

THE
Burma Law Times.

EDITED BY

V. G. BIJAPURKAR, M.A., LL. B.

HIGH COURT PLEADER (*Bombay*)

AND

1st. GRADE PLEADER (*Rangoon.*)

VOL. VII.—1914.

Annual Subscription Rs. 10.

Office.—2, Shafraz Road, Rangoon.

PRINTED AT THE HANTHAWADDY PRINTING WORKS,
RANGOON.

1916

BURMA LAW TIMES.

Index of Cases Reported in Vol. VII.

	PAGE.
A	
Ahmed Gulam Mahomed Sadiq <i>vs.</i> Mahomed Cassim Makda and 18 others ...	142
Ah Yway and 1 <i>vs.</i> Ma Gyi ...	23
Arschan and one <i>vs.</i> Maung Po Win and one ...	85
Arnold, Channing <i>vs.</i> King-Emperor ...	167
Attalides, L. D. <i>vs.</i> R. M. K. Chetty ...	68
A. T. K. P. L. Chetty <i>vs.</i> S. K. R. S. S. T. Chetty Firm ...	93
A. T. K. P. L. Muthia Chetty and 6 others <i>vs.</i> L. A. R. Arunachelum Chetty and one ...	1
B	
Bally Singh <i>vs.</i> Bhugwan Dass Ka'war... ..	95
Ba Nyun and 9 others <i>vs.</i> King-Emperor ...	25
Browne C. H. <i>vs.</i> King-Emperor ...	20
Burma Railways Company <i>vs.</i> Hira Lal ...	238
C	
Chandi Charan Sen <i>vs.</i> Ram Koomar Chakravarti ...	5
Cowie, Chas. R. & Co <i>vs.</i> W. H. A. Skidmore ...	242
Chin Ah Young and one <i>In re</i> ...	275
Clifford George Staunton <i>vs.</i> Emperor ...	37
D	
Dickmann Bros. & Co., Ltd. <i>vs.</i> Sulaiman Haji Bros. & Co. ...	51
Dhunji Deosi <i>vs.</i> Pokermall Anandroy ...	54
E	
Eng Leong & Co. <i>vs.</i> B.I.S.N. & Co., Ltd. ...	92
G	
Gaggero Francesco <i>vs.</i> L. P. R. Chetty Firm by their agent Chinniah Pillay ...	266
H	
Herdandas Paladroy <i>vs.</i> Ram Mohan Bibi & 4 others ...	136
Htaung and 15 others <i>vs.</i> King-Emperor ...	163

	Page
K	
Kalima Bibi vs. Macbul Ahmed	23
Katan vs. Nga Tin and others	205
King-Emperor vs. A. J. Cooke and 4 others	187
King-Emperor vs. Kamali Khan and Deeyagy	204
King-Emperor vs. Kotiya	290
King-Emperor vs. Nga Taung Thu and 2 others	26
King-Emperor vs. Me Thin	165
King-Emperor vs. Po Ba	202
Ko Kyo and 1 vs. A. K. Curpen Chetty and 1	17
M	
Ma Aung Byu and one vs. Thet Hnin	240
Ma E Me and one vs. Ma E	245
Mahomed Ebrahim Saib Khateeb vs. Maung Ba Gyaw	69
Mahomed Esoof and 4 vs. Hajee Mahomed Esoof and 3	203
Mahomed Salay Naikwara vs. Mulla Goolam Mahomed and 7	160
Ma Ngwe Yin vs. Maung Po Taw	14
Ma Nhin Bwin vs. U Shwe Gone	105
Ma Tha and 3 vs. P. L. M. M. Chetty Firm	310
Ma Thein Shin and 1 vs. Ah Shein alias Hoke Shein, Minor by his next friend Ma To	246
Mati Ja Hindle vs. Richard James Hindle	294
Ma Tin Lun and 1 vs. Ma Dwe and 1	80
Mi Ah Pu Ma vs. Mi Hnin Zi U	83
Mi Ngwe Hmon vs. Mi Pwa Su	253
Mi Thein vs. Nga Po Nyun	34
Maung Chet Po vs. King-Emperor	43
Maung Chit Maung vs. Ma Yait & Ma Noo	133
Maung Kya and 3 vs. V. P. L. V. N. Firm	8
Maung Kyaw Yan vs. Ma Nyo U	16
Maung Lu Maung and 4 vs. Maung Pu and one	10
Maung Maung vs. Wightman & Co. and others	64
Maung Mya and 1 vs. Moosaji Ahmed & Co.	90
Maug Mya Gyi vs. Nga Po Shwe	222
Maung Po Maung vs. Maung Kaing and 1	86
Maung Tha Dun vs. S. S. Chokalingum Chetty	18
Maung Tha Kado vs. Ma Thin Myaing	197
Maung Tha Zan and 1 vs. Maung Ba Gale alias Maung Ba	293
N	
Nga Ba Lin vs. King-Emperor	101
Nga Hla Gyaw and one vs. Maung Aing and 1	279
Nga Pi and one vs. Nga Kyan Tha	282
Nga Nyun and 3 vs. Nga Po O	206
Nga Po and one vs. Nga So Pe	255
Nga Po Kan vs. Nga Shwe Dat	250
Nga Po Thin vs. U Thi Hla	27
Nga Po Ywet vs. King-Emperor at the instance of Joseph Heap & Son	209
Nga Ti, legal representative of Nga Tct (deceased) vs. Nga Pan & 1	249
O	
Oodayappa Chetty vs. Ramasawmy Chetty and others	151

	PAGE.
P	
P. J. K. Palaneappa Chetty vs. R. M. A. R. Arunachellam Chetty...	202
P. L. M. Subramanian Chetty vs. K. R. V. Vellian Chetty ...	287
P. M. P. A. N. Annamalay Chetty vs. Shaik Mahomed Ismail ...	75
Po Han and Nga Aye vs. King-Emperor ...	99
P. R. N. Palaniappa Chetty vs. P. M. R. M. Firm by one of the partners A. R. P. Palaniappa Chetty ...	199
Providence W. A. . . P. T. Christensen ...	155
R	
Ramanathan Chetty and 2 others vs. Bank of Bengal ...	126
Ramchandra vs. Latnman Pillay, agent of Viraven Chetty ...	277
Rangoon Electric Tramway & Supply Co., Ltd. vs. Rangoon Municipality ...	44
Rathna Pillay and one vs. N. P. Firm by its agent Sivaraman Chetty ...	88
R. M. A. R. Firm vs. M. R. M. S. Firm and 2 others ...	308
R. M. Ramanathan Pilly vs. M. L. V. E. R. M. Firm ...	53
S	
Sana Eman Saib vs. Moona Ena Mahomed Meera Saib and 6 ...	96
Savariammal vs. Santiago ...	129
Second Grade Pleader <i>In the matter of a</i> ...	304
Secretary of State for India in Council vs. Ma Dwe and 1 ...	268
Seena Mahomed Haniff & Co. by its managing partner S. C. Ghosh vs. Liptons Limited by its duly authorized agent W. Cuffe ...	116
Sofaer I. A. & others <i>In the matter of</i> ...	304
Stuart Smith and Allen vs. Official Liquidator, Bank of Burma ...	230
Sweyadali vs. Esnali and 2 ...	12
T	
Thaddeus G. C. <i>Ex re</i> the Will of ...	272
Ti Ya and 6 vs. King-Emperor ...	143
Toon Chan vs. P. C. Sen (Official Receiver) ...	139
Toola Ram vs. Abdul Gaffoor ...	67
T. S. Natcheappa Chetty and others vs. The Irrawaddy Flotilla Co., Ltd. ...	40
U	
U Ga Zan vs. Hari Pru ...	98
V	
V. R. M. V. A. Chetty Firm vs. Maung Po Sin ...	257
W	
Wa Foon vs. Ma Thein Tin ...	71
Y	
Yeo Kyaw Sum vs. U Ke Tu ...	63
Z	
Zaw Ta vs. Nan Ma Yin ...	225

MANDALAY BAR ASSOCIATION,

An address was delivered by Mr. C. G. S. Pillay, Advocate and President, Mandalay Bar Association, at the Annual Bar Dinner held at Mandalay on the 28th February 1914.

HE SAID:—

It was Shakespeare who said "The world is a stage and men and women merely players, oft times one man plays many parts."

How applicable this is to the Lawyer! He has to adapt himself to each varying case and plays many parts.

He is a doctor, an Engineer, a general who marshalls his facts and fights legal battles, a legislator—there are no less than 170 lawyers in the present Parliament of Great Britain and Ireland.

From Justiman to the Bill of Rights, from the genesis of the Common Law to the attainment of Self-Government, History has written upon her pages the indelible story of the service of the law to Humanity.

There is no other class which has done and is doing so much for the public. It is the lawyer who is in the forefront of every struggle for liberty. He has to do with the questions of life, liberty and property. To him the Parliament, the Legislature, the Municipal Council look for assistance. The Hague Tribunal which is growing popular is so constituted as to give scope to the Lawyer and benefit the world at large by which it is hoped that the civilized methods of obedience to the rule of law will triumph throughout the world.

'When the war drum beats no longer'

'When the battle flag is furled'

'In the Parliament of man'

'The Federation of the world.'

Time was when man scoffed at doctors, philosophers, but the worst satire was reserved for Lawyers likened to sharks for their greed, to gas bags for their windiness. Napoleon the son of a Lawyer hated Lawyers, and then enacted what is known as the Code Napoleon. There is a story told of Peter the Great on his visit to Westminster Hall when he was told that the people in wigs and black gowns were Lawyers, he exclaimed "Lawyers! I have but two in my dominions and I believe I shall hang one of them the moment I get home." The other was his personal Counsel. But the lawyer takes the joke pleasantly. It does not do him any harm, no matter what they say the moment a man gets in a tight place or the moment he is confronted with a troublesome problem or the moment he feels the need of some one to trust he goes straightway to the Lawyer.

A word for those entering the profession. The legal profession has attracted the best intelligence in the country by the fascination of being able

- (1) to make large income;
- (2) to be independent;

But the number of people who made large incomes is limited, there are innumerable men who had failed in the profession and there are others who have been able to secure a modest living.

As for independence a beginner has to devolve to a senior, to work hard for clients. To earn a name, he has to depend upon the good will of the Judges.

The path to success in the profession is steep and narrow and few climb and reach the coveted goal. A generation ago there had not been the struggle for existence as at present. Now practitioners are increasing. As regards qualifications, while fluency of speech is desirable it would not carry much. It might do well in countries where the Jury system is in vogue to appeal to the emotions, but it will be considered waste of time here.

A steady application, good memory, strong physique, a good knowledge of human nature, tact, a readiness of resource above all a very high character, an honest conscientious love of one's profession not merely as a means of making money are among the essential qualifications to ensure success. Opportunity follows one's environment. There is a tide in the affairs of men which taken at its flood leads to fortune.

The object of a Bar Association is to bring Lawyers together for Sociability as well as the discussion of subjects of interest to the profession.

It is the morale and discipline of the Bar that deserve most attention. It is the duty of the Association to jealously watch the conduct of the profession.

Time was when parties required protection from the rapacity of their legal advisers: now it seems as if it is the Lawyers who want protection from clients. A client might come to you one mornin', discuss with you the details of some case, fix your fees, promise to come in the evening, but next you will find him in another's office. It may be a question whether the Association can exercise any effective disciplinary jurisdiction. Discipline implies loyalty, respect and submission to the rules you have framed for your guidance. In Calcutta I think there is an understanding between the Bar Association and the Attorneys that no Attorney will brief counsel who does not belong to the Bar Association. The efficacy of this arrangement is testimony to the discipline and *Esprit d'corps* of the Calcutta Bar.

There is the case of underrating and underselling each other. As members of a learned profession it is not open to them to advertise themselves. By all means let us have competition, but let us not cut one another's throat. The Bar Council in England has regulated the proper fees payable to counsel. Some such rule might be useful here. As to the relations between the Bench and Bar they exist for one purpose that justice may be done to the people

who appear before the one and seek advice of the other. The duty of an advocate is to remember that he himself was taking part in the administration of Justice. An honest, capable, fearless Judge and an efficient Bar are the backbone of good Government.

The recent Madras Bar Dinner is unique in that the Advocate General presiding invited all Judges and Lawyers of the whole of that Presidency to an annual gathering which was a great success.

As for the Laws at present administered, Upper Burma is a Scheduled District. We borrow piecemeal legislation and principles of law and equity and are doing the best we can. The number of English Statutes collected by Chitty in sixteen volumes from the Magna Charta to the present day is unwieldy and some out of date.

The Indian Penal Code a monumental work of its kind, the Criminal Procedure Code, the Contract Act need Revision. A law of Torts may well be codified for India.

The number of Reports becomes bewildering.

Life is not long enough. Our time is taken up in the search of case Law instead of a mastery of the principles of Jurisprudence. Our personal Laws, Buddhist, Hindu, Mahomedan, are administered in the light of Judge-made law.

The highest tribunal in the Empire (the Privy Council) is too busy and little acquainted with the laws of the Gentoos as they are called from the time of Warren Hastings. Our Local and Revenue laws need revision.

There has been a good deal of tinkering going on for the past 50 years, but a period of half a century is a considerable time in these days for changing complex Social and economic conditions. More simplicity of codification and the repealing of obsolete enactments and less of tinkering would be more useful.

There is started lately a Prisoners' Aid Society here. I wish there were more philanthropists like Lambrosi of Italy and others who go about the prisons or find out causes and remedies for the state of crime, which may vary in each case e. g. Heredity, environment, poverty, a morbid temperament, a sudden distemper, Criminal impulses bordering on insanity, national characteristics etc. Education i. e. knowing right from wrong would play a great part in the moral regeneration of the depraved. Juvenile Courts may have to be established. Punishment like the chastisement of a child may be good enough. But severity will defeat its own purpose and may harden the Criminal. What is wanted is to know the root cause and apply the remedy like diagnosing the seat and cause of disease.

In a country like Burma with immense resources and a comparatively small population one would scarcely expect so much crime as is reported, but true nevertheless that Burma is getting a head of Indian Districts in this respect.

Speaking of poverty the local industries such as weaving, salt, sea fishery, catch boiling have been almost killed. People are driven to resort to Agriculture. Unless the cultivator acquires a scientific knowledge of the subject, agriculture alone will hardly keep him from indebtedness. The establishment of Agricultural

Banks, and co-operative credit societies, is some relief in rendering borrowing less ruinous; but so long as the conditions are what they are, it will not relieve the position of the peasantry. It has not done so even in the European countries.

Diversity of occupation to suit each individual taste essential. Forest Laws have become stringent and have handicapped timber trade.

In Kyaukpadaung for instance where there is always a scarcity of water and little rainfall. People whose sole occupation was the manufacture of jaggery can scarcely carry on a lucrative business; owing to restriction in taking even firewood from the reserves so that they have to take to cooly work or carting and there is little agriculture there.

The improvidence of the people, the rise in the price of food stuffs, the use of foreign manufactures for household necessities or luxuries, a feature of Civilization, the incidence of taxation, together with the extra charge on villages for the cost of repression of crime, have all to be reckoned with as also the fact that the gold reserve of sixteen millions sterling has been drained from India to England and lent out to Banks, and the Government of India doles out but a small proportion to Burma for its wants.

As for ~~trade the value of imports and exports~~ appears to be in an inverse ratio. Altogether the problem is one that needs anxious study and amelioration and some remedies must be found. Until then it is to be feared that Burma may not fare well, and crime may not decrease.

The past year's work of the Mandalay Association has been satisfactory: we have given our opinion on some legislative measures, such as the Indian Companies Act, The Legal Practitioner's Act, the Criminal Procedure Code, and the Revenue Laws of the province. We have had a conference through the courtesy of His Honour the Judicial Commissioner on the extension of the Transfer of property Act, and the Registration Act to Upper Burma. In this connection I may note that more facilities are needed than at present provided for the Registration of documents. Upper Burma is a country of distances: people do not readily go far to register documents, and consequently whenever there is litigation they meet with failure for want of registration.

Would that the Local Government take the Association and the Public more into its confidence and send us all intended measures of legislation to opine.

In conclusion I cannot but quote the words of the Right Honourable Mr. Asquith at a Bar Dinner given in his honour on the 10th July 1908.

"The arduous struggle, the blows given and received, the exultation of victory, the sting of defeat which are our daily experiences far from breeding division and ill-will bind us more closely together by the ties of comradeship for which you would look in vain to any other arena of the ambitions and rivalries of men."

I earnestly hope we will combine to make our Association more useful and its influence felt year by year in the years to come.

THE
BURMA LAW TIMES.

VOL. VII.]

JANUARY, 1914.

[No. 1.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 38 OF 1913.

A. T. K. P. L. MUTHIA CHETTY &
6 OTHERS APPELLANT.

vs.

L. A. R. ARUNACHALLAM CHETTY & I. RESPONDENT.

For Appellants—Giles

For 1st Respondent—N. M. Cowasjee.

For 2nd Respondent—A. B. Banerji.

Before Mr. Justice Twomey and Mr. Justice Parlett.

Dated, 10th September 1913.

* *Venue of Suit—Plaintiff's option—Causes for transfer—Preponderance of convenience.*

Though s. 20 of the Old Civil Procedure Code requiring that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so is dropped in the New Code, very strong reasons must be shown under the new as required in the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows.

JUDGMENT.

PARLETT, J.—L. A. R. Arunachallam of Rangoon filed two suits for dissolution of partnership in the District Court of Bassein. In one case the alleged partnership business was carried on at Ngathaingyaung and there were 10 partners; in the other it was carried on at Athok and there were 5 partners; all of them however were also partners in the Ngathaingyaung firm. Eight of the defendants in the Ngathaingyaung suit and 4 of those in the Athok suit desire the suits to be tried at Sivagunga in the Madras Presidency and have filed applications under section 22 of the Civil Procedure Code asking this Court to determine in which

court the suit shall proceed. Subramanian Chetty, the 2nd defendant in each of the suits, desires the hearing to be in Bassein, and he is the 2nd respondent in these applications. It will be convenient and sufficient to deal with the Ngathaingyaung suit only, as the remarks made on that case apply, so far as may be, to the Athok suit, and nothing has been said which applies only to the latter suit. Valliyama Achi, 5th defendant and 4th petitioner, originally filed an affidavit supporting the application, but she has now withdrawn it and desires the case to proceed in Bassein. The other 7 defendants have filed affidavits in practically identical terms, that of the 1st petitioner and defendant, Muthiya Chetty, however, containing some additional matter and it alone therefore need be referred to. The petition sets out that the alleged partnership was dissolved at Sirugudalpatti by mutual consent about 1909 and that thereafter 7 of the original partners being also 7 of the defendants together with 3 fresh persons formed a new partnership with which the plaintiff has not and never had anything to do, that the main issue in the suit is whether there was a dissolution of partnership at Sirugudalpatti, and that the suit has been purposely instituted in Bassein with a view to prevent it being fairly and properly tried, that all the defendants reside at Sirugudalpatti, that all the account books of the partnership are there; that the members of the new firm, the agents, who can speak to the account books, and the agents of the dissolved firm during its subsistence are there, and as these latter persons are no longer in petitioner's employ their attendance at Bassein cannot be produced; that all the evidence necessary for the determination of the suit is at Sirugudalpatti, and that a hearing at Sivaganga will be less expensive, and more convenient and expeditious than a hearing at Bassein. These statements are repeated in all petitioners' affidavits, and Muthiya further alleges that the suit is wholly vexatious and instituted at the instance of Subramanian, the 2nd defendant and 2nd respondent. This the plaintiff, 1st respondent, denies in the affidavit and 2nd respondent, who has the books of the partnership sought to be dissolved except those in current use, is prepared to produce them in Bassein whenever required to do so. The plaintiff in his affidavit denies that the plea of dissolution, for which no definite date is alleged by petitioner, is a *bona fide* one, and he files letters written to him by Karuppan one of the defendants from Ngathaingyaung on 1st December 1909 and 18th January 1910 indicating that the dissolution had not taken place then and also a copy of a letter written by himself to Muthiya on the 29th December 1911 indicating the same, of which letter the first acknowledgment was a telegram not sent till the 17th January 1912, and no detailed reply was sent till the 1st April 1912. Plaintiff asserts that this belated answer, to which he instructed his advocates to reply at once, was the first intimation he had of the alleged dissolution. He points out the delay and expense which in the event of a preliminary decree for dissolution being passed by a Court in the Madras Presidency, would be entailed over the realization of the assets and winding-up

of the business by that Court in the Bassein district, where the assets are situated: and further that the account books of the business cannot be sent from Ngathaingyaung and Athok to India without dislocating the business, whereas there is no difficulty about bringing the old books from India to Bassein. He also alleges that a former agent of the Athok firm is now at Athok and a former assistant of the Ngathaingyaung agent is now manager at Ngathaingyaung, while the 1st defendant and petitioner himself has firms in Rangoon, Ngathaingyaung and Athok. He states that a large portion of the evidence in support of his case is in Burma and not as the petitioners allege, in Sirugudalpatti; and that it will be impossible for himself to leave Burma without breaking agreements with his own employers and partners, thereby entailing heavy monetary losses on the former, damage to his own reputation, and dismissal of his son from a lucrative appointment. He also files a letter purporting to come from Muthurasappa, one of the petitioners, dated, 2nd July 1913 expressing his willingness to come to Burma as soon as the fates are propitious.

In England it has been repeatedly held that the venue will not be changed from the place where the plaintiff has laid it unless it be shown that there will be a manifest preponderance of convenience in trying the cause elsewhere. (*Church v. Barnett*)⁽¹⁾, *Helliwell v. Hobson*,⁽²⁾ and *Durie v. Hopwood*,⁽³⁾ while in *Blackman and 1 v. Bainton*,⁽⁴⁾ 25 witnesses and a horse on one side against 10 witnesses on the other were held not such a preponderance of inconvenience as to induce the Court to bring back the venue from the place where the cause of action, if any, arose. Similar principles have been followed in India. *Geffert v. Ruckhund Mohla*,⁽⁵⁾ was a suit for defamation filed in Bombay, the defendant having previously sued for damages for wrongful dismissal in Wardha, and the defendant applied for the defamation case to be tried in Wardha. The learned Judge said, "We find
" it laid down in the second clause to section 20 that the Court
" may make such an order as is now asked for if it is satisfied
" that justice is more likely to be done by the suit being instituted
" in some other Court. It would no doubt be
" much more convenient to the defendant to have the case against
" him tried at Wardha. Nearly all of his evidence and prob-
" ably a large portion of the plaintiff's evidence is only obtain-
" able there, but is that a ground for depriving the plaintiff
" of the right to bring his suit in this Court? The injury and
" damage of which he complains have been inflicted in Bombay
" and many of his witnesses he says are resident here. He
" desires to vindicate his character in the place where he alleges
" it has been defamed. I can find no authority for preventing

(1) I. L. R. Vol. 6 (Common Plea-) 116, (1871).

(2) 7 Com. Bench Reports (N. S.) 761, (1860).

(3) 7 Com. Bench Reports (N. S.) 835, (1860).

(4) 15 Com. Bench Reports (N. S.) 432, (1863).

