower.

I deny that I advised or influenced my wife to withdraw her money from the Bank. I have been particularly careful not to influence her in the control of her separate property. I adhere to the statement made in the Lower Court. I have nothing further to add.

IMPORTANT POINTS IN MR. JUSTICE TWOMBY'S CHARGE.

Pages 212-224. Province of Judge and Jury explained—Jury to accept judge's decision on questions of law—Jury at perfect liberty to form their own judgment on questions of fact though judge may give out his own conclusions from the evidence—History of the origin of this prosecution given—Balance Sheet of the first half year of 1911—Representation that the Bank was sound and prosperous, just 3 months before its fall—advice to jury to free their minds of prejudice and base their decision on evidence put before them—Charge of cheating certain depositors by inducing them by false representation to deposit their money and causing them loss—The Expressions 'dishonestly' 'wrongful gain,' 'wrongful loss', 'intention' explained—Good, doubtful and bad debts—Question whether debts are correctly represented under their proper heads in the balance sheet is one of fact for the jury—Omission of a note in the balance sheet about the pledge of 5 lakhs of Government Paper to the Bank of Bengal.

Pages 225-247. Fundamental issue in the case is whether the balance sheet is false in putting doubtful or bad debts as *good* and in allotting to profit as earned income, the interest on such doubtful and bad debts which was really unpaid and which there was no reasonable prospect of recovering—Official liquidators' statements of loans and interests (18*a* and 18*b*) criticised—Official liquidator's total deficit of security 33,68,000 brought down to 22 lakhs by deducting amounts found to be good debts—Five large debts and 11 smaller debts examined in detail—Tests of deciding whether a debt is good, doubtful or bad indicated—Attia 3½ lakhs—Mower 7⅝ lakhs—Mount Pimas 1·4 lakh—Aung Ban 1·7 lakh—Rangoon Refinery 5·6 lakhs—The smaller debts—Question of interest—unpaid interest on 60 lakhs bad or doubtful debts was taken as profit and loss and treated as profit—It ought to have gone to interest suspense or deferred interest account—Jury to decide whether the balance sheet and Director's report were false and dishonest and whether the dishonesty was aggravated by keeping the Bank open till November.

Pages 247-253 Auditor's certificate commented upon—He passed the balance sheet in spite of serious misgivings about the debts—He failed in his duty in not reporting his doubts to shareholders—Lindley on Auditors' duties—Mr. Okeden's knowledge of the Bank's affairs not equal to that of the accused—Mr. Okeden may have been a negligent Director but he was not dishonest—His implicit reliance on co-Directors and Manager—jury has to consider the case of each one of the accused separately—Jury has to decide not only whether the balance sheet was false but whether each of the accused knew it to be false when he signed it—The law requires for a conviction of the offence of cheating not mere carelessness or negligence but positive dishonesty—There would be no dishonest intention without actual knowledge that the balance sheet was false.

Pages 253-267—Directors Clifford and Mower—Interdependence of the Bank of Burma and the Mower Companies—Mower and Co, themselves the greatest debtor of the Bank—Out of 122¾ lakhs the total amount of loans and overdrafts due to the Bank on 30th June 1911 the Mower Companies with Attia and Cotterell were responsible for over 105 lakhs—It follows from this that the Bank of Burma, founded by Messrs. Mower and Clifford existed primarily for the purpose of obtaining funds for carrying on the operations of Mower Companies—Accused's connection with these companies and with Attia and Cotterell gave them special opportunities for knowledge of the state of the principal debts—Mr. Clifford, the only Director present in Rangoon for some months before the balance sheet was issued—Presumption that he exercised the supervision and control vested in the Board of Directors and that in so doing became conversant with all really important matters concerning the Bank—He had also full opportunities of knowing the extent of all the large debts of the Bank and in a general way, at any rate, of the security which the Bank held for these debts—Mr. Strachan, the General Manager of the Bank knew the true state of affairs as regards most of the debts of the Bank and the securities held for them and if the balance sheet of 30th June 1911 was really false and fraudulent; he at least must have been aware of it—Mr. Mower was the Senior Director of the Bank from the beginning and was the leading figure in the Mower Companies and also the leading figure in the Bank—Though he presided at Directors' meetings, he left all active work to Mr. Clifford—Mower was in England for some months before the balance sheet was signed by him on 1st August 1911 and the Jury has to decide whether Mr. Clifford must have communicated to him the Auditor's misgivings about the security of the large debts and his advice not to declare any dividend—Jury to consider Mrs. Mower's withdrawing her fixed deposits in August and Mr. Mower's withdrawing all his money in the Bank before the Bank closed in arriving at a conclusion regarding Mower's knowledge of the affairs of the Bank—But the case hinges entirely on the balance sheet, on the jury's decision as to whether it was false and deceitful—If the jury finds it was not, the accused should be acquitted—If they find that it was,

then they have to decide further with regard to each of these men whether it was false to his knowledge when he signed it.

After hearing the evidence produced and hearing the advocates for the prosecution and defence the Hon. Mr. Justice Twomey summed up the case as follows :—

CHARGE.

TWOMEY, J:—Gentlemen of the Jury,—It is nearly eight weeks since you were empanelled for the trial of this case, which is perhaps as important and at the same time as intricate as any case in the history of the Chief Court. It would be difficult for me to speak too highly of the patience and attention with which you have followed these lengthy proceedings and of the personal sacrifices which you have made in attending Court for so many days. I feel confident that you now have a thorough grasp of the main facts of the case and the questions which you have to decide. Several questions of law have been raised on which it will be my duty to instruct you, and in the course of summing up the evidence I shall have to express my opinion, more or less strongly on the principal questions of fact. On questions of law you have no alternative but to accept my decision; but where the question is one of fact you must always remember that the duty of deciding it rests with you alone. Though I may tell you what strikes me as a reasonable conclusion from the evidence on any particular point you are not bound to agree with me in my opinion but you are at perfect liberty to form your own judgment. I am exceedingly glad that there are several gentlemen on the jury with an intimate knowledge of banking and accounts, men who are specially competent to deal with the difficult questions of banking practice and procedure that have arisen in the case. It relieves me of much anxiety to know that the decision of the case rests with men of business who will be able to apply ordinary business standards in weighing the evidence and the probabilities. It is also a great source of satisfaction to me that the three accused have been so very ably defended. You have been addressed for several days by the learned counsel for the defence and I think there is no point and no argument to be urged in their favour which has not been laid before you fully and clearly. Whatever may be the result of the case I think the accused persons will at any rate be unable to reproach their advocates with want of skill or want of zeal in their defence.

ORIGIN OF THE PROSECUTION.

Now I will say a few words as to how this case came to be instituted. The accused Mr. Mower and Mr. Clifford were Directors and the accused Mr. Strachan was the Manager of the Bank of Burma, and a balance sheet with Directors' report was issued over their signature on the 4th August 1911 for the half-year ending 30th June. This balance sheet represented that the Bank had earned a large profit during the half-year and out of this profit it was recommended by the Directors that a dividend at the rate of 7 per cent. per annum should be paid to the shareholders; that is the same rate as in the previous half-year and I think in the half

year before that also. It is beyond dispute that the position of the Bank, according to this report and balance sheet, was sound and prosperous. The Rev. Mr. Cumming on reading the report and balance sheet thought that the Bank must be exceedingly prosperous. Mr. Black, an experienced Banker, says that the balance sheet appeared to him sound and satisfactory. The balance sheet was certainly calculated to create public confidence in the stability of the Bank and to lead depositors to believe that their money would be safe if they placed it in the Bank. Less than three months afterwards the affairs of the Bank had come to such a pass that without assistance from outside the Bank must close its doors. The Directors applied to the Bank of Bengal for assistance and as that Bank could not see its way to give the desired assistance, that is to say, could not accept the proposal to take over Mower & Co.'s loans aggregating some 45 lakhs of rupees, the Bank closed on the 13th November: it was then clearly impossible to carry on any longer. A large number of deposits were falling due in November and there was good reason to believe that all deposits would be withdrawn: a feeling of uneasiness about the Bank was abroad, the shares of the Bank were falling and a run on the Bank was imminent. The Manager and Directors realised that it would be impossible to issue a favourable balance sheet for the half-year ending 31st December 1911. It is clear that the continuous fall in the value of the securities lodged with the Bank had a good deal to do with the collapse, but the mere fall of securities was not sufficient by itself to account for it, for the fall in securities was a phenomenon that affected other Banks also. At any rate the striking contrast between the prosperous outlook of the Bank as represented in the balance sheet of 30th June and the report issued with the balance sheet and the actual state of affairs after such a short interval gave rise, after the closing of the Bank, to an enquiry as to the truth of the statements and the figures in the balance sheet and report and the present prosecution is the result of that enquiry. It is alleged by the prosecution that the balance sheet and Directors' report were false and fraudulent to the knowledge of the Directors and Manager; that instead of making a profit the Bank had in reality suffered a loss during the half-year; that if the truth were known about this a run on the Bank would have inevitably followed and that the accused persons issued the balance sheet and kept the Bank open with the object of deceiving the public and concealing the true state of affairs on 30th June, rather I should say on 4th August, the date on which the balance sheet was issued. The closing of a Bank is an event that gives rise to all sorts of comments in the Press and among the public. It is now 17 months since the Bank of Burma closed and during that time the conduct of the Directors and Manager, their motives and intentions, the policy by which they were guided, and the causes of the collapse of the Bank—all these matters have been the subject of gossip in clubs, hotels, and other resorts. Also, when a Bank fails the air is filled with the lamentations of the unfortunate people who have lost their money and the atmosphere generally is not

likely to be friendly or even fair to the management of the Bank. We know from the evidence in this case that the general attitude towards the Directors and Manager was one of resentment, not to say hostility. This being so, the learned advocates for the defence were certainly right in warning you to free your minds from all prejudice, and I cannot too strongly impress upon you the importance of doing so. You should clear your minds as far as you can from anything you may have read in the newspapers, or heard spoken outside about this case. You are to deal with it in the light of what you have seen and heard in this Court and to discard everything else. The materials for your decision are the evidence that has been put before you and the inferences you can draw from that evidence as reasonable and sensible men of business. It is only common justice to the accused that you should base your decision on these materials and on nothing else.

THE OFFENCE CHARGED.

It is perhaps hardly necessary for me to remind you also, that the accused are not on their trial for mismanaging the Bank or for dealing imprudently with its affairs. You may have formed opinions adverse to the accused on this score but however imprudent their management may have been that is not a matter which should influence your decision at all. It is not part of the charge that the accused mismanaged the affairs of the Bank. The charge against the accused is briefly that, by means of a false balance sheet and Directors' report and by keeping the Bank open as a going concern after it had become insolvent, they deceived certain specified persons and dishonestly induced these persons to deposit their money in the Bank, with the result that they lost their money or the greater part of it. Three persons are picked out from the mass of depositors because the law does not permit of more than three charges of the same kind to be tried jointly in one trial. Strange as it may seem, to issue a false balance sheet does not by itself constitute a substantive offence under the Indian law. It is an offence under section 74 of the Companies Act not to issue a balance sheet at all; the Directors are bound to issue a balance sheet and if they fail to do so they are liable to a fine under that section, but there is no specific offence of issuing a balance sheet knowing it to be false and fraudulent. The prosecution were therefore obliged to have recourse to that part of the Indian Penal Code which deals with cheating. Cheating is defined in section 415, Indian Penal Code (reads it). That is the general definition of cheating, but you see that it includes some kinds of cheating that do not concern us at all in this case. The whole of the latter part of the section, for example, has noting to do with this case at all: the part about intentionally deceiving the person and so on, that is not germane to this case at all. We are concerned only with the kind of cheating which is described more fully in the later section of the Code which makes it a punishable offence to cheat, and thereby dishonestly induce the person deceived to deliver any property to any person. The accused are charged with

cheating in this way the three depositors named in the charge sheet. This kind of cheating, that is cheating by dishonestly inducing the delivery of property, is of course included in the general definition which I have just read, but the law regards it as an aggravated form of cheating and therefore provides for it in a separate section which is section 420. The only part which concerns us is the first part, "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, * * * shall be punished" and so on (section 420). You will see that the elements of the offence are, that the accused has deceived some person and that the accused has thereby dishonestly induced the person deceived to deliver property to any person. The word "property" includes money and the word "person" includes a Company such as a Bank. Thus, the offence is committed if the depositors named in the charge or any of them have been deceived by the accused and have been dishonestly induced by the deceit to pay money into the Bank. But it is very necessary to explain to you that the word "dishonestly" in this section or in the Penal Code generally is not used in its loose popular sense but is strictly defined in the Penal Code and I will read the definition to you (read section 24). You see he must do that with an intention of causing wrongful gain to one person and loss to another person. Then the words, "wrongful gain" and "wrongful loss" also have a technical meaning as used in the Penal Code (read section 23). The word "unlawful" there is not defined in the Penal Code, but there can be no doubt, I think, that it applies to such a case as the issue of a false balance sheet to the public and that a Bank which obtains money in that way is not legally entitled to it. If the Bank obtained money by issuing a false balance sheet, then that gain would be wrongful gain. But you will observe that in the definition of "dishonestly" the intention of the doer is an essential ingredient. A man's act may cause wrongful gain or wrongful loss but it does not necessarily follow that he is dishonest if it was not his intention to cause the wrongful gain or wrongful loss: so that, in a case of this kind, you have to determine whether the accused had the dishonest intention that the law expressly requires. Now, a man's intention is something hidden in his mind and the only way to discover the nature of his intention is to observe his external acts, words and conduct. You have not only to look at what he did and said but you have to consider also what must have appeared to him at the time to be the natural consequence of what he said and did. From these observations and consideration you can determine by inference what was his intention in saying or doing it, for a man is presumed by law to intend the natural and ordinary consequences of his acts. Thus, take the case alleged by the prosecution against these accused—the case of a Bank weighed down by a large amount of debt which there is little or no prospect of realising. The Directors and the Manager in these circumstances conceal the true state of affairs by issuing a false balance sheet representing the Bank to be in a sound and flourishing condition, and they keep the Bank open and continue to invite and receive

deposits for over three months, just as if every thing was in order, and in consequence of this action of the Directors and the Manager members of the public deposit money, all of which they lose by the failure of the Bank soon afterwards. If such were the circumstances —I am of course only now putting the prosecution case in a purely hypothetical form—it would be right to presume that the Directors and Manager intended to cause wrongful loss to depositors and wrongful gain to themselves, which loss and gain resulted as the natural consequence of their acts. It matters not what the motive was. Motive and intention are two different things. In the hypothetical case which I have just put to you the motive might be to enable the Bank to prevent the collapse of a number of commercial ventures in the success of which the Bank or the Directors of the Bank were more or less directly interested. There would be nothing necessarily improper in such a motive but if wrongful gain or wrongful loss is intentionally caused it matters not what the motive was. The motive does not affect the criminality of the act or series of acts concerned. It therefore comes to this. You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of the accused; that the natural result of publishing this balance sheet and keeping the Bank open was the payment of money into the Bank by depositors and that in the circumstances of the case the depositors would as a natural consequence lose their money or part of their money. You will remember that I altered the charge by adding certain words "intentionally keeping the Bank open as a going concern after it had ceased to be solvent". The reason for this addition is that the publication of the balance sheet alone did not complete the inducement to depositors. Even if the balance sheet were false there could be no cheating unless the Bank was kept open afterwards. The balance sheet was published in August 1911 but the last of the three payments did not occur until the 9th November. The balance sheet, therefore, was before the public throughout the intervening period and the feeling of security engendered by the balance sheet and Directors' report was operative up to the time of the last of the three deposits in November. During all this time the Bank kept its doors for the receipt of deposits among other things. If the purpose of issuing that balance sheet was to deceive the public as contended by the prosecution the action of the management in keeping the Bank open was a necessary factor in the execution of that purpose. In other words it may be said according to the prosecution that the Bank was kept open in pursuance of a design of which the first overt act was the issue of a false and deceitful balance sheet.

MEANING AND PURPOSE OF BALANCE SHEETS.

Now the Bank was a Company incorporated under the Indian Companies' Act and limited by shares. The Act prescribed the form of balance sheet of which you have copies. It is laid down in the Act that the balance sheet is to contain a summary of the property and liabilities of the Company arranged under the heads

appearing in that form or as near thereto as circumstances admit. The Act requires a balance sheet to be published yearly but in the Articles of Association framed for this Bank under the Act it is further provided that a balance sheet shall be published half-yearly and you may take it that the provisions of the Companies' Act regarding balance sheets apply fully to this balance sheet of the 30th June 1911. I should tell you that the provisions about issuing balance sheets are contained in the part of the Act which relates to the "Protection of Members", that is, shareholders. The balance sheet is intended by law to be a correct summary of the Companies' financial position so that all who have relations with the Company may have means of knowing how the Company stands financially and whether it is safe to deal with it. I should also point out that a Bank balance sheet is not necessarily a true balance sheet merely because it sets forth correctly the totals of the different accounts in the Bank. It would be no safeguard to the public unless it showed with reasonable fidelity the true state of affairs in general terms. Thus, if credit were taken in the books for assets which did not exist or if the assets were grossly overstated in the books and transferred with arithmetical correctness to the balance sheet with the effect of inflating the assets by large fictitious sums then the balance sheet would be a false balance sheet though it might be in perfect agreement with the books of the Bank.

You have seen many balance sheets in the course of this case and it is evident from these that the prescribed form is not strictly followed in practice—there are wide departures from it,—for example, the assets side of the prescribed form has a heading "Doubtful and Bad debts". But though probably every Bank has some doubtful or bad debts included amongst its assets, you will search for them in vain in the balance sheets. They are there but only in a veiled form being included among the debts considered good. We have the opinion of several expert accountants that this course is unobjectionable but with this important proviso *viz.*, that the bad and doubtful debts are fully reserved against on the liability side of the account. That proviso is essential; for example, the Bank of Burma admittedly had some Rs. 2,94,000 doubtful or bad debts which they showed among the good debts on the asset side but on the liability side they included a secret reserve or contingent fund for about the same amount—I believe it is a few hundred rupees more than the actual amount of the bad or doubtful debts. No dishonesty whatever can be imputed to them for reckoning these doubtful or bad debts as good assets as they reserved against them on the liability side. In doing this they were merely acting according to the recognised practice of Bankers and Auditors all over India. But if the doubtful or bad debts are not reserved against on the liability side then the Bank is bound to show them specifically as doubtful or bad debts on the asset side and if there is a special reserve fund for doubtful or bad debts on the liability side—but this reserve is not sufficient to cover the whole of the debts known to be doubtful or bad, then the difference, that is the excess of doubtful or bad debts must be disclosed expressly as

doubtful or bad debts on the asset side. This appears to be common sense and we have Mr. Meugens' authority for it and his opinion agrees with the other expert accountants who appear as witnesses in this case.

In the prescribed form of balance sheet you will see that the primary division of debts on the assets side is entered as "Debts which are considered good" and "Debts which are doubtful or bad": that is the main line of division. Then "the debts considered good" are subdivided in heading 6, "For which the Company holds bills or other securities" and 7 "For which the Company holds no security". There has been some doubt as to which of the good debts should go under heading 6 and which of them under heading 7. Heading 6 seems wide enough to cover any kind of security. Even the sole promissory note of a debtor is a security though it may be a security of a very attenuated kind. The Act does not distinguish between high class security and security which may be called merely nominal security. Moreover, it might be permissible to include under the first head a debt for which security is held however much the security may have depreciated, for the debt will still be a debt for which the Company holds bills or other securities, that is to say, the depreciated security is still available for the whole debt although the security when realised may not yield anything like the amount of the debt. But if it is still a good debt—that is the main point—then it could properly remain under head 6. In short, whatever the views of auditors on this subject may have been the Act does not require that the good debts entered under heading 6 should be good debts which are *fully secured*. Mr. Holdsworth and, I think, Mr. Tanner construed the heading in this way. They thought the debts to be placed under heading 6 should only be debts which are fully secured; but I think they are wrong. It may be that the Legislature intended that only debts which are fully secured should be put under heading 6 but we cannot consider what the intention of the Legislature may have been except in so far as the intention is expressed in the words of the enactment. We must look at the actual words, and in this case I think the plain meaning is that any debt for which there is security may go under heading 6 and not merely fully secured debts. You will see, gentlemen, that in my opinion at any rate, there was no obligation under the Companies' Act to show the good debts fully secured separately from those which are not fully secured. But from Mr. Allen's and Mr. Meugens' evidence it appears that auditors generally have decided for themselves that the classification of good debts in subdivisions 6 and 7 of the prescribed balance sheet is misleading and therefore a practice has grown up among auditors in India of showing under heading 6 only fully secured debts or the fully secured portions of partially secured debts. This has been the usual practice of Bankers and Auditors for some time and it appears as a matter of fact from the Manager Mr. Strachan's written statement in this case and from the Auditor Mr. Allen's evidence about the balance sheet of 30th of June that they distributed what they treated

as good debts between headings 6 and 7 on these lines, that is to say, they put those parts of the debts which they considered secured under heading 6 and those parts which they considered unsecured under heading 7. But it is obvious, gentlemen, that we could not hold the Manager and Auditor blameworthy if we find that some of the debts under heading 6 are as a matter of fact not fully secured and should under their scheme have gone under heading 7. So long as the whole of the debts are good debts and so long as *some* security is held for the debts under heading 6, there would be no reason to find fault. You may think that the safeguard afforded by the publication of a balance sheet will be much weakened if a Bank is at liberty to put under heading 6 a debt for which it holds any security, even a promissory note of a debtor, or however much the security may have depreciated. But as a matter of fact the really important safeguard is not in the subdivision of good debts into secured and unsecured but lies in the main classification of debts into good debts and debts which are doubtful or bad. If a debt is really a good debt it matters not to the Bank or to the public whether the certainty or practical certainty of recovering it depends upon the fact that specific security is held sufficient to recover the full amount of the debt or whether, as often may be the case, the certainty of recovery depends upon the high financial standing of the borrower. Of course, if the debt is classed as a good dedt because actual securities are held of a value equal to the full amount of the debt and if these securities afterwards depreciate or cease to be available then it becomes a question not of transferring the unsecured portion from heading 6 to 7, but of transferring it from heading 6 to heading 8 "Doubtful and bad debts". It behoves the management of the Bank in each case of that kind to consider whether they have sufficient reason to consider it as a good debt any longer having regard to the depreciation or extinction of the security. That appears to be the crux of the whole matter. I am not going to lay down a definition of a good debt in the abstract. it is not a term of law: it is a business term and it is for you as men of business to apply what you regard as the proper business term and it is for you as men of business to apply what you regard as the proper business standard in deciding on the evidence before you, whether any particular debt is good or not. If a debt is not good it follows that it is either doubtful or bad and here you will bear in mind that the question whether a particular debt should on its merits be classed as good or not, would often be a matter upon which opinions might honestly differ. Where there is room for such an honest difference of opinion no Bank official could be blamed for taking the more favourable rather than the less favourable view. It lies upon the prosecution when they say a debt is doubtful or bad to prove it strictly to your satisfaction and if you think, after considering all the circumstances, that there is still room for an honest difference of opinion as to the classification of any particular debt you should take the more favourable view rather than the less favourable. But I need hardly say there are cases also in which there is no room for any such difference of

opinion: cases in which no reasonable man could honestly hesitate to class a debt as ether than doubtful or bad.

Now gentlemen, in what respects is it contended by the prosecution that this balance sheet is false and misleading? We have spent a good many hours in hearing opinions and arguments about the omission of a note in the balance sheet about the pledge of 5 lakhs of the Government paper to the Bank of Bengal and about the way in which the contingent fund of Rs. 2,94,000 has been manipulated. I use the word "Manipulated" here in no bad or sinister sense. As to the question of Government paper I think the general effect of the evidence is that while it would have been better to mention the matter prominently in the balance sheet, yet there was no positive obligation on the Bank to show it and we have good authority for saying that it may not have even occurred to the Manager or Auditor that an express disclosure of the fact of this pledge was called for. I will not weary you by recalling in detail what each of the expert witnesses has said on this topic. The whole of the evidence has been printed and is in your hands. I think I have stated generally the effect of the expert evidence on this point. It appears that whatever the man in the street may have thought, at any rate a man versed in accounts would not think that the whole of the 15 lakhs of Government paper on the assets side were free from liability seeing that there were nearly 5 lakhs on the other side of the balance sheet which are noted as "Secured per contra." In my opinion the worst that can be said of this matter is that if the balance sheet were otherwise false and deceitful the omission of a note about the pledge of Government paper would to some extent tend to assist the fraud which was contemplated. On the other hand if the balance sheet is otherwise true and honest then the omission of the note about the Government paper has no sinister significance whatever. Then Mr. Holdsworth laid great stress upon the method adopted by the Bank in dealing with the contingency fund or secret reserve for doubtful and bad debts which amounted to Rs. 2,94,000 and is included in the item of 118 lakhs on the liability side. His opinion was that the amount of the doubtful and bad debts for which the contingency fund was reserved should have been shown under head 7 and not under head 6 on the asset side. Now in this balance sheet the amount of the doubtful and bad debts is included in the heading corresponding to number 6, that is, 116 lakhs odd. The effect of this according to Mr. Holdsworth is to make the balance sheet more attractive by reducing the figure of unsecured debt from Rs. 9,36,000 odd to Rs. 6,36,000 odd and correspondingly increasing the figure of secured debts from 113 lakhs odd to 116 lakhs odd. This opinion of Mr. Holdsworth is no doubt based to some extent on his assumption that heading 6 "Debts considered good for which the Company holds bills and other securities" can lawfully include nothing but fully secured debts but this assumption I have already held, is erroneous. I think, gentlemen, in view of the evidence of other expert Bankers and Accountants we have no alternative but to reject Mr. Holdsworth's opinion on this point. It appears that

having provided for Rs. 2,94,000 for bad debts in the secret reserve no exception can be taken to the way in which those debts were shown on the assets side. Mr. Meugens gave us his opinion that according to the strict reading of the prescribed headings 6 and 7, the Bank would be justified in showing the whole of their debts under heading 6 and nothing under 7, *always assuming* that they had some security for all the debts and that all the debts could honestly be considered good debts with the exception of Rs. 2,94,000 which was specifically provided against. I have given this my most careful consideration and I have come to the conclusion that Mr. Meugens' opinion on this point is correct.

So that now we have come to close quarters with the fundamental issue in the case, and that is whether the balance sheet is false in taking credit as *good* assets for a large amount of debts which could not honestly be considered as good debts and in crediting to profit and loss and treating as earned income divisible as profit a large amount of interest on these doubtful and bad debts on which interest was unpaid and which there was no reasonable prospect of recovering.

Before I go any further I think I had better comment on the protest which was made by the learned Counsel for the defence to the effect that we have no right to deal with the question whether the principal of these debts was good or not. The learned Counsel for the defence contend that the prosecution has along impugned the balance sheet only on the grounds that unearned interest was dishonestly put to profit and loss, that the contingency fund of Rs. 2,94,000 was dishonestly dealt with and that the omission of a note about the 5 lakhs of Government paper was dishonest. They say that to impugn the action of the Bank in treating the principal of the debts as good assets is to introduce fresh matter of which the accused had no notice and which they were not prepared to meet. I confess that these arguments took me by surprise and I think they lack substance and reality. It is true that a good deal of time has been consumed in hearing evidence and arguments about the contingency fund Rs. 2,94,000 and the 5 lakhs of Government paper, matters which as it now appears are of comparatively minor importance. But what has been the essence of the charge against these accused from the outset? Has it not been that they dishonestly declared a large profit and distributed handsome dividends when there was in reality no profit at all but a serious loss? What does that mean if it does not mean that they reckoned as good assets a large mass of doubtful and bad debts? How can it be supposed that the only question raised by the prosecution with regard to the debts is that the Bank showed as secured what they should have shown as unsecured? If a debt is really good it is a matter of small consequence to include it in one subdivision of good debts rather than in the other subdivision of good debts. The main thing about it is that it is a *good* debt, whether it is good by reason of the security held or by reason of the unquestionable capacity of the debtor apart from any specific security. The expert witnesses have been questioned not only as to the necessity of

putting interest on doubtful or bad debts to an interest suspense account but they have also been questioned as to the necessity of making special reserve provision against the principal of such debts and as to the necessity of showing them expressly as doubtful or bad debts if no such provision is made. It has never been suggested by the prosecution that a debt which is merely unsecured must necessarily for that reason alone, be treated as a doubtful or bad debt to be provided against as regards the principal in a special reserve fund and as regards the interest in a suspense account. What the prosecution have contended all along is that we have here a large mass of unsecured debts which having regard to the circumstances of the debtors as disclosed in the oral and documentary evidence could not honestly be treated as good and should therefore have been reckoned as doubtful or bad, that it was wrong and dishonest to show a large profit on the strength of such debts and that it really amounted to paying profits out of the monies of depositors. It is for you to say whether the prosecution have established these contentions to your satisfaction.

Mr. Holdsworth prepared a tentative balance sheet, exhibits 39 and 39 (*a*), showing the position of the Bank on 30th June according to his view. In that balance sheet he did not divide the debts into those considered good and those which are doubtful or bad. He divided them only into secured debts and unsecured debts. But though he did not divide the unsecured debts in his balance sheet into good debts and doubtful or bad, it is our duty to consider this matter as an essential part of the case and to decide it according to the materials at our disposal.

The prosecution, it should be noted, have not contended that any debts should be shown specifically as doubtful or bad in the balance sheet if they are reserved against on the opposite side. The contention is that a large amount of doubtful or bad debts which is nowhere reserved against has been included among the good debts.

I would also say that it does not lie on the prosecution to show that a debt is absolutely bad. It is sufficient for the purposes of this case if it can be shown that a debt is so seriously doubtful that it could not honestly be treated as a good debt, that is, without at the same time providing for it in a special reserve or otherwise on the liability side of the account.