(5) I. L. R. 13 Bom. 128, (1888).

“him from doing so. I am not satisfied, to use the words “of the section, “that justice is more likely to be done” “at Wardha or elsewhere than in this Court.” The present Code omits section 20 of the Code of 1882 which required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court, but though it leaves unfettered the Court’s discretion to determine in which Court the suit shall proceed, as strong reasons must certainly be shown under the new as were required under the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows. In *Tula Ram and 1 v. Harjwan Das and others*, (6) the defendants in a suit instituted at Mainpuri applied under section 24 of the Civil Procedure Code 1882 that the suit might be tried at Surat on the grounds that it would be tried with greater convenience to them at that place, it was held that there being no balance in favour of either justice or convenience on the side of the Surat Court the suit should proceed at Mainpuri. The Court said, “We have to see whether the “defendant—applicants have made out a case to justify us in closing “the doors of the subordinate Judge of Mainpuri to the plaintiffs and “leaving them to seek their remedy in another jurisdiction. We do “not think that they have or that any sufficient cause has been “shown for depriving the plaintiffs of the right given them by law “to select in which of the Courts they will carry on their suit.” In *Khatija v. Taruk Chunder Butt*, (7) it was held that parties desirous of obtaining the transfer of a case from one forum to another should satisfy the Court that either on the account of expense or convenience or otherwise the place of trial ought to be changed. In the course of the judgment it was said, “*Prima facie* the plaintiff, as the *arbiter litis* has a right to bring his suit in any Court which the law allows; and section 23 is only intended “as we consider, to provide for those cases where, on the ground of “expense or convenience, or some other good reason, the Court “thinks that the place of trial ought to be changed. If for instance in this case, the defendant could have shown us that “great expense could have been saved, or that the balance of convenience was strongly in favour of the case being tried at “Furridpore.” I consider these principles should be the more strictly applied, where, as in the present case, we can only determine that a subordinate Court shall not proceed with the suit and cannot direct another Court to proceed with it. The allegations that the suit was purposely instituted in Bassein with a view of its being prevented from being fairly and properly tried, that it is wholly vexatious and instituted with ulterior objects and at the instigation of Subramanian, have not been substantiated and no grounds have been shown for supposing that justice is not likely to be done in the Bassein Court. As regards the balance of convenience, it does not appear why all the defendants need appear in

(6) 5 All. 60, (1882).

(7) 9 Cal. 980.

person; and though their evidence in support of the plea of dissolution is in India, it would appear probable that rebutting evidence to show the continuance of the partnership up to the date of suit would be most likely to be obtainable in Burma as the plaintiff says it is. It was said that plaintiff might appoint an agent to conduct his affairs in Burma while he went to India for the case, but unless for very strong reasons he ought not to be compelled to do so. Stress was laid on the advantage to the Court of the witnesses being examined before it instead of on commission, but some at least of the evidence on one side or the other must probably in any case be taken on commission. As regards the books, it would appear more convenient for the old books to be sent back to Burma than for the current ones to be sent to Madras. No grounds were shown for the allegation that the proceedings in Bassein would be more expensive and protracted than in Sivagunga except that more translation might be necessary than in a Court where the language of the accounts was understood; but in a suit of this sort a certain amount of translation will be necessary in any case and as in the event of a preliminary decree being passed a Commissioner will probably be appointed to take accounts, it should be possible even in this country to appoint as Commissioner some one with the necessary knowledge of the language, while it is clear that the winding up can be more easily effected in the locality where the partnership business was carried on and in the event of a Receiver being appointed, that he should be under the supervision and control of a local rather than of a far distant Court.

In my opinion no sufficient grounds have been shown for declaring that the suit shall not proceed in the Court in which the plaintiff is by law entitled to institute it, and I would dismiss both applications, and award each of the two respondents 2 gold mohurs costs as advocate's fees.

TWOMEY, J.:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL NO. 122 OF 1911.

CHANDI CHARAN SEN vs. RAM COOMAR CHAKRAVARTI.

For Appellant—Maung Pu.

For Respondent—K. B. Banerji.

Before Mr. Justice Parlett.

Dated, 11th July 1912.

Sureties for appearance of judgment-debtor on the day the time for appeal expires—Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties—Responsibility of Sureties—Its extent.

D. M. Biswas was summarily arrested under Order XXI, Rule 2 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs the Judge ordered his release on his sureties furnishing security for his appearance on the 1st August 1909, the date when the period for

appeal against the decree expired, failing which the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to jail. An appeal was duly preferred on the 27th July 1909 and dismissed on the 14th October 1909.

The bond which the sureties actually signed was for the due performance of such decree as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on the 1st August 1909.

Held that it was clearly not in accordance with the order of the Court.

Held that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on the 1st August 1909 should discharge the sureties and that it was then the Court's duty to rearrest the judgment-debtor and commit him to prison.

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between the 10th August 1909 and the 5th April 1911 (both inclusive).

Held that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that therefore the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability.

JUDGMENT.

D. M. Biswas was summarily arrested under O. XXI and R. 2 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs the Judge ordered his release on his sureties furnishing security for his appearance on 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount. The order explained that the Judgment-debtor intended to appeal, for which purpose he would be allowed to be at liberty for two months, but if he failed to appeal within that time he would be re-arrested and committed to jail. An appeal was duly preferred on 27th July 1909, and dismissed on 14th October 1909.

The bond which the sureties actually signed was for due performance of such decree as might ultimately be binding on the judgment-debtor, and was to be operative upon the Judgment-debtor's failure to satisfy it. It said nothing about his appealing, or about producing him before the Court on 1st August 1909. It was clearly not in accordance with the order of the Court. The Divisional Court held that it was binding upon the sureties in the terms in which they signed it, and ordered execution to proceed against appellant who is one of the sureties. It held that appellant as a man of ordinary prudence might be presumed to have understood and acquiesced in the terms of the bond which he signed. That presumption is under the circumstances but a weak one. Appellant from the first asserted that he was ignorant of its real terms and believed that he merely bound himself to produce the Judgment-debtor on 1st August 1909, if he failed to prefer an appeal before that date. There was no evidence. The bond is printed in Burmese, which is not appellant's language, it is not stated that he could or did read or understand it or that it was read or explained to him. It is quite likely it was not, and that appellant not unnaturally took it for granted that the bond he was

called upon to sign embodied the conditions laid down in the order which the Judge had just pronounced.

The Divisional Court presumed that appellant knew the contents of the bond, but the Court did not and that as a mistake of fact on the part of one party only to a contract did not, under sec. 22 of the Contract Act render it voidable, it was valid and could be enforced against the appellant. I should be inclined to reverse the position. However I think if the Contract Act is to be invoked at all sec. 13 is more apposite, and that there is no consent between the Court and the appellant as they did not agree upon the same thing in the same sense. The appellant offered security for the Judgment-debtor's appearance, failing which he bound himself to pay the decretal amount. The Court took his security to pay the decretal amount if and whenever the Judgment debtor failed to pay.

It is open to question whether the security bond, as actually taken, could be enforced at all, as it does not appear to be in accordance with any provision of law. Apparently the nearest analogy to any such bond would be that provided for in Rule 2 of order XXXVIII, where the surety must bind himself to pay the decretal amount in default of his principal's appearance.

To leave abstract considerations I consider it quite clear that what the Court ordered and the appellant agreed to was that the Judgment-debtor's appearance on 1st August should discharge the sureties: it was then the Court's duty to re-arrest the Judgment debtor and commit him to prison. It is therefore for consideration whether the surety has fulfilled his obligation. He says he produced the Judgment-debtor on 1st August 1909: the proceedings do not show it: but they do show clearly that the Judgment debtor appeared before the Court in some or all of the following dates:— 10th August; 6th, 10th and 24th September; 3rd and 8th November; 10th December 1909; 19th January; 4th March; 3rd and 28th May; 26th June 1910; and 3rd and 5th April 1911. It is obvious therefore that not only did the Judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of over 2½ years. I hold therefore that the purpose for which the Sub-Divisional Judge on 31st May 1909, ordered appellant to furnish security has been fulfilled and that appellant has been discharged from liability. The appeal is allowed with costs in all Courts, advocates fees 2 gold Mohurs, and appellant is declared to be discharged from liability under the bond signed by him on 31st May 1909.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 154 OF 1911.

MAUNG KYA AND 3 OTHERS vs. V. P. L. V. N. FIRM.

For Appellants—Palit and Harvey.

For Respondent Firm—A. B. Banerjee.

Before Mr. Justice Parlett.

Dated, 10th February 1913.

Benamidar and real owner—Transaction entered into by Benamidar alleged to be unauthorised by real owner—Effect—Estopped by fraud.

Where property is held Benami and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act: So if the property is purchased in the name of a benamidar, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effects of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact.

The consideration of Rs. 650 of the conveyance of the 12th May 1903 whereby the 1st Defendant purported to purchase the land in suit proceeded from the former owner; this conveyance was in his possession and showed him to be the purchaser and he was recorded as in possession in the revenue registers. The only fact which can be alleged as existing which should have put plaintiff on enquiry is the 2nd defendant's claim that he was in possession of the land; but as at that season, the 12th June, probably agricultural operations had not commenced, it may be doubted whether he or any one was in actual occupation of the land.

Held that the plaintiff cannot be fixed with constructive notice of the alleged defect in his mortgagor's title and that accordingly the mortgage was good.

JUDGMENT.

Plaintiff sued for a mortgage decree over among other property 38·71 acres of land now in the possession of 3rd and 4th defendants. It appears that on 12th May 1903 a conveyance was executed and registered whereby 1st defendant purported to purchase the land in suit from the former owner Maung Chan Nyein for Rs. 650. On 12th June 1903 1st defendant mortgaged this land together with 12·54 acres more and some other property to plaintiff without possession for Rs. 1,500 carrying interest at 1½ per cent. per month. On 31st March 1904 a conveyance was executed and registered whereby 1st defendant purported to sell the land in suit to 2nd defendant for Rs. 650. On the same day the 2nd defendant mortgaged this and other land to 3rd and 4th defendants for Rs. 5,000 and on 29th April 1907 he sold it to them outright. First defendant did not appear but the defence of the others is that:

the real purchaser from Maung Chan Nyein was 2nd defendant who borrowed the money to pay for it from 1st defendant, who took the conveyance in his name until money was repaid to him, but that 1st defendant was merely a benamidar and was never in possession of the land, and had no rights in it to mortgage to plaintiff, and that 3rd and 4th defendants are *bona fide* purchasers for value without notice of plaintiff's claim. The court of first instance gave only a money decree against 1st defendant. On appeal the Divisional Court held that 2nd defendant was estopped by his conveyance from saying that 1st defendant was not the owner, and that oral evidence to that effect was excluded by section 92 of the Evidence Act, and gave plaintiff a mortgage decree over both pieces of land. The 3rd and 4th defendants now appeal against all three decisions. The Divisional Court was clearly wrong in giving a mortgage decree over more than the 38 odd acres, since plaintiff had expressly relinquished his claim to a mortgage decree over the other holding.

I am inclined to think that the decision on the question of estoppel was correct, having regard to Dr. Gour's remarks in art. 611 of his commentary on the Transfer of Property Act (3rd Edn. p. 371) and in particular to the dictum of Lord Halsbury in *Colonial Bank v. Cady* (1) there quoted. The estoppel would extend to 3rd and 4th defendants who claim through 2nd defendant. In art. 619 (p. 378) the same learned commentator quotes authorities to the effect that "where property is held *benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a benamidar, and the indicæ of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of that fact." The consideration of Rs. 650 admittedly moved from 1st defendant, the conveyance was in his possession and showed him to be the purchaser: he was recorded as in possession in the Revenue Registers. The only fact which can be alleged as existing which should have put plaintiff on enquiry is the 2nd defendant's claim that he was in possession of the land, but as at that season, 12th June, probably agricultural operations had not commenced, it may be doubted whether he, or anyone, was in actual occupation of the land. I do not think plaintiff can be fixed with constructive notice of the alleged defect in his mortgagor's title, and accordingly the mortgage is good.

I modify the decree of the Divisional Court to one granting plaintiff a mortgage decree over holding No. 23 of 1901-02 which corresponds to No. 27 of 1907-08 of Ahnyet Kwin only. As this appeal has been partly successful each party will bear his own costs therein.

(1) 15 App. Cas. 267. (273).

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 123 OF 1912.

MG. LU MG. & 4 ORS. v. MAUNG PU & I.

For Appellants—Lambert.

For Respondents—Palit.

Before Mr. Justice Parlett.

Dated, 22nd July 1913.

Suit for possession—whether under Section 9 of the Specific Relief Act or not—Inference from the fact that the suit was brought within 6 months—Also from the fact that the suit was for possession only and not declaration of title and does an appeal lie to the Divisional Court?

The sole question in this appeal was whether the suit was in fact brought under Section 9 of the Specific Relief Act (1). The Divisional Court held that it was, because (a) the plaintiff was entitled to bring such a suit, and (b) the suit was filed within 6 months of the dispossession.

In this Court the finding is supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title.

Held that the second paragraph of section 9 shows clearly that no one, though entitled to sue under that section, is bound to do so, but that he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section.

Held also that a person by seeking his remedy early does not thereby alter the nature of his suit.

Held further that there is no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

The plaintiff in the present case set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants, alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the court of first instance held that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession.

Held that both from the frame of the plaint and the course which the case took it was always intended to be a suit based upon title and never a suit under section 9 of the Specific Relief Act (1) and that the plaintiff cannot be heard to assert the contrary and that, therefore, an appeal lay to the Divisional Court.

Ram Harakh Rai vs. Sheodihal Joti (2); Kalee Chunder Sen vs. Aduo Shaibh (3) and Ramasawmy Chetty vs. Paraman Chetty (4) referred to.

JUDGMENT.

PARLETT, J.—The sole question in this appeal is whether the suit was in fact brought under section 9 of the Specific Relief Act. The Divisional Court has held that it was because (a) the plaintiff was entitled to bring such a suit and (b) the suit was filed within six months of the dispossession. In this court the finding is supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title. I consider none of these reasons to be sound. The second paragraph of

(1) No. 1 of 1877.

(2) I. L. R. 15 All. 384.

(3) 9 W. R. 602.

(4) I. L. R. 25 Mad. 548.

section 9 shows clearly that no one, though entitled to sue under that section is bound to do so, but he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section. As to the time when the suit was filed, because a man seeks his remedy early he does not thereby alter the nature of his suit. As to the prayer I see no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

It is true that in *Ram Harakh Rai v. Sheodihal Joti* (1) it was held that a court should in all cases in which it applies, give effect to the provisions of the first paragraph of section 9 of the Specific Relief Act, whether that section is expressly pleaded or not, but that is no authority for refusing to entertain a suit based upon title merely because specific relief might be asked for and is not as was ruled in the other case of *Kalee Chunder Sen and others v. Adoo Shaibh and others* (2). Section 15 of Act XIV of 1859 does not affect the general law on the matters to which it relates, but provides a special remedy for a particular kind of grievance. In *Ramasawmy Chetty and 1 v. Paraman Chetty* (3) a case very like the present one the Allahabad ruling was not followed. The plaintiff sued to eject defendants from certain land claiming title to it by purchase and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The lower court found that plaintiff failed to prove title by purchase, and declared plaintiff entitled to possession under Section 9 Specific Relief Act, but dismissed the suit in so far as it claimed to have plaintiff's title established. The High Court held that the issue concerning title should have been tried. In the present case plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants alleged that they had redeemed the mortgage and so extinguished plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken after which the court of first instance held that defendants had not redeemed the mortgage and that there was abundant evidence to prove plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession. It appears to me both from the frame of the plaint and the course which the case took that it was, and was always intended to be a suit based upon title, and never a suit under section 9 of Specific Relief Act and that plaintiff cannot be heard to assert the contrary. An appeal therefore lay to the Divisional Court. I reverse the decree of that court and direct that the appeal be readmitted and disposed of according to law, costs to follow the result.

(1) 15 All. 384 (1893).

(2) 9 W. R. 602 (1868).

(3) 25 Mad. 548 (1901).

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 76 OF 1912.

SWEYDALI v. { 1. ESNALI.
2. ABDUL MAJID.
3. OLI GHOLABI.

For Appellant—Bilimoria.

For Respondents—Ba Dun.

Before Mr. Justice Parlett.

Dated, 22nd July 1913.

Benami transfer made to defeat claim of creditors—Real owner suing for possession from Benamidar on the ground that the intended fraud was wholly inoperative—Burden of proof—Real owner to prove that fraud was inoperative.

The respondents sought to recover some land which they alleged they had transferred *benami* to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative.

Held that if this be so, they are entitled to recover the land under the Privy Council Ruling in *T. P. Pethepermal Chetty v. R. Muniandy Servai* (1).

As to the question upon whom the burden of proof on the point lay,

Held that it lay upon the plaintiff to prove that no part of the intended fraud had in fact been carried out; that as the plaintiff was alleging an intended fraud on his own part and seeking to escape the consequences of it, he was bound to allege and to prove that the intended fraud was in fact wholly inoperative; and further that unless he alleged and proved that fact his suit must fail, and therefore the burden lies on him to prove it.

JUDGMENT.

PARLETT, J.—Respondents sought to recover 24 acres and odd of land which they alleged they had transferred *benami* to appellant and one Lohman by a registered deed dated 31st December 1908, in order to defeat the claims of their creditors. The first Court dismissed their suit but the Divisional Court granted them possession, without however ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative. If this be so they are of course entitled to recover the land under the Privy Council ruling in *T. P. Pethepermal Chetty v. R. Muniandy Servai* and 2 (1). The appellant contends that the finding of the Divisional Court was wrong. The first question is upon whom the burden of proof on the point lay, and I have no hesitation in saying that it lay upon the plaintiff to prove that no part whatever of the intended fraud had in fact been carried out. I think this placing of the burden might be referred to sections 101 to 103, 106 and 110 of the Evidence Act, but it will be sufficient to say that the plaintiff is

(1) 4 L. B. R. 266.

alleging an intended fraud on his own part and seeking to escape the consequences of it, and in order to enable him to do so he is bound to allege, and to prove, that the intended fraud was in fact wholly inoperative. Unless he alleges and proves that fact his suit must fail and therefore the burden lies on him to prove it.

The evidence he offered was to the following effect. When the transaction was effected on 31st December 1908 he anticipated that three persons would obtain decrees against him, and subsequently they did so, namely Baungaw for Rs. 500, Chinia Chetty for Rs. 400 and Dagu for Rs. 250 with costs in each case. Plaintiff says he paid off the amount due to each about the time he filed this suit, 24th July 1911. One of his witnesses says he saw plaintiff pay Baungaw Rs. 100 but he admits that Baungaw accepted a smaller sum than was decreed to him. That is all the evidence on the point. Plaintiff admits that Baungaw and Dagu are still in the District, and though he alleged that Chinia Chetty had gone to Madras, there is evidence for the defendant that this is not so, and that he too is in the District. None of them is cited by plaintiff, nor does he produce any record of satisfaction of any of the decrees. On the other hand the defendants call Chinia a clerk who states that his decree was obtained on 26th August 1908, *i. e.* before the benami sale, and this, together with the admission as to Baungaw's compromise would be ample to shift the burden to plaintiff even if it originally lay upon defendant to shew that the fraud had been carried out. The Divisional Court held that as there had been no attempt by the decree holders to attach the land and impugn the sale they cannot have suffered, and moreover that as the present suit was being decreed in plaintiff's favour the creditors could thereupon attach the land. As to the first point, it is merely speculation, it may well be that the creditors enquired and believed the sale to be a genuine one, or at any rate that they would be unlikely to be able to prove the contrary. As to the second, as the Divisional Court's decree was only passed on 1st February 1912 it is quite likely that execution of some or all of the decrees might be barred, and admittedly Baungaw had compromised his claim and therefore could not now attempt to execute his decree. In my opinion the testimony as to that compromise alone is strong evidence that in fact the fraud was not inoperative, for it is quite impossible to believe that he would not have got better terms if the land in suit had been available to realize his decree against. The burden which plaintiff took upon himself was in my opinion of the heaviest possible nature and he totally failed to discharge or even appreciably lighten it.

I reverse the decree of the Divisional Court and restore that of the Sub-Divisional Court, Respondents to pay costs of appellant throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 224 OF 1911.*

MA NGWE YIN—DEFENDANT—APPELLANT.

vs.

MAUNG PO TAW—PLAINTIFF—RESPONDENT.

For Appellant—Maung Thin.

For Respondent—Tha Din.

Before Mr. Justice Parlett.

Dated, 3rd April 1913.

Marriage—Breach of contract of marriage—Damages—Will a suit for such damages lie?
 Damages for a breach of a contract of marriage may be awarded to a man.

P. Tribovandas vs. P. M. Nathubhoy (1) followed.

Between Burman Buddhists a suit by the man will lie, unless it can be shewn to be forbidden by the Burmese Buddhist Law.

The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public.

Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and his reputation.

The defendant now appeals on the grounds (*inter alia*) that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation.

Held that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that, therefore, there was nothing to base the finding of either Rs. 13 or Rs. 30 upon.

Held also that there was nothing on the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury.

Held further that the fact that a man has merely become the butt of his acquaintances' jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature.

JUDGMENT.

PARLETT, J.—Respondent sued appellant for damage for Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for “injury to his reputation in public.” Both sides appealed, and the district court increased the damages to Rs. 20 for the furniture and Rs. 30 for “injury to his

*Appeal against the decree and judgment of the District Court of Prome in Civil Appeal No. 45 of 1911 varying the decree and judgment of the Township Judge of Shwedoung.

(1) I. L. R. 21 Bom, 23.

social standing and his reputation." The defendant now appeals on the grounds (1) that the suit did not lie, and (2) that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation.

The case of *P. Tribovandas v. P. M. Nathubhoy* (1) is authority for damages for breach of a contract of marriage being awarded to a man, and, as the district court points out, the ruling in *Maung Hmaing v. Ma P'wa Me* (2) is authority that between Burman Buddhists a suit by the man will lie unless it can be shown to be forbidden by the Burmese Buddhist Law. Section 63, Vol. 2 of the late *Kin Wun Mingyi's Digest* was quoted as forbidding such a suit. In my opinion that section deals with only the particular circumstances therein set forth. Section 74 appears to be direct authority that under other circumstances such a suit might lie.

I consider, however, that the second ground is one of substance. As regards the furniture the facts found by both courts are that in consequence of appellant's promise to marry him respondent bought furniture and household effects to the value of some Rs. 128, which apparently he still has. One witness only says that no Burman Buddhist would take them off his hands as they would be regarded as unlucky. The respondent never alleged this, nor did he either in his plaint or in his evidence claim to have suffered actual loss over the purchase of these articles. There is no evidence whatever that he has made any attempt to resell any of them, or what amount he would be likely to realise for them from a person not a Burman Buddhist, or otherwise averse to buying them; nor is there any evidence that some if not all the articles are not such as to be of use to himself. Thus it cannot be said that there is any evidence at all of actual loss having been sustained by reason of his purchase, much less of what the amount of that loss was, and therefore there was nothing to base the finding of either Rs. 13 or 30 upon. As to the other item the plaint merely alleges that appellant's breach of her promise has caused great pain of mind and unhappiness to respondent, his parents and relations. In this suit obviously the effect upon respondent himself can alone be considered. In his evidence he merely says that his friends and associates jeered at him and he felt much shame on account of the matter. His witnesses do not speak to any other consequences of the breach than a feeling of shame on the part of respondent. I find nothing on the record to indicate that he has suffered injury either to his social standing or to his reputation, much less any evidence indicating any measure of damages for such injury. In my opinion that a man has merely become the butt of his acquaintances' jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature. I therefore reverse the decree of the district court and dismiss the suit with costs in all courts, advocate's fee in this appeal two gold mohurs.