I will now ask you, gentlemen, to refer to the detailed statistics about loans and interest which have been submitted by the prosecution. They are contained in 18 (*a*) and 18 (*b*). Will you kindly refer to these and exhibits 13 (*a*), (*bb*) and (*c*) and exhibit 13 (*dd*)? These exhibits give in tabular form the result of Mr. Holdsworth's examination of the accounts of the Bank as it stood on the 30th June. It has been shown that exhibit 18 (*a*) is not entirely free from inaccuracies but the mistakes in it, such as they are, have been brought to your notice and corrected. The defence have prepared a similar statement, exhibit LL, which gives practically the same figures as are contained in Mr. Holdsworth's statement except that a value is given to certain shares which

Mr. Holdsworth treated as valueless, but in all other respects I think the figures and information given in exhibit 18 (*a*) have been adopted in the preparation of defence statement exhibit LL. I think you will agree with me that the errors which were brought to light in exhibit 18 (*a*) are not errors of any serious consequence, that is to say, they do not materially affect the inferences to be drawn from the printed statements. Mr. Giles went so far as to say that this statement of loans and overdrafts is not admissible in evidence because it is not a correct abstract and because it is not made up from the books of the Bank. I admitted the statement in evidence and you must assume I admitted it rightly. Mr. Holdsworth's evidence shows that besides comparing it with exhibit 18 which was the original statement presented in the Magistrate's Court, he also checked it with the audit papers and security register as regards the security. It is not disputed that it shows the amounts of the debts correctly. In the important case of Mower & Co.'s debt the nature and number of shares shown in exhibit 18 (*a*) correspond with the information given to Official Liquidator Mr. Holdsworth by Messrs. Mower & Co. in exhibit 92 (*a*), and Messrs. Mower & Co.'s account is the most important account of all. Exhibit 18 (*a*) is open to criticism on the ground that it does not show some securities which Mr. Holdsworth considered as valueless—promissory notes of debtors and joint promissory notes in a few cases, the personal guarantee of Mower & Co. in the case of Attia, and one or two other securities to which Mr. Holdsworth found that he was unable to assign any definite value. I think it would have been better if he had put in every kind of security even those he thought worthless; but we know by now what those securities are and we are in a position to consider all these securities along with those shown in exhibit 18 (*a*). As regards the mistakes which were brought to notice in exhibit 18 (*a*) I am not surprised to find that mistakes have been made. Even in exhibit LL for the defence, it was necessary for Mr. Allen to go into the witness box and explain some mistakes which he made and I think the mistakes in exhibit 18 (*a*), such as they were, *bona fide* mistakes and have been put right. The work of compilation was difficult and intricate and it would be surprising if the result was free from errors. Mr. Holdsworth seems to me to have performed his task on the whole with care and skill. He was under our observation in the witness-box for a number of days and it appears to me he acquitted himself creditably. We may not accept all the opinions that he expressed but I think there can be little doubt that he held those opinions in good faith. As to the facts and figures about which he gave evidence I think you may rely upon him as a trustworthy witness, but it is for you, gentlemen, to form your opinion on that point. You will remember that he was a stranger to the Directors and Manager; he had no previous business with them or with the Bank before he undertook the work of Liquidator. He seems therefore to have approached that task with an independent mind. It has been urged against him that he afterwards adopted a partisan

attitude and that he neglected to consult the Directors and Manager of the Bank as freely as he might have done in order to obtain explanations of facts which he thought suspicious. It is also urged that in his joint report with Mr. Ferguson and in his affidavit to the Civil Court he gave the results of his investigation in a way which was prejudicial to the accused; that he omitted to mention facts which told in their favour especially as regards the contingency fund and as regards Mr. Mower's absence in Rangoon for some months before the day he signed the balance sheet. The Liquidators' joint report is not in evidence. So I need not refer to it. As regards the affidavit to the Civil Court that is in your hands, I think it must certainly be said that it is a brief for the prosecution and gives the Court little or no information on matters which the Court ought to know with regard to the defence. But Mr. Holdsworth may well have expected that the Directors and Manager would have an opportunity of replying to the affidavit. As a matter of fact it appears that the defence was not gone into in the Civil Court; but that apparently was not the fault of Mr. Holdsworth. On matters of opinion, as I have said, I mean opinion on questions of accounts and audits, you must compare Mr. Holdsworth's evidence with the evidence given by other experts, some of whom are men of greater weight and experience than Mr. Holdsworth. They do not agree with Mr. Holdsworth's positive views about the 5 lakhs of Government paper and about the contingency fund. His opinion that the balance sheet is false was formed at an early stage of the investigation and it is based partly at any rate on assumptions which are shown to be doubtful, if not erroneous. I mean the assumption that the omission of the note about the 5 lakhs was necessarily dishonest or that the good debts are required by law to be divided into fully secured and unsecured and that the bad and doubtful debts reserved against in the contingency fund should have been included under head 7 and not under head 6. His views on all these points have been examined and it is found that they do not hold water and those views of his may well have prevented him from looking too curiously into facts which might tell in favour of the accused and may have led him to adopt too suspicious an attitude from the beginning. But as I have said before as regards the facts and figures brought to light by his investigation of the accounts and correspondence of the Bank you have to decide whether he has set out the results of his investigation fairly and correctly before you in the printed statements and in his evidence. My own view is that he has done so to the best of his ability. If he has extenuated nothing, he does not appear to me to have set down ought in malice.

ALLEGED BAD DEBTS.

Now, gentlemen, it cannot be contended and the prosecution have never contended that the whole of the debts shown as unsecured in exhibits 18 (*a*) and 18 (*b*) ought to have been taken as doubtful or bad debts in the balance sheet. Exhibit 18 (*a*) must

be read with exhibit 18 (*b*). In the former credit is given only for the quoted security but exhibit 18 (*b*) shows the unsecured balances of the various debts after giving credit not only for the quoted securities but also for the unquoted shares except Moola Oils and Irrawaddy Petroleums. The total deficit of security as shown in exhibit 18 (*b*) is Rs. 33,68,000 odd and it includes a number of minor debts which Mr. Holdsworth regarded as good debts and which there is no sufficient reason to classify as otherwise though they are not fully secured. You may put a mark G against them. These are the unsecured portions of the debts of Bartlett and Bartlett, Halliday, Hicks, Ko Maung Gyi, Minnit, Mandalay Trading Company, Solomon, Smith, Browning and Browning, C. Clifford, Swales and Pullar. I am at present dealing with the smaller debts. You must add to these the debt of Fraser and Stephen, which though it was taken as doubtful by Mr. Allen, has since been paid up in full. The total of these unsecured minor debts according to Mr. Holdsworth is about half a lakh. Then the total of Rs. 33,68,000 also includes some Rs. 2,94,000 reckoned as doubtful or bad at the audit—these are the debts of Caunter, Gorse and Rajh, Michael, Gorse, Maunder, N. T. L. S. P. Curppen Chetty, D. Rajh, J. Reid, I. Rajh, Stathacopoulos, P. Teehan and against these doubtful and bad debts there was as you know a sufficient secret reserve in the balance sheet. Well, if you deduct the amount of the secret reserve and the half lakh of minor good debts from the total of exhibit 18 (*b*) there remains about 30 lakhs in round figures. This figure of 30 lakhs however includes the Rangoon Oil Company's debt of Rs. 7,90,000 odd and I think I had better deal with that debt before going any further. Mr. Holdsworth told us that he treated it as a good debt though he thought the security for it was worthless. He treated the interest on this debt as having been actually paid. Well, it is a matter of comparatively little importance whether there is security for a debt or not, if it is a good debt. I have already explained this point fully. It is therefore a work of supererrogation to examine the question of security for the Rangoon Oil Company's debt. But I may say that after giving the matter the best consideration I could, I have come to the conclusion that the lien* given to the Bank by the Rangoon Oil Company Directors on the 8th July 1911 constituted a valid charge notwithstanding the covenant in clause 37 (*h*) of the trust deed of the British Burma Petroleum Company. The Rangoon Oil Company was not a party of that Trust Deed and the covenant could not bind them in any way. It is true that the lien being a hypothecation of moveable property was liable to be defeated by a subsequent incumbrancer who obtained possession. This presupposes that the Rangoon Oil Company would commit fraud by giving a subsequent lien, which as a matter of fact, they did not do. You may think that the men who in their capacity of Directors of the British Burma Petroleum Company made the covenant with the Trustees for debenture holders were guilty of sharp practice afterwards in giving the lien to the Bank in their

* Exhibit 20.

capacity of Directors of the Rangoon Oil Company. But, if there was sharp practice, it was sharp practice with which we have nothing to do in this case. It is clear enough that the British Burma Petroleum Company regarded the lien as a valid lien, and that they had to exercise pressure on the Bank in November in order to procure the surrender of the lien undertaking on their part to repay the money due by the Rangoon Oil Company to the Bank. So, if from the figure of 30 lakhs you deduct the Rangoon Oil Company's debt Rs. 7,90,000 there is a residum of about 22 lakhs which according to the prosecution the Bank had no right to include among the good debts in the balance sheet.

This sum of 22 lakhs odd is made up principally of five large items aggregating Rs. 19,81,500. The figures are as follows :—

	Rs.	A.	P.
Attia	3,62,500	0	0
Mower & Co.	7,52,700	0	0
Mount Pima	1,38,300	0	0
Aung Ban	1,67,200	0	0
Rangoon Refinery Co.	5,60,800	0	0
The total of these five large debts I think you will find to be	19,81,500	0	0

Then there are 11 smaller items which it is necessary to refer to and which you may call deficiencies on smaller debts.

	Rs.	A.	P.
Major Meagher	38,600	0	0
Britto	1,200	0	0
W. H. Clifford	1,500	0	0
Cotterell	59,900	0	0
Moberley	82,900	0	0
Murray	4,600	0	0
Peters	11,700	0	0
Sevastopolo	5,600	0	0
Tsounas	4,500	0	0
A. Stephen	61,800	0	0
Buckingham	2,400	0	0
The total amounts to	2,74,700	0	0

but you should straightway strike out Murray's unsecured debt of Rs. 4,600, because his debt was shown at a later stage of the trial to be, though unsecured, a good debt. It is admitted to be so by the prosecution. Well, excluding Murray, the total of these minor debts is Rs. 2,70,100 making when added to the five large items a sum of about 22 lakhs which according to the prosecution should have been shown as doubtful or bad. I will deal first with the five larger debts amounting to Rs. 19,81,500. The materials you have for deciding whether any particular debt is a doubtful or bad debt are various. You should have of course to take into account the actual value of the debtor's security on the 30th June and the proportion that the value of this security bore to the amount of the whole debt. In some cases, but not in all, you have information as to the length of time for which the debt has been outstanding

and the length of time during which the interest on the debt remained unpaid and there is evidence as to what payments, if any, have been made to each account. Part of the evidence is contained in exhibit 13 (*a*) and the connected exhibits and there is also a good deal of evidence in Mr. Holdsworth's deposition as to the various accounts. Then you have to consider whether the debtor was good to fill up the deficiency of the security and if not whether it can be said that his financial standing was such that further security could reasonably be dispensed with. It seems to me that a debt to be a good debt should be recoverable or realisable within a reasonable time; but that of course is for you to decide yourselves. What is a reasonable time will vary with the circumstances of each case. These are matters entirely for you to determine on the evidence, whether the debts or any considerable portion of them alleged by the prosecution to be doubtful or bad, were really doubtful or bad to the knowledge of the accused on the 1st of August 1911 when they signed the balance sheet. As I said before it is not necessary for the prosecution to prove that the debt is absolutely bad. It is sufficient to show that it is seriously doubtful, but I should add that it is not sufficient for the prosecution to throw a vague suspicion on a debt. It is not sufficient for them to "hint a fault" and leave us to presume that the debt is doubtful. You must remember that there should be really serious ground for classifying a debt as doubtful for one to go the length of reserving against it and putting the interest on it to an interest suspense account, and it is only where the prosecution have established the existence of such reasons to your satisfaction that you should treat a debt as doubtful. In the case of each debt that I will now deal with I will try to draw your attention to the chief considerations relied on by the prosecution for holding that it is a doubtful debt, leaving you in each case to decide whether the evidence as to its doubtfulness is really sufficient. It is in this matter that your business experience and knowledge of the world will be of the greatest use to you.

ATTIAS DEBT.

First, there is the debt of Attia, Rs. 3,62,500, that is the unsecured portion of the debt on the 30th of June. The total of his debts as shoown in exhibits 18 (*a*) and 18 (*b*) is Rs. 10,48,642. Deficiency in quoted security was Rs. 8,08,752 but if the unquoted shares be taken at full nominal value then the deficiency in Attia's account is still over 3½ lakhs. It has been urged that the prosecution is bound to prove that the unquoted securities were worth no more than their par value, *i. e.*, the prosecution should have shown that they were not worth more than the full nominal value. As to this, gentlemen, I think, we may safely assume that the auditor who took them at par value did not undervalue them. I think that it is a legitimate assumption. Moreover it appears to me that the auditor looked askance at these unquoted shares. His letter of 1st August shows this (exhibit 30). He mentions that the security consists largely of unquoted shares. This was one of the points which caused him uneasiness. I think we are safe in assuming that

these unquoted shares, if they were worth their full nominal value, certainly were not worth more on the 30th of June, and their full nominal value has been given to them in exhibit 18 (*a*) leaving as I said in the case of Attia's account an unsecured balance of 3½ lakhs. This balance was recognised at the time of the audit to be unsecured and it also appears that the auditor thought it not only unsecured but doubtful because he wrote the word "doubtful," at first and then crossed it out on Mr. Strachan's assurance that Attia was all right. You should refer to Mr. Strachan's written statement and Mr. Allen's evidence about Attia's financial standing in Rangoon at the time. This is what the accused Mr. Strachan says about Attia: (Read his written statement *re* Attia). Mr. Allen was justified in accepting the Bank Manager's opinion as to the financial position of a debtor of the Bank. But though he accepted this opinion, he still seems to have entertained some serious misgivings about Attia's debt, for this 3½ lakhs, the unsecured portion of Attia's debt, is the principal item in the Rs. 6,36,000 which was taken as unsecured at the audit and you will remember that in his letter of the 1st of August written 3 days after he signed the balance sheet, he wrote to the Directors and recommended that the interest on most of the unsecured loans, *i. e.*, the interest on most of the Rs. 6,36,000 should go to an interest suspense account, if credited at all, and should not be taken as profit. Does not that mean that Mr. Allen thought Attia's debt to be doubtful in spite of Mr. Strachan's assurance? Mr. Meugens told us if you consider it necessary to put the interest on a debt to interest suspense account, that presupposes that the debt is a doubtful debt. So that Mr. Allen apparently when he wrote that letter of August 1st still thought that the word "doubtful" which he had crossed out against Attia's unsecured balance should not have been crossed out, *i. e.*, that the word ought to have been restored. That seems to me the legitimate inference from the letter of the 1st of August. There were certain receipts from sale of security which were credited to Attia's account during the half year amounting to Rs. 23,000 odd. Mr. Holdsworth told us that after the 30th of June only Rs. 175 was credited to his account. Of course in addition to the securities for Attia's debts shown in exhibit 18 (*a*) there was also a guarantee by Mower & Co. which Mr. Holdsworth omitted to show in exhibit 18 (*a*). The value of this security depends entirely on the question whether Mower & Co.'s own account was good at that date. If as a matter of fact you find that Mower & Co. had a large unsecured balance which they were not in a position to pay up to the Bank, then the value of their guarantee of Attia's unsecured balance would be nil. In considering Attia's financial position you will of course have regard to the letter of the 17th of October, exhibit 84 (*a*), which was referred to by Mr. Rutledge yesterday. That letter certainly seems to show that in October at any rate he was in very serious financial straits being practically insolvent. It does not follow of course that he was in great straits on the 30th of June or 1st August when the balance sheet was signed but it is a fact which has to be taken into consideration in estimating his

financial position a few months earlier Of course, the Manager of the Bank is supposed to be conversant with the financial affairs of the borrowers of the Bank and the fact that Attia in October, so soon after the balance sheet was issued, was in this difficult position, is a point for your consideration. It is also to be remembered that Attia had some years before been intimately connected with Mower & Co. and had been a partner in Mower & Co. itself. The state of this debtor's affairs would probably be known to the Directors and Manager of the Bank in a general way. They would be likely to follow the fortunes of such a debtor as this with special interest. Of course, the offer contained in the letter, exhibit 84 (*a*), was not accepted by the Bank, it was only mentioned as showing the position of this debtor so soon after the time at which Mr. Strachan considered him to be in a flourishing financial position.

MOWER AND COY'S DEBT.

The next large debt on this list of 5 is the debt of Mower & Co. Rs. 7,52,700, that is, the unsecured portion of the outstanding loans and overdrafts on the 30th June as shown in exhibits 18 (*a*) and (*b*). Mower & Co. were the principal debtors of the Bank. The total amount of their debts on the 30th of June was Rs. 42,78,000 which shows an increase of 1½ lakhs since the 1st of January. In quoted securities the deficiency is Rs. 26,56,000 but deducting unquoted security the deficiency is reduced to about 7½ lakhs. But this takes no account of the large number of Moola Oil Company and Irrawaddy Petroleum shares which were put in by Mower & Co. as further security for their outstanding loans. As regards other unquoted securities as I have already said, I think we are entitled to assume that they were not of any higher value at the time of the issue of the balance sheet than the value assigned to them at the audit. That is to say, that they were not worth more than the nominal par value. I will now deal with the question of the Moola Oil and Irrawaddy Petroleum shares. You have been told, and it is apparently correct to say, that if the Liquidator put as low a value as 5-11 per share the deficiency of the security on Mower & Co's. account would be fully covered. You have therefore to consider whether the prosecution has satisfied you that these shares which were deposited for Mower & Co's. account were really worth nothing like 7½ lakhs, the amount of deficiency of this account. By the liquidator Mr. Holdsworth they are called mere prospecting companies and he has been taken to task for disparaging them by the use of this expression. But the Bank auditor Mr. Allen seems to have referred to them in terms which were hardly more respectful. In his letter of the 1st of August (exhibit 30) he expressed his misgivings about the loans which could not be easily realised and mentioned *inter alia* "loans on the security of Certificates of prospecting companies." You have been referred to the balance sheets, lists of shareholders and the original agreements which led to the formation of these companies, exhibits 59 (*b*) to (*f*) and 60 (*b*) to (*g*). I do not think I need refer to them any further. The facts about

these companies will be fresh in your memories. I think the documents show at any rate that the description of the Moola Oil Company and Irrawaddy Petroleum Company as prospecting companies is not very inaccurate. There was an enormous number of shares but no paid up capital, the shares being vendors' shares and it appears that their only substantial asset at the time of the formation of the Companies was the right conferred by the prospecting licenses to search for oil on certain demarcated blocks in Upper Burma. It is true that if the property really yielded oil in paying quantities these companies would make a good thing out of it, for they had got the Rangoon Oil Company and British Burma Petroleum Company who were already working in this neighbourhood on their own property to exploit their territories for them on the basis that the Rangoon Oil Company and British Burma Petroleum Company would pay whatever royalty was due to Government and over and above this royalty would pay further royalty to these companies. Everything depended on oil being obtained in paying quantities but whether oil could be got in such quantity seems to me to be a matter of pure speculation. The geologists' reports had been favourable, but such reports are by no means infallible and it by no means follows that oil will be found merely because you get indications of oil. There are strong indications of oil in the Minbu mud volcanoes, but it has not been found possible to work them as a commercial proposition. Government has marked off into square mile blocks a large area in Minbu and adjacent districts which from their geological conditions may be expected to yield oil but it is always a matter of pure speculation whether if you bore on any given block you will get oil in paying quantities. As to the actual state of affairs of these two companies on the 30th of June we have the evidence of a man from the spot, Mr. Kirk. Extracts have already been read to you but perhaps I had better read the principal parts of the evidence again. (Read from examination-in-chief "I know the territories of Moola Oil Company and the Irrawaddy Petroleum Company . . . . . shallow wells.") That is as regards the Moola Oil Company: you see it was worked by the British Burma Petroleum Company only and all that they knew about it is that it had a shallow test well which they said had the smell of oil. Then as regards the Irrawaddy Petroleum Syndicate, Mr. Kirk says that both companies were working on this territory and that the Rangoon Oil Company started the work in November 1909. (Read from "the Rangoon Oil Company started work . . . . . sunk no other wells after July 1911"). Then he says further down "at the present time the yield of both territories is 150—200 barrels a day." Then he says the British Burma Petroleum Company also worked on this block (18S). (Read from "the British Burma Petroleum Company began to work . . . . . it was a delayed well"). So that in June or July 1911 no oil had been struck in the Moola Oil Company territories and as regards the Moola Oil Company the position was that the Rangoon Oil Company had made one unsuccessful attempt to bore a well and had dug a second well which was yielding 40 to 50 barrels a day, and

in respect of this well difficulties were encountered in the shape of water breaking into the well which had to be cemented off. As regards the Moola Oil Company territory it was said in cross-examination there was only a smell of oil in the hand-dug well, and that it was an extremely good indication to get oil in such a hand-dug well (read from "I am pretty sure . . . . . down any deeper.") Then we are told that the British Burma Petroleum Company had entered into a contract with a contractor for drilling in this particular block and also the British Burma Petroleum Company had paid some royalty to the Moola Oil Company in respect of oil taken in this block over and above the Government royalty, and the Moola Oil Company runs no risk of the expenses of unsuccessful wells. They are in the same position as well-owners in Yenangyaung. If oil is won the Moola Oil Company gets the profit, if no oil there would be no loss. Then we are told that the Moola Oil Company owned a block adjoining 19P. and had struck oil on that block before the development of 19P. began, but in a different sand than the one which was struck in 19P. The prosecution say that is no indication that oil will be found in 19P. Then it also appears that when the Rangoon Oil Company struck oil in 18S. the Burma Oil Company hurried up rigs on the southern boundary of 18S. and started drilling, so as to get the benefit of this oil. The nearest well was about 860 or 900 feet away from the Rangoon Oil Company's well that struck oil and the oil that was struck in 18S. was at a depth of 700 feet which was very satisfactory. Mr. Kirk says "One is apt to meet . . . . does not detract from the value of the oil well." It appears to me that it must detract from the value of an oil well if you have to go to the expense of cementing off the water. Then we are told by Mr. Kirk that a million gallon tank was put up to take the oil from this block and that a pipe was made, 2 or 3 miles long, from the fields to the river bank. All I can say to you is that the construction of the tank and pipes showed great optimism on the part of the company looking to the indication of oil shown in Mr. Kirk's evidence. I call your special attention to Mr. Kirk's evidence: of course a great deal depends upon it and you should read it carefully before you decide this point. It is one of the most important depositions in this case. You have to consider on that evidence whether the territories were proved oil fields in June-July 1911 or whether they were still in the initial speculative stage. My own opinion is after hearing Mr. Kirk's evidence that they could not be called proved oil-fields and that if any one gave a substantial price for the shares of these companies on the strength of the indications that there were at that time, he was a speculator whose optimism would amount to mere foolishness, but that is a matter entirely for your decision and not for mine. It may be of course that exaggerated rumours were spread in Rangoon and that the result of these rumours was to cause the isolated purchases of the shares as to which evidence has been given by Mrs. Smith and Mr. Ady Mr. Ady says that he sold 100 Irrawaddy Petroleum Company shares at Rs.17-8-0 a share some time before May1911 when no oil at all had been found on the Irrawaddy Petroleum Company territories.

Still we are told they were sold at Rs. 17-8-0 a share. Mrs. Smith says that 100 Irrawaddy Petroleum Company shares were sold for Rs. 12 per share: no records were kept of this transaction. The *Rangoon Gazette* of 3rd June published a list showing that there were buyers of Irrawaddy's Rs. 10 shares at Rs. 12-8-0. As regards the Moola Oil Company shares the only transaction is apparently the sale of 100 shares at Rs. 10 in September. I gather there was no transaction up to the time the balance sheet was issued. It seems to me there was very little justification, if any, for these prices and it is of course a significant fact that about this time Mr. Ady and Moola Dawood went to London to try and float a company in connection with these territories. It would be a very good thing to have definite transactions in shares to point to in Rangoon and that is a fact which you cannot overlook in considering whether these transactions were really genuine or not. There were no transactions at all on the stock exchange. Such transactions as are mentioned in evidence were all outside the Stock Exchange. As I said before, Mr. Allen thought it was to some extent a blemish on the shares that they were not quoted on the stock exchange. If he did not think so why should he refer to this fact in his letter of 1st August where he mentions that many of the securities are "Shares for which there is no market quotation." Of course, it suits the purposes of the defence to dismiss the Rangoon Stock Exchange with a shrug of the shouders calling it a *coterie* of superior gentlemen. But it is nevertheless the principal market of the largest city in Burma and it is a place where as a matter of fact we find business done on a considerable scale in all the well established oil companies. It would perhaps not be right to go so far as to call the outside transactions hole and corner transactions, but at any rate without disrespect to the ladies and gentlemen who carry on business as outside brokers it may be said, I think, that transactions outside the stock exchange which are not publicly advertised do not carry the same weight as transactions on the stock exchange. At any rate, gentlemen, the absence of quotations in the recognised market is a fact that you cannot altogether disregard in considering whether these various transactions represent genuine dealings in these shares. You know very much more about these matters than I do and I think you must recognise that the question of the value that might properly be put on these shares on 1st August is a matter of very great importance in this case and is another matter in which your knowledge and experience will help you to come to a right decision. My own opinion is that there were no sufficient grounds for giving any substantial value to the Moola Oil Company and Irrawaddy Petroleum Company shares on 30th of June. That is the conclusion to which I have come but you are not at all bound by my opinion on that point. A great deal has been said about Mr. Holdsworth's letter, exhibit Q, written in May 1912, to Mr. Moberley's solicitor, which has been taken as an admission that these shares had some value at that time. In fact, Mr. Holdsworth in cross-examination admitted that the letter could not bear any other construction. We know, gentlemen, that

this letter was drafted by a subordinate in Mr. Holdsworth's office and not by Mr. Holdsworth himself, though he said he looked through it and signed it. It may well be that he did not consider the effect of the letter as regards these oil shares when he signed it. There is no reference in it to Moola Cil or Irrawaddy Petroleum Company shares. The object of the letter was to put the screw on Mr. Moberley and get him to pay something on account. You will have to give due weight to that letter, and you will also have to consider whether this letter is a sufficient foundation for the inference that you are asked to draw from it. The question is whether the Moola Oil and Irrawaddy Petroleum Company shares were so valuable in June-July 1911 as to cover Mower and Co.'s deficit balance of 7½ lakhs, whether the Bank could honestly take them to be of sufficient value as to fill up such a gap as that. As regards the negotiations in London for the floating of sterling companies, we have only Mr. Ady's evidence and the copies of telegrams which have been put in, exhibits SS, SS1. I leave it to you to put your own value on these proposals of company promoters in London, knowing as you do, better than I do what company promoters are. You know at any rate to what a small extent the Moola Oil and Irrawaddy Petroleum prospecting territories could be considered established oil fields in June-July 1911 when these negotiations were in progress. It seems to me, gentlemen, that these abortive negotiations throw no light on the question whether these shares had any substantial value in June-July 1911.

MOUNT PIMA COMPANY'S DEBT.

I now come to the 3rd debt on the list of the five larger debts, namely, the Mount Pima Company liquidation, *i.e.*, Rs. 1,38,300 in exhibit 18(*a*). The security for this debt is shown as a letter from Mower & Co. undertaking to make over to the Bank their claims as sole creditors of the company, but Mr. Holdsworth omitted to mention that there were also two promissory notes for this debt signed by Mower & Co. as Managing Agents of the Mount Pima Company and also by Mower & Co. on their own behalf. The Company was wound up in March, the general opinion at a meeting of the shareholders being that it was useless to attempt its re-construction. So that the Company went into liquidation and since then a sum of about Rs. 46,000 has been realised by the liquidators, that is about one-third of the amount due to the Bank. This sum I understand has been paid to the Bank under the terms of Mower & Co's. letter, exhibit 15 of the 4th July, which makes over to the Bank as security of the Mount Pima debt their claim as sole creditors of the company. We have no reason to believe that they were not the sole creditors. There is nothing left to be realised, I understand, but the disused ore-crushing mill at Pyawbwe as to which you may refer to Mr. Allen's evidence. He was questioned at length about this mill and what use it could now be turned to. His firm has been entrusted with the liquidation and he presumably knows more about the assets which are available than anybody else. Mr. Strachan says that it was on

Mr. Allen's assurance that the bank took the debt as good. The question for you, therefore, to decide is in the first place whether apart from Mower & Co.'s guarantee of the Mount Pima's debt, Mr. Allen or Mr. Strachan could have honestly thought that the assets of the defunct company were really worth so much as Rs. 1,38,000 odd and that this debt would be recovered. You will not overlook the correspondence about the proposal to lease the mill as a going concern to the Burma Mines' Company. Exhibits NN, NN1 for the defence, which have been printed, show the correspondence on that subject, but the proposal came apparently to nothing for it was decided in July 1911 that the Mines were worthless even as a prospect. (See Mr. Allen's evidence on that point). It seems to me that there are serious elements of doubt about this debt apart from Mower & Co.'s guarantee. As regards that guarantee the value of it depends entirely on the view you take of the Moola Oil and Irrawaddy Petroleum shares which were lodged by Mower & Co. as security for their own debts, for, if Mower & Co.'s account was fully covered, then their guarantee of the Mount Pima debt was no doubt a valuable additional security and made the debt practically a good debt.

AUNG BAN COMPANY'S DEBT.

I now pass on to the Aung Ban Company's debt next on the list, *i.e.*, Rs. 1,67,200-0-0. From exhibit 18 (*a*) it appears that no interest was paid on this debt for over twelve months. There was no security for it except the promissory note signed by the liquidators of the Company. Exhibits 69 (*a*), (*e*), and (*b*) show the correspondence of May 1911 between the Bank and the Liquidators. They were warned that no further debits would be allowed on their account with the Bank. Exhibit 69 (*c*) of June the 5th shows that the manager and the auditor were going to treat the debt as unsecured, as they contended that the liquidators had parted with the assets to the British Burma Petroleum Company, when the Aung Ban's undertaking was merged in that Company. Then you have the letter, exhibit 11 dated the 30th June 1911, which shows that the assets of the Company did not cover the liabilities. The Aung Ban Company had a claim against the British Burma Petroleum Company on what is called an intromission account of the liquidators and it appears that the auditor required a letter of lien on this claim to be obtained by the Bank from the liquidators in order to show the debt as fully secured. By an oversight this letter of lien was not obtained and there was no security for the debt up to the time the balance sheet was issued except the liquidators' pronotes. As a matter of fact it appears from Mr. Williamson's evidence that the claim of the liquidators against the British Burma Petroleum Company was settled in June 1911 for a cash payment in which a sum of Rs. 83,000 claimed by the Aung Ban Company against the Rangoon Oil Company was specifically included. This Rs. 83,000 was included as a liability by the Rangoon Oil Company in their balance sheet of the 31st March 1911, but in the next balance sheet of 31st March 1912, though it was still shown

on the liability side of the Rangoon Oil Company Balance Sheet, it was shown as not admitted by that Company. Well, after the money received from the British Burma Petroleum Company in June-July 1911 had been paid to the Bank there was left an unsecured balance of over Rs. 80,000 due to the Bank by the Aung Ban Company. The only chance of recovering any part of this balance would apparently be by suing the liquidators who had committed what Mr. Giles called the appalling error of distributing to the shareholders of the Aung Ban Company by way of dividend the 90,000 odd shares in the British Burma Petroleum Company in which the Aung Ban Company had been merged. The shareholders should not have been given this dividend by the liquidators until the claims of the creditors of the Company had been satisfied and theoretically at any rate the shareholders could be forced to disgorge the shares they had received by way of dividend. But when it comes to actual legal proceedings to accomplish this purpose the difficulties may be so great as to be insuperable. The suit would apparently have to be against the liquidators and unless the liquidators personally could pay up, the litigation would probably be infructuous to a great extent at any rate. It does not need a trained lawyer to see that any legal proceedings with a view to following up the actual shares into the hands of the persons who now hold them would be beset with difficulties. The shares may have changed hands many times and the chances of recovering any substantial number of them would be to say the least problematical. At any rate it seems to me that the prospect of recovering any considerable portion of the outstanding balance Rs. 80,000 by this means is highly doubtful. Mr. Giles estimated that it would be sufficient if the Bank could recover 16,000 of the 90,000 shares at the present market value. But it is for you, gentlemen, in view of all the circumstances to decide whether the prospect of recovering these shares is so likely that the Bank were under no obligation to treat the Aung Ban Company's debt as a doubtful debt.

RANGOON REFINERY COMPANY'S DEBT.

There remains only the Rangoon Refinery Company's debt the unsecured balance of which is taken as Rs. 5,60,800, exhibit 18 (*b*). The total debt is Rs. 12,44,000 including the 5 lakhs for which the Bank of Burma had pledged Government paper as a guarantee with the Bank of Bengal. The documents relating to the Refinery debt are scattered all through the exhibits. I think they are about 50 in number and they are not arranged in chronological order. It was considered better to adhere to the order in which the exhibits were put in evidence in the Magistrate's Court rather than to renumber the exhibits which would cause confusion. I am not sure now that it would not have been more convenient in the case of the Refinery exhibits to arrange them in a group by themselves, chronologically. But we are indebted to Mr. Giles for going through these documents in order of date and reading out the more important parts of them in course of his speech. I think you all noted at the time the order

in which they should be referred to when you were considering them. The question of the Refinery debt was fully discussed by both Mr. Giles and Mr. Rutledge and as the main facts are fresh in your memory I need not go over the whole ground again. I will deal only with what I consider to be the salient points in those exhibits. First, as to the security before 30th of June 1911. It is true that there were certain agreements of lien on the Refinery Company's assets [exhibits 21 (*a*) to (*d*)]. These agreements were made in the early part of 1910 before the Company went into liquidation. Subsequently when the liquidators sold the undertaking to the British Burma Petroleum Company they sold it free from incumbrance. It has been pointed out that in the actual conveyance in December 1910 (exhibit 72*h*), the liquidators conveyed the undertaking free from incumbrance only as regards their own acts and conduct and that the conveyance therefore did not affect the lien given by the Company to the Bank before the Company went into liquidation, that it is to say, before any liquidators began to deal with the Company. I think it is highly doubtful whether any such position could be maintained in a Court of Law and this was apparently the view held by the Bank and Auditor for they pointed out to the liquidators in May-June 1911 that the debt of the Refinery Company must be taken as unsecured. Mr. Strachan says that these letters were written in order to bring pressure to bear on the British Burma Petroleum Company, but I think it is at least equally probable that they expressed the view which he took of the agreements made in the early part of 1910. Subsequently on the 29th of July 1911 the liquidators gave the Bank a lien on any money they might receive from the British Burma Petroleum Company against which they had made certain large claims, amounting I think to over £70,000. They also transferred to the Bank 135,000 British Burma Petroleum Company's shares as part security for their debt. Writing on the 4th March 1912 (exhibit 21P) Mr. Clifford said that this arrangement satisfied himself and Mr. Strachan and the Auditor and they therefore treated the Refinery debt as fully secured and as a good debt. The question you have to decide is whether they were too easily satisfied, whether Mr. Clifford at any rate could honestly have been satisfied. The position was this: giving full credit for the 1,35,000 shares [(exhibit 18 (*a*) you see they are given credit for Rs. 6,83,457-8-0, that is, the Rangoon Refinery's debt on the last page of exhibit 18 (*a*)] the Bank had good security for under 7 lakhs of a debt of Rs. 12,44,000 odd. For the balance Rs. 5,60,000 they had a lien on the liquidators' claim against the British Burma Petroleum Company. Ultimately in November they released this claim accepting Rs. 75,000 in full satisfaction from the British Burma Petroleum Company. The Director, Mr. Clifford, knew in July that the claim was disputed, not a small part of it but practically the whole. The telegram of 5th July [exhibit 72 (*g*)] from John Taylor & Sons shows this is to be so. Thus, Mr. Clifford knew that the British Burma Petroleum Company after paying £20,000 without prejudice in June disputed practically all the rest of the

claim, over £70,000. It is urged that this telegram did not amount to a repudiation of the liquidators' claim and that the British Burma Petroleum Company after sending the telegram retreated from the position which they had taken up. Mr. Williamson's evidence shows what actually took place. The liquidators of the Refinery Company Mr. Cotterell and Mr. Charles Clifford were in London. Mr. Charles Clifford told the British Burma Petroleum Company's Board that if the persons acting for him in Rangoon were to know that the whole of the balance of the claim was repudiated he would have no option but to telegraph to Rangoon to institute legal proceedings to enforce the claim. The Board then agreed to write a letter to Mr. Cotterell in London "neither too strongly affirmed the repudiation nor too definitely closing the matter," in other words, they wanted to gain time. This letter was actually writen on 1st August 1911 to Mr. Cotterell and Mr. Charles Clifford in London. It is exhibit 74 (e) and it has been read to you. It supports Mr. Williamson's evidence as to the extent to which the Board climbed down. But the telegram of 6th July to Rangoon was not cancelled. The only thing the Board did was to cable to Rangoon that the liquidators need not be informed *officially* of the contents of the telegram of the 6th July [exhibits 106 and 106 (a)]. On the 31st of July Messrs. Mower & Co. wrote to John Taylor & Sons that the position as regards the liquidators' accounts was truly bad and that it was difficult to foresee what the outcome would be. This was two days after the Bank got the lien from the Attorneys to the liquidators in Rangoon. It is clear that Mr. Clifford, who is the Director of Mower & Co. the Agents of the British Burma Petroleum Company, as well as the Director of the Bank, knew that the whole of the balance of the Refinery claim was being disputed by the British Burma Petroleum Company. It is true that the letter of the 1st August to the liquidator Mr. Cotterell in London shows that the British Burma Petroleum Company were anxious for delay and did not wish to run the risk of a law suit which might have resulted in the collapse of the British Burma Petroleum Company. It was a temporizing letter. But the Board did not modify their instructions to their Rangoon Agents which they sent in their telegram of the 6th July. So that matters stood practically as they were. Ultimately the Bank in November waived their claim against the British Burma Petroleum Company accepting a merely nominal sum of Rs. 75,000 in full satisfaction and it is explained that the Directors did this, because to refuse would have ruined the British Burma Petroleum Company. And this was an important matter for the Bank because the shares of the British Burma Petroleum Company formed a very large portion of the security held by the Bank. The Bank had some 400,000 of these shares and had a large holding also in the Burma Investments Company of which the principal asset was about 400,000 British Burma Petroleum shares. Therefore the Bank was interested directly or indirectly in the British Burma Petroleum Company to the extent of about 800,000 shares. The minutes of the Bank

Directors' meeting on 1st November (page 37 of the Minutes) shows exactly what was done at a special meeting of the Directors on the 1st November.

PRESENT.

"Messrs. Mower, Clifford and Okeden,

It was decided having regard to the fact that the Bank of Burma, Limited, was interested to so large an extent in the Rangoon Oil Company, Limited, and the British Burma Petroleum Company, Limited, that it was incumbent on the Bank to take every measure necessary to safe-guard these two companies and to meet the demand of the trustees to the debenture holders in the matter of releasing the equitable mortgages, and of otherwise putting the companies on the soundest possible position in respect of the Rangoon Oil Company debts. It was further considered necessary to secure a second signature to the bond which is available from and offered by the British Burma Petroleum Company. As to whether the Bank was placed at a disadvantage by accepting the bond referred to was fully considered, and it was unanimously considered that such was not the case, having regard to the fact that the Bank had only a second mortgage and in all respects ranked after the prior claims of the Bank of Bengal, whereas under the above arrangement the Bank secured a separate and distinct security of the guarantee of the British Burma Petroleum Company, Limited. It was resolved therefore that the Directors of the British Burma Petroleum Company and the Rangoon Oil Company, Limited, be informed that the Bank requires this arrangement to be carried into effect, it being understood that no further debts are incurred on the security of the assignable assets of the Rangoon Oil Company, Limited. In the same connection, the matter of taking over the liabilities of the liquidators of the Rangoon Refinery Company, Limited, and giving the liquidator thereof an acquittance of their debts to the Bank was considered. It was resolved that the arguments applying to the matter of the loan to the Rangoon Oil Company, Limited, were equally applicable hereto, in so far as they related to the necessity of safe-guarding the interests of the Rangoon Oil Company, Limited, and the British Burma Petroleum Company. It was further considered that no good purpose could be answered by opposing the arrangement in that it was generally admitted that the liquidators' of the Rangoon Refinery Company, Limited, claim on the British Burma Petroleum Company, Limited, could not be made good and therefore the Bank's position as a creditor was not worth maintaining."

It appears therefore that if the Bank refused to release the claim, the British Burma Petroleum Company might have to go into liquidation and the last state of the Bank would be worse than the first. The Directors of the Bank were confronted with this unfortunate dilemma and they chose to let the Refinery claim go in order to save their British Burma Petroleum shares. It is for you to decide whether on the information before him in July Mr. Clifford

could have foreseen that this was a probable outcome of the situation knowing as he did know that the whole claim was disputed and knowing also that the Bank could not bring any serious pressure to bear on the British Burma Petroleum Company without bringing that Company to the verge of ruin. It seems to me that such a result must have been plain to him but it is for you to decide. If that result was visible to him (Mr. Clifford) could he have regarded the lien on the liquidators' claim as good security for the 5½ lakhs due by the Rangoon Refinery Company to the Bank over and above the value of the 135,000 shares. Is the security which a creditor dares not enforce a good security? Is it appreciably better than no security at all? You have to decide whether the Bank had any right to treat this deficiency of 5½ lakhs as a good debt in the balance sheet. It is urged of course that as in the case of the Aung Ban Company's debt, the Bank could have recourse to the shares in the British Burma Petroleum Company, about 300,000 I think, which the Refinery Company liquidators had distributed as dividend without stopping to consider how they were going to pay the creditors of the Company. My remarks as to the shares distributed by the Aung Ban Company's liquidators apply also to the shares distributed by the Rangoon Refinery Company's liquidators and I have nothing to add to them. There was in my opinion only a remote possibility that the Bank could recover any of these shares. If the Rangoon Refinery Company's debt was doubtful to the extent of 5½ lakhs I do not think that it was to any material extent less doubtful on account of the British Burma Petroleum shares which the liquidators had distributed by way of dividend. I should add, however, that Mr. Strachan does not appear to have seen the telegram of the 6th of July nor Mr. Allen. So that full knowledge of the true state of affairs can hardly be imputed to Mr. Strachan though he admits of course that he did discuss the question about the disputed claim with Mr. Clifford, and it is for you to form your own opinion as to what Mr. Clifford must have told Mr. Strachan about it. That is all I have to say about the larger debts aggregating Rs. 19,81,500; but I will have to refer again later on to some of these debts in dealing with the question of crediting unpaid interest.

SMALLER DEBTS CONSIDERED.

Then there are the smaller debts about which I have little to say, namely, the debts of Major Meagher, Britto, Clifford, Cotterell, Moberly, Peters, Sevastopolo, Tsounas, A. Stephen and Buckingham aggregating Rs. 2,70,000. As regards Major Meagher's debts you have to look at exhibit 90, the Manager's letter of the 27th of June 1911, which shows that in the opinion of the management of the Bank in Rangoon Major Meagher's position was considered hopeless and the Manager in Madras was told to sell his stock as a going concern and realise all he could. Durwans were to be placed in charge of Major Meagher's stock. The total of Major Meagher's debts was Rs. 72,000, of which a sum of Rs. 38,000 odd was unsecured. It is admitted that this debt became bad when the

Bank closed in November. The question you have to decide is whether it was bad or seriously doubtful in June. The letter which I have just referred to shows, I think, that in the opinion of the Manager here it was highly doubtful at that time and what you have to consider is whether there was anything in Major Meagher's evidence to warrant a different opinion. He puts the blame on the Madras Corporation for his financial difficulties and he may be right as to this but what we have to consider is not whether the Madras Corporation treated him badly but whether his debt to the Bank was really a doubtful debt. He has produced a profit and loss statement for June for one month showing a profit of Rs. 2,000 on two farms that he had in Madras. There is no profit and loss statement for any other month and we have no assurance that the farms could be relied upon to yield anything like this sum as a normal monthly profit. As regards his statement of assets we have little means of checking it, but judging from the amount realized by the official liquidator of the stock, I think it was Rs. 8,000 against some Rs. 40,000 or Rs. 50,000 valuation of the stock by Major Meagher, that valuation appears to have been very excessive. Major Meagher appears to be a man of a very optimistic temperament. You will have to consider how far you can rely upon his statement that he was really in a financially sound position at the time the balance sheet was prepared.

The next debt is that of Mr. Britto, a debt of Rs. 2,300. The deficiency of security is, I think Rs. 1,200. There were no credits to this account during the half-year, but we have very little else as indications that the debt was bad, or doubtful. It has been stated in evidence that Mr. Britto had a dispensary in the town and he deposited jewellery as security. This jewellery may have been sold by the official assignee at a disadvantage. On the whole, it appears to me there is no sufficient ground for treating Mr. Britto's debt as doubtful. I would therefore strike out this debt.

Then there is Mr. W. H. Clifford's debt of Rs. 5,605 for which the value of the security was Rs. 4,059. The amount which is unsecured is Rs. 1,546. Exhibit 16 shows that he was not in a position to pay any instalments, but the amount is a small one. Mr. Clifford was in receipt of a salary from a firm and I think you might safely strike out this debt also. I do not think there are sufficient grounds for holding that it was a doubtful debt.

Then Mr. Cotterell's debt. The total debt is Rs. 1,34,247. There were no credits at all during the half-year. There is a deficiency of Rs. 80,000 on the quoted security but he had deposited also by way of security 13,125 Moola Oil shares to cover this deficiency. It would be sufficient if these shares realized Rs. 4-9-0 each for the whole or this deficiency to be covered. It depends, gentlemen on your decision, about the Moola Oil shares which I have said you will have to consider very carefully.

Mr. Moberly's debt, 1,91,600. Taking the unquoted as well as the quoted securities [exhibit 18(*a*)] the deficit is Rs. 82,900. There were no credits in the half-year. Mr. Moberly's pay as Agent of the Bank in Rangoon, was about Rs. 2,000 a month and

he had a free house. To cover the deficiency of Rs. 82,900 there were 30,000 Moola Oil shares and 1,000 Indian Petroleum shares. I have already referred you to the letter to Mr. Moberly's solicitor, exhibit Q, in which it was admitted that Mr. Moberly's debt would be fully realised if all the securities were sold out and it appears that if these Moola Oil and Indian Petroleum Company shares realised as little as Rs. 2-12-0 per share that would be sufficient to cover the whole of this deficiency of Rs. 82,900. As in the case of Mr. Cotterell's debt you will have to decide the question of Mr. Moberly's debt with reference to the value which you think can honestly be put on the Moola Oil and Indian Petroleum Company shares.

Peter's debt was Rs. 36,500, the securities being Rs. 24,700. There was a deficiency of about Rs. 11,700. There were no credits in this account during the half-year. It appears that at one time some years ago he was in a prosperous condition living in a fashionable part of the town and his wife was well off. He had his sons educated in England and had all along received a good salary,—I think about Rs. 700 a month. It is also very probable that he did not tell us the truth about his original purchase of the Rangoon Oil Compay shares. As far as the records of the Bank go it appears that he did contribute about one-third of the amount paid for purchasing these shares, the Bank contributing only two-thirds and getting the shares as security. The question is not whether he was well off in 1908-09, not whether the advances were originally made were properly or improperly made to him, but whether the balance due on 30th June 1911 was as a matter of fact good or whether it was doubtful or bad at the time. Rupees 11,700 is a large sum for a married man on Rs. 700 a month to pay up and though Mr. Peters apparently had other resources some years ago, that does not show that he is in a position to pay this debt or that he is likely to pay it within a reasonable time. However, it must certainly be admitted that Mr. Peters was a very shifty and evasive witness and he may have resources which he did not admit. Therefore you will have to consider that point in determining what value to put on Mr. Peters' statement that he is unable to pay. You will remember also that the burden of proving the debt to be a bad or doubtful debt lies upon the prosecution.

Then as to Sevastopolo. His debt is Rs. 9,600 with security to the value of Rs. 3,900, a deficiency Rs. 5,600. There were no credits in the half-year and there have been none since except by the sale of shares which realised a sum of Rs. 3,000. Mr. Allen says Mr. Sevastopolo is trading in coal to Calcutta and he considers his debt to be good. No interest has been paid since the 1st March 1911 when his account was opened. He never paid any interest on his loan: that is an indication of course the debt is somewhat doubtful but it is for you to decide whether that is alone sufficient to make a debt so doubtful that it ought to have been classed as doubtful in the balance sheet. There is of course the negative

indication that he was not so far as Bank records show called upon to furnish further security to make up the deficiency.

Next comes Mr. Tsounas' debt, Rs. 6,300 with security of Rs. 1,800 leaving a deficiency of Rs. 4,500. In this case also there were no credits in the half-year, but he was in receipt of a salary from Macropolo & Co., and he was receiving half profits as Manager of the firm. It is also to be remembered that he borrowed a considerable sum of money on a previous occasion from the Bank, which loan he paid up in full. He has given evidence here and he seems to have given a true account of his affairs as far as I could judge. On the whole I should be inclined to say that in this case the Manager of the Bank might reasonably think that there was good prospect of recovering the unsecured balance.

Then as to A. Stephen's account. The unsecured balance is Rs. 61,800. He was a partner in G. Stephen & Sons. The balance sheet of the Stephen's estate (exhibit O) was drawn up by Mr. Strachan. He was the Receiver of this estate up to the end of December 1910. The balance sheet shows a substantial amount to come to the partner after paying off all liabilities. But this hopeful balance sheet was not realized at all. It is said that the failure of P. Moodeliar and of Nahapiet were the chief causes which prevented the assets from being realized. With regard to this account you will have to refer to Mr. Sen's evidence (the 26th witness for the prosecution). He has given evidence to the effect that when the Official Receiver took over the estate in December 1910 from Mr. Strachan the solvency of the estate was considered doubtful. If it was doubtful then I think it is a legitimate inference that it was more doubtful in June 1911 and Mr. Strachan, if any one, was conversant with the affairs of this estate having himself been receiver up to a period six months before the issue of the balance sheet of the Bank which we are considering. Mr. Sen also told us, you will remember, that the unsecured creditors of the Stephen's estate may receive one anna in the rupee. That is the position in which the Bank of Burma now stands as regards the unsecured debt due by A. Stephen.

A great deal has been said about Seymour Buckingham's account which is a very small one. The deficiency after deducting security was only Rs. 2,471. I need say very little about it. The exhibits relating to this account are exhibits 14(*a*) to (*f*). The correspondence regarding Buckingham's composition with his creditors certainly suggest that his account with the Bank was doubtful on the 30th of June. I mean that there is nothing in these documents to show that the Bank's debt was excepted from the composition with the creditors. It is suggested by the defence that the Bank was not a party to the composition but you will read exhibits 74(*a*) to (*f*) and decide whether there is any reason to believe that the Bank was excepted from it. Exhibit 14(*f*) in particular expresses the disappointment of the Manager at Seymour Buckingham's neglect to pay up in accordance with the composition arrangement. On the other hand, there is evidence for the defence that Buckingham was earning money as agent of certain

firms at Singapore including the Steam Rope Manufacturing Company and that as a matter of fact some money is still due to him as agency commission by one or more of these Companies. This debt is a very small one and I do not think I need say anything more about it.

Well, gentlemen, I have dealt with the larger debts aggregating Rs. 19,81,500 and the lesser debts aggregating Rs. 2,70,000 which together amount to over Rs. 22,00,000. I leave it to you to decide whether any considerable portion of these unsecured debts should have been treated as doubtful in the balance sheet and either shown to be doubtful or else provided for by some sort of reserve on the other side.

UNPAID INTEREST TREATED AS PROFIT.

. I now turn to the question of interest. The details of this part of the case are set out in exhibits 13(*a*), (*bb*) and (*c*) and there is a summary in exhibit 13(*dd*). Column 1 of exhibit 13(*a*) shows that on the 1st of January 1911 there was due a total sum of about 45½ lakhs in round figures on the accounts in exhibit 13(*a*) and the next page, exhibit 13(*bb*), shows over 17½ lakhs due on the accounts printed on that page. The total of these sums is 63 lakhs; it includes in round figures 3 lakhs of debts which were afterward treated as doubtful or bad at the audit in July. You must exclude these 3 lakhs for which provision was made, both as to principal and interest in the contingency fund. But there remains roughly a sum of 60 lakhs of debt the unsecured portion of which according to the prosecution was doubtful or bad. Of course, the 60 lakhs represents the total debts, the secured as well as the unsecured portion. The unpaid interest on the whole of these debts, the unsecured as well as the secured portions, was taken to profit and loss and treated as profit. You will remember Mr. Giles' suggestion that in the case of doubtful or bad debts which were partially secured the Bank was entitled to take the unpaid interest on the secured portion of the debt as earned income. I think the expert evidence shows this to be wrong. You cannot split up a doubtful or bad debt for the purpose of interest into two parts, a secured part and an unsecured part. It is only if the security is sufficient to cover the interest as well as the principal of *the whole* debt that unpaid interest can be taken to profit and loss and that is the system which Mr. Holdsworth has followed in preparing these statements. He has shown in these statements the interest on the whole of these debts, not merely on the unsecured portions but on the secured portions as well. There is a summary in exhibit 13(*dd*) and in this summary the sum of Rs. 12,44,000, the Refinery debt, is added in and its unpaid interest of over half a lakh, Rs 53,000 is also shown. This interest was also taken to profit and loss. The total amount of interest wrongly credited to profit and loss according to this statement of Mr. Holdsworth is Rs. 2,26,000 odd. As regards some Rs. 20,000 of this amount we need not concern ourselves for as I have said it may be taken that provision was made for this amount of interest in the contingency fund on the

30th of June, that is to say the interest on debts recognised to be doubtful or bad at the audit. If this sum of Rs. 20,000 is deducted the balance is Rs. 2,06,000 odd and this represents the amount which the prosecution still contend should have gone to interest suspense or deferred interest account and not to profit and loss and which should not have been distributed as profit by the Bank. The principal items in this sum of Rs. 2,00,000 (these figures you might note down against the list I gave you of larger and smaller debts, you can put the figures in a separate column, "interest wrongly credited to profit and loss according to the prosecution)" are against Attia Rs. 24,500, against Mower & Co. Rs. 90,400; against Mount Pima, Rs. 6,200, against Aung Ban, Rs. 9,400 and against the Rangoon Refinery Company, Rs. 53,500. If you add up these figures you will find that the total is Rs. 1,84,000. Then among the lesser debts the only figures that need attract your attention are those relating to Cotterell, Rs. 5,800, Moberly, Rs. 6,200, Peters, Rs. 2,100 and A. Stephens Rs. 5,700. These are the four larger items and I need not trouble you with the rest. The total of these four is Rs. 19,800. So that adding Rs. 19,800 interest on these four items and Rs. 1,84,000 on the five larger items you get roughly Rs. 2,03,800. That is the total of the items I have given you. To arrive at these figures I have followed the same course as followed by Mr. Holdsworth in calculating the figures for the table at the top of exhibit 13(*dd*), that is to say, I have in each case taken the figure for total interest in column 6 of exhibits 13(*a*) & 13(*bb*) and deducted from the total receipts shown in column 11. The net amount of interest actually debited to each of these accounts and afterwards taken to profit and loss by the Bank during the half-year is thus arrived at. In the case of the Refinery Company's debt [exhibit 13(*c*)] looking to the state of the account and the nature of the payments you will have to decide whether Mr. Holdsworth was justified in treating the credits in columns 10 and 11 of exhibit 13(*c*) during the half-year, entirely as credits to the principal of the Refinery debt I would like to remind you of what Mr. Holdsworth said about this (page 37 of his evidence) (Read *re* Rangoon Refinery Company from "The whole of the interest should have been credited to interest suspense account . . . . . value of the security). That was an admission he made in answer to Mr. Coltman's question. In this case *i.e.*, of a Company in liquidation, it depends entirely on security." Then he said in answer to a question I put to him, "The reason why I make a difference between the Rangoon Refinery debts and other debts in exhibit 13 is that in the case of the Refinery accounts, a large amount was advanced during the period (Rs. 16,06,492), and the amount received was much less (Rs. 11,20,110), and there was a large balance of Rs. 5,39,950 increase in the total balance due at the end of the period and this debt was unsecured and doubtful to a large extent at the close of the period. In the other accounts there were practically no transactions during the period." Well, gentlemen, you must decide whether he was justified in doing that, *i.e.*, in treating this Refinery account in this exceptional way. You

have his reasons which I have read out to you and I leave it to you to decide whether they are sufficient. It is a question on which I think you will be able to form a better opinion than I could. It seems to depend a good deal on what view you take of the Refinery debt, the principal of the debt. I have already dealt with the question whether that debt could be regarded as a good debt at the time of the balance sheet. If you come to the conclusion that the Refinery debt was a doubtful debt, then I think you must decide also that the credits to this account during the half-year should have been taken only in reduction of the principal and that there was no justification for treating the unpaid interest as profit. So also as regards the unpaid interest on the other debts, those of Attia, Mower & Co., Mount Pima, Aung Ban, Cotterell, Moberly, Peters, and A. Stephen. It is only if you find these debts to have been doubtful or bad on the 30th June 1911 that you need consider the further question whether the unpaid interest accruing on them was properly taken to profit and loss. The Bank were of course entitled to reckon as profit the unpaid interest on any debt which was honestly considered to be a good debt. On the other hand, it may be said that whatever portion of the debts you find to consist of doubtful or bad debts the unpaid interest relating to that portion of the total debts ought to have been taken to interest suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account. I would like to remind you of what the experts said about the interest suspense account: perhaps it is not fresh in your memory. Turn to Mr. Black's evidence on pages 1 and 2 of his deposition (read from "taking an account which is bad.....such interest would be credited to interest suspense account)." Further down on the same page he says "in my opinion the mere increase of an overdraft account.....the Bank was satisfied of the debtor's ability to pay." Then in cross-examination by Mr. Coltman he said (read from "Regarding the crediting of unpaid interest.....noted in the books or not"). Then there is Mr. Tanner's evidence, pages 1—3. He says (read from "If a debt is considered good.....to be a firm of repute"). Further down he says "Interest on bad or doubtful debts.....'reserve for bad and doubtful.'" He also said at page 3 of his deposition (read from "I agree that the only object of the interest suspense account.....before the account is published.") Then there is Mr. Warren, former agent of the Bank of Bengal in Rangoon, who was the 7th witness for the defence. He says "The practice of the Bank of Bengal .....which the Bank holds for it." Then last of all I will refer you to what Mr. Meugens said on page 6 of his deposition at the bottom (read from "if a debt is seriously doubtful.....or otherwise reserved against"). Then on page 3 he said "I heard Mr. Warrens' evidence.....may depend on other things". So I think there is no substantial difference of opinion among these gentlemen as to the principles which should guide a Bank in this matter, no real difference as to the circumstances in which you may

credit interest to profit and loss and as to the cases in which the Bank ought to take such interest to interest suspense account. I think, however, that Mr. Holdsworth in saying that "you must have absolute certainty of recovering before you can deal with the interest as earned income" is going beyond the mark. It is unnecessary that the recovery of the interest should be absolutely certain; the consensus of opinion among the other experts who were examined shows that absolute certainty is not necessary. It is sufficient if the Manager of the Bank or the Directors honestly consider the debt a good debt and believe that the interest will be recovered. If they had a reasonable certainty to that extent I think that would be sufficient. I think that is the effect of the evidence given by these expert gentlemen. Well, applying these principles and using the knowledge you have gained of the various debts, you have to decide whether the management of the Bank could honestly treat this interest amounting to over two lakhs of rupees on these debts as earned income available for profit-reckoning in the balance sheet. This is of the greatest importance for you will remember that the available profit shown in the balance sheet was Rs. 1,62,000 odd and therefore the genuineness of this profit depends to a great extent on this question of unpaid interest. If as the prosecution contend the Bank had no right to credit this 2 lakhs odd to profit and loss, then there was no profit at all but a loss and the balance sheet was necessarily false. Even if you decide that any large portion of the two lakhs was wrongly credited to profit and loss you will have to work out the effect of your decision as regards the net profit of Rs. 1,62,000 and see how far the aspect of the balance sheet would have been changed if that portion of the intesrst had been put in an interest suspense account instead of going to profit and loss. I may say that in this part of the case there is no suggestion that the prosecution have sprung a surprise on the accused. The question of crediting unpaid interest to profit and loss has been conspicuous in the fore front of the prosecution case from the beginning. In connection with this branch of the subject you will no doubt bear in mind the Auditor's letter of the 1st August 1911 in which he strongly advised that interest on most of the unsecured loans should be credited to an interest suspense account or not at all. Now, gentlemen, that advice was given before the balance sheet was issued, but after it was printed. The unsecured loans according to the Bank Manager and the Auditor amounted to Rs. 6,36,000 and the interest on that sum was not taken to an interest suspense account in this balance sheet, but was reckoned as divisible profit. Mr. Allen says he meant this advice of his to be applied in the ensuing half-year. But if it was strongly advisable for the ensuing half-year, it is not easy to understand why he did not insist on the same course being followed in the balance sheet for the half year ending 30th June 1911. You will remember that Mr. Allen at first contended that provision for the interest on the unsecured debts had actually been made in the contingency fund on the 30th of June 1911 and that he merely meant to convey to the Directors that it would be better in future to make provision

for such interest in an interest suspense account month by month rather than to make a lump sum provision at the end of the half year when deciding how much was to be added to the contingency fund. That would of course be a mere matter of book-keeping and Mr. Allen went on to explain to us the superiority from the book-keeping point of view of putting doubtful interest month by month in an interest suspense account rather than providing for it in a contingency account at the end of the half-year. But the next day it was shown that Mr. Allen's answers on this subject were not correct. For he was obliged to admit that as a matter of fact the contingency fund on the 30th of June 1911 was only a few hundreds of rupees in excess of the principal and interest of debts taken to be doubtful or bad at the audit, that is to say, Rs. 2,94,000, and therefore it was all but exhausted in providing for these debts and their interest and therefore it is plain that the balance sheet of 30th June 1911 contained no reserve provision at all for the interest on unsecured loans respecting which Mr. Allen had expressed his misgivings in his letter of the 1st August to the Directors. It also appears to me from the Auditor's advice on this point and from his advice about not paying a dividend that he entertained serious doubts about most of these unsecured loans, and though he does not expressly say so, his letter at any rate suggests the inference that the Bank should not merely have credited interest on these loans to interest suspense account but should also have made special reserve provision of some kind for most of the principal of these debts amounting to Rs. 6,36,000. You will remember Mr. Meugens' remark that if you say the interest on the unsecured loans should go to interest suspense account that is tantamount to saying that these debts are doubtful. He said it presupposes that these debts were doubtful. So that we have some grounds—I do not know how substantial they appear to you to be—for thinking that as regards the Rs. 6,36,000 the Bank ought to have made reserve provision not only for interest but also for principal. It is true that there was a reserve fund of 5 lakhs, but no part of this fund was ear-marked as provision for doubtful and bad debts and we have it on Mr. Meugens' authority that if any part of the ordinary reserve fund is to be used for this purpose it must be expressly stated so in the balance sheet; that is to say, the reserve fund or such part of it as may be required for the purpose of meeting bad or doubtful debts should be described as a reserve for doubtful and bad debts. In the absence of such express description, you cannot include bad and doubtful debts, principal or interest, among your assets, unless of course you have provided for them otherwise by a secret reserve or contingency fund.

COMMENTS ON AUDITOR'S ACTIONS.