(1) 21 Bom. 23.

(2) S. J. 533.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 100 OF 1912.

MAUNG KYAW YAN vs. MA NYO U.

For Appellants—K. B. Banerji.

For Respondent—Karak.

Before Mr. Justice Parlett.

Dated, 22nd July 1913.

Buddhist Law—Divorce—Mere caprice and Petty quarrels not sufficient ground for granting a divorce.

A divorce cannot be granted on mere caprice and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce.

Mi. Po Du vs. Maung Shwe Bank S. J. 607 followed.

Ma. Sin vs. Te Maung 5 L. B. R. 87 referred to.

Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent which has been confirmed on appeal. This appeal was lodged on the ground that the decree was passed on grounds insufficient in law.

The facts in the present case were that the parties had both been married before, the appellant being 53 and the respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On the 28th October 1911 the appellant missed rice, plantains and coconuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parent's house. She then attempted to get a divorce before the headman without success and on the 11th November 1911, the 14th day after the quarrel, she filed this suit.

Held that the facts stated above did not constitute such cruelty as entitled her to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms.

JUDGMENT.

PARLETT, J.—Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent, which has been confirmed on appeal. This appeal is lodged on the ground that the decree was passed on grounds insufficient in law. Various rulings have been cited in the Lower

Courts and in this Court. As regards *Ma Sin v. Te Maung* (1) the question of the grounds on which a divorce as by mutual consent could be obtained by a wife after ill-treatment was not raised or decided. No doubt the Upper Burma case of *Maung Pye v. Ma Me* (2) lays down that misconduct on the part of a husband which may not in itself be sufficient to entitle a wife to divorce under the rule of separation where the husband is the offender, may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent. I should be loth to question so high an authority nor is it necessary to do so, for it does not lay down that the ill-treatment to be sufficient for a divorce by mutual consent need not be of a substantial nature, where it is clear that in that particular case the ill-treatment was very severe, varied and protracted. So far as I am aware the dictum of the learned judge in *Mi Po Du v. Maung Shwe Bauk* (3) that a divorce cannot be granted on mere caprice and that petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce, has never been dissented from, and becomes, it appears to me, of even greater weight as civilization and enlightenment progress.

The facts in the present case are that the parties had both been married before, appellant being now 53 and respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not always as amicably as might be, and on 28th October 1911 appellant missed rice, plantains and cocoanuts, and accused his wife of taking them to give to her children, and told her to go away from his house. She did so, and went to her parents' house. She then attempted to get a divorce before the headman without success, and on 11th November 1911, *i.e.*, the fourteenth day after the quarrel, she filed this suit. Respondent asked her to return to him and she refused. The question is whether, in law, these facts constitute such cruelty as to entitle her to a divorce, even as by mutual consent. I have no hesitation in holding that they do not. It is a misuse of terms to say that appellant brought an unfounded charge of theft against his wife and turned her out of the house. He was no doubt annoyed at the loss of his things, and perhaps not unnaturally assumed that his wife's former family, who appear not to live with them, had had the benefit of them, and this he would naturally resent. Clearly telling her to leave the house was no hardship to her, as she had her parent's house to go to and was ready enough to go; while appellant was anxious to make amends. I consider that the matter was a petty quarrel such as a court should not treat as sufficient ground for a divorce on any terms.

I therefore reverse the decree of the District Court, and dismiss the suit with costs, advocate's fee in this Court 2 gold Mohurs.

(1) 5 L. B. R. 87.

(2) 2 U. B. R. (1902-03), p. 6.

(3) S. J 607.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 180 OF 1911.

MAUNG THA DUN v. S. S. CHOKALINGAM CHETTY.

For Appellant—Villa.

For Respondent—A. B. Banerji.

Before Mr. Justice Parlett.

Dated, 10th January 1913.

Civil Procedure Code—Order 21, Rule 91—setting aside Auction Sale on the ground that Judgment-debtor had no saleable interest—Fraud of decree-holder concealing his knowledge.

Where an auction purchaser of land and 2 houses on it at a Court sale found that the Judgment-debtor had interest only in the houses and not in the land and then sought to set aside the sale.

Held that Rule 91 of Order 21 does not apply where the Judgment-debtor has no saleable interest in a portion only of the property sold at the auction.

Held further that the contention that the decree-holder knew that the Judgment-debtor had no interest in the land and fraudulently concealed that knowledge thus inducing the auction purchaser to buy the land—was not supported by the fact found in the case.

JUDGMENT.

At an auction sale held in execution of a mortgage decree against the late Mg. Gale, appellant bought for Rs. 2,490 two houses and the land they stood on. It has now been finally held that Mg. Gale had no right, title or interest at all in the land. The houses without the land are valued by appellant at Rs. 200, and there is evidence that their value does not exceed Rs. 600. The purchaser sues the decree holder and the Judgment-debtor's legal representative to set aside the sale altogether and to recover his purchase money with interest, his claim against the Judgment-debtor's legal representative being in her representative capacity and to the extent only of the surplus over and above the decretal amount which may come into her hands.

The main argument for the sale to be set aside is that the interests in the land and in the houses on it were separable, and that as the Judgment-debtor had no saleable interest at all in the land, the entire sale can be set aside under rule 91 of order XXI. There is abundant authority that this rule does not apply where the Judgment-debtor has no saleable interest in a portion only of the property though the majority of the cases quoted (1) refer to sales of property in the whole of which the Judgment-debtor had only a partial interest. But the Calcutta case of Sonaram Das v. Motiram Dass and others (2) is exactly like the present case, in as much as there the Judgment-debtor had an interest in a portion only of the land sold, and none whatever in the remainder, and it

(1) 9 Cal. 626; 23 All. 355; 27 All. 537.

(2) 28 Cal. 235; (1900).

was held following an earlier Madras case (3) that the sale could not merely on that ground be set aside, nor could the auction purchaser claim a refund in proportion to the extent to which the judgment-debtor had no interest in the property sold.

The next ground advanced is fraud on the part of the decree holder, the allegation being that he knew the judgment-debtor had no interest in the land and that his concealment of that knowledge and his bringing the land to sale constituted fraud, appellant being thereby induced to buy. Both the Lower Courts fully set out the facts, and the Sub-Divisional Court decided that the decree holder did not know the judgment-debtor had no interest in the land. The Divisional Court indeed was of opinion that he knew of Ma Ma Gyi's application but whether that of 23rd October 1908, or that of 27th February or that of 24th March 1909 is not stated; neither is there evidence on which the opinion is based, and I find none: on the contrary there is evidence that his pleader knew nothing of her first petition when he filed his application for review of Judgment on 29th October 1908. On the other hand there is a good deal of evidence tending to show that he believed the judgment debtor had an interest in the land as well as in the houses thereon. On the very day of Ma Ma Gyi's deed of gift to him, the land was changed from her name to his in the Revenue Registers. In the mortgage deed of 10th November 1906 he mortgaged the land as well as the houses to the decree holder: when he obtained a decree not covering the land he got his pleader, who had no knowledge of Ma Ma Gyi's claim to it, to apply for a review, and obtained it. When Ma Ma Gyi sued to establish her right to the land both the decree holder and appellant contested her suit up to the highest court on the grounds that she had transferred the land as well as the houses. The finding of the Sub-Divisional Court on the point was clearly justified. At the hearing plaintiff endeavoured to prove that Solayappa Chetty assured him that if the land was not comprised in the property sold he would refund the money: the only support for this is the evidence of a man once in Jail, a rent free tenant and former witness of plaintiff's, but there is evidence that Solayappa was not in this country at all during the suit or at the time of the sale. The allegation cannot be believed. In this appeal it was urged that on the authority of Mahomed Kala Meah v. A. V. Harperink and others (4) the sale should be set aside. In that case the purchaser was misled by an inaccurate statement as to the property being sold made at the sale by the Court's Officer. In the present case there was nothing of the kind. That when the sale was ordered under the original mortgage decree the bailiff was expressly warned not to sell the land is immaterial. The court reviewed that Judgment including the land and expressly ordered the bailiff to sell the land as well as the houses. The bailiff explained and carried out those orders: it was his duty to do nothing more; nor would he have been justified in doing more.

(3) 17 Mad. 228.

(4) V. L. B. R. 25.

Appellant alleged in his evidence that the bailiff told him that the land was for sale and if there were any complications the court would, or might refund the money. This is denied and is improbable in the extreme and cannot be believed.

Apart however from all this there is an admission by plaintiff himself which I consider completely puts him out of court as regards his pleas of fraud on the part of the decree holder or misrepresentation by the bailiff. He swore before the purchase I understood that the land, *i. e.* house sites belonged to Ma Ma Gyi in other words even if the decree holder had and had concealed this knowledge and even if the bailiff made a misrepresentation, the plaintiff was not misled thereby. He bought the property knowing quite well that the title to the land was uncertain, and with his eyes fully open to the risk he was running.

His appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 123* OF 1913.

C. H. BROWNE vs. KING-EMPEROR.

For Appellant--Patker and Glanville.

For King-Emperor—Government Advocate.

Before Mr. Justice Parlett.

Dated, 13th March 1913.

Misdirection—charge to jury—Criminal Procedure Code, Section 297—"Dishonestly."

When the accused was tried for criminal breach of trust by a District Magistrate with the aid of a jury and the District Magistrate in summing up did not expressly tell the jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss' and where they were not told what those terms meant.

Held that there had not been sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict could not stand.

PARLETT, J.—Appellant was tried as a European British subject by the District Magistrate, Rangoon, and a jury and convicted under section 409 of the Indian Penal Code and sentenced to nine months' rigorous imprisonment. That sentence exceeds the Magistrate's powers under Section 446 of the Code of Criminal Procedure and cannot be confirmed. Appellant, however, appeals on various grounds and those which were urged at the hearing might be summarised as follows:—

I. It was urged that the charge itself was defective in that it stated that accused "criminally misappropriated" the money

*Appeal against the conviction and sentence of 9 months' rigorous imprisonment passed in Criminal Trial No. 12 of 1913 by the District Magistrate, Rangoon, under Section 409, I. P. C. on the appellant who was tried as a European British subject by the District Magistrate sitting with a jury of five.

entrusted to him and that it did not state that it was done "dishonestly." No doubt, the correct form of the charge in view of section 221 (2) Criminal Procedure Code would have been that accused being entrusted with money in the way of his business committed criminal breach of trust in respect of that money. But, it is obvious not only that any objection to the wording could and should have been raised at the commencement of the trial, but also that the charge as framed did give the accused notice of the matter with which he was charged. Counsel naturally never ventured to suggest the contrary; indeed in his reply he withdrew the argument. It was clearly untenable.

2. It was argued that there was misdirection to the jury in that the magistrate told them that the facts were not in dispute, whereas certain of them were; that the magistrate had decided certain questions of fact instead of leaving them to the jury; and that he expressed his opinion upon others without telling the jury that they were not bound by such opinion. The charge must be read as a whole and in relation to the circumstances of the case. Appellant as an auctioneer received articles to sell on behalf of the complainant and did sell some and receive payments to the extent of Rs. 2,296-9-9 for them in March 1912. This amount less certain sums due to him for commission etc., was due to be paid to complainant within three months. At the end of that time demand was made and appellant expressed himself unable to pay. Subsequent demands were also made unsuccessfully and complainant would have been willing to grant further time for payment, if appellant could furnish a guarantor. These facts are admitted. It is urged that the contract between the parties did not create a trust, that the facts as to what that contract was were in dispute and should have been left to the jury to decide, whereas the Magistrate held that the existence of a trust was established. It appears that it is customary here for auctioneers to have to pay up the value of goods sold for their clients within one month of the sale. It is urged that the fixing of the time in this case at three months, no interest being charged on the sum due, together with the offer to grant further time if a guarantor were furnished, are facts bearing on the decision of the point whether the contract between the parties was the usual one between auctioneer and clients, and the decision should have been left to the jury; or, at any rate, that the willingness to grant time on guarantee points to a fresh contract made after the three months expired, and that whether thereunder the relationship of trust was retained was a question for the jury.

It cannot be gainsaid that the ordinary relationship between auctioneer and client is one of trustee and *cestui que trust*, both as regards the goods made over by the latter to the former to sell for him and also as regards the money produced by the sale and received by the auctioneer. (*Crowther v. E. Good.*) (1) What the magistrate, in effect, told the jury was that the admitted facts as to the original

(1) 24 Ch. Div. (1887) 691.

transaction between the parties would constitute a trust; but that appellant relied upon further facts as pointing to special conditions entered into between the parties in consequence of which appellant did not hold the sale proceeds, as the money of the complainant, and he left the question of the existence of such special conditions and the inference to be drawn from them to the jury. In this I am unable to hold that there was misdirection. No doubt it is desirable to remind the jury that they were the sole judges of fact and that any expression of opinion by the judge upon the facts is not binding upon them. But, in this case, I am of opinion that the questions of facts, which should properly have been left to the jury, were, in fact, expressly so left.

3. Some alleged minor errors in the charge to the jury, have been referred to *viz.*, that certain arguments used by the prosecuting counsel were attributed to the defence. It is not, however, suggested that they were erroneous nor that their being attributed to the wrong side has, in fact, occasioned a failure of justice, without being satisfied as to which an Appellate Court is prohibited from interfering.

4. Lastly, it is argued that section 297 of the Criminal Procedure Code was not complied with, in that the magistrate did not sufficiently lay down the law by which the jury were to be guided. It appears that the laying down of the law consisted merely in reading out sections 405 and 409 of the Indian Penal Code. It is urged that this was an insufficient explanation of the constituents of the offence reliance being placed on *J. S. B. Birch v. K. E.* (2) and also *Tajir Premarik v. Q. E.* (3) and *Marie Valyan, and others v. K. E.* (4) and in particular that the jury were not told the meaning assigned in the Indian Penal Code to the word "dishonestly," which, as in the first case cited above, is an essential part of the definition of the offence. It can hardly be necessary in every instance when laying down the law to go back to absolutely first principles and give the definition of every expression used in the section dealing with the offence. To do so might savour of an insult to the intelligence of the jury. For instance, I doubt whether judges often, if ever, tell the jury that the word "death," in sections 299 and 300 of the Indian Penal Code denotes the death of a human being. Similarly in a simple case of theft where a pick-pocket steals a man's watch and runs away with it and the defence is one of mistaken identity, the omission to define "dishonestly" might well be held out to be misdirection which had in fact caused a miscarriage of justice. But, though in many cases the popular meaning of the word, and that assigned to it in the Indian Penal Code coincided, there were certainly instances in which they did not. Men's standards of honesty and straightforwardness differ and so consequently do their opinions of other persons' conduct. Instances are common of transactions, which

(2) 5 L. B. R. 149 (1909).

(3) 25 Cal. 711 (1898).

(4) 30 Mad. 44 (1906).

are discreditable, dishonourable, even fraudulent but which nevertheless fall short of being dishonest within the definition of that term as given in the Indian Penal Code.

In the present instance, there were circumstances which bore upon the question as to whether appellant's action was or was not dishonest within that definition, and though I think the attention of the jury was called to most, if not all of them in the course of the summing up, yet they were not expressly told that the test they were to apply was whether those circumstances showed an intention of causing wrongful gain or wrongful loss, nor were they told what those terms meant. It may be that they thought appellant untrustworthy in business matters, that his conduct in not paying complainant as soon as he received the money was discreditable or even dishonourable; but it is impossible to say that they considered the facts in the light of the definition and came to the finding that he acted with the intention of causing wrongful loss or wrongful gain, and I am, therefore constrained to hold that there had not been a sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict cannot stand. The finding and sentence are reversed; and appellant will be committed for trial. Bail in Rs. 3,000 with two sureties jointly and severally in that sum may be accepted.

[In Criminal Sessions Trial No. 11 of 1913 the appellant was tried before a jury of 9 persons, the Honourable Mr. Justice Ormond presiding, and was acquitted by a unanimous verdict of not guilty on 1st July 1913.—Editor.]

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 87 B* OF 1913.

AH YWAY AND ONE vs. MA GYI.

For Appellant—Lentaigne.

For Respondent—Maung Kin.

Before Mr. Justice Twomey.

Dated, 26th June 1913.

Criminal Procedure Sections 133, 135, 138—Time for setting up bona fide claims to land.

Where a conditional order is passed under section 133 Criminal Procedure Code and the person against whom the order is made raises a *bona fide* claim that the subject of contention is private property the Magistrate is bound to investigate the

* Review of the order of the Eastern Sub Divisional Magistrate of Rangoon, dated the 2nd day of April 1913 ordering the case against the appellants under section 133 of the Code of Criminal Procedure to be tried by jury appointed under section 138 of the Code of Criminal Procedure.

claim and cannot leave it to a jury appointed under section 138. There is however no authority for holding that once a jury is appointed it is open to the person against whom the order is made under section 133 to set up such a claim and to have it determined by the Magistrate before the Jury proceeds with the matter.

L. V. Banerji vs. R. K. Mukerji, I. C. L. J. 434 (436) followed.

Obiter—If the jury decided that the order was reasonable and proper the appellant would not be estopped from bringing a Civil Suit to establish his right to exclusive enjoyment of the land.

M. R. Sahoo vs. M. L. Roy, I. L. R. 6 Cal. 291 referred to.

ORDER.

The rulings cited by the learned advocate for the applicant show conclusively that where a conditional order is passed under section 133 of the Criminal Procedure Code and the person against whom the order is directed raises a *bona fide* claim that the subject of contention is private property the Magistrate is bound to investigate the claim, and if he finds it established to stop further proceedings. Where such a claim is raised the Magistrate cannot leave it for decision to a jury appointed under section 138.

But in the present case the applicant made no such claim when he appeared to answer the conditional order. The order was issued on 2nd December 1912 and the applicant's advocate applied to the Magistrate on 19th December to appoint a Jury under section 135. It was not till the 2nd April 1913 when the Jury had been constituted and were ready to go into the matter in dispute that the advocate raised this point, and asked the Magistrate to go into the question of title to the land over which a public right of way is claimed. I think that it was then too late. This view is supported by the following passage in *L. V. Banerji vs. R. K. Mukerji* (1). "The rule, however, that a *bona fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself". I can find no authority in any of the cited rulings for holding that once a jury is appointed on the application of the person against whom an order under section 133 has been made, it is open to him at a later stage to set up a claim of right to the subject of contention and to have this claim determined by the Magistrate before the jury proceed with the matter.

It appears to me that there is no alternative now but to let the jury try the issue whether the Magistrate's order under section 133 is reasonable and proper.

I may note however that if the jury should decide that the order is reasonable and proper and the Magistrate should then make the order absolute, the applicant will apparently not be estopped thereby from bringing a civil suit to establish any right he may claim to the exclusive enjoyment of the land. See *M. R. Sahoo vs. M. L. Roy* (2).

The application is dismissed.

(1) I. C. L. J. 434 (436).

(2) 6. Cal. 291.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION NO. 101 B* OF 1913.

BA NYUN & 9 OTHERS v. KING-EMPEROR.

Charged under Section 188 Indian Penal Code.

Before the Hon. Mr. Justice Twomey.

Dated, 3rd July 1913.

Indian Penal Code Section 188—Authority of Revenue Officers—Criminal Procedure Code—Section 239.

Ten persons were tried together for disobeying the Deputy Commissioner's order to remove certain Zayats built by them on land granted to some other persons.

Held that the Land and Revenue Act and the rules framed under it do not confer on Revenue Officers any power to deal with third parties who trespass on grant land or who otherwise interfere with grantees' enjoyment thereof.*Held* also that the case did not fall within Section 239 Criminal Procedure Code. The conviction was set aside.

ORDER.

TWOMEY, J. The applicants lately built Zayats on a piece of land surrounding a certain ancient pagoda in the Insein District. But a grant of the land had already been granted by the Deputy Commissioner in 1909 for the purpose of a Karen Christian burial ground.

The Township Officer by the Deputy Commissioner's orders directed the applicants to remove the Zayats by a certain date and as the applicants failed to comply they were prosecuted under Sec. 188 I. P. C. and fined Rs. 5 each. They have now applied in revision to this Court, pleading *inter alia* that the Deputy Commissioner and the Township Officer were not lawfully empowered to promulgate the order in question.

It does not appear from the Revenue proceedings or from the convicting Magistrate's Judgment under what provision of law the D. C. conceived himself to be acting. I am unable to find that there was any lawful authority for the order. The Land and Revenue Act and the rules framed under it do not appear to confer on Revenue Officers any power to deal with third parties who trespass on grant land, or who otherwise interfere with the grantee's enjoyment thereof. So far as I can see, an order directing persons other than the grantee to take certain order with buildings on the land is not authorized by the Act or rules.

Further more, it is very doubtful whether the trial of the ten appellants jointly was lawful under Chapter XIX of the Code of Criminal Procedure. The case does not seem to me to fall under Section 239. Notice of the present application was sent to the District Magistrate but no one has appeared in support of the convictions.

On the above grounds I set aside the convictions and sentences and direct that the fines paid by the applicants shall be refunded to them.

* Re view of the order of the Additional Magistrate of Hlegu, dated the 30th day of April 1913, passed in Criminal Regular Trial No. 35 of 1913.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 141^A B OF 1913.

KING-EMPEROR v. NGA TAUNG THU & 2 OTHERS.

Before Mr. Justice Twomey.

Dated, 29th May 1913.

Commitment order—Quashing of—Criminal Procedure Code sections 215, 537, 494.

A commitment order can be quashed only on a point of law under section 215 of the Code of Criminal Procedure such as want of territorial jurisdiction in the Committing Magistrate. But the commitment would be valid unless a failure of justice had been in fact caused by such commitment (section 537). A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such case to instruct the Public Prosecutor to withdraw under section 494 Criminal Procedure Code.

ORDER.

TWOMEY, J.—The three accused have been committed to Sessions on a charge of murder. The order of commitment was passed by the 1st class Magistrate, Ramree. The case did not occur within the limits of his territorial jurisdiction. He held the inquiry because an order was passed transferring the case from the Cheduba Magistrate to the Ramree Magistrate. But this order of transfer was passed by the Sub-Divisional Magistrate, Kyaukpyu who had no power to pass it. The Sub-Divisional Magistrate purported to sign the order “for the District Magistrate” the District Magistrate being on tour at the time. But this device would not overcome the difficulty. It was only the District Magistrate who could pass the order and the officer who was carrying on the District Magistrate’s current duties was not vested with the District Magistrate’s powers under the Criminal Procedure Code.