In what I have said up to now I have dealt with the case generally and have tried to lay before you the principal considerations to be taken into account in deciding whether the balance sheet and Directors' report were false and dishonest, and whether

the dishonesty was aggravated by keeping the Bank open till November. It remains for me to deal with the case against each of the accused separately. But before doing that it is advisable to touch upon the question how far the accused would have been justified in relying upon the Auditor's certificate on the balance sheet. You will have noticed that both Mr. Mower and Mr. Clifford in their written statements and throughout their defence have relied to some extent on this certificate: they have relied upon it as *prima facie* evidence that all was right. But you have to consider the case of the balance sheet being false and fraudulent. In that case it is a necessary inference from Mr. Mower and Mr. Clifford's reliance upon the Auditor's certificate that the fraud or dishonesty, if any, were confined to the Manager and the Auditor whose signatures were on the balance sheet when it was laid before them; or, in other words, that the Directors were taken in by Mr. Strachan and Mr. Allen who prepared a false balance sheet for them to sign; that is putting the matter quite baldly, but I think it is a legitimate inference from this line of defence. But such an inference, I submit to you, would manifestly be absurd, for it was not Mr. Allen and Mr. Strachan so much as Messrs. Mower and Clifford who were concerned to prevent the Bank from collapsing, and we may reject as wholly improbable any suspicion that Mr. Allen and Mr. Strachan would concoct a false balance sheet and keep the Directors in the dark about it. The law on the subject of Company audits is contained in section 74 of the Companies' Act (read it). Then there are the provisions in the Articles of Association of the Bank which are binding on all concerned (exhibit II). The articles are 110, 113, 114, 115 (articles read). I also will read for your guidance a passage from a recognised authority on Company Law which describes the duties of auditors, that is Lindley on Companies, page 617:—

"The first duty of auditors is to ascertain what duties are imposed upon them by the Companies' regulations, and by the Acts by which it is governed, and to conduct the audit accordingly. Speaking generally, it is their duty to examine the company's books and accounts, and to report whether the balance sheet exhibits a correct view of the companies' financial position at the time of the audit; and in doing this they ought not to confine themselves to verifying the arithmetical accuracy of the figures in the balance sheet. It is, however, no part of their duty to consider whether the business is prudently or imprudently conducted; nor is it their duty to take stock. If special knowledge is required to value the stock or for any other purpose connected with the audit, they are entitled to act on an expert's opinion. If the company's officers have, or may reasonably be supposed to have, such special knowledge the auditors may trust to them if they have no reason to suspect their honesty. If, as is usually the case, it is their duty to report to the shareholders, they will not discharge their duty by reporting to the Directors. Moreover, except perhaps under very exceptional circumstances, their report ought to contain the information to which the shareholders are entitled; if it merely

gives the shareholders the means of information, it will not be sufficient. Auditors are bound to exercise a reasonable amount of care and skill in the discharge of their duties. The amount of care and skill which is reasonable depends on the circumstances of each case; if there is nothing to excite their suspicion, less care will be reasonable than if their suspicious were, or ought to have been, aroused.

Auditors who honestly discharge their duties with the requisite amount of care and skill incur no liability even though they have committed errors of judgment and the balance sheet and accounts are in fact false and misleading. If they do not do so, they will be jointly and severally liable to make good any loss caused thereby, *e. g.*, if dividends are improperly declared and paid on false or misleading accounts certified by them as correct, they will be jointly and severally liable to make good all monies so misapplied with interest."

You see that an auditor has to ascertain the true financial position of the Bank at the time of the audit and to report to the shareholders. He is not there for the Directors or Manager to lean upon. His main function is to protect the interests of the shareholders: that is what an auditor is for. I said before that section 74 of the Companies' Act about balance sheet and auditors occurs in a part of the Act which is headed "Protection of members." What the auditor has to see is that that the Directors and officials are publishing true statements of the Bank's affairs, not merely arithmetically correct lists of balances copied from the ledgers of the Bank. For example, the auditor should see that the sums shown as good assets in the balance sheet bear some close relation to the actual present market value of those assets, and that debts which are doubtful or bad are duly reserved against. In the case of unsecured debts, of course the auditor has to rely principally upon the Manager and Directors as to the solvency of those to whom they have given credit. In this case Mr. Allen was justified in accepting the Manager's statement about Attia. He apparently had some doubts as to whether the Manager's opinion was correct. There is little doubt I think that Mr. Allen did not feel quite comfortable about the Bank's debts. Before the audit actually began we find Mr. Strachan writing to the Aung Ban Company and the Refinery Co. liquidators and telling them that the auditor was threatening to take their debts as unsecured. Letters of lien were obtained from some of the big debtors and Mr. Allen was satisfied. Through an oversight it appears that no such letter of lien was procured in the case of the Aung Ban Company's debt, but Mr. Allen apparently did not know of this omission. But he was still not altogether satisfied with the debts that were shown as unsecured. His letter of the 1st of August which has been referred to more than once is most important. To my mind at least, it shows that he passed the balance sheet in spite of serious misgivings about the debts. He points out the weakness of the security for a considerable number of the loans and comments unfavourably on the kind of security and on the absence of market quotations, then follows the advice "we strongly advise that the interest on most of the unsecured

loans be credited to an interest suspense account or not at all," and he points out that after deducting the amount of the secret reserve from Rs. 9,36,000 unsecured loans, the balance is in excess of the reserve fund of 5 lakhs. What could that mean but that the auditor had misgivings about this sum of Rs. 6,36,000 odd. If there was no doubt about this large sum, then why should he recommend interest on it to go to interest suspense if credited at all. Mr. Meugens says that presupposes that they were doubtful debts. If Mr. Allen thought these debts to be good debts I do not think he would have any reason to make such a recommendation to the Directors. It is for you to decide whether Mr. Allen should have contented himself with writing to the Directors. It seems to me that he should not. Looking to his position as a sort of "watch-dog" for the shareholders I think he ought to have reported to the shareholders the doubts he had about the securities and the advice he was giving to the Directors about the crediting of unpaid interest on the unsecured loans, especially as the balance sheet which he was certifying to be correct treated the unpaid interest on these loans as part of the good assets of the Bank. I think the omission in the auditor's certificate of all reference to this matter was hardly justifiable, especially when Mr. Allen thought the situation was so serious as to warrant him in recommending that no dividend should be paid for the half-year. Then again as regards the Moola Oil and the Burma Petroleum shares I think the auditor relied too much on the Director, Mr. Clifford's assurance as to the value of these undertakings. In ordinary circumstances Mr. Allen would be entitled to take what a Director might tell him on such a point and to act upon it, but in this instance he should have been mindful of the fact that Mr. Clifford was not only a Director of the Bank but was also a Director of the Bank's principal debtor, Mower & Co., and that Mower & Co. had deposited shares of these very Companies in the Bank as security for some seven lakhs of rupees. Mr. Allen has told us that he still considers that this balance sheet honestly and correctly sets forth the position of the Bank at the time. I think you have some reason to doubt whether he can really hold that opinion. It is true that Mr. Allen had very little to gain personally by keeping the Bank open, but if he had stated the true position of affairs and a run on the Bank followed the Bank might have to close and the auditor would lose his fees as auditor of the Bank and of Mower & Co., and any of the Mower Companies that might be involved in the crash. It is hard to believe that the loss of these fees would be a sufficient motive for passing a balance, which he knew or had reason to believe to be a false balance sheet. We are, however, not concerned with his motive. We have to look only at what he actually did. My own opinion is that Mr. Allen's action with regard to the audit and the balance sheet showed a degree of complaisance towards the Directors and Manager which renders it necessary to discount his evidence considerably. But it is entirely for you, gentlemen, to put your own construction upon Mr. Allen's actions and to form your own opinion as to the value of his evidence.

11th April 1913. Gentlemen, when the Court adjourned yesterday I had been dealing with the question whether it would be reasonable to give any weight to the suggestion that if the balance sheet is false the Directors, Mr. Mower and Mr. Clifford, could have no responsibility for it because they were entitled to rely on the certificate of the auditor and on the Manager's signature. I told you that in my opinion it is highly improbable in this case that the Manager with the connivance of the auditor would concoct a false balance sheet and keep the Directors in the dark about it.

It is necessary now to say a few words about another line of defence, which relates to Mr. Okeden's connection with the Bank. It has been suggested that though Mr. Okeden did not actually sign the balance sheet he was here throughout the greater part of the interval between the signing of the balance sheet and the closing of the Bank, and he must therefore have known the actual state of affairs just as well as the other Directors. Here it is argued he is a man of undoubted intergrity who with a full knowledge of the facts saw nothing legally or morally wrong in keeping the Bank open till November the 13th. In such circumstances how can you say that the other Directors or the Manager acted dishonestly in doing precisely the same thing? There is a fallacy in this argument and that fallacy lies in the assumption that Mr. Okeden had a knowledge of the state of affairs equal to that of the other Directors —the present accused. It is quite clear I think that he had not. He had no concern in the various Mower Companies and he knew little or nothing about their affairs. He has appeared before you as a witness and has said among other things that he considered he duly exercised the control which according to the Articles of Association are vested in the Directors. It seems to me that Mr. Okeden's control was of a very flimsy description and that he was practically an ornamental figure on the Board and nothing more. He did not even know that Mower & Co. banked with the Bank of Burma. He attended the Meetings of the Directors and read any notes which the Manager might think fit to circulate for the information of the Directors. But I think it is evident that he exercised no effective control and had only the sketchiest knowledge of what was going on. His evidence shows that he never thought it necessary to look into things for himself but relied implicitly upon what was told him by his co-Directors and by the Manager. Even matters of first class importance such as Andesashia's complaint to the Bank in March 1910 and the auditor's letter of 1st August 1911 did not put Mr. Okeden on inquiry for himself and did not ruffle his confidence in the other Directors and Manager. Though Mr. Okeden may have been a negligent Director I think it is certain that he was not a dishonest one and that this must be so is indeed admitted by the defence. If the balance sheet was really false he at any rate appears to have known nothing about it. His case is distinguished from that of the three accused who all approved and signed the balance sheet and whose state of knowledge as to the contents of the balance sheet we must now consider.

ACCUSED'S KNOWLEDGE OF BANK'S REAL STATE.

It would have been very convenient if I could have put to you first the question whether the balance sheet is in fact false or not: that is the foundation of the whole case. It would be convenient to get your decision on that question before dealing with the further question, how far each of the accused is shown to have had guilty knowledge, for if you are satisfied that the balance sheet was not false or rather if you are not satisfied that it was false there is an end of the matter. But I cannot put the case to you piece-meal: it must all go together. You will understand therefore that the remarks that I have to make as to the degree of knowledge of each of the accused are for your consideration only if you do find the balance sheet to be in fact false and not otherwise. You have to consider the case of each one of the accused separately, for it does not by any means follow if one is found to be guilty that the others must necessarily be guilty. It may well happen in a Bank prosecution like this where the Manager and certain Directors are prosecuted jointly that only the Manager or, it may be, one of the Directors is found to have acted with the guilty knowledge and intention requisite for a conviction. It is easy to imagine such a case. Therefore in the present trial it is for you to decide not only whether the balance sheet was false but whether as regards each of these persons he knew it to be false when he signed it. If you find as a matter of fact that one or more of them signed without knowing or having good reason to believe that it was false, then as regards that accused or those accused, you should certainly bring in a verdict of not guilty. I must repeat that it is not enough for a conviction of this offence to prove that an accused was very careless or very negligent, that he relied too much on the assurances of others as to the correctness of what he was signing. The law requires much more than carelessness or negligence. It requires positive dishonesty and there is a very wide gulf between the two. Without actual knowledge that the balance sheet was false there would be no dishonest intention, and dishonest intention as I have already pointed out to you, is an essential element, indeed it is the main element, in the offence charged against these accused. You have therefore to decide as to the knowledge of each of the accused at the time of the signing of the balance sheet on the 1st August. And for your guidance in considering this question I will read to you the words of the Judge in summing up the City of Glasgow Bank case, a case which resembles this one in many respects. In that case as in this there was a balance sheet which the prosecution alleged to be false and the Jury had to decide not only as to the falseness of the balance sheet but also as to the guilty knowledge of the accused Directors individually.

The Judge says "As to the knowledge of the Directors that these balance sheets were fabricated. Now, what the prosecutor has undertaken to prove, and says that he has proved, is not that these Directors were bound to know the falsity of the statements in the balance sheets—not that they lay under obligations to know it, not that they had the means of

knowledge—but, that, in point of fact, they did know it, and that is what you must find before you can convict the prisoners of any part of the offences attributed to them. You must be able to affirm in point of fact, not that they had a duty and neglected it, not that they had the means of information within their power and failed to use them, but that, as a matter of fact, when that balance sheet was issued they knew that the statements contained in it were false. I say that, because there has been some phraseology used in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation; for what a man is bound to know he shall be held to have known. But that has no place at all when a man is charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you you can convict him. But while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which show and carry to your mind the conviction that the man when he circulated, or when he made that balance sheet, knew that it was false. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, in point of fact, know the falsehood of which he is accused."

I will take first the case of the two Directors Mr. Clifford and Mr. Mower, and as regards these two accused it is necessary to deal with an aspect of the case which distinguishes it from other Bank trials. I refer to the inter-dependence of the Bank of Burma on the one hand and what are deferred to as the Mower Companies on the other. This is a fact which leaps to the eye and which I consider highly relevant to the charge. It is undisputed that these two accused, who were the original Directors of the Bank and continued to be Directors till the Bank closed in November 1911, were also Directors of Mower & Co., the principal debtors of the Bank, and had either through Mower & Co., or as individuals, a very large and in many cases a controlling interest either as managing agents or Directors or principal shareholders, in most of the other large companies which were financed by the Bank. To make this quite clear it is sufficient for you to refer to Mr. Clifford's note, exhibit 26 (*a*). It is attached to the Manager, Mr. Strachan's note of the 30th October, exhibit 26. It has been read to you more than once and I do not think I need read it to you again. It shows the close connection between Mower & Co. and most of the other companies. A statement, exhibit 89 (*b*), has been prepared to show the extent with which the funds of the Bank were used for the purpose of financing the Mower group of companies. There is another statement, exhibit 89 (*a*). Exhibit 89 (*a*) is a revised edition of another exhibit 89 put in evidence in the Magistrate's Court for the same purpose. It has been pointed

out that there are great differences between the two exhibits. Mr. Holdsworth explained that the omissions in the second statement were in favour of the accused, but it is a pity that more pains were not taken to compile the information correctly in the first instance. I prefer to draw no inference from exhibit 89 (*a*). As regards exhibit 89 (*b*), however, the figures in that statement have not been challenged and I think you may take the information given in that statement into consideration. As I have said, Mower & Co. themselves were the greatest debtors of the Bank. For information as to the other companies mentioned in exhibit 89 (*b*) you can look at the balance sheets and the lists of shares in exhibits 45 (*a*) to 58 (*c*) and exhibit 60 (*f*). You will notice among other things that two-thirds of the Burma Investments' shares were held by S. A. Mower and that the Burma Investments Company had more than one-half the Rangoon Oil shares afterwards converted into British Burma Petroleum shares, so that S. A. Mower had a controlling interest in the Rangoon Oil Company. Attia, whose accounts are shown in exhibit 89 (*b*), was originally a partner in Mower & Co. but retired in 1907. Mr. Cotterell was a partner in Mower Cotterell & Co. which afterwards became Mower, Limited. He was also a partner of Marshall Cotterell & Co. in which Messrs. Mower and Clifford and the firm of Mower & Co. held more than half the shares. At the bottom of exhibit 89 (*b*) you will see a summary of the figures. According to this summary, the total amount of loans and overdrafts due to the Bank of 30th June 1911 was 122¾ lakhs in round figures, and out of this total the Mower Companies with Attia and Cotterell were responsible for over 105 lakhs. Out of Rs. 9,21,000 odd shown as bills receivable in the balance sheet the Mower Companies together with Attia and Cotterell were interested as drawers or drawees or both in all but a small fraction. These figures have been worked out by Mr. Holdsworth and their accuracy has not been questioned. It is impossible in my opinion, to shut our eyes to these facts or to overlook the important bearing they have on the case. They lead to the conclusion that the Bank of Burma, founded by Messrs. Mower and Clifford, existed primarily for the purpose of obtaining funds with which to carry on the operations of the Mower Companies. I am not saying that the Directors were contravening the law in getting funds for their various companies in this way. So far as I can see there was nothing illegal in it. The prescribed form of balance sheet has a heading on the assets side "Sums due by a Director or other Officer of the Bank." But this refers to sums due by them in their personal individual capacity. It does not refer to sums due by Companies in which they are interested, however intimate or preponderent their interest in such companies may be. This is a matter to which the Legislature have turned their attention in framing the new Companies' Act, but under the present law (Indian Companies' Act of 1882), the law which applies to this case, it appears that the Directors of a Bank could also be Directors and Managing Agents and part-owners of any number of Companies indebted to the Bank and

there would be no legal obligation on them to disclose such facts to the public. You must therefore dismiss from your minds any shadow of bias against the accused on this score. You may think it a vicious system which allows the funds of the Bank to be used mainly for the purposes of oil-winning and other industrial concerns in which the Directors themselves are among the persons chiefly interested but it would be entirely wrong to let any such views influence your decision as to the guilt or innocence of the Directors in this case. They did nothing more than what the law permitted in this matter. I have introduced these remarks for a different purpose altogether, that is, to assist you in deciding the question of the two Directors' actual knowledge of the affairs of the Bank on the date that they signed the balance sheet. It seems to me that the close connection of Messrs. Mower and Clifford with these companies and with Attia and Cotterell gave them special, not to say unique, opportunities for knowledge of the state of the principal debts. It must be said that they had better opportunity than Bank Directors ordinarily might be expected to have. I find it difficult to believe that they kept their knowledge of the affairs of these various companies in a brain compartment entirely shut off from the brain compartment which was brought into use in perusing and approving the balance sheet, the profit and loss statement and the Directors' report of the Bank. This, however, is a matter entirely for you as business men to settle for yourselves. Opportunity and knowledge are not the same thing. You are entitled to make any reasonable inferences but they must be reasonable. The law about inferences of this kind is that you may presume the existence of any fact which you think might have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case before you and bearing that in mind you will have to decide what inferences you can legitimately draw from the opportunities of knowledge which the accused Directors had. Your common sense and business experience will enable you to decide how far actual knowledge of the state of the debts and securities can reasonably be inferred from the opportunities which these two Directors had by reason of their connection with the affairs of the debtor companies and their connection with Attia and Cotterell.

Taking first the case of Mr. Clifford you will see he was the sole Director present in Rangoon for some months before the balance sheet was issued. He denies that he took any part in the preparation of it: this is in contradiction of what he is reported to have said at the meeting of shareholders after the Bank closed. He said "In June of this year when the half-yearly balance sheet was issued, the securities held by the Bank were subjected to close scrutiny by the Auditors and Directors, and valuations assessed at a minimum market price." He says the report of that meeting is inaccurate, and it is clear that it is inaccurate at any rate in one respect because it mentions Directors in the plural and I understand that there was only one Director in Rangoon at the time

of the audit. I think Mr. Clifford's explanation may be accepted at any rate to the extent that he did not take any part in preparing the details of the balance sheet. But you will have to consider the likelihood of the Bank Manager deciding for himself without reference to the sole Director in Rangoon such radical questions as the total amount of debt to be credited as good, the amount to be classed as doubtful or bad and against which provisions should be made by way of reserve in a contingency fund. As to that of course you must also remember the evidence given by Mr. Kesteven. He said "I am a Director of a few companies. So far as my knowledge goes the Directors usually rely on the auditors as to the accuracy of the accounts and do not go into the figures themselves." I see he also says however in cross-examination that the Directors are supposed to be generally cognisant of the affairs with which the balance sheet deals but not with all the details of the affairs. This gentleman, Mr. Kesteven, was apparently never a Director of a Bank though he was a Director of other companies. It is true that wide powers were conferred on the Manager by the power-of-attorney (you see the power-of-attorney among the exhibits), but these powers were not conferred to the exclusion of the Directors' powers. It would be absurd to hold the Director responsible for any mere details of bank management but in large matters such as I referred to just now, it is not unreasonable to presume that the Manager acted in consultation with the Directors. At least so it seems to me, but this is a matter which you have to decide for yourselves. You will remember that paragraph 86 of the Articles of Association laid down that the management and control of the Bank shall be vested in the Directors, that is to say, they are left no option but have the duty of managing the affairs of the Bank expressly laid upon them Whatever powers they confer on the General Manager the Directors cannot divest themselves of the general duty of management and control, or perhaps I should say the general supervision and control, so long as they continue to be Directors. I think therefore you must presume that Mr. Clifford as the sole Managing Director in Rangoon at this time did exercise the supervision and control that were vested in the Board of Directors and that in exercising these functions he would naturally become conversant with all really important matters concerning the Bank. Mr. deGlanville drew attention to an English case in which it was laid down that a Director is entitled to trust the officers and servants of a Bank to do their duty honestly and that of course is perfectly true as a general proposition; but that English case was a civil case in which somebody tried to make the Director responsible for the misdeeds of a dishonest Manager. The balance sheet which was laid before that Director, the defendant, falsely represented the Bank to be flourishing and the Directors' report falsely stated that proper provision had been made for bad debts. It was very like the case alleged by the prosecution here in those respects. But in that case though the balance sheet was really false, the Director, who was the defendant, believed the balance sheet and report to be perfectly true and he had no reason to suspect the

honesty or competence of the Manager. He was himself deceived by the Manager. He was deceived by the false balance sheet and report and it was held that he was not civilly liable to make good the money which had been improperly paid away as dividends on the basis of this false balance sheet and report—that was the case—much less would he be liable criminally. It appears in that case that not only the Manager but another Director who was a Managing Director had for years before fraudulently concealed the true facts of the value of the outstanding debts and other matters which it was their duty to bring to the notice of the Board and which might have been discovered by the defendant Director if he had made a careful examination and comparison of the accounts of the Bank. You will see, gentlemen that in this English case the circumstances were very different from those alleged in the present case. It is not pretended by any one that Mr. Strachan deceived or had any motive for deceiving Mr. Clifford and Mr. Mower in any way. The suggestion of the prosecution on the contrary is that they all acted in concert.

Well, gentlemen, whatever you think about the minor debts of the Bank it seems to me that you might reasonably infer that Mr. Clifford knew most of what was essential to know of the large debts—those of Mower & Co., the Refinery, Aung Ban, Mount Pima, Cotterell, Moberly and Stephen. This is an important question of fact which you will have to decide. You must give all due weight to the circumstance that has appeared in evidence that Mr. Clifford at the time of the audit was suffering from sprue. A man who was in bad health, might not take such a close interest in his business affairs as he would if he were in good health. There is some conflicting evidence about this because one witness Compton said that at this time Mr. Clifford was attending office and kept very late hours. He says "I came out to Rangoon at the end of May 1911 in the service of the British Burma Petroleum Company. At that time I worked in the office of Mower & Co. The work in that office was very heavy from that time until November 1911. Mr. Clifford had very frequently to remain in office until late at night. I had also to do the same, six months on end, three or four nights a week. We worked until midnight sometimes". It is not clear, whether, Mr. Clifford was ill in June and July but it appears it was about this time at any rate that he was suffering from sprue, and you have to give due weight to that fact. It is clear, however, that Mr. Clifford knew the auditor's opinion that in the circumstances no dividend should be declared. He was advised of that fact in the course of the audit and he was in a position to understand fully why the auditor gave that advice. It is impossible to disassociate that advice given by Mr. Allen from the letter which Mr. Allen wrote on the 1st August, exhibit 30, which shows that the auditor was uneasy about the securities and thought that the unsecured loans for Rs. 6,36,000 were somewhat shaky at any rate. Mr. Clifford was aware of course of the nature of the securities for the Refinery debt and the extent to which the liquidators' claim was disputed in July 1911. As Managing Director of

Mower & Co. he knew all about that matter. I discussed the Refinery debt yesterday and the security for it. I left it to you to exercise your own judgment as to whether the lien on the liquidators' claim against the British Burma Petroleum Company could be regarded as a good security or whether it could only be regarded as a sort of makeshift to tide over the audit. If you take that view of the security for the Refinery debt you must also consider whether Mr. Clifford realised when he signed the balance sheet that this lien on the liquidators' claim should be so regarded, that is, as a makeshift to tide over the audit. Did he realize or did he not, you should ask yourselves, that the British Burma Petroleum Company must needs take action to have this lien surrendered by the Bank and that the Bank would inevitably have to give way for fear of ruining the British Burma Petroleum Company of which they held such an enormous number of shares. Then you will also remember that Mr. Clifford was actively directing the affairs of Mower & Co. for some months before the balance sheet was issued and he was also the active controller of the large interests of Mower & Co. and of Mr. Mower in all the various other Mower Companies. It seems that he had full opportunities for knowing the extent of all the large debts of the Bank and in a general way at any rate of the security which the Bank held for these debts. You must look to the nature of the security, which consisted chiefly of British Burma Petroleum shares, Burma Investment shares and shares in companies which were controlled and financed by Mower & Co. Looking to that circumstance it appears that Mr. Clifford must have known as well as any one the realizable value of those securities at the time the balance sheet was issued. If the balance sheet did take credit as good assets for a large amount of debts which are really doubtful or bad, if you come to that conclusion that the resulting profit shown on the half-year's working was for that reason fictitious, I think there are substantial grounds for believing that Mr. Clifford was at any rate cognisant of this state of affairs. I am entitled to give my opinion on this point and on other points of facts, but it is an opinion which does not bind you as I said before and you can reject or follow it as you think fit. You will of course give weight to the fact that Mr. Clifford did not sell out his shares in the Bank and as regards his account in the Bank, which as we know was pledged as security for Mower & Co.'s debt, there appears to be no real ground for urging that he tried to take money out of the Bank for his own purposes when the collapse of the Bank appeared to be imminent.

Next as to the General Manager, Mr. Strachan. He accepts full responsibility for the figures in the balance sheet which were all prepared by him with the exception of the two inner columns dividing the good debts into debts for which security was held and debts for which no security was held. That sub-classfication of the good debts was effected by the auditor in consultation with Mr. Strachan. We have the auditor's evidence about that, and it agrees with what Mr. Strachan says. It was Mr. Strachan's

duty as General Manager to be conversant with the financial position of persons and companies to whom money had been lent by the Bank, and it may fairly be presumed that he was posted at any rate in a general way in reference to all or most of the debtors. As to A. Stephen's debt he had some special means of knowledge because he had been the liquidator of Stephen and Sons' estate up to Dec. 1910 and he was in a position to know how far A. Stephen's balance could be considered a good recoverable balance. Major Meagher's account has specially occupied his attention: he wrote that letter, exhibit 96, to the Manager in Madras specially about this debt. In connection with Major Meagher I should like to correct what appears to be a mistake in what I said yesterday. I said that Major Meagher's stock was sold for Rs. 8,000. But I find that as a matter of fact this figure was merely suggested to him in cross-examination and he said he did not know what the stock had been sold for. So you have to dismiss from your minds that remark I made to you as to Major Meagher's stock having been sold for Rs. 8,000. You have no evidence as to the price realized. He did say, however, that his debt to the Bank became a bad debt because the Bank closed and because the liquidator had sold off his stock.

Mr. Strachan had been specially interesting himself about Major Meagher's account just before the balance sheet was issued, and he therefore had means of knowing or knew as well as any one in the Bank could know what prospect there was of recovering that debt. He knew the state of the accounts of all the minor debtors and with reference to the large debts, Mower & Co., Mount Pima and so on, you will see from his written statement that he was conversant with the state of affairs regarding each of these debts. As regards the Refinery debt in particular, he denies that he knew that the whole of that debt was being disputed by the liquidators, but in his examination by the liquidator, Mr. Holdsworth, exhibit 21-(*o*), he admitted that he must have discussed this matter with the Director, Mr. Clifford. It is not suggested that Mr. Clifford concealed anything from him in the course of that discussion, but on the other haud there is no evidence that Mr. Strachan saw or was told the contents of the cable of the 6th July from John Taylor & Sons, exhibit 72 (*g*). As regards the Aung Ban debt, Mr. Strachan admits that the promissory notes of the liquidators were the security, apparently the only security held by the Bank. It appears that Mr. Strachan did not get a letter of lien on the Aung Ban liquidators' claim such as he did get in the case of the Refinery Company. We have no evidence as to why he did not get it: it may have been by inadvertence. At any rate there was no security for the Aung Ban debt except the pro-notes of the liquidators. Then he received the auditor's letter of the 1st August—he received that letter on the day on which it was written and he saw in it the auditor's recommendation as to crediting the interest on the unsecured loans to an Interest Suspense Account. As in the case of Mr. Clifford I think you will have no difficulty in deciding that Mr. Strachan

knew the true state of affairs as regards most of the debts of the Bank and the securities held for them, and if the balance sheet of 30th June 1911 was really false and fraudulent he at least must have been aware of it. But as I said with regard to Mr. Clifford's knowledge I say also with regard to Mr. Strachan's knowledge that this is a pure question of fact for you to decide on the materials before you and you can discard my opinion altogether if you disagree with it. If the balance sheet was false there was a strong probability that the Manager who drafted it and worked out the figure of profit Rs. 1,62,000 was cognisant of its falsity. At the same time you must remember that if the Bank had collapsed in August 1911 it could not have been as vital a matter for Mr. Strachan as it was for Mr. Clifford and Mr. Mower. He was not interested as they were in the Mower Companies though he certainly knew how closely the fortunes of the Bank were bound up with the Mower Companies. If it was necessary for the safeguarding of the Mower Companies to keep the Bank open and to shore it up with false balance sheets: that motive would not operate so strongly with Mr. Strachan as with the others. But it is of course possible that he might be a party to this design out of a mistaken sense of loyalty to Messrs. Mower and Clifford. However, his motive is not what we are concerned with but what he actually did, and if as a matter of fact you do find the balance sheet to be false and deceitful, you must decide whether Mr. Strachan with the means of knowledge which were at his disposal as General Manager of the Bank, could honestly believe that all the debts with the exception of those provided for in the Contingency Fund, were good assets of the Bank and that the profit he showed in the balance sheet was a real and not a fictitious profit.

I now turn to the case of the 3rd accused, S. A. Mower. He was the Senior Director of the Bank from the beginning and was the leading figure in the Mower Companies' and also the leading figure in the Bank. Though he presided at the Meetings of Directors when he was in Rangoon it does not appear that he took any active part or any great part in the management. He was absent in Europe a good deal and in fact he was absent for several months before the balance sheet was signed on 1st August. He arrived from England on that day. It is clear therefore that he could have had no hand in the preparation of the balance sheet and that he had a very short time—at most a few hours—to look into the balance sheet before the Director's Meeting which was held on the day of his arrival. The Minutes of the Directors' Meeting is at page 23 of the Minute Book. It is possible of course that Mr. Mower did not look into the balance sheet but signed it off-hand. The Minutes of the Meeting are as follows:

"Minutes of the 36th meeting of Directors held at the Registered Office of the Bank on Tuesday, the 1st August 1911.

PRESENT: G. S. CLIFFORD, CHAIRMAN, AND S. A. MOWER.