A commitment order can be quashed under section 215 C. P. C. only on a point of law. The want of territorial jurisdiction in the 1st class Magistrate who held the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment (see section 537 C. P. C.) If a failure of justice did occur in this case it is clear that it was not due to the fact that the committing Magistrate had no territorial jurisdiction to inquire into the case. The commitment order cannot be quashed on this ground.

The District Magistrate recommends that it should be quashed on the ground that the commitment should not have been made and that there should be further investigation. He forwards a note by the Police Superintendent pointing out that the evidence is insufficient and untrustworthy. There is certain direct evidence that the accused beat the deceased but the committing Magistrate

*Review of the order of the 1st class Township Magistrate of Revenue dated the 8th day of May 1913 passed in Criminal Regular Trial No. 95 of 1913.

disbelieved this evidence. Apart from this evidence he thought that there was nothing but suspicion and he remarked that the accused should get the benefit of the doubt. Nevertheless he proceeded to commit the three accused men for trial.

I should be glad to quash the commitment order in the circumstances. But I find myself unable to do so as no question of law is involved. A commitment order cannot be quashed merely on the ground that the evidence is doubtful.

It is open to the District Magistrate if he thinks fit to instruct the Public Prosecutor to withdraw under section 494 C. P. C.

The records are returned.

IN THE COURT OF THE ADDITIONAL JUDICIAL COMMISSIONER, MANDALAY.

CIVIL 2ND APPEAL CASE No. 273 OF 1912.

NGA PO THIN vs. U THI HLA.

Advocate for Appellant—Mr. J. C. Chatterjee.

„ „ Respondent—Mr. San Wa.

Before H. E. McColl, Esq., I. C. S.

Dated, 15th September 1913.

Suit between a layman and a monk—Jurisdiction of Civil Courts—Vinaya and Dhammathats—Their applicability to suits regarding gifts to Phongyis and subsequent transfers.

Though the subject-matter of a suit between a layman and a monk was admittedly once religious property, the Civil Courts had jurisdiction to try it.

Cases regarding gifts to Phongyis and their subsequent transfers should be decided according to texts of the Vinaya and not according to the Dhammathats which are hopelessly contradictory.

Held that a monk cannot, according to the Vinaya, give away to an individual, either monk or layman, a monastery dedicated to him personally.

JUDGMENT.

This is a case of very considerable difficulty as it involves questions of the Buddhist Ecclesiastical Law.

Section 9 of the C. P. C. lays down that the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and in the explanation to that section a suit in which the right to property is contested is declared to be a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rights or ceremonies.

In *U The Za and another vs. U Pyiunya* (1) which was a suit between Buddhist monks relating to a Kyaung-Taik, it was held that according to the custom in force before the annexation, such

(1) II U. B. R. 92-96 p. 59.

disputes were decided by the ecclesiastical authorities, that the Hlutdaw never interfered with such decisions but on the contrary lent its aid to enforce them, that the rights which the ecclesiastical authorities had acquired remained to them after the annexation, and that the civil courts should adopt the same practice as the Hlutdaw had followed.

In *U Thatdama and U Wilatha vs. U Meda and U Myizu* (2) it was held not only that the civil courts should be bound by the decisions of the ecclesiastical authorities in matters within their competence but they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. In these two cases all the parties were Buddhist monks.

U Teikka and two others vs. Nga Tin Byu (3) was a case in which a layman had brought a dispute between him and three monks before the Thathanabaing and having obtained an order in his favour applied to the civil court to enforce it. It was contended in that case that as the plaintiff was a layman the ecclesiastical authorities had no jurisdiction. But it was held that as the Thathanabaing's order was a pronouncement on the religious duties of monks towards the descendants of a "taga" and was directed against subordinate ecclesiastics, it was an order within the Thathanabaing's competence and should be enforced.

This is clearly not an authority for holding that in a dispute between a layman and a monk, the ordinary jurisdiction of the civil courts is ousted and a layman plaintiff must submit to the jurisdiction of the ecclesiastical authorities. In the present case the plaintiff who is a layman did not do so but brought a suit in a civil court for trial on the merits, the defendant-respondent who is a monk raised no objection to the jurisdiction of the civil courts and though the property in suit was admittedly at any rate once religious property, I am of opinion that the Township Court had jurisdiction to try the suit on the merits.

The plaintiff appellant's case is that the land in suit on which a monastery stands was the *poggalika* property of a monk U Ariya, that a monk U Pandava who was U Ariya's pupil obtained it as a Withathagaha gift and had subsequently given it to him. He sued for possession.

The defendant-respondent U Thi Hla who is living in the monastery standing on the land raised two inconsistent defences namely (1) that he and U Pandava took the land and Kyaung as a Withathagaha gift jointly and that U Pandava made a gift of his interest to defendant respondent and (2) that on the death of U Ariya, the property reverted to the original donor who again gave it to the defendant-respondent as his *poggalika* property.

The Township Judge found in plaintiff-appellant's favour and gave him a decree.

The Lower Appellate Court found on the authority of *Mg. Henoa and another vs. U Cho and another* (4) that a monk can dispose of

(2) II U. B. R. 97-01 p. 42.

(3) II U. B. R. 1910 p. 78.

(4) II U. B. R. 92-96 p. 397.

his poggalika property during his life time but that if he fails to do so, it reverts to the donor, who can select a successor but that if he fails to do so, it becomes thinghika property, but he went on and found that the land in suit had become thinghika and therefore could not be the subject of a gift. He accordingly set aside the decree of the 1st court and dismissed the suit.

The learned Additional Judge obviously quoted a ruling without referring to it. The ruling cited by him has no bearing on the point at all. Possibly he referred to Tha Gywe's Treatise on Buddhist Law page 239 and quoted the ruling he did by mistake for *Mg. On Gaing vs. U Pandisa* (5) quoted a few lines lower down on the same page.

The first thing to consider is the principle on which the case should be decided. If the Dhammathats be referred to it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the Vinaya. Thus in Vol. I U Gaung's Digest page 464, the compiler says. "The rules laid down in the old Dhammathats are inconsistent with those in the Vinaya and an attempt has been made in the present treatise to reconcile them and readers are requested to exercise their own discretion in their application of the rules."

The rule laid down in *Mg. On Gaing vs. U Pandisa* referred to by the Lower Appellate Court is contained in Section 410. "Property (including monastery) given to a specified Rahan shall on the death of the original donee revert to the donor who shall be at liberty to again give it away as a charitable gift to whomsoever he likes". But the rule given in Section 405 is diametrically the opposite: "If a deceased Rahan did not transfer his poggalika monastery to any one, it shall become Sanghika property..... The donor has no voice in the selection of a successor to the original donee, the right to select being exercised by the members of the order".

Again in Section 399 a gift made by a Rahan to take effect after his death is declared to be invalid whilst in section 404 the gift of a Poggalika monastery made by a dying Rahan is declared to be valid.

The questions which arise for decision in this case are such as would be better decided by the ecclesiastical authorities, but as I have found that the civil courts have jurisdiction to try this case, those questions must be decided and I think the proper basis for the decision should be the texts of the Vinaya so far as they can properly be applied.

It might be objected that the Vinaya is at least 300 years older than the Christian era, that law is progressive and that it would be as absurd to apply the rules contained in the Vinaya to modern conditions as to apply the law of mortgage contained in Leviticus to a dispute between Christians. But the cases are widely different. Christians do not profess to be bound in their disputes about property by either the old or the new Testament.

Whereas though no doubt the strict rules contained in the Vinaya are departed from by many monks, there are other monks who try to conform to them as well as the times will permit and all monks profess to be bound by them, and when a case of this nature is brought before the ecclesiastical authorities for decision, it is in accordance with texts from the Vinaya that they decide it (Vide *U Te Za vs. U Pyinnya* (6)).

Now the questions for decision are (1) can a monastery or land be the subject of a poggalika gift? (2) If so is the recipient monk competent to give it away either to another monk or to any one else? (3) Was there a valid Withathagaha gift from U Ariya to U Pandava? (4) Was there a valid gift from U Pandava to the plaintiff-appellant?

If the plaintiff—appellant is to succeed, all these points must be decided in his favour.

In *Mg. Talok and another vs. Ma Kun and 2 others* (7) the Lower Appellate Court held that “looking to the accepted precepts of the Buddhist religion, it seemed evident that Pongyis could not own poggalika property and at most could only have a usufruct in such things as gardens etc., for the purpose of obtaining by means of their produce those few things lawful to be possessed”. It was held however by this court that whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may possess property. But the authorities on which that decision was based were the Dhammathats, which are not the authorities on which the ecclesiastical authorities themselves decide these matters.

No doubt the proposition that a monastery cannot be poggalika property will sound novel but nevertheless I have been unable to find any authority in the Vinaya—and I have spent a very considerable amount of time in the quest for the opposite proposition, though some of the Dhammathats assume that a monastery can be poggalika property and in *Mg. On Gaing vs. U Pandisa* and in other cases the courts have followed these Dhammathats.

It would appear that originally the monks lived in the woods and forests and caves and anywhere where they could get shelter as buildings had not been expressly allowed them and when a rich man offered to build some dwelling houses for certain monks they refused lest they should commit a sin. The matter was referred to the Buddha and he said “I allow you, O Bhikkus, abodes of five kinds—Viharas, Adhayogas, storied buildings, attics and caves”. A Vihara is clearly used over and over again in the Vinaya as equivalent for what is known as a “Kyaung”. The rich man thereupon built 60 Viharas and asked the Buddha what he was to do with them. The latter replied “Then O House-holder, dedicate these sixty dwelling places to the Sangha of the four directions, whether now present or hereafter to arrive. This story” is given in the Kullovagga Book VI Chap. I, Sections 2,

(6) II U. B. R. 92-96 p. 59.

(7) II U. B. R. 92-96 p. 78.

3 and 4, and clearly indicates that at the beginning at any rate dwellings dedicated as monasteries were to form the common property of the whole body of Buddhist monks.

It is perhaps worthy of note that apparently the first if not the only mention in the Vinaya of a garden (*ārāma*) given as a religious offering was dedicated to the fraternity of the Bhikkus with the Buddha at its head (Mahavagga Book I Chap. 22, Section 18.)

When the people knew that monasteries were permitted they began to build with zeal and a poor tailor who wished to gain merit in this way but had not the necessary skill, on finding that his building kept tumbling down before it was completed complained that whereas the monks taught others, no one taught him or helped him to build. When the Buddha heard of this, he said "I permit you O Bhikkus, to give new buildings in course of erection in charge to a Bhikku who shall superintend the work. (Kullavagga Book VI Chap. 5). Next we find that this permission was taken advantage of by monks who wished to defeat what I consider was the plain rule *viz.*, that a monastery was not to be considered the property of an individual monk and buildings which were practically completed and required nothing but a little plastering or the socket for a bolt were given in charge to individual monks and the charge was assigned for 20 or 30 years or for life. The stricter monks objected and the Buddha was informed and he forebode the practice and fixed as the limit of time during which a Bhikku might superintend the building of a Vihara as 12 years. (Kullavagga Bk. VI Chapter 17, Section 1).

It is true that it is possible to read these passages as having reference only to monasteries dedicated as Sanghika property but on the other hand they are perfectly consistent with the proposition that monasteries cannot be other than Sanghika property. But section 3 of the same chapter seems to me to make the matter clear. The question for the decision of the Buddha was what was to be done in case a monk in charge of building operations left the place or became incompetent by leaving the priesthood or otherwise and he decided thus: "In case that occurs, O Bhikkus, as soon as he has taken charge, or before the building has been completed, let the office be given to another lest there should be loss to the Sangha. In case the building has been completed, O Bhikkus, if he then leaves the place, it (the office and its privileges) is still his—if he then returns to the world, or dies, or admits that he has abandoned the precepts or that he has been guilty of an extreme offence, the Sangha becomes the owner." In their notes to this passage, Messrs. Rhys Davids and Hermann Oldenberg, from whose translation of the Vinaya, these texts have been quoted, say that what is meant is that the monk in charge loses his special privileges such as his lien on the best sleeping places etc.

This passage appears to me to include buildings dedicated to an individual monk because if a Sanghika Kyaung only were referred to, it is difficult to see how any loss could be caused to the Sangha owing to the owner's abandoning it. Reading these passages together it seems to me that a monk could act as owner of a monastery

whether dedicated to him personally by Kyaungtaga or allotted to him by other monks for 12 years at least. But whether this be so or not, I think it is clear from other texts which I shall now refer to that a monk cannot according to the Vinaya give away to an individual either monk or layman a monastery dedicated to him personally.

The proposition that a monk can dispose of property received as a poggalika gift as he thinks fit appears to rest on a saying of the Buddha recorded in the Kullavagga Bk. X, Chapter 15, Section 1. "I allow you, Bhikkus, to give away that which was given to special individuals." But this saying must be taken with the context. The story runs that the people gave food to the Bhikkus and the Bhikkus gave it to the Bhikkunis (or nuns). The people murmured saying "How can their reverences give away to others what was given for them to have—as if we did not know how to make gifts." When the Buddha heard of this, he said "a Bhikku, O Bhikkus, is not to give away to others what was given for them themselves to have. Whosoever does so shall be guilty of a *dukkata*." Clearly this is the general rule but an exception was allowed.

"Now at that time the Bhikkus had come into the possession of some food. They told this matter to the Blessed One.

"I allow you, O Bhikkus, to give away that which was given to special individuals" "I allow food that has been stored up to be enjoyed by Bhikkunis after they have had it given over to them by the Bhikkus." This is an authority for the giving away of such a thing as food by a monk to whom it has been given as a poggalika gift to another monk, or to a nun, but it is very far from being an authority for the proposition that a monk to whom individually a monastery or land has been given can give the same away to a layman. But there are other texts which I think are conclusive.

The Kullavagga Bk. VI Chapter 15 relates how certain monks were constantly worried by other monks from distant places claiming sleeping accommodation in the monastery and how they try to remedy matters by handing over all the sleeping accommodation to one of their number as his own property. This would of course be converting Sanghika property into Poggalika property and is obviously against the rules, (for an exception *vide* Mahavagga Bk. VIII Chapter 24 Section 4) but when the Buddha heard of it he went much further than forbidding this; he said "these five things O Bhikkus, are untransferrable and are not to be disposed of either by the Sangha, or by a Gana (a group of monks) or by a single individual, and what are the five? A park (*ārama*) or the site for a park a Vihāra or the site for a Vihāra—this is the second untransferrable thing that cannot be disposed of by the Sangha or by a Gana or by an individual. If it be disposed of, such disposal is void and whosoever has disposed of it is guilty of a *thullakkaya*" This passage is repeated in Chap. 16, Section 2 with the word 'divide' in place of the word 'transfer' on the occasion of some monks dividing all the sleeping

accommodation in a monastery amongst themselves, and it clearly has reference to the different kinds of religious gifts, that have been mentioned in Mahavagga Book VIII, Chapter 32, of which three only may be mentioned here *viz.*, a gift to the Sangha, a gift to a specified number of monks (a Gana) and a gift to an individual monk.

The distinction between such property as a monastery or land and the few requisites of a monk is again made clear by the Buddha's directions as to the disposal of a monk's property after his death given in the Mahavagga Book VIII, Chap. 27, Section 5. Now at that time a certain Bhikku who was possessed of much property and of a plentiful supply of a Bhikku's requisites completed his time.

They told this matter to the Blessed one. "On the death of a Bhikku, O Bhikkus, the Sangha becomes the owner of his bowl and of his robes. But now, those who wait upon the sick are of much service I prescribe, O Bhikkus, that the set of robes and the bowl are to be assigned by the Sangha to them who have waited upon the sick. And whatever little property and small supply of a Bhikku's requisites (Lahuban) that is to be divided by the Sangha that are present there; and whatever large quantity of property and large supply of a Bhikku's requisites there may be, (Garuban) that is not to be given away and not to be apportioned, but to belong to the Sangha of the four directions, those who have come and those who have not."

Thus I think it is extremely probable that the Buddha refused to allow a monk to own a monastery for more than 12 years, and considered it the property of the general body of monks throughout the world. Whatever the intention of the donor may have been it is quite certain that he forbade the giving away of a monastery whether it had been dedicated to an individual or not.

It thus becomes unnecessary to consider the alleged *Withathagaha* gift, but I will add even if it had reference to such *poggalika* property as a monk can dispose of in his life time, the appropriation would have been invalid.

A *Withathagaha* gift is described in the Mahavagga Book VIII, Chapter 19, and in Section 400 of U. Gaung's digest. But in the latter the rules are somewhat different.

If a monk takes the property of another monk and appropriate it to his own use the appropriation is valid, and is called a *Withathagaha* gift, provided (according to the Vinaya) five conditions are fulfilled *viz.*

- (1) The monks must be intimate.
- (2) They must have associated together.
- (3) They must have spoken about the property.
- (4) The owner must be alive when the property is taken and
- (5) The taker must know that the owner would be pleased at the taking.

It was in connection with the linen cloth deposited with one monk by another and appropriated by the former, that the Buddha

pronounced this rule which is clearly a sensible one and refers to property of little value because if an intimate friend appropriated property of large value he could not be sure that the owner would be pleased.

In the present case when U. Ariya was dying and was lying insensible some of the monks living in the Kyaung told U Pandava to take the Kyaung and land as a *Withathagaha* gift so as to prevent its becoming *Sanghika* property. They frankly admit this. There was thus an endeavour to evade the rules by which they were bound by a pharisaical attempt to adhere to the letter of the law whilst breaking it in spirit. But as a matter of fact they also broke the letter of the law. Three and possibly four of the necessary conditions were fulfilled, but as U. Ariya was on the point of death and insensible, he was incapable of being either glad or sorry at the appropriation, which by the way was one in name only, and if U. Ariya had not been on his deathbed and insensible, there is no reason to suppose that he would have been pleased at being deprived of his Kyaung and lands.

The plaintiff—appellant's suit thus fails completely and the appeal is accordingly dismissed with costs.

IN THE JUDICIAL COMMISSIONER'S COURT,
UPPER BURMA.

CRIMINAL REVISION CASE No. 559 OF 1913.

MI THEIN v. NGA PO NYUN.

Advocate for Applicant—Mr. Bose.

Respondent—M. S. Mukerjee.

Before L. H. Saunders, Esq., I. C. S.

Dated, 30th October 1913.

Criminal Procedure Code—Section 488—Maintenance of Child—Mothers' ability to maintain—Bona fide offer to maintain if child lives with him.

Held that the father is bound to maintain his child whatever the position of the mother may be.

Merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him.

ORDER.

SAUNDERS, OFFG. J. C.—The applicant sought to obtain an order for the maintenance of her son aged about 12 from the respondent. The paternity of the child is not denied and the respondent said that he had never neglected to maintain the child, that he had asked for the custody of it and made several offers.

to maintain the child on condition that he lived with him. The Magistrate after recording evidence declined to make an order and the applicant now comes to this court in revision.

Most of the reasons given by the learned Magistrate appear to be erroneous. "I consider that the complainant is able to maintain Tha Gyaw without assistance from accused." This is no reason. The father if he is able to do so is bound to maintain his child whatever the position of the mother may be. Whether she makes the application to annoy the father or not is immaterial. It is also immaterial that when the boy goes to see his father, the father gives him a little money and once gave him a longyi. Obviously the father does not provide sufficient funds for his maintenance. It is not necessary for a mother to prove that she had asked the father to support the son and the father has refused. The mere fact that it is necessary to institute proceedings may be taken to prove the neglect of the father.

The property which was made over to the mother at the time of the divorce, she says has all been dissipated, and this is borne out by the evidence of the respondent's own witnesses Mg. Yo and Mg. Shwe Tin.

There does not appear to be any evidence of any *bona fide* offer to support the son if he would live with his father. Mg. Si, the respondent's witness, says that he went and asked Tha Gyaw, the child, and Tha Gyaw replied. "I won't live with him." This man is the respondent's tenant. It is obviously absurd to suggest that this invitation given to the child can amount to an offer to look after him, and on the authority of *Mi Saw vs. S—* (U. B. R. 1910 1st qr. p. 1) such an offer cannot absolve the father from his responsibility on the latter.

The respondent is bound to maintain the child. The appellant says that it cost her Rs. 7-8 a month. From the evidence the respondent is clearly able to pay this sum, but there has been some exaggeration on the appellant's part and I think it will be sufficient if the father pays Rs. 6 a month. There will be an order therefore for the payment of this amount.

THE BURMA LAW TIMES.

VOL. VII.]

FEBRUARY, 1914.

[No. 2.

PRIVY COUNCIL.

[On appeal from the Chief Court of Lower Burma.]

Present :

THE LORD CHANCELLOR (VISCOUNT HALDANE), LORD
MOULTON, LORD PARKER OF WADDINGTON
AND LORD SUMNER.

GEORGE STAUNTON CLIFFORD

v.

EMPEROR.

Practice—Special leave to appeal—Criminal proceedings.

Leave to appeal from conviction and sentence on the grounds of alleged irregular conduct of the proceedings, misdirection of the Jury, and misreception of evidence refused, the case not coming within the principle laid down in *In re Abraham Mallory Dillet* (1).

PETITION for special leave to appeal from convictions upon a trial before Twomey J. and a Jury and sentences and from a judgment of the Chief Court upon questions reserved for the decision of that Court.

The facts as appearing from the petition were shortly as follows :—

The petitioners were two directors and the general manager of the Bank of Burma, Limited, a company incorporated in Burma under the Indian Companies Act, 1882. By an order of the Chief Court made on June 27, 1912, the Company was ordered to be wound up and an Official Liquidator was appointed. The Official Liquidator filed a complaint in the Court of the District Magistrate of Rangoon, alleging that the petitioners had, by knowingly issuing a false balance-sheet for the half year ending June 30, 1911 (issued on or about August 1, 1911), and by continuing to advertise the Bank as a prosperous and going concern up to the time of its close, dishonestly induced certain persons to deposit money with the Bank. The District Magistrate having held an inquiry on January 28, 1913, framed against each of the petitioners a charge with three heads in which he charged them that they did respectively "by means of a false and fraudulent balance-sheet and by false advertisements" falsely and fraudulently induced three named persons

(1) (1887) 12 App. Cas. 459.

F. C.
George
Staunton
Clifford
v.
Emperor.

to deposit moneys with the Bank of Burma, and he committed them for trial by the Court of Session on these charges. In the Magistrate's Court the balance-sheet was attacked on four specific grounds.

On February 17, 1913, the petitioners were put upon their trial before Twomey J. and a Jury. The Judge struck out that part of the charge which referred to advertisements on the ground that there was no evidence before the Magistrate that the persons named had seen them. On the second day of the trial the learned Judge of his own motion amended the charge by adding the words "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." Up to the close of the prosecution no indication was given that the grounds of attack upon the balance-sheet had been enlarged beyond the four grounds alleged before the Magistrate, or that the petitioners were being charged with falsely and fraudulently showing (debts which they knew were bad or doubtful as good debts). Only one debt of this character was specifically referred to by the prosecution and the debtor was thereupon called by the petitioners as a witness. The learned Judge in his summing up stated that the fundamental issue in the case was whether the balance-sheet was false in taking as good assets "a large amount of debts which could not honestly be considered as good debts" and in treating as assets unpaid interest upon these debts. The learned Judge specified to the Jury debts amounting to twenty-two lakhs as to which he directed them to consider whether the petitioners should not have regarded these debts as bad or doubtful. The petition alleged that this was the first time in the course of the trial on which these debts were specified.

The petition complained of the summing up of the learned Judge upon other grounds and objected that certain evidence had been admitted improperly.

On April 11, 1913, the Jury returned a general verdict of guilty against each of the petitioners on all the charges. The learned Judge passed sentences on the first petitioner of eight months' rigorous imprisonment on each charge and upon each of the other petitioners sentences of six months' rigorous imprisonment on each charge, the sentences in the case of each of the petitioners to run consecutively.

The petitioners applied to reserve and refer certain questions of law for the decision of the Chief Court of Lower Burma under the Code of Criminal Procedure (Act V of 1898), S. 434. Their application included several questions of which, however, the learned Judge refused to refer any but four, which included the question whether the amendment of the charge in the course of the trial had prejudiced the petitioners.

On June 20, 1913, arguments upon the question so reserved were heard together by three Judges, including Twomey J., who had presided at the trial, and judgment was delivered deciding all the questions reserved against the petitioners. By this judgment the Court held *inter alia* that the question whether the principal

debts were good or bad was involved in the charge, and that having regard to passages in the summing up they were unable to hold that the Jury had found their verdict upon the ground of the charge added by amendment.

The accused petitioned to His Majesty's Privy Council for special leave to appeal.

Sir R. Finlay, K. C., and *Collman*, for the petitioners.—The amendment of the charges by the Judge during the trial was bad in law, and the verdict was bad as being a general verdict upon a charge part of which was bad in law. The learned Judge ought not to have directed the Jury to consider whether a large amount of the debts shewn in the balance-sheet should not have been treated as bad or doubtful. These debts had not been specified during the trial, and the petitioners had no notice that this was an allegation which they had to meet.

The summing up was unsatisfactory in other respects and evidence was wrongly received. The sentences passed were in contravention of the Indian Penal Code, S. 71. Consecutive sentences should not have been passed in respect of the separate charges which were really parts of the same offence.

The judgment of their Lordships was delivered by

HALDANE L. C.—Their Lordships do not propose in this case to recommend that leave to appeal be given. Their functions are not to sit as a Court of criminal appeal, and it would be contrary to their constitutional duty to assume that position. A Court of criminal appeal can go into questions of evidence and into questions of procedure, and can deal with the case on the same footing as an ordinary Court of appeal. Their Lordships' functions on the other hand are limited by the principle laid down in *Dillel's case*⁽¹⁾ to something much more narrow, namely, this: that if they find that what has been done has been grossly contrary to the forms of justice, or violates fundamental principles, then they have power to interfere. But in the present case they think there was evidence to go to the Jury on all the matters which have been dealt with, and it would be contrary to their duty to express any opinion as to whether in that state of things the verdict found by the Jury was a right one, or the summing up a perfect one. As regards the sentences, it is obvious that the question is one of form only. The learned Judge has given three periods of eight months in one case and three periods of six months in another, taking each offence as a separate offence. Technically, their Lordships think that these were separate offences, and moreover it would have been possible to give a longer term upon any one or the whole of the charges in question. The analogy between this case and other cases which constantly occur in criminal jurisprudence is a perfect one, and their Lordships see no difficulty in treating these as separate offences. Their Lordships will humbly advise His Majesty that the petition ought to be dismissed.

Petition dismissed.

P. C.
George
Staunton
Clifford
v.
Emperor.

(1) (1887) 22 App. Cas. 459.

IN THE CHIEF COURT OF LOWER BURMA.

PRIVY COUNCIL APPEAL No. 29 OF 1913.

T. S. NATCHEAPPA CHETTY & OTHERS... APPELLANT.
 vs.
 THE IRRAWADDY FLOTILLA CO., LTD ... RESPONDENT.

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 8th December 1913.

PRESENT AT THE HEARING :

LORD SHAW.
 LORD MOULTON.
 MR. AMBER ALI.

[Delivered by Lord Shaw.]

Delivery by Flotilla Company without production of mate's receipts—Mate's receipts—does it fulfil the condition of a negotiable instrument?—Effect of representation in Rate circular.

Held that the document in suit though headed "Mate's Receipt" was not negotiable as a bill of lading and was not such a document of title as could have been transferred except upon the usual form of assignment as between the shipper and his assignee accompanied by notice to the ship-owner charging him with the fact of the assignment and making him responsible to the assignee instead of the original shipper.

The document in suit is a simple ordinary receipt for goods and charges the Respondents with receipt of certain goods from one Chowdry under a bargain to convey them by ship to Rangoon for a stipulated freight and to deliver the goods to Chowdry or his nominee at Rangoon.

There is therefore no legal foundation for the position that the document was a document of title and that the goods passed upon its transfer.

As to the terms and conditions of the Company's Rate Circular *held* that they set forth a mode in which in conducting their own business they would protect themselves and it is wholly *jus tertii* for any person in the position of the appellants (who as money lenders had made advances to Chowdry and now make claims against him for the paddy) to plead that those claims and conditions constitute an obligation upon which they as outside parties are entitled to found any claims.

JUDGMENT.

The Respondents in this case are the Irrawaddy Flotilla Company, and their vessels ply in the inland waters of Burma. The Appellants, who were the original Plaintiffs in the suit, are money lenders, and they carry on their business in Henzada, and in other places, in Lower Burma. On the 13th, 20th and 23rd October 1906, there having been eight other shipments in similar terms, there were the three shipments of paddy which are in dispute in this case. They were sent by ship from Henzada to Rangoon.

The document* which accompanied their transmission is in each case similar in terms to the one which is now to be quoted. It is dated 12th October 1906, and it is headed as follows:—"Irrawaddy Flotilla Company, Limited." It is denominated plainly in the document as a "Mate's receipt." The document then proceeds

* For a copy of the document see 4 Bur. L. T. p. 22.

in these terms:—"Received from O. Rahman" (who in this Judgment is called, for brevity, "Chowdry), the undermentioned "quantity of paddy to be forwarded per cargo boat 128 in tow of "steamer," and then the denomination is given, and then follows this expression "with liberty to tranship to other vessel. "Number of baskets 5,000—five thousand baskets paddy, more or "less." That document is signed "Alex. Wingate, Agent." He was, in point of fact, the ship's agent acting at Henzada for the Irrawaddy Flotilla Company, the Respondents in this Appeal. Chowdry was, as the document bears, the shipper. It appears to be the fact that in this year 1906 the Appellants had advanced monies to Chowdry for the purchase of the paddy so shipped.

It might be a question under what legal category this document fell. It is manifest that the parties to it were not at all assured in their own minds as to what that category was, because although the document was headed "Mate's receipt" there were appended to it certain terms which were more suitable to bills of lading. The "document says:—"N.B. All risks of navigation, loading and unloading goods, destruction or damage by fire, robbery, weather, "wreck of boat, separation of flat from steamer, or any other cause "of whatever nature or kind so ever to be borne by the shipper. "Freight payable before delivery."

It is in these circumstances that their Lordships have before them two Judgments of the Courts of Lower Burma. The present Appeal is from a Decree of the Chief Court dated the 22nd November 1910, and that reversed a Decree of the District Court of Henzada dated the 17th December 1908. They have no difficulty in pronouncing that in their opinion the Judgment of the Chief Court of Lower Burma is a correct Judgment, and that the Appeal fails.

Two points upon this Appeal have been carefully argued by Mr. Roskill. With reference in the first place to the document itself, it is pleaded as a document of title. It is admitted, however, in argument, that it is not a bill of lading, and therefore not *eo nomine* a negotiable instrument.

In the second place it is admitted that if, as it denominates itself, it is a Mate's receipt, then also it must fall under the category of documents which are not negotiable.

But Mr. McCarthy supplemented the argument by saying that notwithstanding that it could not claim negotiability as a bill of lading, and notwithstanding that if it were a mere "Mate's receipt," it would be non-negotiable, yet this document falls under Section 137, the concluding Section, of the Transfer of Property Act, 1882, Act IV. The language which is there adopted is:—"And any other document used in the ordinary course of business "as proof of the possession or control of goods, or authorising, or "purporting to authorise, either by endorsement, or by delivery, the "possessor of the document to transfer or receive goods thereby "represented."

Their Lordships are of opinion that this document was not a negotiable document in the sense of this section of the Statute. It

L. S.
T. S. Nathe-
appa Chetty
& others
The Irra-
waddy
Flotilla Co.,
Ltd.

L. B.
 T. S. Nathe-
 appa Chetty
 & others
 v.
 The Irra-
 waddy
 Flotilla Co.,
 Ltd.

was not a document of title. There was no authority by law to give to an assignee by transfer of that document any right as against the shipowner except upon the usual form of an assignment as between the shipper and his assignee. That usual form must be accompanied by notice to the shipowner which charges him with the fact of the assignment, and makes him responsible to the assignee instead of the original shipper. There is great difficulty in cases of this kind, in avoiding being misled by terminology. Each of the categories attempted has failed. The document is not a bill of lading not a Mate's receipt, and not a statutory negotiable instrument. The simple fact remains that this is a document which charges the Respondents with receipt of certain goods from Chowdry, under a bargain to convey them by ship to Rangoon for a stipulated freight and on certain conditions, and the duty arising from it was to deliver the goods to Chowdry, or to his nominee at Rangoon. In complete compliance with that duty the goods so placed in the possession of the shipowner for carriage were duly delivered.

In these circumstances their Lordships see no reason to doubt that the judgment reached in the Court appealed from is correct. It is a simple ordinary receipt for goods. Why should these goods not be delivered to the person who is said to have handed them to the shipowner? Assuming the "Mate's receipt," as it is called, to have been lost, was the owner of the goods, who then handed them to the shipowner, not to be entitled, because the receipt had disappeared, to possession of his own goods from the carrier whose freight he was willing to pay?

Their Lordships are of opinion that that simple statement of the point shews that there is no legal foundation for the position that this was a document of title, and that the goods passed upon the transfer of it.

The second point which was taken by Mr. Roskill is, that whatever be the name under which this document might be classed, the Respondents themselves are charged with a duty and have come under an obligation to deliver to no one except upon the Mate's receipt. The argument is an astute one, and it is founded upon the circular dated 1st January 1907, which their Lordships presume is a sample of what was usually issued in the course of the Respondents' business. That circular is headed:—"Rates for paddy in bulk by the Company's barges and cargo boats in Rangoon," and it contains these two clauses: "That the barges and boats will be moored at mills in accordance with instructions received from holders of Mate's receipts, which must previously have been presented at Rangoon office for verification." In terms the circumstances do not demand any application of that rule.

But the next rule is said to be square with the situation in the present case. The clause is: "Mate's receipts must, however, be given up before discharge is allowed to commence, or in the event of Mate's receipts not having come to hand, the Company's usual guarantee must be signed." In the opinion of their Lordships the sentences now quoted from the circular of the Respondent Company merely set forth a mode in which in conducting their

own business, the Respondent Company would protect themselves in the course of their trade. But they cannot be founded upon by other parties as forming any part of an obligation to them restrictive of their freedom or methods of action in conducting their own affairs. As against customers they afford protection to the Irrawaddy Flotilla Company, and they give an intimation or warning that they shall not part with the goods unless Mate's receipts are given up, or otherwise unless a guarantee be obtained. But this protection of themselves they could freely give up if satisfied of the identity and solvency of the owner or nominee of the owner who demanded the goods at the port of delivery. And it is wholly *jus tertii* for any person in the position of the Appellants (who are money lenders who had made certain trading advances to Chowdhry and make claims against him for the paddy) to plead that clause of the shipowners' circular constitutes an obligation upon which they as outside parties are entitled to found.

Failing these clauses as constituting a contract with the Appellants, the next argument presented was that there was a course of business on the part of the Irrawaddy Flotilla Company which showed that they did protect themselves, and apprised the public at large that they, the public, were also protected by the manner of negotiating the Mate's receipts. Their Lordships are of opinion that this point in the abstract does not fall to be determined, because upon the facts it entirely fails. The Judgment of the Judge who framed these issues is a merely apparent affirmative or negative, in fact, a most indefinite answer, to the two issues which he has himself written out. "Was it," says the seventh issue, "the usual course of business of the second Defendant not to recognise any person as entitled to the paddy shipped without his giving up the Mate's receipts, and not to discharge the paddy without the production of such Mate's receipts?" It follows on the Judgment of the learned Judge that this might have been what he describes as a general course of business which is open to exception at the will of the traders themselves. In such circumstances the question of fact really does not arise.

Their Lordships therefore think that the point as to any contract in this case fails. There is no document constituting such a contract, and there was no course of business from which a contract could be inferred. And accordingly the learned Counsel for the Appellants puts his case upon tort. It is difficult to figure it; but the thing upon which tort was founded was some failure of duty. The failure of duty apparently was this: that the Irrawaddy Flotilla Company had suspicions raised in their minds, or might have had suspicions raised in their minds, as to the expediency of parting with these goods unless on production of the Mate's receipt to Chowdhry, who himself handed them over to them, because some financiers like the Appellants might have claims upon them. Their Lordships are surprised to find what is put forward as in any respect a communication upon which the Appellants are entitled to found. Wingate, the shipowners' agent, gave evidence, and his evidence, instead of being to the effect cited, is of a

L. S.

T. S. Nathe-
appa Chetty
& others
v
The Irra-
waddy
Flotilla Co.,
Ltd.

L. B.
T. S. Nathe-
appa Chetty
& others
v.
The Irra-
waddy
Flotilla Co.,
Ltd.

completely different character. It is necessary, however, to see what Wingate says upon the subject. Wingate does admit that it was known, at a certain stage of the proceedings, to him, that Chowdry was having advances for the purchase of the paddy which was being shipped, and that the Chetty from whom advances had been given might have had certain rights. Then Wingate in his evidence proceeds thus:—"I refused to give him the Mate's receipt in first Defendant's name until I got the sanction of the Chetty. He then brought the Chetty to my office. The Chetty then agreed to have the Mate's receipt in first Defendant's name. I did so accordingly. They told me that the differences had been settled."

In these circumstances their Lordships think it unnecessary to pursue this point further, because, so far as the evidence stands, instead of the shipping Company being charged with the knowledge that there was any danger on account of rights possessed by the Chetty, in this case it turns out upon the evidence that those rights had been the subject of negotiation and settlement, and that the settlement having been achieved the goods were forwarded in the name of Chowdry himself. This being so, there was no duty left in the circumstances except, of course, to deliver to Chowdry, or to his order, and this was done. The failure of duty pleaded completely disappears, the Respondents having fulfilled all the duties resting upon them, either by contract, or under the Common Law.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed, and the Respondents are entitled to costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 1* OF 1913.

RANGOON ELECTRIC TRAMWAY & SUPPLY CO. LTD.

vs.

RANGOON MUNICIPALITY.

Before the Officiating Chief Judge and Mr. Justice Twomey.

For Applicant—Giles and Coltman.

For the Municipality—Lentaigne.

Dated, 11th August 1913.

Burma Municipal Act—Section 46 (1) (A) and Section 46 (4) — Valuation of premises containing Machinery—Principle of valuation.

Held (1) Machinery placed for use in the building is liable as such to taxation under section 46 (1) (A) (a) of the Burma Municipal Act (2) Machinery which is on the premises to be rated and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used is to be taken into account in ascertaining the rateable value of such premises.

* Reference made by the Judge of Small Causes Court, Rangoon, under Section 113, Civil Procedure Code.

It is not all things on the premises, or that are used on the premises which are to be taken into account but things which are there for the purpose of making and which do make them fit. as premises for the particular purposes for which they are used.

- (1) Tyne Boiler Works Co. v. The Overseers of the parish of Long-
benton 18 Q. B. D. 81. } followed.
(2) Kirby v. Hunslet Assessment Committee L. R. A. C. (1906) 43. }

L. B.
—
Rangoon
Electric
Tramway &
Supply Co.,
Ltd.
v.
Rangoon
Municipality.

PREVIOUS HISTORY OF THE REFERENCE.

The power station of the petitioner company was assessed to municipal taxation for the current year by the assessor at the sum of Rs. 6,000. The company objected to the assessment and the objections were heard by the president, Rangoon Municipal Committee, in April, 1912, and decided by him on November 19. The first objection taken was to the effect that the term buildings to be found in section 46 (1) (A) (a) of the Burma Municipal Act could not be held to include machinery; and the second objection was that certain land held by the company, but not at present made use of for the purposes of the power station, should be eliminated when calculating the capitalised value of the land and buildings for assessment purposes. The president of the municipality, after hearing Mr. Giles for the petitioners, confirmed the assessment arrived at by the assessor. The petitioners then appealed to the Small Cause court on the following grounds:

- (1) that the assessable value of the power station as decided by the president was excessive;
- (2) in particular, the president in arriving at such assessable values erred in taking into account all machinery contained in the building comprised in the power station;
- (3) The president misconstrued the expression "buildings" as used in the Burma Municipal Act, 1898;
- (4) The president erred in basing his decision upon the market value of building sites of land not used or required for the purpose of the power station;
- (5) The president failed to appreciate that the annual value of the power station was not governed by the market value of all the land comprised in it regarded as building sites.

The Small Cause Court Judge in disposing of the appeal said he was of opinion that machinery as such was not liable to taxation under the Act and he thought that all that could be covered by the word "buildings" was that which literally formed part of the structure and which could not (for example) be removed by a tenant. He held that if the machinery was such that it would fall under the denomination of a fixture, it was taxable under the head of building; if not, then it would not be taxable under that head. The judge thought that in taking the value of such machinery into account in arriving at the annual value of the building, the president, Rangoon Municipality, was in error, and he accordingly allowed the appeal. But as the case involved a very important point the judge referred the case to the Chief Court on the following two questions: (1) Whether machinery placed for use in the building is liable as such to taxation under section 46 (1) (A) (a) of the

L. B.
 Rangoon
 Electric
 Tramway &
 Supply Co.,
 Ltd.
 v.
 Rangoon
 Municipality.

Municipal Act; (2) if not, what is the principle to be applied in determining when (if at all) it is liable to taxation under that provision.

JUDGMENT.

Hartnoll, Offg. C. J.:—Two questions have been referred to us for decision under the provisions of section 64 (5) of the Burma Municipal Act, 1898, namely, (1) whether machinery placed for use in a building is liable as such to taxation under section 46 (1) (A) (a) of the Municipal Act; and (2) if not, what is the principle to be applied in determining when, if at all, it is liable to taxation under the proviso? The reference has been rendered necessary as the Rangoon Municipal Committee in assessing the Rangoon Electric Tramway and Supply Co. has, in arriving at the gross assessable value, included in it a sum of Rs. 6,50,000 on account of machinery. From the order of the president of the Municipal Committee it would appear that the machinery assessed consists mainly of four Turbo generators and three boilers not built into the power house in such a way as not to be readily removable, but merely bolted to the floor for the purpose of steadying them while in motion. Section 46 (1) (A) (a) contains the provision of law under which the tax on the company has been imposed. It permits a tax on buildings and lands not exceeding ten per cent. of the annual value of such buildings and lands. Section 46 (4) defines annual value and is as follows: "In this section," "annual value" means the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, and in the case of houses may be expected to let unfurnished."

On the part of the company it is contended that in their assessment the value of all machinery which is not so structurally incorporated into their buildings as to form part of them should be excluded; but on behalf of the Municipal Committee it is urged that the value of all the machinery should be taken into consideration in deciding the annual value. The Municipal Committee relies on the English cases concerning the liability of machinery to be rated; the company contends that such cases should not be taken into consideration at all as they are of a conflicting nature and are based on different statutes, that Burma has its own act, and this act alone should be considered in arriving at a decision. It was urged that there are two distinctions between the statute of 43 Eliz. c. 2. and the Burma Municipal Act. First, that the object of the Elizabethan statute was to relieve the poor for which the standard would be wealth, whereas the object of the Municipal Act is to provide roads, scavenging, lighting and other amenities for the town, the standard for which is the extent to which these facilities are enjoyed by each person. Secondly, under the statute overseers were employed to tax persons, whereas under the Act the Municipal Committee taxes property.

As regards the present state of the law in England I am unable to find that it is now in an unsettled condition. The case of the

Tyne Boiler Works Co. v. the Overseers of the Parish of Longbenton (1) laid down the rule as to how machinery was to be taken into account in ascertaining the rateable value of the premises and the principle laid down in that case was affirmed by the House of Lords in *Kirby v. Hunslet Assessment Committee* (2). In that case Lord Halsbury said, "It is enough for me that a long series of decisions, for certainly half a century, have established the bald proposition which is all I am insisting on, namely, that although the machinery may not be part of the freehold, yet it is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it, although as a matter of fact, the machinery may not be attached to the freehold."

With regard to the argument that in England it is the person who is taxed and in Burma the property, in the *Tyne Boiler Works Co.* case all consideration of personal property was left out of account. Only the question of how the value of real property was to be arrived at for the purpose of rating it was considered. Lord Esher, M. R., said: "It is said with respect to some of the cases that they are not authorities because of the provisions of the statute passed with regard to the rating of personal chattels. Difficulties had arisen with regard to the question how far personal chattels were to be taken into consideration in rating the inhabitants of a parish. Those difficulties were set at rest by the statute 3 and 4, Vict. c. 89. But it had nothing to do with the question how the value of the real property is to be arrived at for the purpose of rating it. Nobody says that these machines are to be rated as personal chattels. The question is whether they are to be taken into account in estimating the rateable value of the premises which it is admitted are liable to be rated. The statute therefore makes no difference as all the cases in regard to estimating the value of real property remain untouched by it." No weight therefore can be attached in my opinion to such an argument in deciding the present case.

With regard to the argument that the objects of the English statute and the Burma Municipal Act are not the same, I am unable to see how the objects of the different laws affect the decision of this reference. One of the objects of the Municipal Act is to impose taxes, and moreover section 72 of the Burma Municipal Act shows that its objects are not so circumscribed as urged by counsel. It was further argued that the word "buildings" used in section 46 of the Municipal Act should be construed in its strict sense and should not be taken to mean anything that was not a structural part of the actual buildings, that the same meaning should be given to the word in section 46 as in other sections of the Act, such as sections 89 to 92, and this seems to me to be the real point for decision in the reference. Should this contention

(1) 18 Q. B. D. 81.

(2) L. R. A. C. (1906) 43.

L. B.
Rangoon
Electric
Tramway &
Supply Co.,
Ltd.
v.
Rangoon
Municipality.

L. B.
 Rangoon
 Electric
 Tramway &
 Supply Co.,
 Ltd.
 v.
 Rangoon
 Municipality.

prevail in interpreting section 46 (4)? Or should the established English rule followed? Section 46 (4) lays down how the "annual value" is to be determined and declares that it means the gross annual rent for which buildings and lands may reasonably be expected to let. It was the annual rent, gross or net, that was in issue in the English cases that dealt with the ratable value of machinery. In the *Tyne Boiler Works Company* case it is set out at page 82 of the report that the mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant) and by making the statutory deductions from such rental. The judges in the English cases relating to machinery ~~were therefore engaged in deciding the same~~ question as we are now being called on to decide. This being so, although we are not bound by the English cases, I fail to see how we can lightly set aside the arguments and the decisions of such judges, who were and are of the greatest eminence, and no argument has been advanced to us which in my opinion would justify us in doing so.