The Minutes of the 36th Meeting of Directors was read, confirmed and signed. The audited accounts and balance sheet and profit and loss accounts were placed on the table and signed. The Directors decided to confirm the allocation of the available profits amounting to Rs. 1,62,277-12-5 as follows:—

	Rs.	A.	P.
To declare an *ad interim* dividend at the rate of 7 per cent. per annum free of Income tax absorbing	61,687	8	0
To place to Reserve Fund making that Fund Rs. 5,75,000	75,000	0	0
To carry forward	25,590	4	5
Total ...	1,62,277	12	5

The Directors were glad to see that the working Capital of the Bank had increased during the half-year from Rs. 1,53,13,703 to Rs. 1,69,31,785 and that the Bank's investments in 3½ per cent. Government paper had been increased by Rs. 50,000 to Rs. 15,68,800.

(Sd.) S. A. MOWER,
"Chairman."

The only Directors present were Mr. Clifford and Mr. Mower. We are told that the Manager was also present at these meetings.

These minutes show that Mr. Mower knew at any rate that a sum of Rs. 1,62,000 odd net profit was represented as having been earned in the half-year including the amount carried forward from the previous half-year and the question arises whether it is likely that he signed it without any inquiry from his co-Director, Mr. Clifford, or from the Manager as to the method by which this large figure of profit was worked out. I suggest to you that he must have known that Mower & Co., and the Mower Companies were the Bank's principal debtors. Would he not also have known or have a general knowledge of the nature and extent of the security held by the Bank for the debts of these companies? The fall in the value of shares in Rangoon had been going on since the beginning of the year. There is a document which mentions that fact (exhibit 23), Mr. Strachan's note circulated to the Directors during the week ending 2nd September 1911. "During the past eight months (from January 1911) the share market in Rangoon has gone through a very critical period and prices of shares are now the lowest that have been known. This has resulted in the secured position of the Bank being considerably jeopardised." Well, it is not reasonable to suppose that Mr. Mower was ignorant of the trend of affairs in Rangoon as regards the share market. It may be that he had no precise knowledge about the various liens obtained from debtor companies by the Bank while he was absent in England. But you must consider whether Mr. Clifford and Mr. Strachan kept these important matters to themselves or whether

they were communicated to Mr. Mower on 1st August. The time was short for such communication, at most a few hours, but there was time. Mr. Clifford's memorandum at the foot of exhibit 30 (the Auditor's letter of the 1st of August) suggests that it was his practice to talk over important matters with Mr. Mower when Mr. Mower happened to be in Rangoon and as regards that letter you have to decide for yourselves whether it had been seen by Mr. Mower before he signed the balance sheet. If he saw that letter before signing the balance sheet he would know at any rate that the Auditor was uneasy about the securities and that the Auditor had an uncomfortable feeling also about the unsecured loans. Whether it was seen before the balance sheet was signed depends a good deal upon the date when Mr. Clifford's memorandum was written. It appears to me to have been written on 1st August but you will have to form your own opinion from an inspection of the document. It may be, however, that the discussion referred to therein occurred on 1st August but after the balance sheet was signed. It was signed then but it was not actually issued until 4th August. As regards the Auditor's advice not to pay a dividend it is possible that Mr. Clifford did not inform Mr. Mower about this but it seems to me that this was a matter which Mr. Clifford was very likely to communicate to Mr. Mower. Mr. Clifford's interests and Mr. Mower's interests were almost, if not, entirely identical and it is difficult to think that it would not have occurred to Mr. Clifford to inform Mr. Mower of this important matter as bearing on the balance sheet which was being signed and issued. You will have to consider, gentlemen, whether Mr. Mower must not be held to have known the position and prospects of the Moola Oil Company and Irrawaddy Petroleum Company in which his firm had such very large holdings and the shares of which had been deposited by his firm as security with the Bank to such a large extent. You must also take into account in deciding as to Mr. Mower's degree of knowledge the fact that though he was the Senior Director of the Bank and of Mower & Co., he did not take the most active part in the affairs of the Bank or of Mower & Co. It was apparently Mr. Clifford who was the active controller. But though Mr. Mower is shown by the evidence to have come to office only for one or two hours a day and then to have done no office work I think there are no grounds for holding that he was a mere sleeping partner in these firms. As might be expected from his age and seniority, he left most of the work and most of the details of management to Mr. Clifford, but one may presume that Mr. Mower was no mere dummy and that he took a prominent part in directing the affairs of Mower & Co. and of the Bank. It appears to me that this is not a case of mere contructive knowledge. It is a case in which you will have to ask yourselves whether Mr. Mower must have really possessed the requisite knowledge about the falseness of the balance sheet having regard to all the circumstances, that is to say, having regard to his position and opportunities and the probabilities that he really used those opportunities as a reasonable man would, and having regard to his relationship

with Mr. Clifford. Looking to these matters you will decide whether Mr. Mower really had this knowledge or not when he signed this balance sheet. If you think there is a reasonable doubt about it—if you lean to the view that he signed the balance sheet blindly relying on the Manager's and Auditor's signatures without troubling to ask for any information about the large profit shown in the balance sheet and honestly believing that the profit had been really earned, then, however careless and negligent he may have been, you should acquit him even though you think the balance sheet to be false and fraudulent. Some stress was laid by the prosecution on the fact that Mr. Mower drew out all the money he had in the Bank. I admitted the evidence also that Mrs. Mower was allowed to withdraw her fixed deposits without penalty for it seems to me that she may reasonably be presumed to have acted in this matter under her husband's advice. It seems very doubtful from the evidence we have whether any favour was shown to her in the matter of interest and the evidence on that point is unsatisfactory. I do not think you will be justified in presuming that any favour was shown to her with regard to interest. But she took out all her money in August and put in Government paper. Mower's account went on till November; but he cleared out before the Bank closed.

These matters are of importance only if you come to the conclusion that the balance sheet was actually false and that Mr. Mower knew it to be so when he signed it. In that case they furnish corroborative evidence on the question of carrying on the Bank, for these facts tend to show that he was aware of the impending collapse of the Bank at an early period and that he took steps to save his relatives from being involved in the disaster. You must also remember that though Mr. Mower and Mrs. Mower withdrew their money Mr. Mower did not part with his shares in the Bank. Both Mr. Mower and Mr. Clifford might have paid up the amount due on their shares and then have sold them at a considerable profit when they were 125 or 130. This is a fact which weakens any presumption arising from the withdrawal of cash from the Bank by Mr. and Mrs Mower. But again it may be remarked that if either of these two Directors were to sell a number of their Bank shares it might have aroused suspicion and in that way hastened the fall of the Bank which they were anxious to avert as long as possible.

As I have already laid down you are not justified in finding any of the accused guilty, unless the balance sheet is proved to your satisfaction to be false. If the balance sheet was not false it follows that the Bank was in a sound and even flourishing state on the 30th June 1911, and if the difficulties which led to its ultimate failure began later than the date on which the balance sheet was issued, then the carrying on for a month or two longer while the Directors were endeavouring to avert the catastrophe, might or might not be justifiable, but it could not in my opinion be regarded as positively dishonest, and of course without clear proof of positive dishonesty there can be no conviction in this case. According to the defence

the Bank was in a sound financial state on the 30th of June and its collapse in November was due to the rapid depreciation of security in the meantime and to the action of the British Burma Petroleum Company in repudiating the Refinery debt. It is certainly the case that the securities of the Bank fell in value to a very great extent after June. But according to the prosecution the Bank was already in a sinking condition in June-July 1911 being weighed down with a load of doubtful and bad debts, and the fall in securities after that date only precipitated the collapse which was in any case bound to come soon. We have Mr. Warren's and Mr. Kestevan's evidence as to the steps taken by the accused, G. S. Clifford, when it was realized that the Bank could not possible issue a favourable balance sheet for the half-year ending December 31st, 1911 *i.e.*, unless assistance was given from outside. We have no reason to question the propriety of the steps taken by the Directors at that stage. It would be difficult to say at what date the Bank became insolvent in the sense that all its reserves and capital were gone. It depends upon a great many factors. But you need not concern yourselves with this point at all. Whether the Bank was insolvent or not, the carrying on the business of the Bank on the strength of a false and deceitful balance sheet, would be an aggravation of the dishonesty of the balance sheet. As I have said before, the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after the 30th June must be considered only with reference to the balance sheet and the knowledge which can be imputed to the accused as to the character of the balance sheet. The case hinges entirely on this balance sheet, on your decision as to whether it was really false and deceitful. If you find that it was not, the accused should all be found not guilty. If you find that it was then you will have to decide further with regard to each one of these men: whether it was false to his knowledge when he signed it and you will give your verdict of guilty or not guilty accordingly on each of the three charges of cheating.

I want to make a few remarks on general matters which have been referred to by the learned Counsel for the defence before closing. First, about Teehan's debt and Mr. Coltman's remark that the evidence relating to this debt was introduced only for the sake of prejudice. I think the prosecution were fully justfied in putting in as exhibits the correspondence regarding Teehan's debt. They were not produced to show that the Bank had made loans imprudently in the past. Mr. Coltman's point is that the Bank having shown the debt as bad at the July audit, it was superfluous to put in the correspondence. But the prosecution were concerned to show that the Bank had no right to show the interest on this debt as earned income. We have now been told that the interest, though taken to Profit and Loss was afterwads taken out again or "written back" as the technical phrase goes, in the provision of Rs. 71,000 which was added to the contingency fund on the 30th June. But there was nothing in the books of the Bank to show this and it was an entirely new procedure for this Bank. The practice up to October 1910 had been to put interest on doubtful

or bad debts to what is called a "Deferred Interest Account." It is Exhibit 9. You will see that the deferred interest account was in abeyance from October 1910 up to July 1911. The practice of crediting to deferred interest account was the usual practice of the Bank and this practice was resumed after the issue of this balance sheet during the half-year ending December 1911. It was therefore a reasonable presumption on the part of Mr. Holdsworth that the interest on the doubtful and bad debts in the half-year ending 30th June 1911 was taken as profit for he had nothing to show what that sum of Rs. 71,000 in the Profit and Loss statement was meant to provide for. Even Mr. Allen, the auditor, seems to have been in doubt as to what these figures really included, for in one part of his evidence he said these figures included provision for unpaid interest on unsecured loans which were not bad or doubtful, but he afterwards admitted that this could not be so because the contingency fund was all but exhausted in making provision for principal and interest of the bad or doubtful debts recognized as such at the audit. There was nothing left over which could be taken as interest on unsecured loans. Well, if the Bank's auditor was uncertain as to the contents of the contingency fund it is hardly surprising that it did not occur to Mr. Holdsworth to look for the provision for interest on the bad debts in the contingency fund. The matter has now been explained by the defence and I think the prosecution and you, gentlemen, will accept the explanation that provision for the interest on the Bad and doubtful debts which were recognised as such at the audit was really included in the secret reserve or contingency fund, that is to say, in the sum of Rs. 2,94,000 odd. I have only to repeat what I said yesterday that no imputation of dishonesty rests on the accused as regards their treatment of the debts of Teehan, Gorse, Dennis and the other persons whose debts were taken by the Manager and Auditor as bad or doubtful at the audit in July 1911. It is no part of the prosecution case at all that the interest on these debts was wrongly credited to Profit and Loss.

As to the order passed by Mr. Justice Robinson I agree with Mr. Coltman in advising you to pay no attention whatever to the fact that this prosecution was ordered by the Civil Court. The order was passed *ex parte*, that is to say, without hearing the defence and the fact that the Judge thought fit to order a prosecution on Mr. Holdsworth's *ex parte* affidavit should of course not influence you at all. The fact that this order had actually been passed was allowed to be proved merely as introductory matter explaining how the prosecution was initiated. It would be entirely wrong for you to rely on the order in any way as conclusive of the guilt of the accused or even as furnishing any substantial ground whatever for holding them to be guilty.

Another point is that in exhibit 40 (*b*), the Profit and Loss statement of the Bank of Burma, a considerable sum was written off for depreciation of furniture, provision for income-tax and other matters. The total amount I think was Rs. 17,000 exclusive of the provision for contingencies and the provision for bad debts.

If is urged that if the Bank management were really in difficulties in July 1911, if they did not know where to turn to show a profit, the first thing that would naturally occur to them would be to forego or rather to postpone the writing off for depreciation and other matters. This is certainly a point in favour of the honesty of the balance sheet. Of course it would be a stronger point if the amount were greater; as it is, the amount is not really very large.

Another strong point in favour of the accused is the fact that no fraudulent entries or fabrications have been brought to light in the books or correspondence of the Bank. Mr. Holdsworth, I think, said in his affidavit that there were such entries but he was at a loss to substantiate this accusation. Of course it is possible to regard the rating of the Moola Oil and British Burma Petroleum Oil shares at their full par value as false and fraudulent. That entirely depends upon the value which you are going to attach to these shares. You must remember also that the essence of the charge against the accused is that the Bank management took credit for large sums as good debts which at least were very doubtful: that is the prosecution case, and this is a kind of fraud which can be carried out without making positively fraudulent entries in the books. The fraud if any would be in the minds of those who were responsible for the balance sheet and in the guilty knowledge they had that the debts put down as good debts were really not good debts. At the same time you should certainly take into consideration this point in the accuseds' favour and especially in the Manager's favour, that so far as can be seen they have handed over all their accounts and correspondence files complete without any attempt to fudge or fabricate the accounts or to burke correspondence which it might have been inconvenient for them to disclose. I would specially refer exhibit 30 which has been so much commented upon and which I remarked is *prima facie* at any rate a damaging piece of evidence.

Then as to the amount of ready money at the disposal of the Bank when it closed its doors. I do not think this matter affects the question you have to decide. Deposits came flowing in from India to the extent of 40 lakhs in the interval between the issue of the balance sheet and the closing of the Bank. This was in the ordinary course and as a matter of fact the disbursements of deposits kept pace with the receipts. It has been shown that at the time of closing the Bank there was considerably less money belonging to other people in their hands than they had on the 30th June 1911. It is quite clear that the Bank closed because the management saw that a run on the Bank was imminent, and saw also that they had not the funds to meet the run and had no prospect of getting the funds either by realizing their securities or by borrowing from another Bank. I think I have now touched on all points which it was necessary for me to mention and the issues you have to determine should now be clear to you. I have only to say in conclusion that the accused persons are entitled to the benefit of any reasonable doubt in your minds, whether it is a doubt as

to the actual falseness of the balance sheet or a doubt as to the knowledge of its falseness by the accused. By a reasonable doubt is meant the sort of doubt which would influence you as conscientious and sensible men in deciding momentous questions in your own lives. If you entertain a doubt of that kind as to the guilt of the accused or any of them it would of course be wrong to convict him, but I need hardly say that a doubt springing from indecision or from disinclination to make up your minds is not a reasonable doubt. You have a clear and definite duty to perform that is to say, on the evidence which has been placed before you whether the accused or any of them are guilty of the three specific offences of cheating which are set forth in the charge. I am confident that you will apply your minds earnestly to this task and that you will bring in a verdict according to your consciences. Whatever your verdict may be I venture to think it will command respect.

Before you retire, gentlemen, I should like to say that it is specially desirable that your verdict should be unanimous and if you can come to an unanimous verdict I hope that you will do so.

The Jury afterwards returned a verdict of guilty and the Judge on the application of the Advocates for the accused reserved and referred the following questions to the Full Bench and pending the decision of these questions admitted the accused to bail.

MR. JUSTICE TWOMEY'S ORDER OF REFERENCE.

After hearing counsel for the applicants, I am satisfied that the following questions of law should be reserved and referred for the decision of a Bench of this court under Section 434 Code of Criminal Procedure :—

1ST—Whether the amendment of the charge in the Sessions Court was bad in law, and if so whether the the accused were thereby prejudiced in their defence.

2ND—Whether the presiding Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount, over 22 lakhs of rupees of the debts shown as good debts in the balance sheet of 30th June, were really doubtful or bad debts, and whether the accused had sufficient notice of this part of the case.

3RD—Whether the presiding Judge misdirected the jury in instructing them as to the value and effect of exhibits 13 (*a*), 13 (*bb*), 13 (*c*) and 13 (*dd*) being the tabular statements showing the amounts of unpaid interest which according to the witness Holdsworth were wrongly credited to profit and loss and treated as divisible profit;

4TH.—Whether the sentences passed on the accused contravened the provisions of Section 71 Indian Penal Code.

I do not consider it necessary to refer any other points.

The Officiating Government Advocate also granted the accused the following certificates to the various accused as follows:—

GOVERNMENT ADVOCATE'S CERTIFICATE GRANTED TO S. A. MOWER.

Rangoon, 16th May 1913.

I hereby certify that in my opinion it should be further considered by the Chief Court, whether the learned Judge who presided at the Special Sessions held at Rangoon on the 17th day of February 1913 and the following days for the trial of S. A. Mower and two others, erred in misdirecting the Jury on the following points:—

1. In failing to direct that there was not sufficient evidence for them to decide whether the principal sum of Mower and Company's debt to the Bank of Burma, Ltd., was bad to the knowledge of the accused at the date of the issue of the balance sheet.

2. In directing that Mr. Meugens deposed that to say that interest on unsecured loans should go to interest suspense account was tantamount to saying that these debts were doubtful.

3. In stating to the jury that "the auditor is not there for the Directors to lean upon" and in not directing the jury that the decision in *Davey vs. Cory* governed the matter.

4. In directing them that they might legally draw presumptions under the provisions of section 114 of the Indian Evidence Act as to S. A. Mower's knowledge of the facts constituting the offence charged, for which the necessary foundation had not been laid by evidence.

GOVERNMENT ADVOCATE'S CERTIFICATE GRANTED TO G. S. CLIFFORD.

Rangoon, the 23rd May 1913.

I hereby certify that in my opinion it should be further considered by the Chief Court, whether the learned Judge who presided at the Special Sessions held at Rangoon the 17th day of February 1913 and the following days for the trial of G. S. Clifford and two others erred in misdirecting the jury on the following points:—

1. In failing to direct that there was not sufficient evidence for them to decide whether the principal sum in each of the following debts was bad to the knowledge of the accused at the date of the issue of the balance sheet.

(*a*) Attia's Debt
(*b*) Mower and Company's ,,
(*c*) Mount Pima Company's ,,
(*d*) Aung Ban Company's ,,
(*e*) Rangoon Refinery Company's ,,
(*f*) Major Meagher's ,,
(*g*) W. J. Cotterell's ,,
(*h*) Moberly's ,,
(*i*) Sevastapolos' ,,
(*j*) Andrew Stephens' ,,

2. In directing that Mr. Meugens deposed that to say that interest on unsecured loans should go to interest suspense account was tantamount to saying that these debts were doubtful.

3. In directing them that they might legally draw in the presumptions arising out of the following passages:—

FROM PAGE 10.—"Of course the Manager of the Bank is "supposed to be conversant with the financial affairs of the bor- "rowers of the Bank and the fact that Attia in October so soon "after the balance sheet was issued was in this difficult position "is a point for your consideration. It is also to be remembered "that Attia some years before been intimately connected with "Mower and Company itself. The state of this debtor's affairs "would probably he known to the Directors and the Manager of "the Bank in a general way. They would be likely to follow the "fortunes of such a debtor as this with special interest.

FROM PAGE 15.—"It is for you to decide whether on the information before him in July Mr. Clifford could have foreseen "that this was a probable outcome of the situation, knowing as he "did know that the whole claim was disputed and knowing also "that the Bank could not bring any serious pressure to bear on "the British Burma Petroleum Company without bringing that "Company to the verge of ruin."

FROM PAGE 20.—"But such an inference I submit to you "could he manifestly absurd for it was not for Mr. Allen and "Mr. Strachan so much as Messrs. Mower and Clifford who were "concerned to prevent the Bank from collapsing and we may reject "as wholly improbable any suspicion that Mr. Allan and Mr. "Strachan would concoct a false balance sheet and keep the "Directors in the dark about it."

FROM PAGE 24.—"Your common sense and business ex- "perience will enable you to decide how far actual knowledge of "the state of the debts and securities can reasonably he inferred "from the opportunities which these two Directors had by reason of "their connection with the affairs of the debtor companies and "their connection with Attia and Cotterell." "But you will have to consider the likelihood of the Bank Manager deciding for him- self without reference to the sole Director in Rangoon such radical questions as the total amount of debt to be credited as good the amount to be classed as doubtful or bad and against which provi- sions should be made by way of reserve in a contingency fund."

FROM PAGE 25.—"It would be absurd to hold the Director responsible for any mere details of Bank Management, but in large matters such as I referred to just now it is not unreasonable to presume that the Manager acted in consultation with the Directors."

"I think therefore that you must presume that Mr. Clifford the sole Managing Director in Rangoon at this time did excercise the supervision and control that were vested in the board of Direc- tors and that in exercise of these functions he would naturally be- come conversant with all really important matters concerning the Bank."

"Well gentlemen, whatever you think about the minor debts "of the Bank it seems to me that you might reasonably infer that "Mr. Clifford knew most of what was essential to know of the large "debts—those of Mower and Company, the Refinery, Aung Ban, "Mount Pima, Cotterell, Moberly and Stephen."

GOVERNMENT ADVOCATE'S CERTIFICATE GRANTED TO R. F. STRACHAN.

Rangoon, the 23rd May 1913.

I hereby certify that in my opinion it should be further considered by the Chief Court, whether the learned judge who presided at the Special Sessions held at Rangoon on the 17th day of February 1913 and the following days for the trial of *R. F. Strachan* and two others erred in misdirecting the jury on the following points:—

1. In failing to direct that there was not sufficient evidence for them to decide whether the principal sum in each of the following debts was bad to the knowledge of the accused at the date of the issue of the balance sheet.

(*a*) Attia's	Debt
(*b*) Mower and Company's	,,
(*c*) Mount Pima Company's	,,
(*d*) Aung Ban Company's	,,
(*e*) Rangoon Refinery, Company's	,,
(*f*) Major Meagher's	,,
(*g*) W. J. Cotterell's	,,
(*h*) Moberly's	,,
(*i*) Sevastapoloi's	,,
(*j*) Andrew Stephen's	,,

2. In directing that Mr. Meugens deposed that to say that interest on unsecured loans should go to interest suspense account was tantamount to saying that these debts were doubtful.

3. In directing them that they might legally draw the presumptions arising out of the following passages:—

FROM PAGE 10.—"Of course the Manager of the Bank is "supposed to be conversant with the financial affairs of the bor-"rowers of the Bank and the fact that Attia in October, so soon "after the balance sheet was issued was in this difficult position "is a point for your consideration."

FROM PAGE 15.—"So that full knowledge of the true state of "affairs can hardly be imputed to Mr. Strachan though he admits "of course that he did discuss the question about the disputed "claim with Mr. Clifford and it is for you to form your opinion as "to what Mr. Clifford must have told Mr. Strachan about it.

FROM PAGE 17.—"If it was doubtful then I think it is a legitimate inference that it was more doubtful in June 1911 and Mr. Strachan if any one was conversant with the affairs of this "estate having himself been Receiver up to a period of six months "before the issue of the balance sheet of the Bank which we are "considering.

FROM PAGE 26.—"It was Mr. Strachan's duty as General 'Manager to be conversant with the financial position of persons 'and companies to whom money had been lent by the Bank and "it may fairly be presumed that he was posted at any rate in a "general way in reference to all or most of the debtors."

After hearing the counsel of the accused at great length the Honourable Judges passed the following orders.

Dated Rangoon, the 20th day of June 1913.

ORDER.

HARTNOLL, OFFG. C. J:—The applicants G. S. Clifford, R. F. Strachan and S. A. Mower have been tried before my learned colleague Mr. Justice Twomey and a jury and have been convicted under three heads of cheating and dishonestly inducing delivery of property punishable under section 420 of the Indian Penal Code. They have been sentenced—the first two to eight months' rigorous imprisonment on each charge and the last to six months' rigorous imprisonment on each charge, the sentences to run consecutively. At the conclusion of the trial my learned colleague reserved certain questions of law under the provisions of section 434 of the Code of Criminal Procedure and since then the learned Government Advocate has certified that certain other points should be further considered under section 12 of the Lower Burma Courts Act. The reference under section 434 and revision cases arising out of the learned Government Advocate's Certificates have been heard together. The applicants Mower and Clifford were Directors of the Bank of Burma which closed its doors on the 14th November 1911 and Strachan was the General Manager of the same Bank. The cheating alleged and of which they have been convicted was that by means of a false balance sheet for the six months ending the 30th June 1911 and by a false Directors' report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent they dishonestly induced (1) one Maung Tin Baw to deliver the sum of Rs. 5,000 to the Bank (2) one John Cumming to deliver the sum of Rs. 40 and (3) one N. Mitter to deliver the sum of Rs. 100. The delivery by Maung Tin Baw was on the 30th October 1911, by Cumming on the 2nd November 1911, and by Mitter on the 10th November 1911.

I propose to deal with the points referred and dealt with by the learned Government Advocate's Certificates in the order in which they were argued. The first point is whether the learned Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount over 22 lakhs of

rupees of the debts shown as good debts in the balance sheet of the 30th June were really doubtful or bad debts and whether the accused had sufficient notice of this part of the case. One of the acts of deception alleged was that the balance sheet showed that there was a profit of Rs. 1,62,277-12-5 for the half-year whereas in reality there had been a loss of over Rs. 55,000 and that the way that this had been arranged was to credit to profit and loss unpaid interest due on bad or doubtful debts which should really have been put to an interest suspense account. One of the witnesses was the Official Liquidator of the Bank, Holdsworth and it was on his initiative that the prosecution took place. He alleged certain other defects in the balance sheet which in his opinion showed its false and deceptive character. These were also gone into at the trial, but Mr. Justice Twomey as shown in his summing up found that they were not matters that should be considered in deciding whether the offence of cheating was established or not. He therefore found in applicants' favour as far as these other matters were concerned. The convictions have been obtained on the ground that unpaid interest on bad and doubtful debts has been dishonestly credited to profit and loss and rendered divisible as profit and also on the ground that the principal of these debts was treated as good in the balance sheet. Holdsworth to support the case prepared amongst others three Exhibits Nos. 13, 18 and 39. No. 18 is a statement setting out certain debtors of the Bank, the amount of their debts on the 30th June 1911 and on certain subsequent dates, the securities lodged with the Bank to secure their repayment, their market price as regards quoted securities and nominal value as regards unquoted on the above mentioned dates and the balance being deficiency in value of quoted securities. Exhibit 13 is a series of statements showing certain of the debtors shown in Exhibit 18, their balances on the 1st January 1911 and 30th June 1911—increases in balances—debits including interest debited every month—credits if any—and difference between debits and credits. Exhibit 39 is a balance sheet drawn out by Holdsworth to illustrate the case put forward by him though he says that it is not in the form he would approve. It is allowed that it does not necessarily follow that, because a debtor is in Exhibit 18, his debt is considered bad or doubtful. In fact it is allowed that some of the debts in Exhibit 18 are good. The defence therefore say that Exhibit 18 does not give them notice that there was according to the prosecution a large amount of bad or doubtful debts, that it merely shows unsecured balances, and that these unsecured balances may be good if the personal capacity or other resources of the debtors are taken into consideration—that it was for the prosecution to prove that the personal capacity of the debtors or their other resources were negligible quantities in considering whether the unsecured balance could be realized. Exhibit 13 is objected to in that Holdsworth's standard was, that if a debt, or a portion of a debt, is not secured, the interest if not paid should always be placed to a suspense account unless it is certainly recoverable, and that standard is too high. It is objected that in saying that

unpaid interest shown in Exhibit 13 should go to a suspense account sufficient attention has not been paid to the other capacities of debtors to pay. Exhibit 39 is objected to as it does not specifically show the Nos. 2, 8, 68, 123 set out under head "Debts for which the Bank holds no security" as bad or doubtful. As regards Exhibit 13 it was pointed out that if the principal of the debts was alleged to be bad or doubtful credits should have gone to the reduction of principal and not as has in fact been done in reduction of interest. It is allowed that a certain amount of evidence has been led which goes to show that the principal of certain of the debts was bad but it is argued, that some of this evidence was called to create prejudice with the jury. Mr. deGlanville says that he thought it was called to merely corroborate Holdsworth. There seems to me to be no doubt that it was part of the case for the prosecution, that the principal of the debts shown in Exhibit 13 was bad or doubtful and that the accused had sufficient notice of this part of the case. It is not denied that in the Magistrate's Court this was part of the case, but it is urged, that, as section 409 of the Indian Penal Code was abandoned in that Court, it was not understood that in the Sessions Court the principal of the debts would be again attacked. I would note here that in the Magistrate's Court Holdsworth distinctly said that he did not consider the debts Nos. 2, 8, 68, 123 which he classed as debts for which the Bank holds no security, to be good. It was contended that the words recorded have not this meaning and that they mean that he did not consider whether they were good or not; but the meaning appears to me to be clear enough. Evidence was given at the trial that interest on the principal debts had not been paid for a considerable period and this is a distinct indication that the principal may be bad or doubtful. It was an indication that should have come to the notice of the defence, and when further evidence was given that went to attack the principal such evidence clearly meant that the principal was being attacked. As regards the debts referred to in the learned Government Advocate's certificate I will refer to the evidence as to their being bad or doubtful when I come to them. The Exhibit 14 shows that the personal capacity of S. Buckingham to pay was attacked. As regards Britto no interest had been paid since 1st January 1910 and the proceeds of the jewellery pledged did not clear the debt. Evidence was given that W. H. Clifford had not paid interest for six months' and that he wrote on 10th June 1911 and said he was not prepared to pay anything monthly at the moment. Evidence was produced to show the salaries of Moberly, Dennis, Gorse, Teehan, A. Stephen and F. Rajh. Holdsworth says he made enquiries into the position of Dennis, Gorse, Moberly. Holdsworth describes how that as regards T. A. Fraser with the exception of Rs. 248-12-0, paid on 12th November 1910, no interest had been paid since 1st January, 1906. Some Rs. 1,300 worth of securities were sold in December 1910 and February 1911. The debt was Rs. 18,639 on 30th June 1911. Holdsworth describes how Mossop and Bartlett paid no interest from 1st December 1909 when the

account started. He is taken through all the names. He says that he enquired into Rajh's position. Evidence is given as to Reid's salary. Letters are put in to show Teehan's position. Then when Holdsworth is cross-examined by Mr. Giles he distinctly says that one of the grounds on which he alleges that the balance sheet is false and fraudulent is that some of the debts which were bad were treated as good. Peters was asked about his means and was cross-examined as to his resources. Tsounas was also called and examined as to his means. Sen was called to prove the badness of G. Stephen & Son's estate. All the above evidence clearly involved the goodness or doubtful character or badness of the principal, and it is not now for the defence to turn round and say that they did not have notice. From Mr. Justice Twomey's notes the Government Advocate in his opening speech said that the balance sheet drawn up by Holdsworth showed a loss of Rs. 55,000 instead of a profit of Rs. 1,62,000 that is if due allowance is not made for bad debts—if due allowance made for bad debts the result would be much worse. On the 26th February Mr. Justice Twomey's notes show that he held the question of the badness or doubtful character of the debts shown in Exhibit 13 was in issue. This was in answer to an objection by the defence. Mr. Justice Twomey does not remember whether he read the order out; he says he did not sometimes read out his orders in extenso. I would also refer to his notes of the 26th March and 2nd April. The mere fact that Holdsworth in Exhibit 39 dealt with the interest and not specifically with the principal as bad or doubtful should not in my opinion be held to be a sufficient ground for considering that there are reasonable grounds for holding that the defence were misled in consideration of the facts I have set out and am going to set out in discussing the evidence as to the badness or doubtful character of the debts in the Government Advocate's Certificate.