To come to the actual questions themselves, it is not contended by the Municipal Committee that machinery placed for use in a building is liable as such to taxation. nor is this laid down by the English cases. I would, therefore, answer the first question in the negative. The second question I would answer in the words of Lord Esher, Master of the Rolls, as used by him in the *Tyne Boiler Works Co.* case as follows: "Machinery, which is on the premises to be rated and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used, is to be taken into account in ascertaining the ratable value of such premises. It is not all things on the premises, or that are used on the premises, which are to be taken into account, but things which are there for the purpose of making and which do make them fit as premises for the particular purposes for which they are used."

YOUNG, J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 5* OF 1913.

In re the application of Maung Chet Po for the refund of Stamp Duty and Penalty.

Before the officiating Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

* Reference made by the Financial Commissioner, Burma under Section 57 of the Stamp Act as to whether a document written on a *parabait* is liable to stamp duty.

Mr. Higinbotham, Government Advocate on behalf of the
Financial Commissioner.

L. S.
Maung Chet
Po
v.
King
Emperor.

Dated, 29th July 1913.

Unsigned documents—written on palm leaf—whether inadmissible because unstamped—Indian Stamp Act—S. 2—Paper—definition thereof—Execution—Meaning of the Expression.

Held that as 'execution' means 'signature' under Section 2, Indian Stamp Act 1899, an instrument which becomes chargeable with stamp duty on being executed is not liable to duty until it is signed.

Held further that such unsigned documents written on palm leaf may be admitted as completed documents in accordance with the universal custom in Upper Burma and the courts cannot refuse to admit them in evidence merely on the ground that they are unstamped.

INTRODUCTORY.

Mr. H. L. Eales, officiating Financial Commissioner, made the following reference to the Chief Court of Lower Burma under Section 57 of the Stamp Act as to whether a document written on a *parabaik* is liable to Stamp duty. The reference arose out of an application by Maung Chet Po for the refund of the duty and penalty levied by the township judge, Myingyan, on a document written on a *parabaik*.

The reference, was in these terms: The judge of the township court, Myingyan, in his civil regular suit No. 130 of 1912 impounded as unstamped a document, written on June 21, 1900, on a *parabaik*. A copy of the document with the translation is filed at page 1 of the Myingyan district office proceeding No. 32 of 1912-13. It was not executed by the parties concerned. The township judge held nevertheless that the document was chargeable with stamp duty under Article 32, schedule 1 of the Indian Stamp Act 1889 and collected duty Re. 1 and penalty Rs. 10. The collector, Myingyan, recommended a refund, as, in his opinion, the document not being executed was not liable to stamp duty. It was the custom in Upper Burma not to insist on the signature of the parties in the case of a *parabaik*. Such unsigned documents have nevertheless been admitted in evidence in the civil courts. The objection to their admission would not be the allegation of non-execution, but doubtful authenticity. Mr. Hall, a previous Financial Commissioner, distinctly held that a *parabaik* was liable to stamp duty and apparently accepted the view that the omission to sign was not tantamount to a failure to execute. In my opinion the intentional and customary omission of the principals to affix their signatures to a *parabaik* cannot be taken as evidence to show that the *parabaik* was not duly executed according to the custom of the country. The document, being accepted as evidence of its contents, is, I am inclined to think, liable to stamp duty just as if it were duly signed. But, as the matter is an important one, I think it advisable to refer the question for the decision of the Chief Court under section 57 of the Stamp Act.

L. S.
 Maung Chet
 Po
 v.
 King
 Emperor.

JUDGMENT.

Hartnoll, Officiating Chief Judge.—The question on which the learned officiating Financial Commissioner desires a ruling under Section 57 of the Stamp Act is not precisely formulated in the order of reference, but may perhaps be stated as follows: "Can an unsigned instrument written on *parabaik* be held liable to duty under the Indian Stamp Act 1899?" The fact that an instrument is written on *parabaik*, or palm leaf, is, of course immaterial. "Paper" is defined in the Stamp Act as including vellum, parchment, or any other material on which an instrument may be written.

Before the British annexation it was the universal custom in Upper Burma to make all documents without signature. Under the Burmese law and practice signatures were absolutely unknown. (See the Upper Burma Rulings 1892-96, Vol. I, (Criminal) page 303 and Vol. II, (Civil) page 462.) The English practice of affixing signatures had been adopted gradually since the annexation, but the old custom continued for many years, and probably persists still in remote parts. The document out of which the present reference arose is dated 10th Waning Nayon, 1262 B. E., or 21st June 1900.

A document, though not yet executed, may be an instrument. But as a general rule instruments become chargeable with stamp duty only when they are executed (Section 3, Stamp Act). It was held by the Judicial Commissioner, Upper Burma (Mr. Burgess) in 1893 (in the first case cited above) that signature was not necessary for the completion or execution of Burmese instruments. The custom of the country was to regard them as complete without signature and the stamp law as it then stood (Indian Stamp Act 1879) presented no obstacle to the recognition of this practice, for it contained no definition of "executed" and "execution." Moreover, under the English law signature was not essential for the execution of instruments under seal though necessary in the case of instruments not under seal (section 122, English Stamp Act 1891.) But, the present Indian law is different. The Indian Stamp Act of 1899 expressly defines the words "executed" and "execution" as meaning "signed" and "signature—" section 2 (12). Unsigned Burmese instruments made since that Act came into force, *i. e.*, since July 1, 1899, cannot be treated as executed for the purposes of the Stamp law.

Our answer to the present reference is therefore as follows: As "execution" means "signature" under Section 2 Indian Stamp Act, 1899, an instrument which becomes chargeable with stamp duty only on being executed is not liable to duty until it is signed. In accordance with the universal custom referred to above formal documents on palm leaf and *parabaik* have hitherto been treated by the courts in Upper Burma as completed documents and admitted in evidence as such though they are not signed. Our decision that these unsigned documents are not liable to stamp duty does not

necessarily imply that they must henceforward be regarded as incomplete. The effect of the present decision is only that courts cannot refuse to admit any such document in evidence merely on the ground that it is unstamped.

TWOMEY, J:—I concur.

ORMOND, J:—I concur.

L. B.
Maung Chet
Po
v.
King
Emperor.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 1ST APPEAL NO. 71^f OF 1912.

DIEKMANN BROS. & COY., LTD. ... PLAINTIFF—
APPELLANT.

vs.

SULAIMAN HAJI BROS., & CO., ... DEFENDANT—
RESPONDENT.

For Appellant—Patker.

For Respondent—C. C. and Das.

Before Mr. Justice Parlett.

Dated, 12th September 1913.

Contract—Assignment of contract—Transfer of Property Act, Chapter VIII—When benefit of a contract may be assigned.

Though the benefit of a contract may be assignable by one party, the burden is not so assignable without the consent of the other party. *Held* that looking at the contract in this case it clearly imposed such liability on the purchasers as would preclude their transferring it without the consent of the sellers. *Held* also that an actionable claim such as could be transferred under chapter VIII of the Transfer of Property Act did not arise until the sellers had refused delivery to the purchaser.

(1892) *Tod vs. Lakhmidas* I. L. R. 16 Bom. 441. Referred to.

(1906) *Jaffer Meher Ali vs. Budge Budge Jute Mills Co.* 33 Cal. 702. } Followed.

(1906) *Nathu Gangaram vs. Hansraj Morarji* 9 Bom. L. R. 114.

(1903) *Tolhurst vs. The Associated and Portland Cement Manufacturers* L. R. App. cases 415 (considered.)

PARLETT, J.—The defendants in this case, who are millers, on September 22, 1910, sold to Zaretsky Bock and Co., the whole produce of rice meal from their mill for the season 1911 at Rs. 85 per 100 baskets of 45 lbs. net, delivery to be taken ex-hopper at seller's mill from January 1, 1911, to the end of 1911 season, date at seller's option and payment to be made in cash before any rice meal was removed but not in any case later than immediately after milling and apparently as soon as 1,000 bags were bagged. On August 10, 1911, Zaretsky Bock and Co. endorsed this contract as transferred to the plaintiff firm and on the same day wrote to defendants informing them of the transfer and asked them to send bills

*Appeal against the judgment and decree of the Small Causes Court, Rangoon in Civil Regular No. 6260 of 1912.

L. B.
 Diekmann
 Bros. & Coy.,
 Ltd.
 v.
 Sulaiman
 Haji Bros., &
 Co.

in future to plaintiffs. There was no reply to this letter and on September 2, 1911, the plaintiff firm wrote to them asking for a bill and delivery order in respect of about 1,000 bags which they believed them to have ready, and on September 4 defendants replied repudiating the transfer of the contract as it was made without their knowledge and consent. The plaintiff's firm purchased the 100 bags of rice meal in the open market at Rs. 115 per 100 baskets of 45 lbs., and have now sued the defendants for Rs. 1,320 damages suffered in the transaction.

The principal point is whether the contract is assignable without the assent of the defendants, the sellers. A somewhat similar contract was held not to be assignable in *Tod v. Lakhmidas* (1) and cogent reasons for the decision are set out in the judgment in that case. It is, however, pointed out that it was decided before the Transfer of Property Act came into force, and it is urged that this contract is an actionable claim as defined in section 3 of that Act and can therefore be transferred under the provisions of Chapter 8. I doubt, however, whether until Zaretsky Bock and Co. claimed delivery on tender of payment and were refused, an actionable claim arose which they could transfer as such to another party. The more recent cases of *Jaffer Meher Ali v. the Budge Budge Jute Mills Co.* (2) and *Nathu Gangaram v. Hansaraj Morarji* (3) were decided after the Transfer of Property Act came into force and in neither was a contract similar to that involved in the present case considered to be transferable merely as an actionable claim. The principle there laid down is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term "benefit" the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, provided that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to perform. It was expressly stated in the Calcutta case that looking at the terms of the contract it did not appear to impose any liability or obligation of a personal character on the assignor, which would prevent the operation of the rule of assignment, and I feel no doubt that the expression "of a personal character" referred to the obligation only and not to the liability, and that the decision was not intended to qualify the rule that, though the benefit of a contract may be assignable by one party, the burden is not so assignable without the consent of the other party. The House of Lords case of *Tolhurst v. the Associated Portland Cement Manufacturers* (4) was referred to as an authority for this contract being assignable but the decision in that case was arrived at on a consideration of the terms of the particular contract concerned and the assent of the Lord Chancellor to the opinion of majority of the judges was accorded, and that too with hesitation, only in view of the length of duration of the contemplated contract, the persons

(1) 16 Bom. 441 (1892).

(2) 33 Cal. 702 (1906).

(3) 9 Bom. L. R. 114 (1906).

(4) L. R. Appeal Cases (1903) p. 415.

engaged in it, and the nature of the contract itself, in none of which respects had it anything in common with the contract now under review. Looking at the contract in this case, I think it clearly imposes liability on the purchasers such as would preclude their transferring it without the consent of the sellers. It contains the following clauses:—

(10) If market price of above rice meal declines prior to milling, sellers have the option of requiring buyers to deposit a margin between contract and market prices of the day within 24 hours.

(11) Should buyers fail to appear to take delivery ex-hopper or as above, sellers to have the right of cancelling this contract and claiming on buyers for any difference in price between sale and market price of the day on which the rice meal was to have been milled.

(12) Sellers have the option of disposing of the rice meal by public or private sale on buyers' account should they fail either to deposit margin as above or to pay for it as above within two days of the presentation of the bill.

These provisions in my opinion operate to render the contract not assignable without the seller's consent. The appeal is dismissed with costs.

L. B.
Diekmann
Bros & Coy.,
Ltd.
Sulaiman
Haji Bros., &
Co.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 105* OF 1912.

R. M. RAMANATHAN PILLAY .. APPLICANT.

vs.

M. L. V. E. R. M. FIRM ... RESPONDENT.

For Applicant—Maung Pu.

For Respondent—Chari.

Dated, 12th March 1913.

Provincial Insolvency Act—III of 1907 S. 46 (2) and (3)—Appeal from orders of the District Court—Whether an appeal lies against order dismissing applicant's petition for adjudication as an insolvent for abuse of process comes under any of the sections enumerated in clause 2 of S. 46.

Where the applicant's petition for adjudication as an insolvent was dismissed on the grounds of fraud and abuse of the process of the Court,

Held that such an order could not be made under any of the sections enumerated in S. 46 (2) and no appeal can be laid against it except with the leave of the District Court or of the High Court.

JUDGMENT.

Fox, C. J. :—The petition was dismissed because the Judge thought there had been fraud on the part of the petitioner, and that the petition was an abuse of the process of the Court.

* Appeal against the District Judge of Insein dismissing the applicant's petition for the benefit of the Insolvency Act as being a fraud and abuse of the process of the Court.

L. E.
 R. M. Rama-
 Nathan Pillay
 v.
 M. L. V. E.
 R. M. Firm.

Sub-section 2 of section 46 of the Act gives an appeal from an order made under section 15, but this order was not made under any of the sections mentioned in that Sub-section.

For an appeal against any order not made under the sections mentioned in Sub-section 2, the leave of the District Court or of the High Court has to be obtained. The appellant applied to neither Court for leave to appeal. The appeal must be dismissed.

HARTNOLL, J.:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

Original Civil Jurisdiction.

CIVIL REGULAR NO. 341 OF 1912.

DHUNJI DEOSI PLAINTIFF.

vs.

POKERMALL ANANDROY DEFENDANT.

Before Mr. Justice Young.

For Plaintiff—Lentaigne and Doctor.

For Defendant—Giles with N. M. Cowasji and A. B. Banerji.

Dated, 16th September 1913.

Wagering Contracts—Teji and Mundi contracts explained—Practice and intention of the parties—Milling notice—Effect of delivering it—Double option—Does it differ from a single option so as to make it a wager?—Resources of the contracting parties.

A *teji* (rise in price) contract is a contract in which all the usual formalities of an ordinary contract are observed except that the seller only signs his (*i. e.* the seller's) note and gets an extra amount as consideration for his promise not to proffer delivery unless called upon. It is virtually the purchase of an option or right to call for delivery, the *teji* eater being bound to supply if called upon.

In a *mundi* (fall in price) contract the procedure is the same, a similar premium is paid to the *mundi* eater who signs a bought note but the other party signs no sold note, merely purchasing an option to sell.

As to the question whether the *teji* contract in the present case was an honest contract or was void as a wager,

Held that the practice and intention of the parties were that the holder of the option should, if the market rose, call for and the other party (the *teji* eater) should give delivery of milling notices.

Held also that in the rice trade, the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice.

Held that the purchase of an option or right to call for shares is not necessarily a wagering contract and the test to be applied in such contracts is whether differences *only* are intended to be paid.

Held further that a double option is no more necessarily a gamble than a single option.

Held that a contract cannot be proved to be a wagering contract unless neither of the parties intended under any circumstances to give or take delivery.

Held that the transactions in question were within the genuine commercial resources of the parties who were doing a large legitimate business and cannot therefore be classed as wagering contracts.

JUDGMENT.

YOUNG, J:—The main question in the case was whether a certain contract entered into at Rangoon relating to rice being one of a class known as *teji* contracts was void as being a wager. Before discussing this it is necessary to consider an argument raised upon the pleadings by the defendant, so far as I am able to understand it. The plaintiffs pleaded that by a contract, dated February 10, 1911, the defendant firm sold to the plaintiffs 10,000 bags of rice at Rs. 325 per 100 baskets deliverable ex-hopper in all August 1911, date at seller's option, and on the same day executed a sale note and that as and by way of consideration for the defendant's undertaking to give delivery to the plaintiffs (whenever the plaintiffs chose to call upon them) during the month of August the plaintiffs gave to the defendant Rs. 1,000 at the rate of Rs. 100 for every 1,000 bags. They then pleaded in paragraph 5 that according to the custom of the trade in such transactions they had the option of demanding delivery in August on paying the agreed price. I may at once say that I do not consider that these two paragraphs were very well or very clearly drafted. The payment of Rs. 1,000 was made not by way of consideration for the defendant's promise to deliver, which was already secured by plaintiff's promise to pay the agreed price, but as consideration for a promise on the part of the defendant not to proffer delivery unless called upon. The plaintiffs then proceeded to plead that they had called upon the defendant to deliver and that he had failed to do so and to claim damages on the basis of the difference between the market and contract rate on August 31, 1911. The defendant in his written statement denied having sold any rice to the plaintiffs as alleged but pleaded that it was a *tejimundi* transaction, i. e., a gambling transaction, and represented a wager. In the next paragraph he exclaimed from his point of view or rather from the point of view of his defence, what was meant by a *teji-mundi* transaction, saying it was a bet on the market price of rice for the month of August, and admitted that he signed the sold note which he said was usual in such transactions, and added that the plaintiff did not sign any bought note, which is of course admitted. Except that defendant in my opinion was incorrect in describing the particular transaction sued on as a *teji-mundi* transaction and should have described it as a *teji* contract only, it seems to me that both parties are practically agreed as to *modus operandi* but differ as to the intentions of the parties and the legal effect upon the contract arising therefrom. The defendant asserts that there was only an intention to pay differences and not to receive or give delivery of the rice, while the plaintiff urges that there was every intention to give and receive delivery of the commodity at any rate as far as this could be effected by the delivery of milling orders, and that there was no intention either on his part or on that of the defendant merely to pay the difference between the contract price and the market rate. He says that this was one of a considerable number of contracts entered into between himself and the defendant, in all of which he

L. S.

Dhunji Doosi
v.
Pokermall
Anandroy.

L. B.
Dhunji Deosi
v.
Pokermall
Anandroy.

had duly received milling notices, where he had demanded performance of the contract. Now a *teji* contract for rice as entered into in the Rangoon market seems to be as follows:—There are two parties, the one being the buyer and the other the seller, who is called the person who eats *teji* (a Gujerati word meaning 'rise'). The latter in payment of a fixed sum, small in relation to the value of the quantity of the rice dealt in, agrees to sell and deliver rice in a certain month at a certain price, but not to deliver it and demand the price unless called upon to do so. It is virtually the purchase of an option or right to call for so much rice during a given month, the *teji-eater* being bound to supply if called on, but the other not being bound either to demand or in default of a demand to accept delivery. If therefore the market price rises above the contract price it will be to the interest of the buyer to call for delivery; if on the other hand it falls below the contract rate, it will be to his interest not to do so. As delivery may be given during the whole month, the purchaser of the option naturally waits till towards its close for fear of a sudden fall between his call for delivery and the actual delivery. It is obvious therefore that the transaction may be a mere bet on the rise of the market, and if the intention of both parties was not to deliver but merely to pay the difference between the *teji* and the market rate on the day of settlement, which in these contracts seems to have been the last day of the month, then according to the authorities it would in my opinion be considered to be such and the contract would be void under section 30 of the Contract Act.

In a *mundi* contract, the procedure is the same, but the parties gamble, as the defendant would say, on the chance of a fall, *mundi* being the Gujerati term for a fall. A similar fixed premium is paid to the *mundi* eater, who in consideration thereof agrees to buy rice forward from the other party at a certain fixed rate. The *mundi* eater signs a bought note, but the other party signs no sold note. If the market falls below the *mundi* rate, the *mundi* eater is, as the plaintiff would say, called on to take delivery of the contract quantity and to pay more than the market price of the day. If it did not fall below that price the *mundi* eater keeps the fixed premium but does not attempt to demand delivery. Each contract therefore, whether *teji* or *mundi*, is unilateral and not reciprocal—a purchase of an option in a *teji* contract to buy and in a *mundi* contract to sell rice at a given price in a given month. As a concise method of expressing their mutual intention, the *teji* eater signs the sold note and the *mundi* eater the bought note, implying that he is bound; and the other party, in token of his freedom from the correlative obligation to take delivery in a *teji*, or to give delivery in a *mundi* contract does not sign the bought note, in a *teji* or the sold note in a *mundi* contract. This and the fact that a fixed brokerage in lieu of an *ad valorem* brokerage was paid at the inception of a *teji* or *mundi* contract seems to me the only paper differences between what has been called the ordinary and these which are alleged to be wagering contracts. All the minutiae

of the genuine contracts were employed either, as the plaintiff says, because it is a genuine contract, or, as the defendant says, from a desire to hoodwink the courts and force them to collect gambling debts if the *teji* or *mundi* eater repudiates. The bought or sold note used is precisely the same as that used in the ordinary contracts; the mills which in ordinary contracts it is usual to strike out from the list of those whose products the sellers may deliver being struck out in these also.

L. B.
Dhunji Deosi
v.
Pokermall
Anandroy.

From the fact that a sold note was signed, the defendant argued (a) that the contract had been reduced to writing and that by virtue of section 92 of the Evidence Act this note must be deemed to embody the final terms of the agreement arrived at between the parties, and (b) that the contract embodied in this note did not represent the real agreement between the parties and that therefore as it was the contract sued on, plaintiff's suit should be dismissed. I am unable to accept this contention. It is true that clauses 10 and 11 of Exhibit A, which provide that if the market price declines prior to selling, sellers should have the option of requiring the buyer to deposit the margin between the contract price and the market price of the day within 24 hours and that should buyers fail to appear to take delivery ex-hopper sellers were to have the right of cancelling the contract and claiming the difference between the sale and the market price of the day on which the rice was to have been milled, signify in my opinion a reciprocal promise on the part of the seller to give and on the part of the buyer to accept delivery, and that any evidence of a verbal agreement that the seller should not have the option referred to in clause 10, or the right to compel buyers to pay the difference referred to in clause 11 cannot be proved by the plaintiff being excluded by section 92, Evidence Act, as being terms inconsistent with and repugnant to the written contract. But so far as I can see plaintiff's cause of action is simply and solely defendant's failure to give delivery. He might have accepted the position created by section 92 and relied solely on Exhibit A, and left defendant to prove, as the defendant was entitled to do under proviso 1 to the same section, the other facts and circumstances which would show that the ostensibly good contract contained in Exhibit A was void as a wagering contract and that the document was therefore invalidated.

So far as I can see plaintiff did sue on Exhibit A. He annexed it to his plaint and filed it, thereby complying with the provisions of Civil Procedure Code, Order VII, Rule 14, with regard to documents on which he sued. Other documents on which he relied he specified in a list again complying with the provisions of the same rule with regard to the documents relied on, as distinct from those sued on.

He has proved his contract, he has proved his demand for delivery, and he has proved the defendant's failure to comply with this demand. It is either an honest contract or void as a wager by reason of circumstances which it was for defendant to allege and

L. B.
Dhunji Deosi
v.
Pokermali
Anandroy.

prove. I think paragraphs 4, 5 and 6* of his plaint need not have been pleaded and were pleaded owing to an unnecessary sense of candour and a desire not to lay himself open to the imputation that he had concealed anything from the court. If he had not pleaded these facts, defendant would have had to assert them in order to show that it was a wagering contract, and not a mere ordinary contract, and did so.

Thus he says in his examination in chief "As regards *teji* contracts I signed sale notes, as regards *mundi* I signed bought notes. In ordinary contracts it is usual to sign in two documents—sale and bought notes. In ordinary contracts no party deposits any money at the time of execution. In *teji* I would take Rs. 100 on 1,000 bags. Both parties fix a certain rate say Rs. 325. If the market goes above Rs. 325 then the party who has received this Rs. 100 has to pay the difference (here lies the main contest between the parties) between the contract rate and the market rate. If during the month when the contract falls due, the market falls below that rate neither party pays anything unless the rate subsequently goes up (beyond the *teji* rate). Here we have the essential features of the actual agreement: *viz.* that in consideration of a payment of Rs. 100 the common form of reciprocal contract evidenced by Exhibit A was restricted and confined so that it became unilateral, the vendor alone being bound. It was urged that the plaintiff had brought himself within the principles laid down by the Appellate Court in *Christensen vs. Suthia* 2 Burma Law Times 100 and the Privy Council Cases there cited which decided that it is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; but so far as I can see this principle is not violated. That the defendant bound himself to deliver certain rice in a certain month at a certain price and that he failed to do so though called upon are facts set out in the pleadings and are the very facts on which the plaintiff bases his claim and these and only these actually occurred. Supposing the market had fallen below the *Teji* rate and the defendant relying on Exhibit A had tendered the rice

* (4) The plaintiffs state that as and by way of consideration for the said undertaking of the defendant firm to give delivery to the plaintiff (whenever the plaintiffs chose to call upon the defendant firm) during the month of August 1911 of 10,000 of cleaned white rice of the quality and at the price as stated in paragraph 3 above the plaintiffs gave to defendant on 10th February 1911 Rs. 1,000 at the rate of Rs. 100 per every 1,000 bags.

(5) The plaintiffs state that according to the custom of trade relating to such rice transactions as stated above the plaintiffs as buyers from the defendant firm had the option and right of demanding delivery of 10,000 bags in August 1911 from the defendant firm, the plaintiffs paying the defendant the price of the same at the rate agreed upon *viz.* Rs. 325 per 100 baskets of 75 lbs. net each and that the defendant firm was bound to give delivery of the said 10,000 bags to the plaintiffs during the month of August 1911 on the plaintiff's demanding such delivery.

(6) The plaintiffs further submit that it was agreed and understood between the plaintiffs and defendant firm that the plaintiffs were entitled to demand delivery and to obtain delivery from the defendant firm on such demand of 10,000 bags during the month of August 1911, and that the defendant firm was bound to give delivery of the same during such month, on any date at its (the defendant firm's) option.

and demanded payment then it is possible that in a suit brought by the defendant upon Exhibit A for the price, the present plaintiff might have found himself precluded by section 92 of the Evidence Act from proving that he was not bound to take delivery. But this is not what happened, the market did not fall and the defendant did not call upon the plaintiff to take delivery, on the contrary the market rose and the plaintiff called upon the defendant to give delivery. These are the circumstances which gave the plaintiff his cause of action and these are set out in the pleadings and if the plaintiff had pleaded then and there only what I think he would have been entitled to do, the present contention would not, I think, have been raised. So far as the plaintiff is concerned, the other facts are surplusage as weapons of attack though for the defendant they are vital as weapons of defence.

With regard to the defence on the merits, the defendant after attempting to prove in the earlier part of the examination that no delivery in kind was ever intended or given, but only a payment of the difference between the *Teji* and the market rate, was forced to admit that in all previous *Teji* contracts with the plaintiff for delivery prior to July, he had invariably delivered milling notices, and never paid differences between the contract and the market rate. He is forced to admit it first in one contract and then in another, and finally he is said "Exs. E. H. J. M. O. P. Q. and R. were eight contracts which I had with the plaintiff for delivery in the period previous to July 1911. These were the only *Teji* contracts which I had with the plaintiff. In every one of these eight contracts I have delivered a milling notice and I have paid or received difference i. e., profit or loss calculated on my contract with some previous person." Now if, delivery of a milling notice is tantamount to a delivery of goods, these differences will represent the actual profit and loss on an actual completed contract to deliver goods, and plaintiff's position will be considerably stronger than if there was no delivery but a mere payment of differences between the *Teji* and the market rate. Before considering this question, however, it may be pointed out that these contracts though made before, were performed after the contract in suit was entered into, and that their probative value as to the intention of the parties at the date of entering into the contract in suit is lessened but at page 41 the defendant says "In the *Teji* contracts of 1910 likewise I delivered milling notices or paid differences or gave both together. When I talk of a difference with the milling notice I mean the difference between the rate at which I purchased from any one and the rate at which I sold under the milling notices" and again at page 25 he says "In all my *Teji* contracts in which I have settled my losses I satisfied some by payment of the difference and delivery of the milling notice" and he says the same with regard to his *Teji* contracts with others such as Hirji Oomersy and Dhunji Dewacaran (v. p. 40 of his evidence.) He clings desperately to his statement that in some he paid differences only. But I do not recollect that he produced a single instance to that effect, and I am convinced that the practice and intentions of the parties were that

L. B.

Dhunji Doesi
a.
Pokermall
Anandroy.

L. B.
 Dhanji Doesi
 v.
 Pokermhl
 Anandroy.

the holder of the option should, if the market rose, call for and that the other party (the *Teji* eater) should give delivery of milling notices. I must also hold that in the rice trade the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice.

Passing on, the milling notice (says the defendant at p. 7) is the delivery. First the milling notice is passed and then when the goods are milled the delivery order comes up. When I receive delivery under an ordinary contract first I get the "milling notice" and again at p. 8 he says "when I get a milling notice I take it that I am in possession of goods and when I pass it on to another I take it that another man is in the possession of the delivery." It was quite immaterial to him whether he got a milling notice direct from the mill or whether he got from a 3rd party (vide page 42) where he says "when I delivered a milling notice I did not bother myself whether it was got from a mill or from outside, and a milling notice which he had accepted as performance of an ordinary contract i. e. a contract (to take his own words at page 7) in which the original intention was as far as possible to give or take delivery he would pass on by way of performance of *Teji* contract (vide page 24) where he says "what I purchased at Rs. 325-8 was under an ordinary contract. I passed the milling notices to the plaintiff under a *Teji* contract at Rs. 310." The procedure in fact seems to be as follows. The millers contract to mill and sell so much rice to A, and when they are ready to mill the paddy they send him a milling notice, stating the day and hour when they intend to commence milling, so that he may attend and see the operations and object, if he wishes, to the quality of the rice turned out. After the rice is milled he loses this chance and the millers send their purchaser a delivery order and on payment the rice is delivered. If in the meantime the purchaser has resold, he will deliver the milling notice to his purchaser and will pay or receive the difference between the price at which he has bought from the mill and that at which he has resold. The milling notice may pass through numerous hands at various prices and a broker is employed to ascertain and collect or pay what each purchaser has to pay or receive but as defendant says at page 43 "Any one of the fifty" (i. e. if it has passed through 50 hands) can keep the milling notices and take delivery of the rice and eat it but he will have to pay the mill and get the rice milled" i. e. if he has bought Rs. 300 and the mill has sold at Rs. 325 he will receive from the broker Rs. 25 on behalf of his vendor and get the rice by a payment of 325 plus the ordinary fixed charges for gunnies etc. Is this a wagering contract? The milling notice is only a piece of paper and, as defendant says at page 43, "it is always possible to effect a sale or purchase of rice in the Rangoon market, "and as this sale or purchase is symbolised and considered to have been effected by the delivery or acceptance of this piece of paper, it follows that it is equivalent to money and that a man may go in for the largest speculations without ever intending to take delivery of any of the actual commodity, but only to sell the rights evidenced by the paper and receive his profit or pay his loss. If such

was the intention of the parties, there can, I think, be no doubt but that on the principle laid down by the Privy Council in *Kong Yee Lone and Co. v. Lowjee Nanjee* (1) the transaction would be regarded as a wager. But the onus lies upon the defendant to prove it, and has he succeeded? Defendant admits that at the time he was doing a large rice business and admits that the plaintiff was a genuine shipper doing a large commission business in rice and also business in rice on his own account, and, so far as I can see, never showed that the plaintiff never took actual delivery under his *Teji* contract but always passed them on. Nor can I see that it would have helped him if he had done so, seeing that he was undoubtedly doing a large *bona fide* business in rice at the time, for what was said of delivery orders by Beaman J. in *Mathuradas v. Narbeshanker* (2) may equally well in my opinion be said in Rangoon of milling notices, namely, that though the mere giving and taking of a delivery order may be a device in use amongst gamblers to evade the law, yet on the face of it is a regular business method and as effective as taking the goods away and putting them in your own godown. Nor can I see on the authorities that it makes any difference that he only purchased from the defendant a right to call for the delivery of the specified quantity of rice. The law of England and of India as regards wagering has been declared to be the same by the Privy Council in *Kong Yee Lone's* case already cited and in *Buitemlandsche Bankvereniging v. Hildeheim* the Court of Appeal held that the purchase of an option or right to call for shares was not necessarily a wagering contract, but that the same test namely as to whether differences only were intended to be paid must be applied. They held that in the contract in question this was not the case but "that it was a bargain for good consideration for the right to call for so many shares—like a bargain for the right to call for so many tons of iron at a certain price on a certain day." In *Tod v. Lakmidas* (4) Farran J. laid it down that contracts were not wagering contracts unless it was the intention of both parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other. This rule, though regarded by Batchelor J. as being perhaps too broadly expressed in *Motital v. Govindram* (5), has been restated with approval by Beaman J. in the later case of *Mathuradas v. Narbeshanker* (2). Whether it is or is not too broadly expressed seems to me immaterial in the present case, where so far as I can see the defendant's intention when he entered into this contract was to perform it if called on to do so, by passing on a milling notice and paying or receiving the difference between the price at which he had bought and that at which he had sold, and while the plaintiff's intention is not shown to have been other than to demand the milling notice if the state of the market rendered it profitable to

L. S.
Dhunji Doshi
v.
Pokermali
Anandroy.

(1) I. L. R., 29 Cal. 461.

(2) 11 Bom. L. R. 1008.

(3) 19 T. L. R. 641.

(4) 16 Bom. 441.

(5) 7 Bom. L. R. 85.

L. S.
 Dhunji Doesi
 v.
 Pokermall
 Anandroy.

him to do so and use it either to obtain rice himself or to enable him by passing it on to perform another *bona fide* contract. Lastly, it was shown that it was the plaintiff's practice followed in the transaction in suit to enter on the same day into a *mundi* contract whereby he obtained an option to sell the same quantity of rice deliverable in the same month at a very much lower rate, *viz.* Rs. 285 per hundred baskets. The effect of the double option was that if the market fell below Rs. 285 he would sell, and if it rose above Rs. 325 he would buy. The defendant admitted that he had entered into many *mundi* contracts and that his intention was to perform his *mundi* contracts if called on in the same manner as his *teji* contracts, but that the market never having fallen below the *mundi* rate he had never been called on to take delivery. Plaintiff thus obtained a double option. It was argued that if these were genuine contracts he must lose as he had contracted to buy for Rs. 325 and sell at Rs. 285 but the argument loses sight of the fact that it was an option. In my opinion a double option is no more necessarily a gamble than a single option. It may be one, as it may be an attempt to provide against the fluctuations of the market and to enable the holder to perform his other contract. Farran J's dictum in *Tod v. Lakhmidas* (4) that a contract is not a wagering contract unless neither of the parties intended under any circumstances to give or take delivery seems to me to represent the law, though personally I should prefer to say that a contract cannot be proved to be a wagering contract unless it be proved that neither of the parties intended under any circumstances to give or take delivery. The delivery, however, must be a genuine delivery, and not a mere sham, not merely the delivery of a piece of paper which was never to be transformed into the actual delivery of goods. In *Kong Yee Lone's* case the transactions in question were so out of proportion to the genuine commercial resources of the parties that the Privy Council held them to be wagers, but here each was doing such a large legitimate business that I am unable to hold the test applicable to this particular case. I am unable to hold it proved that the plaintiff did not intend to take and that the defendant did not intend (if called on) to give a perfect genuine delivery. He therefore fails in my opinion to show that the contract was a wagering contract and the plaintiff must have a decree calculated on the difference between the contract rate of Rs. 325 per 100 baskets and Rs. 390 per 100 baskets, this being the agreed settlement rate for August 1911 namely, Rs. 19,500 with costs and Advocate's fees of 10 gold mohurs for the first and eight for each subsequent day.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 11* OF 1912.

YEO KYEW SUM vs. U KE TU.

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

Dated, 3rd, March 1913.

Buddhist Law—religious offering irrevocable when.

A verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable even without the formal dedication ceremony. A building erected on religious land with the permission of the presiding monk partakes of the nature of the ground on which it stands and becomes ecclesiastical property.

JUDGMENT.

PARLETT, J.—Plaintiff (U Ke Tu) is the presiding monk of a Buddhist monastery and the owner of the monastery and its precincts. Ma Thet, widow of Yeo Poon Yoke, obtained plaintiff's permission to erect a *Zayat* on the monastery ground to be presented to him. Permission was given and a building was erected. In execution of a decree, defendant attached the building as belonging to the estate of his judgment debtor, Yeo Poon Yoke, deceased. Plaintiff, having failed to get the attachment removed, filed this suit for a declaration that the building is his property and not that of the defendant's judgment-debtors, and obtained a decree against which defendant now appeals.

It is denied that plaintiff had possession of the building. It appears that it was kept locked and the key was in Ma Thet's custody, the reason being the necessity of protecting from theft the furniture and moveables kept in the building, and that plaintiff would have no occasion to enter it unless invited there for ceremonial purposes. It further appears that the formal dedication ceremony was not gone through before the attachment was effected, and it is urged that until dedication the property in the materials remained with the builder. For this proposition no authority has been cited. So far as I am aware a verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable even without the formal dedication ceremony, and in this view even the materials became religious property, when deposited in the plaintiff's monastery precincts with the intention of their being used for the building. There can be no doubt that permission to build was given only on the understanding that the building was to be plaintiff's property and that it would not have been given without such understanding. No authority has been quoted to contradict the view that by its erection in the circumstances of this case, the building partook of the nature of the ground on which it stood and became ecclesiastical property and as such not liable to attachment in execution of defendants' decree. I would therefore dismiss this appeal.

Fox, C. J.—I concur.

* Appeal against the judgment and decree of the Judge on the Original Side in Civil Regular No. 245 of 1912 passed on 17th December 1912

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION NO. 128 OF 1912.

MAUNG MAUNG vs.	}	1. WIGHTMAN & CO. 2. MOOSAJEE AHMED & CO. BY ITS MANAGING PART- NER ISMAIL MAHOMED.
-----------------	---	--

For Appellant—McDonnell.

For Respondent—S. N. Sen.

Before the Officiating Chief Judge and Mr. Justice Twomey.

Dated, 12th August 1913.

Proclamation of Sale—particulars of—value and capacity of a mill are material facts for proclamation—stay of Sale—Civil Procedure Code O. XXI, Rule 66—Section 47, Civil Procedure Code.

Where the judgment creditor had purchased property at an auction sale which was subsequently set aside and the judgment-debtor in the next sale proclamation claimed a set off from the judgment creditor for the mesne profits of the property held that this matter should be dealt with in execution proceedings and not by a separate suit.

In the sale proclamation as the parties did not agree as to the valuation and capacity of two rice mills the Court inserted the respective figures of both parties. Held that as far as valuation was concerned this amounted to a material irregularity. The sale was stayed and the Lower Court was directed to hold an enquiry as to valuation and insert the figure found on such enquiry. Each case must be dealt with on its merits.

Sadanand Khan vs. Phul Kuar, 22, All. 412 referred to.

JUDGMENT.

HARTNOLL, OFFG. C. J.:—This is an application for stay of the sale of two mills, their sites and the buildings in connection with them. They are proclaimed for sale in execution proceedings. Their sale was ordered for the 9th instant and as we decided that the sales should be stayed we issued telegraphic instructions to this effect as this order could not reach the district court in time to stay the sales.

They are being sold by the respondents, Messrs. Wightman and Co., in execution of a mortgage decree obtained against the appellant Maung Maung. They were sold in execution last year in these same execution proceedings, but the sales were set aside owing to certain irregularities. Messrs. Wightman and Co., decree holders, purchased them. They were, therefore, in possession of them for some time and worked them, but went out of possession when the sales were set aside. When the proclamations for the present sales were being considered, Rs. 84,522-8 was the sum calculated to be due on the decree. Appellant claimed to set off against this sum the net income derived from the mills by respondents when they were in possession. The respondents made this sum Rs. 7,000 odd, but appellant says that it is much more.

At the argument it was stated that appellant claimed the amount to be Rs. 30,000. A commissioner had been appointed to take accounts and ascertain what it is.

Appellant urges that no sale should take place until this sum has been ascertained. It is allowed that he does not claim it to be more than Rs. 30,000. Respondents agreed to allow the net profit to be set off against the mortgage debt, and so the sum stated to be due in one of the proclamations is Rs. 77,828. There seems to be an error in the other, where the sum was entered as Rs. 72,828. It would appear to be correct that this matter of what is due owing to respondents' occupation is one which should be dealt with in execution proceedings and not by a separate suit and that appellant is entitled to have set off against the decretal amount the net profit enjoyed by respondents.

Another objection raised is that the value of the mills is not accurately stated in the proclamations. In one, the mill is stated to be valued by the decree-holders at Rs. 30,000 and by the judgment-debtor at Rs. 60,000. In the other the value is said to be given by the decree-holders at Rs. 45,000 and by the judgment-debtor at Rs. 60,000. It is urged that valuations of this nature will vitiate the sale. Order 21, Rule 66, lays down that the proclamation shall specify as fairly and accurately as possible, amongst other things, every other thing, which the court considers material for the purchaser to know in order to judge of the nature and value of the property. In the case of *Sadanand Khan v. Phul Kuar* (1) their Lordships of the Privy Council said:—Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things which the court considers material for the purchaser to know and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible. The words in the Code in force when that case was decided are the same as those in the rule now in force. It is impossible to hold that a fair and accurate value is given in the proclamations now under consideration and this is a sufficient reason for staying the sales.

A further objection is made that the maximum capacities of outturn are not given accurately. In the case of one mill, it is given as estimated by the decree-holders 3,000 baskets of rice in twelve hours and as estimated by the judgment-debtor 3,500 to 3,700 baskets, according to the quality. In the case of the other mill the figures are given respectively in the same way as 1,500 baskets and 1,800 to 2,000 baskets according to the quality. There is no sufficient variation in a matter of this description as would constitute a material irregularity, although it would be better to give one estimated outturn only; but the outturn must differ from time to time.

There is a second mortgagee Messrs. Moosajee Ahmed and Co. and he objects to the sales proceeding till the termination of an

L. S.
—
Maung
Maung
v.
Wightman
& Co.
and others.

(1) I. L. R. 22 All. 412.

L. E.
 Maung
 Maung
 v.
 Wightman
 & Co.
 and others.

appeal in a suit which has been dismissed and in which the judgment-debtor's wife is claiming in her own right a half share or interest in the mills.

This last objection in my opinion is of no force. The first mortgagee is entitled to his money and to bring the mills to sale in execution of his decree irrespective of what other claims there may be that are subsequent to his and irrespective of litigation that may prejudice the interests of a subsequent mortgagee. When the latter made his loan, he should have considered all such risks and the first mortgagee cannot be delayed by the fact that the sales might prejudice the second mortgagee.

On the ground that the valuation of mills is not as accurately shown in the proclamations as possible, the sales are stayed and fresh proclamations must issue, when the mills have been as accurately valued as possible. Evidence must be produced before the district judge from which he can fix their values. The inquiry should not be long or protracted but summary and both parties should be allowed to produce evidence. This is an exceptional case, as it is not often that mills of this nature are sold in execution in this province, and I would not say that in all cases it is necessary to hold an inquiry of this nature. Each case must be dealt with on its merits.

When values have been fixed, and, if possible, a more accurate description of maximum capacities of outturn have been given, the mills can be then proclaimed again for sale. On the date fixed for sale if it is then known exactly what should be set off against the decretal amount on account of the net sum received by respondents, when they were in possession and working the mills, the sales can then take place to recover the sum due. If one mill does not fetch such sum, the more valuable one being sold first, the second can then be sold. If such sum has not been ascertained on the date fixed for the sale, the more valuable mill and premises appertaining to it should be sold. If it fetches a sum within Rs. 30,000 of the sum due on the decree, not taking into account any set-off on account of the sum due by respondents on account of their occupation, then, the sale of the second mill should be stayed, pending the ascertainment of such sum. But, if it fetched any less sum than this, the second mill should also be sold. For example, on the date of the sale, Rs. 86,000 was found due on the decree, not taking into account any set-off against it on account of the respondents' occupation. If the mill sold fetches Rs. 56,000, or more, the second should not be sold as it may be found that there is due from the respondents on account of their occupation Rs. 30,000. This Rs. 30,000 plus Rs. 56,000 realised for the mill sold would satisfy the decree. If the mill sold only realises Rs. 50,000, then the second mill should be sold, in any case, as even if Rs. 30,000 were found to be due by respondents as a set-off on account of their occupation, even that sum would not, with the Rs. 50,000 realised by the sale of the mill, satisfy the decree and so the second mill would have to be sold in any case. It must be remembered that Rs. 30,000 is the maximum claim of Maung Maung as a set-off.

I would pass no order as to the costs of this appeal as I am not satisfied that Maung Maung has not unnecessarily been delaying execution.

TWOMEY, J.:—I concur.

L. B.
Maung
Maung
v.
Wightman
& Co.
and others.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 212* OF 1912.

TOOLA RAM DEFENDANT
APPELLANT.

vs.

ABDUL GAFFOOR PLAINTIFF
RESPONDENT.

For Appellant—A. C. Dhar.

For Respondent—K. B. Banerji.

Before Mr. Justice Robinson.

Dated, 5th February 1914.

Practice—Procedure—Section 73 of Act V of 1908—Section 295 of Act XIV of 1882—Rateable distribution—Meaning of same judgment debtor.

Where certain property was attached and sold in execution of a decree obtained against X in his personal capacity and where the holder of a decree passed against X as heir to his wife sought rateable distribution of the proceeds of the sale.

Held that the provisions of section 73 of the Civil Procedure Code cannot be invoked unless the judgment-debtor occupies the same character in each decree.

I. L. R. 26 All. 28

and

I. L. R. 25 Bom. 494

} followed.

JUDGMENT.

ROBINSON, J.:—Appellant obtained a decree against one Butchia on 29th November 1911 and in execution attached and sold, on 28th January 1912 certain property: part of the purchase price was paid that day and the balance on the 9th February 1912.

Respondent on 24th November 1912 obtained a decree against Kaja Mahomed and Butchia for a debt due by Butchias' deceased wife for which Kaja Mahomed had been surety. The decree was transferred to the same Court as that in which the property had been sold and respondent applied for a rateable distribution under section 73 Civil Procedure Code. It is now admitted that all the purchase money not having been paid in, he was in time.