I will now deal with the first ground referred by my learned colleague.

Whether the amendment of the charge was bad in law and if so whether the accused were thereby prejudiced in their defence.

The words objected to are "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." In page 3 of the summing up my learned colleague deals with these words, and there he expressly says "You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of the accused." Nearly at the end of the charge he said: "As I have already laid down you are not justified in finding any of the accused guilty unless the balance sheet is proved to your satisfaction to be false. As I have said before, the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after the 30th June must be considered only with reference to the balance sheet and the knowledge which can be imputed to the accused as to the character of the balance sheet. The case hinges entirely on this balance

sheet on your decision as to whether it was really false and deceitful. If you find that it was not, the accused should all be found not guilty." It is urged that these words are only expressions of opinion, and that the jury may have found the accused—especially Mower—guilty on the ground that the Bank was kept open after it become insolvent; but I cannot allow this plea. The words are not an expression of opinion but are a clear direction of law not to find the accused guilty unless they found the balance sheet false. The meaning to be attached to the words was explained. I am therefore unable to hold that they may possibly have misled the jury in giving their verdict. As regards the actual words themselves it is objected that they have let in evidence of events that took place after the signing and issue of the balance sheet, and that such evidence is irrelevant. I am unable to hold that such evidence is irrelevant. The allegation is that the profit in the balance sheet was fictitious as it should all have gone to suspense account being interest unpaid and due on bad and doubtful debts. This was the deceit. The evidence as to subsequent events was to show that the position grew worse—that the debts became more and more doubtful and had till the last deposit was made—*that is, that the deceit being practised on the public of showing the bank in a flourishing condition became worse.* In these circumstances I am of opinion that it was open to the prosecution to prove such subsequent events and the accused's knowledge of them as part of the deceit being practised and also as showing the continuance of dishonest intention on their part.

I will now turn to the matters dealt with in para. 1 of the certificates of the Government Advocate given in the cases of Clifford and Strachan.

ATTIA'S DEBT.—There is the evidence set out in the summing up. It should be observed that the guarantee by Mower & Co., dated the 1st August 1906 extends to the whole of Attia's debts. This guarantee would clearly be a reason for Mower & Co. keeping touch with Attia and his affairs. Exhibit 46 (*c*) shows that Attia had a big stake in Mower, Cotterell & Co. in October 1910, and the Exhibits down to Exhibit No. 58 and Exhibit No. 93 show how he was interested in the same ventures. He signs as a director in the Aung Ban Oil Co. in March 1910. Exhibit 89 (*b*) shows how the Bank did business and may be taken as an indication of the relations between Attia, and the accused. Attia also appears in Exhibit 85 (*c*). The evidence seems sufficient for the jury to draw a conclusion.

MOWER & CO.—Besides what is stated in the summing up there is Exhibit 26 (*a*) which was put in by Holdsworth early. This surely is a most important document by which the jury would be able to judge whether Mower & Co. had extraneous resources to meet its unsecured debts. Then again Exhibit 23 goes to show that prices had been falling from January 1911 and this factor might well be taken into consideration by the jury in

gauging the resources of Mower & Co. Exhibit 26 (*a*) does not merely deal with the position in October 1911, but from 1909. Holdsworth said that Clifford had told him that Mower & Co. had lodged all available security with the Bank and this evidence is corroborated by Clifford's letter of the 13th February 1912 to the shareholders (Exhibit 6) from which it is clear that the Bank called upon Mower & Co. and indeed on all debtors to furnish further security as the values of securities declined. As regards Clifford's knowledge Exhibits 45 to 60 show how interested he was in the companies the shares of which the Bank held as securities. It is reasonable to conclude he would know of their condition and market prices. Considering the extent the Bank was interested in them, surely it is reasonable to think that he would consider what effect falls in value would have on the Bank.

MOUNT PIMA COMPANY.—Before the examination of Allen there was the Exhibit 15 which showed that the company was unsuccessful and that Mower & Co. had made over their claim as sole creditors. Interest had not been paid for some time. Surely this was evidence attacking the principal. After Allen's evidence taken with that given before there seems to have been sufficient evidence to go to the jury.

AUNG BAN OIL CO. AND RANGOON REFINERY CO.—The summing up shows what evidence there was, and that was sufficient to go to the jury to form a conclusion as to whether the debts should be classed as bad or doubtful. But Mr. Giles contended that my learned colleague misdirected the jury in not directing them that these debts were recoverable from any or all of the shareholders. The Government Advocate has not certified that the direction by my learned colleague on this point should be further considered by this bench; but Mr. Giles was allowed to argue that there was such a misdirection. The evidence in connection with the distribution of the shares in the British Burma Petroleum Company to the shareholders of the Aung Ban and Rangoon Refinery Companies is contained in the cross-examination of the witnesses Holdsworth and Maunder. Holdsworth says that a large number of the 1,00,000 shares received from the British Burma Petroleum Company as the price of the Aung Ban Oil Company's undertaking were distributed in dividends to the shareholders of the Aung Ban Oil Co. He also stated that he was considering whether he should take steps to enforce the claim of the Bank against the Aung Ban Oil Company. The Rangoon Refinery Company sold its undertaking to the British Burma Petroleum Company for 4,35,000 shares in the latter company and Maunder says that about 2,94,000 of these shares have been distributed by the liquidators amongst the shareholders of the Rangoon Refinery Company by way of an interim dividend. Now it is perfectly clear that Mower and Clifford knew of the payment of these interim dividends. They were prime movers in the formation of the British Burma Petroleum Company and were according to Exhibits 48 and 50 shareholders in the Aung Ban and Rangoon

Refinery Companies, Mower having large holdings. They were two of the Bank's directors and it is clear to me that the Bank acquiesced in the payment of these dividends. Exhibit 85 (*a*) shows that as regards Seymour Buckingham's account his Rangoon Refinery shares held by the Bank as security were exchanged for British Burma Petroleum shares and his Aung Ban shares were similarly transferred. Exhibit 88 (*d*) and Exhibit 18 (*a*) show that Peter's Rangoon Refinery shares held by the Bank must have been transferred for British Burma Petroleum shares. Exhibit 85 (*e*) said by Holdsworth to be G. Clifford's account shows that 1,425 Rangoon Refinery shares were exchanged for 1,686 British Burma shares and 600 Aung Ban shares for 690 British Burma Petroleum shares. According to Exhibit 22 the Bank held some 4,00,000 British Burma Petroleum shares. Exhibit 50 shows that the Bank itself held 45,058 shares in the Rangoon Refinery Company. It is extremely probable that many of the British Burma Petroleum shares held by the Bank were received in exchange for shares of the Aung Ban and Rangoon Refinery Company's shares held by them. The record shows that the Bank never objected to the distributions by the liquidators and never entertained any intention or idea of pursuing the British Burma Petroleum shares into the hands of those who received them with a view to satisfying their debts due from the Aung Ban and Rangoon Refinery Companies. Their action in waiving the claim of the Rangoon Refinery Company against the British Burma Petroleum Company, which amounted to over £70,000, for a sum of £5,000, indicates clearly that they never intended proceeding against the shareholders as it seems that such action effectually prevented them from doing so. If they had only recovered about half of the £70,000 the debt would have been satisfied. Their acquiescence may possibly have been due to the fact that they considered the liquidators would be able to meet the debts. The liquidators had large claims against the British Burma Petroleum Company in respect of the Aung Ban Company as well as in respect of the Refinery Company which, it would appear from a consideration of Holdsworth's evidence page 2, Williamson's evidence page 4 and Exhibit MM I, page 8, were not met in full to a considerable extent. It is impossible to disregard the inter-relations of all the parties. W. J. Cotterell and C. Clifford were the liquidators. Mower and Company were the Managing Agents of the Aung Ban Company according to Exhibit 48. Mower, Cotterell and Company, of whom W. J. Cotterell was a partner, were the Managing Agents of the Rangoon Refinery Company according to Exhibit 5c. Page 4 of Exhibit MM I, shows how Mower and Company knew of the conduct of affairs by the liquidators, for as regards the expenditure on the Refinery the report runs: "The payments when made however all came to the notice of Mower and Company and they doubtless satisfied themselves that they got value for the work done". The consideration arises, that, if it had not suited the Bank's interest, they would not have assented to the change of shares without protest or enquiry.

Considering that the Bank acquiesced and all the circumstances of the case I think it extremely improbable that the Bank could have proceeded successfully against the shareholders. This is in effect the same conclusion as is contained in my learned colleague's charge to the jury and I therefore see no reason for interference on this ground.

MEAGHER.—The evidence is in the summing up and is in my opinion sufficient to go to the jury. It is objected that my learned colleague should have referred specifically to some of the evidence. The whole of it was before the jury and it cannot be expected that every particle of evidence can be put to the jury.

COTTERELL.—Besides what is said in the summing up there are the facts that he had paid no interest since August 1910, and that he is down in 85 (*c*) coupled with the fact that a close business connection is shown between him, Mower and Clifford in Exhibits 45 to 60 which would cause them perhaps to have a knowledge of his affairs and so indirectly cause Strachan to do so through his directors. According to Holdsworth page 25 he could not clear his account at once.

MOBERLY.—There is nothing more to be said than is set down in the summing up.

SEVASTOPOLO.—In addition to what my learned colleague said the counsel for the Crown has brought to our notice that more than half the debt was unsecured.

A. STEPHEN.—More than half the debt was unsecured and no interest except from realization of securities was paid after January 1910. Mr. Giles drew attention in the course of his argument on this debt that my learned colleague in his remarks on the debt relied on a passage in the witness Sen's evidence that was not relevant, when he said in re-examination: "when the Official Receiver considered it doubtful whether the estate was solvent". This point was not one of those certified by the Government Advocate as one that should be further considered. The last sentence of his cross-examination was: "when the Bank of Burma was appointed receiver, G. Stephen and Son's estate was considered solvent because the debtors were considered solvent and rightly in my opinion". That opinion must have been based on Sen's knowledge of the papers in his office and on his opinion of the value of the assets at that time. In re-examination after the passage objected to, Sen said that the Official Receiver took over charge in December 1910. Then Sen was not Official Receiver but he would still be competent to give the effect of the records in his office and state the official opinion that was come to on these records at the time the office took over the estate. The answer was never objected to as far as the record shows. If such objection had been made the sources of his knowledge might have been gone into. I am not satisfied that the passage of the evidence objected to was inadmissible.

There is Exhibit 30 to consider in connection with all these debts.

To sum up, I consider that there was evidence to go to the jury with regard to all these debts though it was meagre in the case of Sevastopolo and A. Stephen.

I now turn to the second point certified by the Government Advocate for all three accused.

It is objected that the sentence in Meugen's evidence referred to three times in the summing up is different to an earlier statement of Meugens, and that both statements should have been put to the jury. I do not think that there is anything in the objection. The earlier statement was made in respect of a loan which was covered by security in respect of the principal and not the interest. In Exhibit 30 the interest on unsecured loans is referred to and he is speaking with regard to Exhibit 30.

I would now deal with the third point referred by my learned colleague. I have already set out what the Exhibits 13 are and have discussed them. Mr. Giles' contention is that they were prepared on the principle that unless the interest was certainly recoverable it should not go to profit and loss, that this high principle vitiates the whole of it, and that, unless it was considered in the light of Holdsworth's explanation, it should not have been put to the jury at all. Looking at Holdsworth's evidence as a whole and especially that portion of it at page 18 of his printed evidence I am of opinion that he does not differ very much from the other experts. He no doubt said that interest should be certainly recoverable before it was credited to profit and loss, but he also said that it might be so credited if a debtor had all his ready cash for the moment tied up or if he was a man of whom there was no doubt as to his financial stability. Mr. Giles argued that the statements should not have been put to the jury as there was no attempt to prove the debts were bad or doubtful. It seems to me that the Exhibits were put to the jury in the right way. They were used to show the amount of interest that it was alleged should have been put to interest suspense account on the ground that the debts themselves were bad or doubtful whereas it was really credited to profit and loss, and the jury were asked to consider which portion of the debts themselves were bad or doubtful as in that case the "unpaid interest relating to such portion ought to have been taken to interest suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account." An attempt was made to prove that the debts themselves were bad or doubtful and this is where Mr. Giles' argument fails.

I now turn to the certificate granted by the Government Advocate in the case of the accused Mower.

The first point I have already dealt with. There was evidence in my opinion from which the jury could if they so desired come to a conclusion as to whether Mower's debt was good bad or doubtful and as regards knowledge of Mower it is not an unreasonable assumption that he would know the affairs of his own firm and of the securities that were pledged with the bank as security for the

firm's debt, that he would know the fall in the value of the securities from January 1911 and the position of his firm as set out in Exhibit 26 (*a*). Then there are the letter Exhibit 30—whether he saw Exhibit 30 or was told of its contents was a question for the jury to decide—and the conduct of his wife with regard to her monies as also the other inferences that could be drawn as set out in the summing up.

The second point in Mower's certificate I have already dealt with.

The third is that my learned colleague erred in stating to the jury that "the auditor is not there for the Directors . . . . . to lean on" and in not directing the jury that the decision in *Dovey* vs. *Cory* governed the matter. The summing up which was very lengthy must be taken as a whole. In the passage referred to, the learned Judge was explaining how one of the main duties of an auditor was to protect the shareholders. I am unable to hold that the jury were misled by the words complained of, nor can I see that the case of *Dovey* vs. *Cory* governs the matter. In that case the allegation that Cory was a party to the fraud was withdrawn and no moral obliquity was imputed to him at the hearing of the appeal. In this case actual fraudulent conduct is alleged against Mower—that he knew the balance sheet was false when he signed it. The jury were told to acquit him if they had any reasonable doubt about this matter. I cannot see that there has been any misdirection in dealing with *Dovey* vs. *Cory*.

I now come to the matter of presumptions dealt with by the Government Advocate's Certificate and I would say, to commence with, that the summing up must be read as a whole, and that my learned colleague more than once said that his opinion was not binding on the jury. At page 26 of the summing up he said: "I am entitled to give my opinion on this point and on other points of facts, but it is an opinion which does not bind you as I said before and you can reject or follow it as you think fit." Also it must be remembered that all the evidence that was before the jury was not always referred to in connection with the passages complained of.

CLIFFORD'S CERTIFICATE.

1ST PRESUMPTION.—I cannot see any objection to the first sentence. As regards the next two there were before the jury the facts and considerations I have set out in discussing Attia's debt. Giving them due weight I am unable to hold that there was any misdirection.

2ND PRESUMPTION.—I can see nothing wrong in the words. Clifford had a full knowledge that the claim was disputed and of the affairs of the Refinery and British Burma Petroleum Companies.

3RD PRESUMPTION.—This was an opinion, and a strong one, expressed by the Judge; but it must be remembered that the jury were told that they were not to be bound by his opinion and that they could follow or reject it as they chose.

4TH PRESUMPTION.—I can see nothing to object to in the first sentence. There were facts before the jury from which to deduce knowledge as I have shown above in this order. The second sentence appears to me to be in order, the more especially considering the great knowledge Clifford had of the various Companies, the shares of which the Bank held as security for the different debts.

5TH PRESUMPTION.—The words I have just written are equally relevant to the first sentence, and also the second, nor can I see any good reason for objection to the third sentence except perhaps the reference to Stephen.

STRACHAN'S CERTIFICATE.

1ST PRESUMPTION.—I have already dealt with.

2ND PRESUMPTION.—It was left to the jury to form what opinion they liked.

3RD PRESUMPTION.—Strachan certainly would be conversant with the estate and its affairs, and as I have said the Judge expressly told the jury that they were not to be bound by his opinion.

4TH PRESUMPTION.—The words appear to me to be justifiable. They are very general and broad.

MOWER'S CERTIFICATE.

1ST AND 2ND PRESUMPTIONS.—I have already dealt with.

3RD PRESUMPTION.—The inference the Judge drew was based on facts nor was the jury bound by it. He just before said that he had introduced his remarks to assist them in deciding the two Directors' actual knowledge.

4TH PRESUMPTION.—I have already dealt with; but I would say that this passage must be read with what preceded it. There were grounds based on facts for saying that Mower had great knowledge of the state of the companies the shares of which the Bank held as security.

5TH PRESUMPTION.—The passage must be taken with what succeeds it, and the whole passage seems to me to be one that it was quite fair to put forward for the consideration of the jury.

6TH PRESUMPTION.—It must be remembered that in addition to the letter Exhibit 30 Allen had advised the non-payment of a dividend. The jury were asked to consider and not ordered to draw any presumption. The second sentence may perhaps be too strong when the word practice is used; but there was no such misdirection as could possibly influence the jury in their verdict.

7TH PRESUMPTION.—I can see no objection to the passages and moreover they were merely an expression of opinion which the jury were told to follow or not as they chose.

8TH PRESUMPTION.—I can see no objection to these passages. They must be read with what had been said before. There were facts from which the jury could come to a conclusion. It was

matter of constructive knowledge. There was evidence of facts from which an inference could be drawn. In saying that Mower was not a mere dummy there was evidence as has been put before us to show that he was not a mere dummy. His large interests alone in the various companies would lead to such a conclusion. Exhibit AA (2) makes Mower the senior partner. The minute book of the Bank shows Mower presided at meetings.

9TH PRESUMPTION.—It is objected that the evidence is irrelevant. I am unable to hold that it is. The sum was large over Rs. 70,000. It was at Rs. 7 per cent. Mower returns on the 1st August. On the 11th measures begin to be taken to move it out of the Bank and place nearly all of it in Government paper at 3½ per cent. Mower is a director of the Bank. The point at issue is whether the balance sheet signed on the 1st August was false and fraudulent to Mower's knowledge. The relevancy of the fact seems to me to be obvious.

There remains for consideration the last point referred by my learned colleague.

"Whether the sentences passed on the accused contravened the provisions of section 71 of the Indian Penal Code?"

I have no doubt that they do not do so. The essence of the offence under section 420 of the Indian Penal Code is cheating and dishonestly inducing the person deceived to deliver property. Here not one but three persons were deceived and induced to deliver property, and each one was induced to deliver his property at a different time. It was not one sum of money that was delivered but three different sums. The argument that there was only one deceit practised in respect of all three persons does not seem to me to bring the dishonest inducing of three separate persons within the first part of section 71 of the Indian Penal Code. It is illustration (*b*) to that section in my opinion which governs this case and not illustration (*a*).

In the result I see no reason for any interference and would now commit the applicants to jail to undergo the sentences passed on them.

ORMOND, J.:—The 2nd and 3rd questions referred by the Judge relate to the objection of the defence that they were not given to understand that it was part of the case for the prosecution that the principal of the debts mentioned in Exhibit 13 was doubtful or that the interest on these debts due for the 6 months previous to the 30th June 1911 was doubtful, except in so far as interest on such debts had not been paid and the debts were unsecured. Exhibits 13 were admittedly prepared by Holdsworth to shew what interest should have been put to an interest suspense account instead of to profit and loss account. Mr. Giles relied upon Holdsworth's statement that unpaid interest on an unsecured debt should go to an interest suspense account unless there are very good reasons for believing that such interest is recoverable:—even so; I think the prosecution would be bound to shew that there were no good reasons for such belief on the part of the accused:—

or in other words, to shew that such interest was doubtful to the knowledge of the accused. And the only practical way of shewing that the interest was doubtful would be to shew that the principal of such debts was wholly or in part doubtful. Evidence was adduced by the prosecution to shew that the principal of each of the debts mentioned in Exhibits 13 was doubtful, except Murray's —Murray was called by Mr. Giles to shew that his debt was good:—in order to shew that Holdsworth's reasons for putting unpaid interest to a suspense account were deficient; and he cross-examined the witness for the prosecution as to the quality of the debts in order to shew that the interest on these debts could honestly have been thought to be recoverable. This would lead one to suppose that he must have known that the prosecution were trying to shew that these debts were doubtful in order to shew at least that the interest on them was doubtful. Mr. Giles seems to have assumed that such evidence was adduced by the prosecution principally in order to prejudice the jury; but I cannot see any ground for this assumption. Mr. deGlanville understood that the purpose for which the prosecution adduced evidence as to the doubtfulness of the debts mentioned in Exhibit 13 was, to shew that the interest should have gone to suspense account; and to shew that the basis adopted by Holdsworth, in putting unpaid interest on unsecured loans to suspense account, worked out correctly. It must be remembered that T. A. Fraser's interest was included by Holdsworth in Exhibit 13 *bb* because he thought it doubtful; and that the principal of this debt is not included in Exhibit 18 (*a*) because he could not say that the principal was not fully secured—whilst the unsecured debts of the Rangoon Oil Company and Solomon, on which the interest was unpaid are not included in Exhibit 13 because Holdsworth considered those debts good. This should have been sufficient to shew the defence that Exhibit 13 comprised a list of debts prepared by Holdsworth (principally no doubt, though not invariably, upon the basis of the debts being unsecured and the interest unpaid),—in order that the prosecution should prove that the interest on these debts was doubtful, and should therefore not have been put to profit and loss account. In Exhibits 13 Holdsworth has credited payments to interest which in strict accounting should have been credited to the principal, if the debts were doubtful. This however could not have been taken by the defence as an admission by the prosecution that the debts in Exhibits 13 were good. Exhibits 13 were prepared for a certain purpose *viz.*, to shew the least amount of interest that should have gone to an interest suspense account, —and the crediting of payments to interest was by way of a concession to the defence. In the Magistrate's Court Holdsworth prepared a "model" balance sheet which shews a loss of Rs. 55,000 odd instead of a profit of Rs. 1,62,277 which would be the result, if the interest on the debts in Exhibits 13 were put to suspense account instead of to profit and loss. If the principal of those debts was doubtful and put to a Reserve Account the loss appearing in this balance sheet should appear as being so much

more. But this Exhibit 39 cannot have been taken by the defence as an admission by the prosecution that the principal of these debts was good, for the document was prepared at a time when the prosecution alleged criminal breech of trust, which necessarily involved the badness of these debts. Moreover Holdsworth explained that he omitted the words "considered good" against the item of 28 lakhs because as he said in the Magistrate's Court—he did not consider these debts good; and as he said in the Sessions Court because he was not dealing with the question whether the debts were good or bad; and later on he explains that he prepared Exhibit 39 with reference to 2 questions, the interest suspense account and what amount of debts were secured or unsecured. In answer to Mr. Giles, Holdsworth says:—"One of the grounds on which I allege the balance sheet is fraudulent and dishonest is that some of the debts which were bad were treated as good." He was then being cross-examined as to securities, so his answer I think clearly had reference to the principal of the debts and not merely to debts of interest. And in the Judge's notes it is recorded at an early stage of the proceedings that the doubtfulness of the debts had been a fact in issue all long. It is true that the prosecution have not specifically stated what debts they asserted to be doubtful but they adduced evidence to shew that many of the debts in Exhibit 13 were doubtful and the defence could have had no doubt that any debts asserted by the prosecution to be doubtful must be included in the Exhibits. Murray was called by the defence to prove that this debt was good—his subpœna was taken out on 17th February—and at a later stage the defence sent for Major Meagher from Madras to prove that his debt was good. Allen was examined by the defence to prove that in his opinion the other debts were good; and they could have called other evidence if they had been so minded. The doubtfulness or goodness of the debts in Exhibits 13 was gone into both by the prosecution and the defence. In my opinion the question as to the doubtfulness of the debts in Exhibits 13 was necessarily involved in the question whether the interest on those debts should have been put to an interest suspense account instead of to profit and loss, which was admittedly part of the case for the prosecution—I think that the defence have no good reason for saying that they were misled by the conduct of the case for the prosecution, into the belief that it was no part of the case for the prosecution that the debts in Exhibits 13 were doubtful.

The first question referred by the Judge relates to the amendment of or addition to the charge:—The amendment was fully and clearly explained by the Judge to the Jury: See pages 3, 20 and 29 of the printed copy of the summing up. It is urged that the jury might have given their verdict upon a finding simply that the Bank had been kept open and received deposits when insolvent:—the answer is, that that was never the case of the prosecution and the jury were in effect told emphatically that they were not to do so. The Judge told the Jury that the case hinges entirely upon the balance sheet; the keeping open of the Bank was put to the jury as a continuing invitation to persons to make deposits upon the

strength of the representation contained in the balance sheet as to the Bank's financial position; and if the balance sheet was false and fraudulent, the keeping of the Bank open was an aggravation of the dishonesty of the balance sheet (it being admitted that the financial position of the Bank became steadily worse subsequent to the time of the signing and publication of the balance sheet). The Judge also directed the jury that they must be satisfied with regard to each of the accused that he knew the balance sheet to be false when he signed it. It is urged that the amendment of the charge let in evidence as to the subsequent financial position of the Bank and as to subsequent knowledge of the accused, which would not have been admissible for the purpose of shewing the financial position of the Bank on the 30th June previously, or the knowledge of the accused at the time of the signing and publishing of the balance sheet. Evidence as to the subsequent financial position of the Bank would in my opinion be evidence to go to the jury in order to determine its financial position on the 30th June previously; and would also be relevant as to the dishonesty of the accused at the time of accepting the deposits. The amendment of the charge was I think merely an amplification of the charge. The accused were charged with obtaining 3 deposits on 3 separate occasions by means of a false representation contained in the balance sheet—it was a continuing representation up to the time of the deposit, and in my opinion operated as a representation at the time of the deposit, as to the financial position of the Bank on the 30th June. If a Director innocently signs a false balance sheet but subsequently comes to know that it is false; it becomes a false representation by him from that time. The knowledge of the accused as to the falsity of the balance sheet should therefore be determined as at the time of the deposit; and I think that the Judge should have directed the jury to that effect. The direction of the Judge that such knowledge should be determined as at the time of signing or issuing the balance sheet was however in favour of the accused. The financial position of the Bank and knowledge of it by the accused at the time of the deposit were also I think relevant facts;—for if the deposit is not dishonestly received, there is no cheating. In my opinion the amendment of the charge was not bad in law and the accused were not prejudiced thereby.

The last question referred by the Judge is whether section 71 of the Indian Penal Code is contravened by 3 consecutive sentences having been passed on each of the accused:—The offence in respect of each of the 3 deposits was a separate and distinct offence and therefore section 71 has not been contravened. I have no doubt that the Judge when awarding the sentences considered them in the aggregate; and I think it would have been more appropriate if the accused had been sentenced to the aggregate amount of the 3 sentences in respect of each offence, the sentences to run concurrently.

The first question referred to us under the certificate of the Government Advocate in the case of Clifford and Strachan, is

whether the Judge misdirected the Jury in failing to direct that there was not sufficient evidence for them to decide whether certain debts were bad etc. This means:—was there any evidence to go to the jury upon which they could come to such findings? In my opinion there was such evidence as to each of these debts. If so; that disposes of this question, but Mr. Giles was allowed to argue that the Judge had otherwise misdirected the jury on certain matters in connection with some of these debts. This Court has no power of Revision in cases tried by it in its Original Criminal Jurisdiction, except such as it is given to it by section 433 of the Code and by section 12 of the Lower Burma Courts Act. Such power must be construed strictly and as being limited to the necessity of the case when determining the question or questions of law referred. In my opinion the Court has no power to question the decision of any points of law other than those referred by the Judge or referred under the certificate of the Government Advocate. As regards the application of the decision in *Dovey* vs. *Cory*:—that case decided that a Director may trust his co-Directors and if he is in fact ignorant of the fraud perpetrated by them, he is not liable in damages. The question left to the jury in this case was:—if the balance sheet was fraudulent, had the 3 accused respectively knowledge of its falsity? I fail to see how the decision in that case of *Dovey* vs. *Cory* governed the present case, or that the Judge misdirected the jury as to the law in connection with that case.

I see no misdirection in the Judge's reference to Mr. Meugen's evidence. I understand Mr. Meugen's evidence on this point to be; that if interest on a debt is credited to deferred interest account it follows that the principal should be reserved against as a doubtful or bad debt unless there is security sufficient to cover the principal; and that crediting interest on unsecured loans to interest suspense account presupposes that they are debts.

With regard to the "presumptions" referred to in the Government Advocate's certificate they are inferences which the Judge suggests to the jury should or could be drawn from certain facts. One of the directions complained of is at page 10 of the printed summing up where the Judge says that "the Directors and the Manager of the Bank would be likely to follow the fortunes of such a debtor as Attia with special interest" if the only fact to support this inference was that Attia some years before had been connected with Mower & Company itself, there would be no evidence to go to the jury to find knowledge on the part of the accused as to Attia's financial position in June 1911. But the summing up must be read as a whole and there was other evidence to support a finding as to such knowledge. The Judge impressed upon the jury that they alone were to decide the facts and to draw such inferences as they thought reasonable. As to the other alleged misdirections mentioned in the certificate of the Government Advocate, in my opinion they are not misdirections. There is evidence in each case from which the jury could draw the inferences suggested. I would dismiss these applications.

Amendment of charge.

TWOMEY, J:—The reasons for amending the charge are as set out in the summing up. Seeing that the condition of the Bank grew steadily worse in the interval between the issuing of the balance sheet and the receipt of the deposits—2 to 2½ months later—it seemed to me that this fact was highly relevant in determining the intention of the accused when they accepted the three depositors' monies in October and November. The three offences were incomplete until then, and if the balance sheet was issued dishonestly, the dishonesty was aggravated by keeping the Bank open when its condition was worse even than its true condition on August 1st. The representation made by the balance sheet was that the Bank was in a sound state and there was a continuing representation to this effect up to the time when the deposits were paid in. But the jury were strictly cautioned against finding the accused guilty on this part of the charge alone. They were told also that they need not concern themselves as to the precise date on which the Bank actually become insolvent in the sense that all its capital and reserves were exhausted. This question was not fully investigated at the trial and I do not think it was a material question. It was shown that the Bank if not actually insolvent was at any rate in a desperate plight when the deposits were received.

If after the balance sheet had been issued, the Bank had a sudden access of prosperity which placed it in a sound condition by the time the deposits were received there would then have been no cheating. For though the accused may have intended to cause wrongful gain or wrongful loss when they issued the false balance sheet this dishonest intention could no longer be imputed to them at the time of accepting the deposits if the state of the Bank at that time agreed with the representation made by them. It appears to me that the dishonest intention in August would not be punishable as cheating if the intention at the time of accepting the deposits was not also dishonest.

Allegation that accused were misled by extension of charge.

As regards the principal of the debts we have heard the learned counsel for the defence at great length on their complaint that this part of the prosecution case was left in obscurity until a late stage of the trial and then suddenly sprung upon them. It is true that printed statements were put in embodying in statistical from the witness Holdsworth's opinions as to the amounts which ought to have been shown as "secured" and "unsecured," and the amounts which should have gone to an interest suspense account, but we have no specific statement anywhere in the evidence of the amount of principal which should have been shown as doubtful or bad or else should have been reserved against. But it is clear that evidence was led in the Magistrate's Court for the purpose of showing that the unsecured portions of the debts in Exhibit 13, etc. were doubtful or bad, and this evidence was repeated at the Sessions Trial. The accused Mower's learned advocate admits

that the principal of the debts was called in question in the Magistrate's Court with reference to a proposed charge under section 409 of the Indian Penal Code and that this evidence was also relevant on the question of crediting unpaid interest to profit and loss. No charge was framed under section 409, but the interest question was admittedly a main ground of attack by the prosecution in the Sessions Trial no less than in the Committing Magistrate's Court. The evidence as to the principal of the debts being relevant on that question in the Magistrate's Court was equally relevant in the Sessions Court, and that being so, I think the Court was bound to consider this evidence in all its bearings, that is to say, the Court had to determine whether the unsecured part of the principal should have been treated as doubtful in the balance sheet, and not merely with the question whether the interest on these debts should have been put to interest suspense.

The learned advocate for Clifford and Strachan does not admit that any question as to the doubtfulness or badness of the principal was ever put in issue by the prosecution. He contends that the evidence on this part of the case was called merely for the sake of prejudicing the minds of the jury against the accused. He also urges that this evidence goes but a very little way towards establishing the doubtfulness of the debts, and that the defence could not be expected to see that the principal of the debts was really impugned where the attack was so feeble as to be beneath contempt. But the cross-examination of the first witness Holdsworth indicates that there was at any rate at that time no illusion as to this part of the prosecution case. It seems to me that it was clear on the surface of the case that the unsecured portions of the debts shown in Exhibit 13 (*a*) etc., were challenged by the prosecution as doubtful or bad debts throughout the trial and that no mystery was made about it. These Exhibits include all the debts which were admittedly reckoned as bad by the Bank itself at the July audit, and as regards the other debts it was a matter of clear inference that the prosecution challenged them as doubtful. For it is only when the unsecured portion of a debt is doubtful that any question arises of putting the unpaid interest on it to interest suspense, and this was in fact the line taken throughout the trial by the defence no less than by the prosecution. I therefore adhere to the opinion I expressed in summing up the case that the complaint of surprise is unfounded.

Value and effect of Exhibits 13 (*a*) etc.

With reference to Exhibits 13 (*a*) and the connected statements relating to unpaid interest, I concur in Mr. Justice Ormond's remarks. I think he has analysed correctly the arguments placed before us with reference to these exhibits. The facts that the debts in Exhibit 13 (*a*) etc., were to a large extent unsecured and that the interest accruing on these debts had remained unpaid for a long time were indications that the debts were doubtful. These were no doubt the primary grounds for Holdsworth's opinion that the interest should have been provided for in an interest suspense account and not taken as earned income. But the prosecution did

not let the case rest on these indications alone. They produced evidence both before the Magistrate and at the trial to show that the debts were doubtful debts, and the defence endeavoured to rebut this evidence in some cases. The Exhibits 13 (*a*) etc., were put to the jury as showing the amounts of the debts and the amounts of unpaid interest and the credits to the various accounts during the half-year and it was left to the jury to decide on all the materials before them whether the prosecution had made out their case that the debts were in fact doubtful or bad to the knowledge of the accused.

It is said that Holdsworth treated all the debts in Exhibits 13 (*a*) etc., as good debts except the Refinery Company's debt because in Exhibit 13 (*dd*) he gave credit towards interest for all payments during the half-year except on the case of the Refinery debt. It would have been more logical if he had treated all the debts as he treated the Refinery debt, and the reasons which he gave for the difference of treatment are unconvincing. I mentioned this point to the jury. But his intention was clear enough. It was to show the amount which in his opinion ought to have gone to interest suspense on the assumption most favourable to the accused, namely, the assumption that all receipts during that half-year may properly be reckoned in reduction of the accrued interest instead of being reckoned as part satisfaction of the principal the latter being the natural course to follow in the case of doubtful or bad debts.

I cannot see that the Jury were misdirected as to the value or effect of these exhibits.

The G. A's certificate in the case of Clifford. Para. 1.

If there was a complete absence of evidence as to the doubtfulness or badness of the various debts it would have been necessary to instruct the jury to that effect. But this was not the case. I reminded them of the principal facts appearing in evidence with regard to each of the debts leaving it to them to decide as to the sufficiency of the evidence. I do not think that this method of dealing with the matter was incorrect. The learned Officiating Chief Judge has given a summary of the evidence relating to the debts and has mentioned several points which were not specifically noticed in the summing up. It is unnecessary for me to go over the same ground. But as regards Mower & Company's debt it is desirable to refer to Exhibits 92 (*a*) and QQI which are now relied upon as showing that Mower & Company had a large margin of security which could have been made available for their debt to the Bank of Burma. Exhibit 92 (a) was put in by the prosecution and it was never contended by the defence that the securities shown in that exhibit as lodged with the Bank of Bengal and Perchiappa Chetty were more than sufficient to cover the liability of Mower & Company to those creditors. Towards the close of the case QQ and QQI were put in by the defence but only for the purpose of showing that Clifford has disclosed the position of affairs unreservedly to the Bank of Bengal when he went to Calcutta in November, 1911 to ask for assistance from that Bank. It was not

suggested at any time during the trial that these securities would yield a surplus so that Mower & Company could have given a second or third lien on them to the Bank of Burma. The values of the immoveable property mentioned in the exhibits was not examined and the terms of the first and second liens to which the securities were already subject were not disclosed. The Exhibits 92 (*a*) and QQI went to the jury without any allegation on the part of the defence that they bore upon the question of the goodness or badness of Mower & Company's balance due to the Bank of Burma. They have been referred to now merely as showing that the defence were misled into thinking that the goodness or badness of Mower and Company's debt was not in issue. But, as I have already said, I think there is no foundation for this complaint. As the defence did not rely upon Exhibits 92 (*a*) and QQI for the purpose of proving Mower and Company's balance to be good, I think it must be inferred that this method of proving it would not have been successful.

With regard to the Aung Ban and Refinery Companies' debts I wish only to say that the process which a creditor would have to follow in order to recover the shares distributed by the liquidators was not fully investigated at the trial. It was no doubt incorrect to suggest that the creditor could only follow up the shares in the hands of the persons now holding them. The matter has now been threshed out and the conclusion arrived at is stated in the order of the learned Officiating Chief Judge. It shows I think that I was right in instructing the jury that the Bank had very little prospect of recovering any substantial part of the distributed shares.

Certificate of Clifford Para. 2.

Mr. Meugens said that if the unearned interest on a debt is credited to deferred interest it does not follow that the principal should reserved against as a doubtful debt, and this remark was not repeated by me to the jury. He explained this remark by saying that the security might be sufficient to cover the principal but not the interest. Latter on, when telling Mr. Giles what he thought of Allen's letter of 1st August, he remarked of his own accord, that crediting interest on unsecured loans to interest suspense presupposes that the unsecured loans are doubtful. He probably assumed that the debtors referred to in Allen's letter had furnished all the security they possessed (as indeed appears to have been really the case,—See Exhibit 6.) If the debtors were people of undoubted financial capacity apart from the security they had furnished, Allen would not have made this recommendation at all.

In the circumstances I do not think that there was any inconsistency between Mr. Meugen's first remark and his second remark which was made with special reference to the circumstances of this case as indicated by Allen's letter. I cannot admit therefore that there was any misdirection in what I said to the jury as to Mr. Meugen's opinion about interest suspense.

Presumptions on P. 10 of summing up.

As regards Attia, Mr. Justice Hartnoll has indicated the main grounds for thinking that this debtor of the Bank was closly connected with Mower and Company even after he ceased to be a partner in the firm. Looking to all the circumstances appearing in evidence on this point and especially to the fact that Mower and Company were guaranteeing Attia's debt to the extent of 1½ lakhs. I think it is a reasonable inference that the Directors and Manager would follow his affairs closely.

PAGE 15.—The Director Clifford certainly knew in July that practically the whole of the claim against the British Burma Petroleum Company was disputed. The Bank would bring serious pressure to bear on the British Burma Petroleum Company by suing on the liquidators' claim for £70,000 or by threatening such a suit. The effect of such a suit at that time would be highly detrimental if not ruinous to the British Burma Petroleum Company. I think this is clear from Mr. Williamson's evidence and from the terms of the Trust Deed. As a Director of the British Burma Petroleum Company and as a partner in Mower and Company the Managing Agent, the accused Clifford could hardly be ignorant of the factors governing the situation.

PAGE 20.—I stated the inference which appeared to me to be deducible from the facts as to Mower and Clifford's strong motive for keeping the Bank afloat. The inference was justifiable in my opinion, but it was left to the jury to form their own conclusion.

PAGE 24.—The use of the word "opportunities" in this passage was no doubt unsuitable. But I do not think the jury could have been misled by it. The meaning of the whole passage from which this is abstracted was plainly that the jury should decide whether Mower and Clifford had actual knowledge of the state of the debts and securities, and the jury's decision was to be based on the evidence before them showing the close connection of the two Directors with the affairs of the debtor Companies (Aung Ban, Refinery, and Mount Pima) and with Attia and Cotterell.

As regards the second extract from page 24 I can see no valid ground for objection. It was admittedly a time when Mower and Company's financial resources were strained to the utmost and when the shares in the Mower Companies which formed the bulk of the securities held by the Bank had much depreciated. Moreover, the Director Clifford's attention had been drawn specially to the critical condition of the Bank's affairs by the auditor's advice not to pay a dividend. In these circumstances, I think the presumption was justifiable that Clifford who was the only Director in Rangoon was cognizant of the principal factors by which the profit of Rs. 1,62,000 was arrived at, and this presumption is borne out by the report of his own speech to the shareholders on the 16th December (P. 46 of the minute book, exhibit 4).

Strachan's certificate paras. 1, 2 and 3. Page 10 of summing up.

The grounds stated in paragraphs 1 and 2 have already been discussed in my remarks on Clifford's certificate. As regards the passage on page 10 of the summing up it seems to me that there is nothing unreasonable in presuming that Bank Managers are conversant with the financial affairs of borrowers. It is a principal part of their business to keep themselves acquainted with the vicissitudes of fortune that befall the clients of the Bank. Of course Bank Managers sometimes neglect this part of their business and if a Bank Manager lost touch with a borrower through mere negligence he might go on honestly reckoning the debt a good debt after it had become doubtful. But I do not think there was anything wrong in reminding the jury of the general course of business in this matter. They were in a position to Judge for themselves whether the accused Strachan belonged to the class of merely negligent Managers.

PAGE 15.—I see nothing wrong in this passage. Strachan admitted that he discussed the question of the disputed claim with Clifford, and has never alleged that Clifford misled him as to the nature and extent of the dispute. This being so it was left to the jury to draw their own conclusion as to what Strachan was told by Clifford.

PAGE 17.—The inference suggested in this passage as to Stephen and Son's estate appears to be correct. As to the admissibility of the witness Sen's evidence about the solvency of the estate at various periods, I have nothing to add to what has been said by the learned Officiating Chief Judge.

PAGE 26.—The passage objected to on this page is little more than a repetition of what was said on page 10 and I have already referred to that.

Mower's certificate, Para. 1.

The learned Officiating Chief Judge has referred to the evidence indicating that the unsecured balance of Mower & Company's debt was doubtful to the knowledge of the accused and I have nothing to add to the remarks I made on this point in dealing with para. 1 of Clifford's certificate.

I have already dealt with para. 2 of Mower's certificate. It is the same as para. 2 of Clifford's certificate.

PARA. 3.—In para. 3 it is stated that I misdirected the jury in stating to them that the Auditor is not there for the Directors and Manager to lean upon and in not directing them that the decision in *Dovey* vs. *Cory* governed the matter.

My remarks as to the functions of an auditor are in a part (p. 21) of the summing up entirely distinct from my remarks on the *Dovey* v. *Cory* case. (p. 25). In dealing with auditors I pointed out that their principal duty is to protect the shareholders, to see that the Directors and Manager are issuing true balance sheets. In that connection the statement that the auditor is not there for the Directors and Manager to lean upon seems to be appropriate.

The jury would understand that I was merely emphasizing the principle that it is the shareholders who are entitled to rely on the auditor as a check on the Directors. The remark would have required qualification if I had used it in commenting on *Dovey* vs. *Cory* in a later part of the charge to the jury. I pointed out to them the differences between the facts of that case and this, but did not call attention to the ruling of the House of Lords which was to the effect that the Director Cory was not bound to go into detail himself and was not to blame for acting on the assurances of his co-Director and Manager that all was as it should be. It seems to me that the present case is sharply distinguished from *Dovey* & *Cory* by the evidence direct and indirect of knowledge on the part of the accused Mower and Clifford who were not only Directors of the Bank but themselves constituted the firm of Mower & Company which with its connected Companies and firms absorbed by far the greater part of the funds of the Bank, and who apparently instituted the Bank with the main object of financing these various enterprises. Having regard to Mower's arrival from England on the very day on which he signed the balance sheet it might have been better to remind the jury expressly that Mower, *if he had no reason for suspicion,* was entitled to accept the figures as set before him by the Manager and Auditor. But I do not consider that the omission amounted to a misdirection in the circumstances.

PARA. 4.—The learned Officiating Chief Judge has dealt with the presumptions or inferences extracted in this paragraph and I concur in his remarks. In each case I merely stated to the jury my own opinion as to the inferences that might be drawn from the facts appearing in evidence. I think the inferences were reasonable but in any case the jury were left free to form their own opinion on the facts.

SENTENCES.—As to the sentences I agree with my learned colleagues. The money was taken from the three depositors each on a different date and as I have already pointed out the dishonest intention which is the gist of the offence in each case is not merely the dishonest intention when the balance sheet was issued but the dishonest intention at the time when the offence was completed by the acceptance of the deposit. I cannot see therefore how the three offences can be regarded merely as parts of one composite offence under the first part of section 71 of the Indian Penal Code.

I concur therefore in thinking that the three applications should be dismissed.

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TO

BURMA LAW TIMES, Vol. VI—1913.

A

Buddhist Law—Inheritance—dissolution of marriage—claim of children—absence of filial relationship—similarity of status under adoption and after divorce.

A was the daughter of **B** and **C** who had separated and after a period remarried—**B** marrying **D**.

A through her mother **C** sued **D** for a portion of the inheritance of the deceased **B**.

It was held first that the marriage between **B** and **C** was dissolved: and secondly that children lost he right to inherit the property of the parent who has abandoned them unless filial relations are resumed. In the cases of divorce and adoption it is the will of the parents which decides the disposition of the children.

Ma Yi vs. Ma Gale 75

Buddhist Law—Inheritance—grandchild of deceased, (son of the eldest daughter) claiming as against a son of deceased—Kinwunmingyi's Digest, S. 163—Orasa son.

A Burman Buddhist couple died leaving two heirs, a son, and a grandson, (the son of their eldest child, a daughter). The son, at the time of his father's death, was competent to assume the position of an "orasa" heir.

The grandchild claimed an equal share with the son in the property of the couple, on the ground that he was the son of the "eldest daughter," (relying on the texts collected in section 163 of the Kinwunmingyi's Digest).

Held, that these texts were not intended to be applied where there is or has been an "orasa" son.

Po Zan vs. Maung Nyo 105

Buddhist Law—Inheritance—Proof of execution by wife of deeds of mortgage entered into by husband.

The share of the 2nd husband in the *payin* property of his wife will not exceed $\frac{1}{4}$th.

Where it appeared the 2nd husband surrendered all his claims to the *payin* property of his wife when she became insane and when he took another woman and where it was found that the 2nd husband had himself affixed what purported to be the mark of his wife who was illiterate and who had become insane and of unsound mind for some time before her death.

Held that it was incumbent on the plaintiff respondent to prove what interest if any the second husband obtained or retained and how he did so.

Ma Gun v. N. M. C. Karuppa Chetty 91

Buddhist Law—Inheritance—step-daughter and next of Kin.

Respondent was the daughter of U Pwe and Ma Gwet who were divorced and started new houses. Respondent lived with the mother and was held not to have resumed filial relations with her father who predeceased his wife Ma Hnin Tha whom he had married after the divorce. There was no child by the second marriage and respondent claimed the estate after Ma Hnin Tha's death excluding the nephews and nieces of the deceased who were the appellants.

Held that the respondent having failed to resume filial relations on U Pwe's death Ma Hnin Tha was his heir aud inherited his

B—continued. PAGE.

C

C—continued. PAGE.

Concurrent sentences—Criminal Procedure Code Sec. 256—Recalling Prosecution witnesses.

The accused was tried in 4 separate trials under four distinct charges and sentenced to various terms ranging from six months to six years and it was ordered that all the sentences should be served conterminously.

Held that such an order could not be legally passed and that even if it was meant that the sentences were to run concurrently the order was illegal as the sentences were passed at separate trials and not at one trial.

The learned Judge refused to grant the accused's application for recalling all the prosecution witnesses under section 236 Criminal Procedure Code for cross-examination on the ground that the accused had the fullest opportunity of cross-examinatian and apparently did not want to elicit anything new.

Held setting side the conviction and ordering a new trial that the section gave the Magistrate no discretion in the matter and the fact there has been some cross-examination before the charge had been drawn up did not effect the privilege of the accused.

Nga Pya v. King Emperor. 67

Confession—Inducement from person in authority—Magistrate recording confession—duty of Magistrate trying a case when confession retracted.

Accused Shwe Sa on the 23rd April made certain disclosures to the police and pointed out certain articles to them. On the 25th April he told them he took part in the crime (dacoity) and on his statement one Sin The was arrested next day. Shwe Sa continued to remain in company of the Police but unarrested and went about from place to place with the inspector for three days. Then he was formally arrested and sent to a Magistrate who took down his confession and to whom the accused candidly expressed his hope that by confessing he might secure a pardon and the Magistrate acquiesced in the idea and even confirmed it.

Held that the confession was inadmissable as it was quite impossible to hold that it did not appear to have been caused by some inducement from some person in authority.

Shwe Hmon and 2 v. King-Emperor 109

Confessions of accomplices—Value to be given to them.

See Accomplices 47

Contract Act Section 49—Performance of Contract—Place of payment where no place is fixed for performance at the time of entering into a contract—English Law.

Where no place of payment is specified either expressly or by implication the general rule of English Law is that the debtor must seek his creditor, *i. e.* he must pay the debt at the place where the creditor is living. Section 49 of the Indian Contract Act is in accordance with this rule and leaves it to the creditor to appoint a reasonable place for payment.

Yar Mahomed Khan v. Amir U Din 143

Contract Act Secs. 51 to 54—Must be enforced if legally valid.

See Review 53

C—continued. PAGE.

Criminal Procedure Code Section 233, 239—Joint trial—Meaning of same offence—Section 239 not applicable where charge against each accused is mutually exclusive.

Where two accused were tried together on a charge of having caused grievious hurt to a person and the allegation was that either one or the other committed the crime and the Magistrate discharged one of the two accused and convicted the other.

Held that the words "same offence" in Section 239 of the Code of Criminal Procedure imply that both the accused should have acted in concert or association and do not apply to a case like the present and that the two accused ought to have been tried separately as required by the provisions of Section 233.

Criminal Procedure Code—S. 256—Recalling Prosecution witnesses—accused's right not affected by some cross-examination before the framing of the charge.

Criminal Procedure Code—Chap. XXII—Summary trial of offence not coming under Sec. 260 is illegal—Sec. 451 & 452 of the Indian Penal Code.

Where a complaint was made to a Magistrate under section 452 Indian Penal Code and where there was nothing in the complainant's examination on oath to justify the Magistrate in thinking that the offence fell under Sec 451, I.P.C., he ought not to have followed the procedure of summary trials laid down in Chap. 22 of the Code as the offence under Sec. 452 is not one af those mentioned in section 260.

Criminal Procedure Code (1898) Secs. 337 and 339—Procedure when pardon forfeited by approver.

The present Code of Criminal Procedure contains no provisions for the withdrawl of pardons.

The proper course is to draw up an order setting forth specially the alleged breach of any condition of pardon and to call upon the approver

C—continued. PAGE.

to show cause on a future date why he should not be tried for the offence as provided in S. 339 of the Code of Criminal Procedure. On the date fixed for the hearing unless the approver admits the alleged breach of condition the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence.

The question whether a pardon has been forfeited is in each case a question of fact and elementary principles of justice and good faith require that this question of fact should be properly tried and determined before the approver is charged with the offence for which he was pardoned. The approver should be given an opportunity of meeting the allegation that he had failed to make the full and true disclosure required under Sec. 337.

Nga To Gale v. King-Emperor 96

Criminal Procedure Code S. 403—meaning of 'acquittal, under the Section.

See Workmens' Breach of Contract Act 1859 108

Criminal Procedure Code S. 476—Order passed by Small Causes Court whether revisable under S. 25 of the P.S.C. Cts. Act or under S. 439 of the Criminal Procedure Code.

An application to revise an order under S. 476 of the Criminal Procedure Code of the Judge of a Provincial Small Cause Court lies under S. 25 of Act IX of 1887 and not under S. 439 of the Code of Criminal Procedure. The power of revision conferred by S. 25 of the Provincial Small Causes Court Act is much narrower than that under the Criminal Procedure Code. It is only when some substantial injustice has directly resulted from a material misapplication or misapprehension of law or from a material error of procedure that the High Courts intervene under S. 25 of the Provincial Small Causes Court Act.

Gaggero Francesco v. King-Emperor 144

D

Damages—Defamation—Existence of privilege or qualified privilege—malice—remand to Lower Court for trial of fresh issues—Proof that alleged statements were true or were made on reasonable grounds for belief.

Statements made in answer to a police officer conducting an investigation into the commission of a crime under the Code of Criminal Procedure, 1882 were privileged.

A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without the privilege, would be slanderous and actionable.

A police officer was making enquiries with a view to taking proceedings under the preventive sections of the Criminal Procedure Code and the Respondents were examined by him as witnesses in the course of those inquiries. At their conclusion the officer asked them whether there were any other bad characters in the village, and in reply they made the statements complained of, viz. that plaintiff was a bad character and an associate of criminals.

Held that it was the police officer's duty to ascertain the existence of any persons whom it was necessary in the public interest to require to furnish security under the Criminal Procedure Code and that it was equally the defendant's duty in the public in terests to assist him by giving him information within their knowledge.

Held therefore that the occasion was one of qualified privilege.

The reasons for holding any occasion privileged is convenience and welfare of society.

As soon as the Judge rules that the occasion is privileged, then, but not till then, it becomes material to inquire into the motives of the defendant and to ask whether he honestly believed in the truth of what is stated.

It is for the defendant to prove that the occasion is privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice.

The mere fact that the words are proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication.

Every answer given by the defendant to any one who has an interest in the matter and, therefore, right to ask for the information is privileged. But of course the defendant must honestly believe in the truth of the charge he makes at the time he makes it; and therefore must have some ground for the assertion. It need not to be a conclusive or convincing ground; but no charge should be made recklessly or wantonly, even in confidence.

Communications imputing crime or misconduct in others must always be made in the honest desire to further the ends of justice and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion.

Held that it lay upon the defendants to prove that the occasion was privileged and that they did so, and it was then for the plaintiff to establish malice on their part and, if he succeeded, it was still open to the defendants to show that their statements were true or that they believed them to be so.

Damages—for loss caused by adjournment of an auction sale—Necessity of proving loss.

Damages for use and occupation of premises—cannot lie during the subsistence of a lease of those premises.

Damages—Malicious Prosecution—Reasonable and probable cause—Honest belief—meaning of—Malice—'Malus Animus'—Damages calculated in magnitude of solatium and Court expenses.

In order to succeed in a suit for malicious prosecution the plaintiff must show that the defendant had maliciously prosecuted him without reasonable and probable cause.

Reasonable and probable cause may be defined to be "an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances

D —continued. PAGE.

D—continued. PAGE.

Divorce—Adultery coupled with desertion and cruelty—Section 10 of the Indian Divorce Act—Act IV of 1869—condition of 2 years not fulfilled—Application premature—Fresh application on completion of 2 years of desertion not barred by dismissal of present application.

The petitioner prayed for a decree for divorce from the respondent on the grounds that he had been guilty of adultery coupled with cruelty and desertion. The learned Divisional Judge found the adultery proved, the cruelty not proved and the desertion proved. He accordingly passed a decree for divorce subject to the confirmation of this court.

The evidence as to the adultery was very meagre, but it was not necessary to come to a decision as to whether it was proved or not, as on another ground the decree could not be confirmed.

The evidence as to cruelty was insufficient as it rested on the uncorroborated statement of the petitioner as to the events of a single day.

As regards desertion it appeared from the evidence that there was a quarrel between the parties on the 23rd of July 1910 in consequence of which petitioner left the house which belonged to her; that she stayed with her sister for a month and then returned to the house, the date of her return being a day or two after the 19th August 1910, the date of the letter she found in respondent's pocket. Thereupon respondent left the house and never returned.

Held that the date on which the respondent left her and on which his desertion may be said to have commenced was a date subsequent to the 19th August 1910, or a day or two after that date.

Section 10 of the Indian Divorce Act provides that "any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that . . . her husband . . . has been guilty . . . of adultery coupled with desertion without reasonable excuse for two years and upwards."

Held that when petitioner presented her petition, which was on the 26th February 1912, the period of desertion was not two years, and so she had no cause of action; that she could not get a decree on her petition, as it was presented prematurely.

The decree for divorce was dated the 1st August 1912.

Held that as there had not been desertion for a period of two years up to date the decree should not be confirmed, and the petition must be dismissed.

Held lastly that the dismissal of her petition will not prevent the petitioner from presenting a fresh petition, if the desertion should be continued and she should be able also to prove adultery.

Divorce under Buddhist Law—Available for a single Act of cruelty on certain condition.

Divorce under Mahomedan law—no fixed time for claiming it—Right to divorce not defeated by submitting to illtreatment for some time.

Dying declaration—Method of proving it—its essentials.

D—continued. PAGE.

Divorce Act—s. 55 of Act IV of 1869—appeal from a decree refusing to allow a dissolution of marriage, of a District Judge in Upper Burma—Can it lie to the Chief Court, Lower Burma ?

Held by the *Full Bench* (Fox C.J. and Hartnoll, Ormond and Towmey J.J.) that as the Upper Burma Civil Courts Regulation of 1896 does not provide for any appeal from a decree or order of a Divisional Court passed in the exercise of original civil jurisdiction there is no court to which an appeal lies from a decree or order of such court under the Indian Divorce Act and therefore no such appeal lies to this Court.

Hardinge v. Hardinge 10

E

Evidence Act—S. 24—Inducement from person in authority.

See confession 109

Evidence Act—Section 32 (1) and (3)—Deceased's Statement whether admissible or not.

One Po Thaw Gyi gave information to the Police of an intended dacoity. It was arranged that he should accompany the dacoits and assist the Police and was not to be fired at. By mistake he was shot and died of his injuries after making certain statements. It was contended that his statements were admissible as evidence against the accused under Section 32 Clause 3 or Clause 1 of the Indian Evidence Act.

Held, it was not admissible under Clause 3 of the section as it could not be said that the deceased was of the same mind as the other dacoits and that he had the same intention as they had *i. e.*, to rob. It was inadmissible under Clause 1 because the cause of his death did not come into question in the trial except indirectly and incidentally.

Nga Ti and 2 v. King-Emperor 183

Evidence Act S. 33 and 32 (1)—dying declaration—Common intention must be looked to where it is doubtful which of the accused caused the mortal injury—murder—grievous hurt.

The statement of the deceased was taken down in the absence of the accused. Subsequently in the presence of the accused the statement was read over and the accused were allowed to cross-examine the dying person.

Held that the statement was not a dying deposition under section 33 of the Indian Evidence Act and was not admissible under section 32 (1) unless it was proved by examining the Magistrate who recorded it or some one who heard it made.

Where stabbing took place all of a sudden under a fit of uncontrollable rage and annoyance and where the accused were in all probability in liquor and it was not clear which of the accused inflicted the wound.

Held altering the conviction for murder to one under section 326 that it could not be held that the accused who did not give the stab had the common intention of murder and both the accused must be held to have the common intention to cause grievous hurt.

Ngo Po and 1 vs. King Emperor 68

Evidence Act—S. 58—Admitted facts need not be proved.

See Mortgage or sale 131

Evidence Act—S. 110—Burden of proof of showing fraudulent nature of a conveyance—on what party does it lie ?

See Fraudulent conveyance 185

E—continued. PAGE.

Excise Act—section 48 (c) Importing cocaine—Inference from facts—Presumptions—Intention.

A registered postal parcel containing cocaine addressed to accused's daughter of 10 years at a place where accused was not living was received by appointment by the accused from the postman in charge and remained unopened for about 10 minutes when the Excise Officers entered and arrested her for importing cocaine. Accused pleaded that she had ordered some toys for her girl: that she took delivery of the parcel thinking it to be the expected one containing toys; that she had asked the parcel to be addressed at her friends' house as she contemplated moving from her own house and that she hesitated to open the parcel as she could not identify the sender's name as being that of the person whom she had ordered the toys from, but offered no proof of any of these facts which were peculiarly within her sole knowledge.

Held that, in the absence of evidence that she was at the time expecting a parcel addressed identically with that seized but with different contents, the inference is that the parcel seized was the one expected and its contents what she ordered.

F

Foreign Judgment whether passed exparte or on merits—Rules of the Supreme Court, Order III Rule 6.

When a writ of summons from the King's Bench Division, England, was properly served on the appellant and his solicitors filed a defence the court granted leave to defend on appellant's paying into court £59-16-11 within 6 weeks. Appellant failed to do so and Judgment was entered for plaintiff. Subsequently a suit was brought on the judgment in the Subdivisional Judge's Court, Toungoo, when the appellant contended that the English Judgment was not given on the merits within the meaning of Section 13 of the Civil Procedure Code, that it is neither conclusive nor *res judicata* and that a suit based on it must fail.

Held, as the defendant was both summoned and entered an appearance and had an opportunity of defending the action and as he neither applied for extension of time for giving his defence or reopened the case, the Judgment must be held to have been given on the merits of the case.

Fraudulent Conveyance—Bona Fides and adequate consideration—Burden of Proof—Section 110 of the Evidence Act—Relationship of the parties—Presumption.

The plaintiffs—respondents instituted a suit for Rs. 1,142-6 against Ma Pn on the 12th July 1909. Two days afterwards Ma Pu transferred the land in suit to the defendant—appellant, Ma Kyin, by a registered conveyance, the consideration being stated therein as Rs. 1,000. Subsequently the plaintiffs—respondents, having obtained a decree against

F—continued. PAGE.

Ma Pu, attached the land in execution; but the defendant—appellant, Ma Kyin, objected to the attchment on the ground that the land had been sold to her and that she was in possession at the time of the attachment. Her objection was allowed and the attachment was removed.

The plaintiffs—respondents then sued Ma Pu and Ma Kyin alleging that the sale to Ma Kyin was fraudulent, collusive and without consideration. The Sub-divisional Court dismissed the suit, but it was decreed on appeal by the Divisional Court, when it was held that in view of the relationship of Ma Kyin and Ma Pu and the fact that the alleged sale occurred so soon after the institution of the plaintiffs—respondents' suit against Ma Pu, the burden of proving that the transfer was made in good faith and for adequate consideration lay on Ma Pu and Ma Kyin and that they had failed to discharge the burden.

There was evidence that they lived together at one time; but they were not living together at the time of the sale. Ma Kyin admittedly obtained possession from Ma Pu and was in possession at the time of the attachment.

Held that the burden of proving that Ma Kyin was not the owner lay upon the plaintiffs—respondents.

Held also that the burden of proving that Ma Kyin was not the owner lay upon the plaintiffs—respondents under section 110 of the Evidence Act and that it also lay upon them according to the principle that he who alleges fraud must prove it; that it was for the plaintiffs—respondents to show that the circumstances under which Ma Kyin came into possession raised such a strong presumption of fraud that she should be required to prove *bona fides* and adequate consideration, and that this they had failed to do.

Fraudulent preference—S. 56 of the Presidency Towns Insolvency Act—Meaning of 'Creditor.'

Fraudulent Sale—S. 53 of the Transfer of Property Act.

H

Holder of a Negotiable Instrument—He alone can sue and none other.

Hundi—Negotiable Instruments Act Section 37 and 43—Indian Contract Act—Sections 135, 62—Merger—Novation.

A hundi by which defendant promised to pay to one C. Rungasawmy Mudaliar or order Rs. 10,000, sixty days after date was endorsed to the plaintiff Bank by the drawee. The defence was that the bank was not a holder in due course and that the hundi was discharged by a subsequent mortgage given by drawee to the bank by way of merger or novation and also that defendant being liable as a surety was discharged under Section 135 of the Indian Contract Act.

Held that the defendant bank was a holder in due course and that being so, under Sections 37 and 43 the defendant was liable as a principal and C. Rungasawmy Mudaliar as a surety and therefore Section 135 of the Indian Contract Act did not apply.

H—continued. PAGE.

Held also that the defendant not being a party to the novation (*i. e.*, the contract of mortgage) Section 62 of the Act would not help him and there was no recital or evidence that the hundi was considered as discharged on the execution of the mortgage.

J. E. Loader v. Chartered Bank 171

Husband and wife—Mortgage of joint property—Proof of wife's consent—Proof of execution by wife of deeds—Inference to be drawn from the facts that the husband put wife's name and that wife was already insane.

See Buddhist Law 91

Husband and wife—Right of husband to dispose of joint property—When wife estopped from repudiating sale by husband.

See Buddhist Law 113

I

Indecent Assault—Intention to outrage modesty essential.

See Penal Code S. 363 and 376 21

Inheritance—Claims of children of divorced parents to the estate of the parent from whom they are separated by the other parent.

See Buddhist Law 75

Inheritance—son of eldest daughter claiming an equal share with another son of the deceased.

See Buddhist Law 105

Inheritance to Property left by a Buddhist—Right of the children of a previously divorced wife staying with the latter.

See Buddhist Law 117

Insolvency Act 1909—Sec. 50—Fraudulent Preference—Surety—Creditor.

The word " Creditor " in Sec. 56 of the Presidency Towns Insolvency Act, 1909 (which avoids as ' Fraudulent ' a payment made by an insolvent debtor in favour of any creditor with a view to prefer such creditor) means any person who, at the date of the payment, is entitled, if insolvency supervenes, to claim a share of the insolvent's assets under Section 46 of the Act. A surety is included in the latter section and a payment made to such surety, before he has been called upon to pay as surety, may be deemed fraudulent and void as against the Official Assignee.

Ismail Mawoon Dawoodji v. Official Assignee 166

Insolvent can sue his creditors if Official Assignee does not interfere.

See Negotiable Instruments 81

Instalments—Order refusing them—appealable or not.

In an appeal against the order of refusal by the District Judge to allow the decretal amount to be paid by instalments an objection was raised against the maintenance of such an appeal on the ground that such an order is not a part of the decree but is a separate order passed under Order 20, rule 11 of the Civil Procedure Code.

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Held the objection ought to prevail and the appeal could not lie.
Mohamed Ibrahim v. A. Subbiah Pandaram 133

Irregularity—The adjournment of auction Sale by bailiff for 2 days without Court's permission a material one.
See Auction sale 65

J

Joint trial—Meaning of 'same offence.'
See Criminal Procedure Code S. 233 191

Jurisdiction—Dissolution of Marriage—Did parties last reside within the District ?—Proper cause in such cases.

The case was sent back to the Divisional Court of Toungoo to take evidence as to where the wife (the Petitioner) was residing at the time the petition was presented.

Held that according to the finding of the Divisional Judge, from which there was no reason to differ, the petitioner did not, when she filed her petition, reside in the Toungoo Division, and that, as it was not suggested that the husband and wife last resided there together, the Divisional Court of Toungoo had no jurisdiction to entertain the petition. The decree of that court dissolving the marriage was not confirmed but set aside and the Divisional Judge was directed to return the petition to the petitioner with instructions that she should present it to a court that has jurisdiction.
Mrs. Rose D'Castro v. Mr. Edmund Castro 176

Jurisdiction—nature of suit—not altered by nature of defence.

As the question for decision was whether the plaintiff, who had applied for a refund of security given, had duly performed his work as manager the defendant was entitled to try to prove that he had not done so. The Court of Small Causes which heard the case was not debarred from going into this question even if it was not competent to go into accounts. Such a Court in determining whether it has jurisdiction or not must look to the nature of the suit as brought by the plaintiff and not to the nature of the defence. A defendant has not power to oust the Court of a Jurisdiction which it otherwise has by the mere raising of a defence.
M. Dorabjee v. Havabee and 5 85

K

Kidnapping and Rape—alleged mixing up of the witnesses for Defence with those for the prosecution—Preliminary inquiry—Indecent assault—outraging of modesty.
See Penal Code S. 363 and 376 21

Kidnapping—with a view to murder—with a view to ransom—law applicable—insufficiency of punishment—sections 364, 365 and 387 Indian Penal Code, distingnished—section 71 and 383, Indian Penal Code—section 35, Criminal Procedure Code.

Where a person has been abducted in order that he may be held to ransom, his abductors can be convicted under section 365, Indian Penal Code, as the intent secretly and wrongfully to confine is always present but there can be no conviction under section 364, Indian Penal Code, unless the intent to murder or so to dispose of as to be put in danger of being murdered is strictly proved as such an intent is not a

necessary consequence of abducting to hold to a ransom. Section 387, Indian Penal Code, was also held to apply to a case of this nature; but under section 71, Indian Penal Code, read with section 35, Criminal Procedure Code, 1898, separate sentences cannot be passed under both section 365 and section 387, Indian Penal Code. The punishment provided by law may be insufficient but Courts can only administer law as they find it.

Po Lan and 4 v. King-Emperor 77

L

Legal Practitioners' act—Act XVIII of 1879—S, 28—agreements between pleaders and clients—Does the section apply where work to be done is not Court work?

Held that s. 28 of the Legal Practitioners' act regarding the filing of agreements between pleaders and clients in the District Court or in some Court where the work is to be done applies to agreements for Fees in respect of the practitioner's services where the business does not lie in any Court, Civil or criminal.

T. Game vs. U. Kye and 1 18

Letters of administration—Withdrawl of application—erroneous dismissal—cancellation of the order of dismissal—Procedure in contentious cases—Order XVII, Rules 2 and 3 and order XLIII, Code of Civil Procedure 1908—Ss. 83, 86, Probate and Administration Act, V of 1881.

A applied for letters-of-administration to an estate. The application was returned for amendment. A then applied to be allowed to withdraw the application. No orders were passed on this application and when the case was called at the expiry of the six months allowed for amendment the original application was dismissed. Later, on an application to re-open the case, the Judge allowed the petition for letters to be withdrawn.

When returned for amendment the case came under order XVII, Civil Procedure Code, 1908. The application was dismissed under Rule 2 of that order and the Judge had authority under Rule 9 of order IX to set aside the dismissal. Under order XLIII no appeal lies against his order in spite of section 86 of the Probate and Administration Act which refers only to orders made by virtue of the powers conferred on a Judge by that Act. The section applicable is section 83 whereby the procedure in contentious cases is governed by the Code of Civil Procedure.

Ngwe Hmon v. Ma Po 87

Limitation—Art. 123 of Sch. II of the Limitation Act—Act. 142 and 144—suit barred both under Art. 123 and 144 -Burden of proof under Art. 142 and 144—Adverse possession.

Maung Tun U sued for a fourth share of a certain house and house site at Bassein alleging that this property belonged to his grand parents. The property was in the possession of the 1st defendant—respondent Myat Tha Zan, who pleaded that it never belonged to the grand-parents, but that it was bought by Myat Tha Zan's father, Tun Aung. Myat Tha Zan admitted that for a time the property stood in the names of Shwe Maung and Ma Dun Byu, but explained that Tun Aung put it in his parents' names, so that his parents and sisters 'might be able to live together." Tun Aung was contemplating matrimony and did not want to give his future wife the power of turn-

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ing out his parents and sisters. The property was transferred to Myat Tha Zan's name in 1896 and Myat Tha Zan had been in possession ever since.

Tun Aung died in 1906. In 1908 Myat Tha Zan transferred the property to the names of his minor children, the 4th and 5th defendants.

The Sub-divisional Court dismissed the plaintiff's suit on the ground of limitation and also on the merits. The Divisional Court on appeal confirmed the Subdivisional Court's decree on the qu estion of limitatien alone, and this is the only question in the appeal. Both Courts held that the case was governed by Article 123 of the schedule of the Limitation Act.

It was urged that this article did not apply and that it was necessary to decide the question of limitation with reference to Act. 142 considered with Art. 144.

Held that if Art 123 applied the suit was barred, for Shwe Maung of whose property the plaintiff sued for a distributive share, died 18 years before the suit, and the twelve years' period of limitation would run from the time of his death.

Held therefore that the Lower Courts were right in applying this article.

Held that, if the case fell under Article 142, the plaintiff would have to show that he (or his mother, Ma Thi) was in possession (joint or separate) within twelve years of the filing of the suit, but that if Article 144 was the right article to apply, the burden of proving adverse possession for twelve years before the suit would fall upon the defendant—respondent, Myat Tha Zan.

Held also that if Art. 144 applied to the case, the defendant—respondent must be held to have discharged the burden of proof, as he produced evidence showing that the site was originally bought by his father, Tun Aung, and that when the house was built Tun Aung was supporting his parents. The site had stood in Myat Tha Zan's name for 15 years prior to the suit and, so far as the evidence showed, he had been in sole possession during that time.

Held therefore that some doubt cast on his title by an incident referred to in the judgment could not be regarded as sufficient to rebut the strong case of adverse possession made out by the defendant—respondent, Myat Tha Zan.

Held therefore that the Lower Courts were right in finding that the suit was barred by limitation.

Mg Tun U v. Mg Myat Tha Zan and 6 188

Limitation—Possession—Article 135 and 144 of Schedule II Limitation Act IX of 1908...Minor—Exemption—Sections 6 and 8—Article 148—60 years' Limitation Period

This was a suit for redemption of land orally mortgaged in usufructuary mortgage by the plaintiff's father, Tun Aung Gyaw, to the 1st defendant, Aung Zan, for Rs. 300 about the year 1885,

The facts as found by the Lower Courts are as follows: Tun Aung Gyaw died about 1890 leaving him surviving his children, the plaintiffs, Ma Yu Ma and Maung Pan, who were minors. About 1893 the 2nd defendant, Po Te, obtained the land from Aung Zan on paying him the mortgage debt, Rs. 300 Po Te was the brother of the mortgagor, Tun

L—continued. PAGE.

Aung Gyaw, and it was with the express consent of his niece, Ma Yu Ma that Po Te took the land from Aung Zan. This transfer to Po Te is called a redemption and it was clearly intended to be such by Po Te, Aung Zan and Ma Yu Ma. Po Te worked the land for a year and then in 1894 the 3rd defendant, Shwe Pi, got possession of it. Po Te says that Shwe Pi seized the land forcibly for a debt of some Rs. 600 due by Po Te, but there was no other evidence of any force being used. Probably Po Te who admitted owing the money gave up the land to Shwe Pi in satisfaction of the debt. Shwe Pi shortly afterwards sold the land for Rs 750 to the father-in-law of the 4th defendant, Nya Na. Shwe Pi says that this was about a month after he got possession. From that time upto the time the suit was filed, a period of about 16 years, the land was in the possession of Nya Na's family

The plea of limitation was not raised and no issue was framed on that subject. But the question of limitation was clearly involved and both Courts have dealt with it in their judgments. The first court held that the 4th defendant had been in adverse possession for over 12 years without stating under which article in the Schedule of the Limitation Act, he conceived the suit to fall, though he probably considered Article 144 to be the relevant Article. The Divisional Court on the other hand held that the suit came under Article 134, being a suit to recover possession of immoveable property mortgaged and afterwards transferred by the mortgagee for valuable consideration, the period of limitation being the same under Article 134 as under Article 144 namely 12 years.

The Lower Courts agreed, however, in applying the provisions of Section 6 of the Limitation Act. The original cause of action arose in 1894. The period of 12 years expired in 1906. The suit was not filed till 1910. But both the plaintiffs were minors in 1894. Maung Pan attained majority about 4 years before the suit was filed and his sister Ma Yu Ma some years earlier, but less than 12 years before the suit was filed. Both courts held that in these circumstances the plaintiffs were entitled under Section 6 to bring their suit within twelve years of attaining majority.

Held that both courts overlooked the provisions of Section 8, which limits the extention of time under Section 6 to three years from the cessation of minority, the Act allowing as a maximum three years from the cessation of minority or the full period from the ordinary starting point of limitation, that is the original cause of action (here, 1894) whichever is more advantageous to the plaintiff.

Held also that in this case the plaintiffs could not invoke Section 6 and 8 because, when the suit was filed, the statutory maximum of three years from the date of attaining majority had already expired, both the plaintiffs having attained majority more than three years before filing the suit.

Held therefore that the limitation must be computed in the ordinary way *i. e.*, from the original cause of action in 1894 and that, as more than twelve years from that date had elapsed when the suit was filed, it was barred by limitation unless the Lower Courts erred in assigning twelve years as the proper period of limitation for the suit.

In this appeal it was argued for the respondents that the suit fell neither under Article 134 nor under Article 144 but under Article 148, which prescribes a period of sixty years limitation.

L—continued. PAGE.

The Lower Courts, though each of them held the period of limitation to be twelve years, seemed to have some doubt on the point.

Held that the case cannot be brought within the scope of Article 148, as the transfer by Aung Zan to Po Te, described by both parties as a redemption, cannot be construed as a transfer of the mortgagee's interest to Po Te, but that the same cannot be said of what took place in 1894, as it was clear that Shwe Pi possessed himself of the land without any reference to the subsisting mortgage.

Held therefore, that it was erroneous to assume that there was a mere transfer of the mortgagee's rights from Po Te to Shwe Pi and that Shwe Pi having invaded the mortgagee's rights his possession became adverse to both mortgagor and mortgagee and that he cannot be regarded as a sub-mortgagee or as an assignee of the mortgagee and that, therefore, Article 148 was inapplicable.

Held also that Article 134 was also inapplicable, as there was no transfer from the mortgagee to bring the case within this Article.

Held finally that the article which really applied was Article 144 and that under that article the suit was barred by limitation, and that would also be barred if the article applicable were found to be Article 134.

Maung Shwe Pe and 1 v. Ma Yu Ma and 1 196

Liquor—Country fermented liquor—Seinbat—Seinyi—Preparation and attempt—Excise Act, Section 45.

Where the accused was found in possession of three viss of *Seinbat* which is not country fermented liquor and intended it for the manufacture of *Seinye* which is a kind of country fermented liquor he cannot be punished under Section 45 of the Excise Act for the mere intention. Nor can he be punished for an attempt to manufacture as he had not yet proceeded beyond the stage of mere preparation.

King-Emperor v. Nga Kyaw 140

Lower Burma Town and Village Lands Act—Act IV of 1898—S. 41 (b)—ultra vires—S. 65, 66 and 67 of Government of India Act of 1858,—S. 22 of the Indian Councils Act of 1861.

Held that the effect of Section 65 of the Act of 1858 was to debar the Government of India from passing any act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in the East India Company; that the section is not, like the two other Section 66 and 67, a merely transitory Section and that its purpose was to make it clear that the subject was to have the right of suing and was to retain that right in the future or at least until the British Parliament should take it away. *Held*, therefore, that Section 41 (*b*) of the Act IV of 1898 was *ultra vires* of the powers vested in the Lieutenant Governor of Burma.

The Secretary of State v. J. Moment ... ... — 1

M

Mahomedan Law—Restitution of conjugal rights—Breach of condition a contract entered into by parties at time of marriage—Ill-treatment—Delegation of power of talak—Is there any limitation of time for exercising it?

Where a Mahomedan husband contracted with his wife at the time of his marriage not to abuse or assault her and also contracted to stay with her in her parents' house for 3 years after the marriage giving her an option of divorce on breach of any of these conditions.

M—continued. PAGE.

Held that as the girl was only 15 at the time of marriage and at the end of 3 years she might still be under 18 and a minor, the condition of three years' residence at her parents house was valid and recognizable by Law.

Held also the condition not to assault her was a reasonable one and its repeated breach entitled her to avail herself of the power to divorce created by the contract.

Held further that the option to divorce her husband need not be exercised at once or within a specified time and does not lapse because of her putting up with the husband's ill-treatment for some time.

Mi Nafizunissa v. Bodi Rahiman 125

Mahomedan Law- Right of a childless widow of the Shiah Sect to immoveable property- Gift—Specific Relief Act—Sec. 42.

The childless widow of a Shiah Mahomedan has no right of inheritance in the immoveable property of her deceased husband.

The suit for declaration under sec. 42 of the specific Relief Act was not barred by the proviso as the evidence showed that the paddy land was let out to tenants by the plaintiff and therefore a suit lay for a declaration of title without consequential relief.

Murdin and 2 v. Asha Bi 135

Maintenance—decree for restitution of conjugal rights without an order for Guardianship of child—payment of amount ordered for maintenance of child to be confirmed—S. 488, Code of Criminal Procedure 1898.

Where the appellant, wife of the respondent obtained an order for the payment of Rs. 3 per month for the maintenance of their child and where the respondent subsequently obtained a decree for restitution of conjugal rights without any order for guardianship of the child and where further the appellant refused to stay with Respondent.

Held that the decree for restitution of conjugal rights did not determine the respondent's liability to pay for the maintenance of the child.

Nan Saw Shwe v. Maung Hpone 51

Malicious Prosecution—Reasonable and probable cause—Honest belief—meaning of—Malice—'Malus Animus'—Damages calculated on magnitude of solatium and Court expenses—damages 59

Merchant Seamen's Act (1859) S. 35, 55 and 56—Seamen-Officers.

See Wrongful dismissal 89

Minors-Exemption from Limitation and S. 68 of the Limitation Act.

See Limitation 196

Mortgage or Sale---Burden of proof where originally there was a mortgage and subsequently a sale---Burden on plaintiff to prove that there was a mortgage at the beginning---Effect of admission---S. 58 of the Evidence Act.

Where the transaction between the parties admittedly began by a simple mortgage and there was subsequently a transfer of possession to the mortgagee it lies upon him to prove his right to resist redemption. If he alleges an outright sale, he must prove it.

Before the Transfer of Property Act was extended to the whole of Lower Burma, the burden of proving the initial mortgage lay upon the plaintiff who sought to redeem it. Proof of it was dispensed with under S. 58 of the Evidence Act where it was admitted.

M—continued. PAGE.

Quere :—Would the admission of an unregistered mortgage after January 1905 cure the defect of want of registration?

Ma Shwe Hpe v. Maung Sein and 131

Mortgage—priority of registered mortgage—oral mortgage—defective pleadings—determination of legal rights—section 48, Registration Act, 1908—section 73 and Rule 33—Order 41, Civil Procedure Code, 1908.

A held a registered mortgage of the property of **C**. **B** held an oral mortgage of the same property. Although **A** sought certain relief on the ground that **B**'s mortgage was fraudulent—a ground which was not proved—it was held that in spite of the defective pleadings the legal rights arising out of the priority of **A**'s mortgage under section 48, Registration Act, could be determined, regard being had to the provisions of Rule 33, Order 41, Civil Procedure Code, 1908.

Although the property had been sold in pursuance of B's oral mortgage as it had been sold subject to A's mortgage, the sale was annulled.

Maung Sein and one v. Ngwe Nu 72

Municipal Act—III of 1898—Section 142 (d) and section 202, Bye laws 19 and 20 framed thereunder—are they ultra Vires—section 180—can punishment for breach of bye-law No. 19 come under the provisions of section 180—Notice must require alterations that are reasonable and possible.

Where it was contended that clause (c) of Bye-law 19 framed by the Rangoon Municipality requiring the owners of lodging houses "to make such alterations in the construction and in the sanitary appliances and water supply of the building as may seem necessary for keeping the building in a wholesome condition" is *ultra vires* in as much as section 142 (d) which authorises the framing of the Bye-laws does not contemplate the framing of rules which will entail structural alterations to the building.

Held that the framing of such a clause is authorized by sub-clause (iii) of section 142 (d) which mentions one of the objects of such bye-laws to be to promote cleanliness and ventilation in lodging-houses and that rules for promoting ventilation must by their nature provide for the necessary structural alterations when the purposes of the bye-law cannot be attained without them.

A notice to be valid must be reasonable and possible to comply with. It is not reasonable to require a house owner to remove the latrines to a site outside and quite separate from the main building when no such site is available nor to require him to close the latrines without the provisions of any others.

Partial Maistry v. King-Emperor 638

N

Negotiable Instruments—promissory notes—holder—right to sue—adjudicated insolvent—discharge—Official Assignee's right of interference—insolvent's right of maintaining trover.

An adjudicated insolvent who has not obtained either his personal or final discharge may, even if all his property existing and prospective has been vested in the Official Assignee, sue for monies which he alleges are due to him provided that the Official Assignee does not interfere.

A holder of a negotiable instrument at the time of the action brought, being the only person who is then entitled to receive its contents, is the only person who can sue on it.

Ram Bullab Rhirkawala v. Babu Bickraj and one 81

N—continued. PAGE.

P.

Partner—Liability of partner on lease executed by other partners—Obligation of partners specially defined in partnership deed—Effect—Damages for use and occupation—Does a suit for them lie during the subsistence of a lease?

Where applicant entered into partnership with two others to carry on the business of a Hotel under a special agreement that "no partner shall be at liberty to enter into any agreement in the name of the firm but every such agreement shall be signed by each and every one of the partners in his individual name and not otherwise" and where the two other persons executed a lease of the premises for the Hotel which the applicant resolutely refused to sign.

Held, that the applicant cannot be held liable on the lease.

Held also that no suit for compensation for use and occupation of the premises would lie during the continuance of the lease.

Penal Code Ss. 161 42, and 384—Extortion—Ywathugyi—Sanction to prosecute—Burma Village Act Ss. 10 and 28—Burma Gambling Act S. 10

The terror of a criminal charge, whether true or false amounts to a fear of injury and though to threaten to use the process of law is lawful, to do so for the purpose of enforcing payment of money not legally due, is unlawful and such a threat made with such an object is a threat of injury sufficient to constitute the offence of extortion and not one under S. 161 of the Indian Penal Code.

A Village headman is not empowered to arrest people whom he finds contravening section 10 of the Burma Gambling Act.

K. E. vs. Nga Thu Daw 2 L. B. R. 60 (followed).

Obiter—Section 28 of the Burma Village Act refers to a complaint of an Act which constitutes an offence under the Indian Penal Code if such act is also punishable departmentally under s. 10 of that Act but not otherwise. In the latter case no sanction is necessary under section 28 of the Act.

P—continued. PAGE.

Penal Code—S. 363 and 376—Kidnapping and Rape-alleged mixing up of the witnesses fot Defence with thote for the prosecution—Preliminary inquiry—Indecent assault—outraging of modesty.

Where a Magistrate is inquiring into the truth or otherwise of a complaint he can examine all those who know about the matter and it is immaterial at what stage they are called as long as opportunity for cross-examination is allowed.

An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged.

Penal Code—S. 364 and 365—Intent to confine always present in Pyan Pe cases but not necessarily intent to murder.

Penal Code—S. 392, 397—Use of a deadly weapon.

Penal Code—S. 405—Breach of Trust—Advances to Brokers for supply of paddy—absence of Pronotes—undertaking to apply advances to purchasing paddy for advancing firm—Do such advances amount to loans or trusts?

Held by the Chief Justice and Justices Ormond and Towmey (Hartnoll J. dissenting) that, where money was advanced to appellants on the undertaking that they should buy paddy at what rate they could and should sell to the advancing firm at the market rate on the day of delivery, the property in the money passed to the appellants and their contract to use the money in a particular way did not operate to create a constructive trust.

Held that the presence or absence of the pronotes does not alter the character of these transactions.

As the appellants had to make good the loss of money in any circumstances and as they had to bear any loss on a fall in the market price and to profit by any rise, the property in the money passed to them and no beneficial interest remained with the miller.

Penal Code—S. 420—dishonest intention the gist of the offence of cheating—S. 71.

Held that the three separate acceptances of deposits from three persons at different times cannot be said to be parts of one composite offence under the first part of s. 71 of the Indian Penal Code since the dishonest intention of cheating was present not only at the time the balance sheet was issued but also at the time of accepting each of the deposits.

Pleader's statement with client's consent—Effect of non-filing of power by pleader.

Practice—Procedure—S. 100 of the Civil Procedure Code—2nd Appeal is against the decision of the Lower Appellate Court—Reference to the Original Court's decision erroneous.

The only appeal open to the appellant is one on grounds mentioned in Section 100 of the Civil Procedure Code which are as follows: That the decision of the Appelllate Court,

(a) is contrary to law or some usage having the force of law; or

P—continued. PAGE.

b) has failed to determine some material issue of law or usage having the force of law;
or on the ground that
(c) there has been some substantial error or defect in the procedure provided by the Code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

All the grounds of appeal, which will be found in the Judgment, referred to the decision of both the Lower Courts. Held that on second appeal to this court under Section 100 of the Code the decision of the Lower Appellate Court is the only one which has to be dealt with under clauses (a) and (b) of the section and that reference to the original court's decision in the grounds of appeal is erroneous.

S. K. Subramanian Pillay v. P. Govindsawmy and 1 180

Practice—Procedure—Suits in forma pauperis—Civil Procedure Code Act V of 1908—Order 33 Rules 2, 3, 5, 7, and 15—schedule of applicant's property with its estimated value.

Where a petition to be allowed to sue *in forma pauper* was not accompanied by a schedule of the moveable and immoveable properties of the applicant together with the estimated value thereof, the application ought to be rejected under rule 5 of Order 33 as being not framed in the manner prescribed by rule 2.

In view of the express provisions of Order 33, rule 5, Section 141 cannot be held to apply in the case of pauper applications though they are a kind of miscellaneous proceedings.

Kalikumar Sen v. N. N. Burjorjee and 9 141

Pre-emption—Prompt assertion necessary.

See Buddhist Law 115

Privileged statements—statements made to an investigating officer when statements can be deemed 'privileged'—

See Damages 100

Probate and administration Act—S. 83 and 86—Right to appeal granted under S. 86 only against orders passed by virtue of the powers confessed by that Act.

See Letters of Administration 87

Provincial Small Causes Act—S. 25—whether sanction granted under S. 476 of the Criminal Procedure Code revisable under this section or under S. 439 of the Criminal Procedure Code.

See Criminal Procedure Code S. 476... 144

Pyan Pe—Kidnapping for ransom—Penal Code S. 364 and 365.

See Kidnapping 77

R

Reasonable and probable cause—definition thereof.

See Damages 59

Registration Act S. 48—Priority of a registered mortgage over an oral one.

See Mortgage 72

R—continued. PAGE.

Review—Contract if legally valid must be enforced—Court not to dictate to parties as to what the terms ought to have been—Indian Contract Act—section 51 to 54.

The Small Causes Court dismissed the suit which was for work done for defendant on the ground that owing to bad workmanship the work had proved ineffectual. On appeal this finding was reversed but the decree was confirmed on the ground that the terms of the contract being vague plaintiff was not entitled to relief though he had carried out the terms of the contract as it stood. Plaintiff asked for a review on the grounds *inter alia* that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal, that on the contract as it stood plaintiff would not have been justified in delaying his part of the work and that the contract as it stood being valid in law the Court was bound to enforce it.

Held reversing the order dismissing the appeal that the decision in appeal proceeded on grounds not raised at the trial, that the Courts should not dictate to the parties what the terms of their contract ought to have been but if it is a valid contract should enforce it; that the contract did not consist of reciprocal promises to which section 51 to 54 of the Contract Act would apply, that time being of the essence of the contract the plaintiff could not delay the work and the work being for a lump sum plaintiff could not claim quantum meruit.

Peter Vertannes v. A. R. M. M. R. M. Mutia Chetty 53

Robbery-use of deadly weapon by one of a gang of robbers—Ss. 392, 397, Indian Penal Code.

The use of a deadly weapon by one of a gang of robbers does not bring his associates within the terms of Section 397, Indian Penal Code.

Ma Yi v. Ma Gale 88

S

Sessions Judge—Summing up.

Held that the summing up of a Sessions Judge must be read as a whole.

G. S. Clifford and 2 v. King-Emperor 201

Small Causes Court—competent to decide whether plaintiff worked properly as manager though incompetent to go into accounts.

See Jurisdiction 85

Solatium for injury to the feeling.

See Damages 59

Specific Relief Act S. 42—Suit for declaration without consequential relief.

See Mahomedan Law 135

Summary trial—Only offences enumerated in S. 260 of the Criminal Procedure Code can be tried summarily.

See Criminal Procedure Code 137

T

Tramways Act 1886—Bye-laws framed under the Act—Break of journey—Necessity for purchase of fresh ticket.

A passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance; he alighted at an intermediate stopping place, and boarded another tramcar, which was performing the same

journey, in order to get to the point which he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket.

Held that the contract of carriage had been determined by the passenger's own act and that he was rightly convicted for travelling on the second tramcar without paying his fare.

Nga Ba Thin *v.* R. E. T. Coy. 193

Transfer of Property Act Sec. 53—Fraudulent Sale.

Where the debtors handed over property worth over Rs. 6,000, for Rs. 3,000 the amount due to the creditor was Rs. 5,000 and the creditor admittedly allowed the debtors to remain in possession of a portion of the property and did not give any satisfactory proof that he had obtained possession of any of it, *Held* that these facts afforded sufficient grounds for the Lower Court's conclusion that the sale of the property was not a *bona fide* one.

Maung Tun Tha *v.* Leong Chye 121

Trustee—His power to divest himself of his office.

The only modes in which a trustee can divest himself of his office are the following :—

(*a*) He may have the universal consent of all the parties interested;

(*b*) He may retire by virtue of a special power in the instrument creating the trust or a statutory power applicable to the trust;

(*c*) He may obtain his release by application to the Court.

The trust was to apply the income of some land to the purpose of a temple and the worship of a goddess. It was not clear whether the temple was a public or a private one, but the ancestors of the defendant appeared to have been the most prominent supporters of it and the trust was one created by the will of the defendant's grandfather.

The Divisional Judge found that the defendant's father and the defendants had been in possession and control of the temple for more than ten years prior to the institution of the suit.

Held that under the circumstances it appeared justifiable to conclude that all persons interested in the temple and land did consent at the time to the plaintiff's handing over the management and divesting himself of the trusteeship.

S. K. Subramoney Pillay vs. P. Govindsamy and 1 180

W

Waiver—Effect of such waiver on the liability of sureties—Pleader's statement with clients' consent when pleader fails to file Power—Indian Contract Act, Sec. 137—Forbearance to sue—distinguished from waiver.

The only point for decision in this appeal was whether the respondent waived her claim against the principal, the first defendant, Arthur Abreu, and whether such waiver has discharged the other defendants, the present appellants who were Abreu's sureties.

The entry on the diary sheet relating to the waiver was dated the 11th October 1910 and was in the following terms; "Maung Po Yin Si says the first defendant cannot be found and he will waive claim against him."