The sole remaining question argued was whether Butchia was the same judgment-debtor in both decrees. Mr. Dhar argues that in Respondent's decree he was merely legal representative of his deceased wife.

Respondent's suit was brought after the woman's death and the plaint describes the defendants as Kaja Mahomed and Butchia.

* Appeal against the judgment and decree of the District Judge, Toungoo, in Appeal No. 53 of 1912 confirming the decree but reversing the judgment of the Township Court in a suit brought under section 73 (2) of the Civil Procedure Code.

Held that an order requiring the judgment-debtor to pay to the mortgagee interest on the amount due to him from the date of payment into Court by the auction-purchaser till the date of payment made by the judgment-debtor under this rule was illegal.

L. B.
—
L. D.
Attaites.
v.
R. M. K.
Chetty.

JUDGMENT.

HARTNOLL, OFFG. C. J. :—The defendant-appellant is a mortgagor against whom a final order for sale in pursuance of a mortgage decree was passed on the 3rd August 1912. On the 19th February 1913 the sale took place, and the purchaser paid into Court 25 per cent. of the purchase money. The balance of the purchase money was paid in by the 5th March. The appellant obtained leave to set aside the sale under Order 21, Rule 89 and on the 24th March he paid into Court Rs. 83,421-4-6 being the amount due to the plaintiff mortgagee on the 5th March and 5 per cent. on the purchase money for payment to the purchaser. The District Judge ordered him to pay interest on the amount due to the mortgagee not only upto the 5th March, but up to the 24th, the date the appellant paid in the Rs. 83,421-4-6. It is against that order the appellant now appeals. The plaintiff mortgagee was entitled to draw out the amount due to him under his mortgage decree on the 5th March, and upon a sale being set aside under Order 21, Rule 89 the decree holder was not entitled to more than was due to him under the decree. We think therefore that the order appealed against was wrong, and set aside so much of the order as directs interest to be paid after the 5th March to the decree-holder. We allow an Advocate's fee of two gold mohurs to the appellant in this appeal.

ORMOND, J. :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL No. 185* OF 1911.

MAHOMED EBRAHIM SAIB KHATEEB ... PLAINTIFF—
APPELLANT.
vs.
MOUNG BA GYAW ... DEFENDANT—
RESPONDENT.

For Appellant—Dantra.
For Respondent—P. N. Chari.

Before Mr. Justices Ormond and Parlett.

Dated, 30th January 1914.

Notice—Purchaser aware of a previous mortgage by his vendor and his father—Sufficient notice to purchaser of father's interest in the property—Amendment of claim.

* Appeal against the judgment and decree of the District Court of Hanthawaddy in Civil Suit No. 52 of 1911.

L. B.
 —
 Mah'med
 Ebrahim Saib
 Khateeb.
 v.
 Moug Ba
 Gyaw.

Where the purchaser of a land from X became aware before the sale of a previous mortgage of the same land by X and his father together and where X's father was living in a house on the land, *held* he was put upon his enquiry as to X's father's interest in the land and could not be deemed to have purchased anything except X's interest in the property though the land stood in X's name in the Revenue Registers and he had the landholder's certificate in his name.

Where the suit, originally brought for possession of land purchased from X but in the occupation jointly of X and his father was afterwards sought to be amended into one for a declaration for a charge to the extent of the amount paid out of the purchase money towards the redemption of a previous mortgage on the same land executed by X and his father jointly.

Held such an amendment cannot be allowed as it would alter the nature of the suit.

JUDGMENT.

ORMOND, J.:—The plaintiff-appellant sued for possession of two plots of land. He bought the land for Rs. 20,000 from the defendants' son. The land stood in the son's name in the Revenue Registers and the son had a landholder's certificate. The defendant who is a retired myook says that the land is his; that the son had no power to sell it and that he the defendant is in possession.

The plaintiff employed Mr. Dhar the conveyancer, to investigate the title. During that investigation Mr. Dhar perused a mortgage deed in respect of this land executed by the father and the son in favour of the Chetty whose mortgage for Rs. 10,000 was paid off at the time of the plaintiff's purchase from the son. The plaintiff alleges that he went on the land and enquired from some Punjabis (who were tenants in certain of the houses) and was satisfied that the son was in possession. The plaintiff did not go to the Thugyi to make enquiries and there can be no doubt that the defendant was living in a house on the land. The Thugyi who is the collector of the municipal taxes and Income tax gives evidence and states that the defendant paid the municipal taxes and that he was assessed to the Income tax upon the rents received from the houses on the property. The son is a clerk upon a salary of Rs. 45. The plaintiff does not allege that the defendant authorised the sale and he admits that after the sale he went to the defendant who repudiated the sale. In my opinion the defendant has proved that he is the real owner and the fact that by the mortgage deed which was brought to plaintiff's agent's notice in which the father is mentioned as being interested in the property the plaintiff was put upon his enquiry. The plaintiff therefore cannot assume the position of a *bona fide* purchaser from the ostensible owner; and he only bought the son's interest in the property which was nil. Mr. Dantra for the appellant then contends that the father is estopped by the mortgage deed from saying that the son was not an owner to the extent of one half but the statements in the mortgage deed would be admissions which can be rebutted by evidence and the evidence shows that the son had no beneficial interest in the property. Mr. Dantra then contends that the father being the sole owner and his mortgage (Rs. 10,000) having been paid off out of the purchase money, the plaintiff is entitled to stand in the shoes of the mortgagee and would be entitled to a declaration that he has a charge upon the property to that extent and he asks leave to amend the plaint

by adding a claim for such a declaration. That would be altering the nature of the suit and I see no reason for allowing such an amendment at this stage. The suit is one for possession and the plaintiff would not be entitled to possession in the character of a mortgagee. If his claim to stand in the mortgagee's shoes is barred by limitation he would not be entitled to have the plaint amended so as to include that barred claim and if the claim is not barred there is nothing to prevent him from filing a fresh suit in respect of that cause of action.

I would dismiss this appeal with costs.

PARLETT, J.:—The appellant not only had indirect notice of defendant's claim to the land but there is evidence that he had direct notice of it, and he himself says that he saw a letter whereby defendant purported to authorise his son to sell. It is clear that appellant was grossly negligent in not making effective enquiry into his vendors' title and that he bought no more than Tha Dun had to sell.

I agree that the evidence establishes that the land was defendant's sole property. Tha Dun was not called as a witness and there is no evidence that he had any interest whatever in the land. I concur in dismissing this appeal with costs.

L. B.
Mahomed
Ebrahim Saib
Khateeb
v.
Moung Ba
Gyaw.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CRIMINAL REVISION No. 504 OF 1913.

WA FOON vs. MA THEIN TIN.

For Applicant:—S. Vasudeva for C. G. S. Pillay.

Before L. H. Saunders, Esq., I. C. S.

Dated, 11th September 1913.

Criminal Procedure Code—Section 488—Validity of marriage of a Chinese Buddhist with a Burman Buddhist—No maintenance where marriage not according to Chinese Buddhist Law.

Where a Burman Buddhist female applied for maintenance as wife against a Chinese Buddhist who denied that he was ever married according to law.

Held that the personal law of a Chinese Buddhist would be applicable to such a case. That law is considerably restricted than the Burmese Buddhist Law according to which living together by mutual consent constitutes a valid marriage. Amongst the Chinese Buddhists the following three conditions are essential viz:—

- (1) Consent of the parents, the consent of the parties themselves being unimportant.
- (2) Certain formalities and ceremonials.
- (3) The suitability of the parties in the matter of their respective positions.

U. B.

Wa Poon
v.
Ma Thein
Tin.

JUDGMENT.

Applicant, a Burmese woman, claimed maintenance from the respondent on the ground that she was his wife, that he had deserted her and refused to maintain her. The respondent replied that they were not married and he was therefore not bound to maintain the applicant. The respondent claims to be Chinese. From the evidence it appears that his father was a Chinaman and his mother was the daughter of a Chinaman by a Burmese wife. There can be no doubt, I think, that he is justified in claiming that he belonged to that nationality.

The Magistrate has found that he is a Buddhist and according to Buddhist Law the parties were married and that he is therefore liable to maintain the petitioner and has ordered him to pay Rs. 5 a month under section 488, Code of Criminal Procedure. The respondent now applies to this court to revise the order of the Magistrate.

I think the Magistrate was clearly wrong in confining himself to the question whether the present applicant was a Buddhist or not. If he was a Chinese Buddhist, his own personal law would be applicable to him, and it does not follow that, because living together by mutual consent constitutes a valid marriage among Burmese Buddhists, it does so among all people who profess the Buddhist faith. On the contrary it appears that the marriage laws among the Chinese are considerably restricted than among the Burmese Buddhists. For instance, on page 172 of Alabaster's Notes and Commentaries on Chinese Criminal Law, it is stated that three conditions are necessary to constitute a valid marriage, the first of these being the consent of the parents of the parties, the consent of the parties themselves being unimportant, the said parties being in fact parties to a contract agreed on by others; certain formalities and ceremonials must be complied with as a second condition; and the third condition is that the respective position of the parties is such that a marriage is not invalid. It is clear that in this case none of these conditions was complied with.

In view of the defence of the respondent (the present applicant,) I think, it was for the applicant (the present respondent) who claimed to be his wife to show that she was so.

The question of the law which is applicable in a case of this kind was discussed in the case of Fone Lan *vs.* Ma Gyi and others⁽¹⁾ and I think there can be no doubt that the conclusions there arrived at were correct.

I therefore allow this application and set aside the order of the Head-quarters Magistrate.

(1) 2 L. B. R. 95.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CRIMINAL REVISION NO. 606 OF 1913.

KALIMA BIBI APPLICANT.
 vs.
 MACBUL AHMED RESPONDENT.

For Applicant—D. Dutt.

For Respondent—S. Mukerji.

Before L. H. Saunders, Esqr., I. C. S.

Dated 11th September 1913.

Stay of Criminal suit during pendency of a civil suit involving the same issues—Distinction between private prosecutions and those ordered or sanctioned by Government or Court Officers—Magistrate's Discretion.

Where an application for stay was made by the accused in a criminal case on the ground that the same issues were being tried in a Civil Suit before District Judge. Held that the Magistrate would exercise his discretion properly if he would adjourn the Criminal Proceedings until the decision of the Civil Suit.

JUDGMENT.

One Macbul Ahmed, alleging that he was married to one Kalima Bibi, lodged a complaint in the Court of the Western Sub-divisional Magistrate, Mandalay, in the first instance against four persons, the first of whom Rahman Ali was charged under section 497 I. P. C. with having committed adultery with his wife, and the other three accused with abetting the first accused. He subsequently filed a second complaint in which he charged the same persons and also his wife under section 491 I. P. C. with having committed bigamy, and with abetment of the same. The magistrate examined the complainant and issued process but not so far examined any witnesses. Accused Kalima Bibi has now applied to this court to stay criminal proceedings on the ground that she had filed a suit in the District Court, Mandalay against the complainant Macbul Ahmed for recovery of her dower and also for maintenance for the period of *Iddat*, on the ground that after her marriage with Macbul Ahmed she had been divorced, and her case is that she went through the form of marriage with Rahman Ali, the 1st accused in the criminal case, after divorce, and that therefore no offence was committed by the parties to that marriage.

An application was also filed before the Western Sub-divisional Magistrate praying for stay of the proceedings upon the grounds now set forth in this Court, but the magistrate declined to grant the application.

U. B.
Kalima Bibi
v.
Macbul
Ahmed.

There are several Indian authorities upon the subject the general tenor of which appears to be that it is not generally a good ground for adjourning criminal proceedings that there are proceedings pending in a Civil Court for the determination of issues similar to those arising in the Criminal Court. Note No. 3 to 344, page 741, 7th Edition of Sohoni's Code of Criminal Procedure may be referred to, and the cases of *Brojo Bashi Panda vs. Emperor* (1) and *Dwaraka Nath Rai Chowdhury vs. Emperor* (2) have been quoted. In the former case, the High Court refused to interfere partly on the ground that the Criminal Court had come to the conclusion after an enquiry that there were grounds for starting criminal proceedings, while in the latter case the prosecution of the accused had been directed by the District Judge as the result of proceedings which had taken place in the District Court, so that in both these cases the prosecution was not a private prosecution. In the present case the prosecution has not been instituted by order of the Court but is entirely a private matter between the parties. But in the second case quoted the Judges quoted with approval the remarks in the judgment in the case of *Rajkumari Devi vs. Bama Sundari Devi* (3) "that the discretion should ordinarily be left to the Magistrate either to stay proceedings or not as he in the circumstances of the case may think it right and proper." But at the same time the learned judge remarked that "it is ordinarily not desirable that when the parties to the two proceedings are substantially the same and the prosecution before the magistrate is but a private prosecution, and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time." And the judge added that "it was open to the Magistrate to put the accused on terms as to appearance or otherwise." I am of opinion that the rule stated in these quotations is sound and that it should generally be acted upon.

In the present case, it is true that the issues between the parties are not absolutely identical, but if the accused who is the plaintiff in the Civil Suit succeeds in that suit, it is clear that the present prosecution must fall to the ground. The prosecution is a private prosecution and there appears to be no reason why in the interests of justice, it should not be stayed.

I am therefore of opinion that the Subdivisional Magistrate should adjourn criminal proceedings for a reasonable time to enable the accused who is plaintiff in the District Court to prosecute her suit in that court through to a termination and there will be an order accordingly.

(1) C. W. N. Vol. 13 p. 398.

(2) I. L. R. Vol. 31 Cal. 858.

(3) I. L. R. 23 Cal. 610.

MANDALAY BAR ASSOCIATION,

An address was delivered by Mr. C. G. S. Pillay, Advocate and President, Mandalay Bar Association, at the Annual Bar Dinner held at Mandalay on the 28th February 1914.

HE SAID:—

It was Shakespeare who said "The world is a stage and men and women merely players, oft times one man plays many parts."

How applicable this is to the Lawyer! He has to adapt himself to each varying case and plays many parts.

He is a doctor, an Engineer, a general who marshalls his facts and fights legal battles, a legislator—there are no less than 170 lawyers in the present Parliament of Great Britain and Ireland.

From Justiman to the Bill of Rights, from the genesis of the Common Law to the attainment of Self-Government, History has written upon her pages the indelible story of the service of the law to Humanity.

There is no other class which has done and is doing so much for the public. It is the lawyer who is in the forefront of every struggle for liberty. He has to do with the questions of life, liberty and property. To him the Parliament, the Legislature, the Municipal Council look for assistance. The Hague Tribunal which is growing popular is so constituted as to give scope to the Lawyer and benefit the world at large by which it is hoped that the civilized methods of obedience to the rule of law will triumph throughout the world.

'When the war drum beats no longer'

'When the battle flag is furled'

'In the Parliament of man'

'The Federation of the world.'

Time was when man scoffed at doctors, philosophers, but the worst satire was reserved for Lawyers likened to sharks for their greed, to gas bags for their windiness. Napoleon the son of a Lawyer hated Lawyers, and then enacted what is known as the Code Napoleon. There is a story told of Peter the Great on his visit to Westminster Hall when he was told that the people in wigs and black gowns were Lawyers, he exclaimed "Lawyers! I have but two in my dominions and I believe I shall hang one of them the moment I get home." The other was his personal Counsel. But the lawyer takes the joke pleasantly. It does not do him any harm, no matter what they say the moment a man gets in a tight place or the moment he is confronted with a troublesome problem or the moment he feels the need of some one to trust he goes straightway to the Lawyer.

A word for those entering the profession. The legal profession has attracted the best intelligence in the country by the fascination of being able

- (1) to make large income;
- (2) to be independent;

But the number of people who made large incomes is limited, there are innumerable men who had failed in the profession and there are others who have been able to secure a modest living.

As for independence a beginner has to devolve to a senior, to work hard for clients. To earn a name, he has to depend upon the good will of the Judges.

The path to success in the profession is steep and narrow and few climb and reach the coveted goal. A generation ago there had not been the struggle for existence as at present. Now practitioners are increasing. As regards qualifications, while fluency of speech is desirable it would not carry much. It might do well in countries where the Jury system is in vogue to appeal to the emotions, but it will be considered waste of time here.

A steady application, good memory, strong physique, a good knowledge of human nature, tact, a readiness of resource above all a very high character, an honest conscientious love of one's profession not merely as a means of making money are among the essential qualifications to ensure success. Opportunity follows one's environment. There is a tide in the affairs of men which taken at its flood leads to fortune.

The object of a Bar Association is to bring Lawyers together for Sociability as well as the discussion of subjects of interest to the profession.

It is the morale and discipline of the Bar that deserve most attention. It is the duty of the Association to jealously watch the conduct of the profession.

Time was when parties required protection from the rapacity of their legal advisers: now it seems as if it is the Lawyers who want protection from clients. A client might come to you one morning, discuss with you the details of some case, fix your fees, promise to come in the evening, but next you will find him in another's office. It may be a question whether the Association can exercise any effective disciplinary jurisdiction. Discipline implies loyalty, respect and submission to the rules you have framed for your guidance. In Calcutta I think there is an understanding between the Bar Association and the Attorneys that no Attorney will brief counsel who does not belong to the Bar Association. The efficacy of this arrangement is testimony to the discipline and *Esprit d'corps* of the Calcutta Bar.

There is the case of underrating and underselling each other. As members of a learned profession it is not open to them to advertise themselves. By all means let us have competition, but let us not cut one another's throat. The Bar Council in England has regulated the proper fees payable to counsel. Some such rule might be useful here. As to the relations between the Bench and Bar they exist for one purpose that justice may be done to the people

who appear before the one and seek advice of the other. The duty of an advocate is to remember that he himself was taking part in the administration of Justice. An honest, capable, fearless Judge and an efficient Bar are the backbone of good Government.

The recent Madras Bar Dinner is unique in that the Advocate General presiding invited all Judges and Lawyers of the whole of that Presidency to an annual gathering which was a great success.

As for the Laws at present administered, Upper Burma is a Scheduled District. We borrow piecemeal legislation and principles of law and equity and are doing the best we can. The number of English Statutes collected by Chitty in sixteen volumes from the Magna Charta to the present-day is unweildy and some out of date.

The Indian Penal Code a monumental work of its kind, the Criminal Procedure Code, the Contract Act need Revision. A law of Torts may well be codified for India.

The number of Reports becomes bewildering.

Life is not long enough. Our time is taken up in the search of case Law instead of a mastery of the principles of Jurisprudence. Our personal Laws, Buddhist, Hindu, Mahomedan, are administered in the light of Judge-made law.

The highest tribunal in the Empire (the Privy Council) is too busy and little acquainted with the laws of the Gentoos as they are called from the time of Warren Hastings. Our Local and Revenue laws need revision,

There has been a good deal of tinkering going on for the past 50 years, but a period of half a century is a considerable time in these days for changing complex Social and economic conditions. More simplicity of codification and the repealing of obsolete enactments and less of tinkering would be more useful.

There is started lately a Prisoners' Aid Society here. I wish there were more philanthropists like Lambrosi of Italy and others who go about the prisons or find out causes and remedies for the state of crime, which may vary in each case e. g. Heredity, environment, poverty, a morbid temperament, a sudden distemper, Criminal impulses bordering on insanity, national characteristics etc. Education i. e. knowing right from wrong would play a great part in the moral regeneration of the depraved. Juvenile Courts may have to be established. Punishment like the chatisement of a child may be good enough. But severity will defeat its own purpose and may harden the Criminal. What is wanted is to know the root cause and apply the remedy like diagnosing the seat and cause of disease.

In a country like Burma with immense resources and a comparatively small population one would scarcely expect so much crime as is reported, but true nevertheless that Burma is getting a head of Indian Districts in this respect.

Speaking of poverty the local industries such as weaving, salt, sea fishery, catch boiling have been almost killed. People are driven to resort to Agriculture. Unless the cultivator acquires a scientific knowledge of the subject, agriculture alone will hardly keep him from indebtedness. The establishment of Agricultural

Banks, and co-operative credit societies, is some relief in rendering borrowing less ruinous: but so long as the conditions are what they are, it will not relieve the position of the peasantry. It has not done so even in the European countries.

Diversity of occupation to suit each individual taste is essential. Forest Laws have become stringent and have handicapped timber trade.

In Kyaukpadaung for instance where there is always a scarcity of water and little rainfall. People whose sole occupation was the manufacture of jaggery can scarcely carry on a lucrative business owing to restriction in taking even firewood from the reserves so that they have to take to cooly work or carting and there is little agriculture there.

The improvidence of the people, the rise in the price of food stuffs, the use of foreign manufactures for household necessities or luxuries, a feature of Civilization, the incidence of taxation, together with the extra charge on villages for the cost of repression of crime, have all to be reckoned with as also the fact that the gold reserve of sixteen millions sterling has been drained from India to England and lent out to Banks, and the Government of India doles out but a small proportion to Burma for its wants.

As for trade the value of imports and exports appears to be in an inverse ratio. Altogether the problem is one that needs anxious study and amelioration and some remedies must be found. Until then it is to be feared that Burma may not fare well, and crime may not decrease.

The past year's work of the Mandalay Association has been satisfactory: we have given our opinion on some legislative measures, such as the Indian Companies Act, The Legal Practitioner's Act, the Criminal Procedure Code, and the Revenue Laws of the province. We have had a conference through the courtesy of His Honour the Judicial Commissioner on the extension of the Transfer of property Act, and the Registration Act to Upper Burma. In this connection I may note that more facilities are needed than at present provided for the Registration of documents. Upper Burma is a country of distances: people do not readily go far to register documents, and consequently whenever there is litigation they meet with failure for want of registration.

Would that the Local Government take the Association and the Public more into its confidence and send us all intended measures of legislation to opine.

In conclusion I cannot but quote the words of the Right Honourable Mr. Asquith at a Bar Dinner given in his honour on the 10th July 1908.

"The arduous struggle, the blows given and received, the exultation of victory, the sting of defeat which are our daily experiences far from breeding division and ill-will bind us more closely together by the ties of comradeship for which you would look in vain to any other arena of the ambitions and rivalries of men."

I earnestly hope we will combine to make our Association more useful and its influence felt year by year in the years to come.

THE
BURMA LAW TIMES.

VOL. VII.]

MARCH, 1914.

[No. 3.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 46 OF 1912.

P. M. P. A. N. ANNAMALAY CHETTY ... DEFENDANT—
APPELLANT.

vs.

SHAIKH MAHOMED ISMAIL Minor by his next friend Ali Ahmed and 2 others. PLAINTIFF—
RESPONDENT.

For Appellant—Giles.
For Respondent—B. Cowasjee.

Before Mr. Justice Hartnoll, Offg. C. J. & Mr. Justice Young.

Dated, 5th September 1913.

Mahomedan Law—Gift—Settlement—Creation of life-estate—Burma Laws Act 1898, Sec. 13 (2)—Transfer of Property Act 1882 Sec. 2, 20, 21, 123 and 129.

The Mahomedan Law is to be applied in all suits instituted in the Chief Court of Lower Burma relating to gifts among Mahomedans.

The creation of a life-estate is inconsistent with Mahomedan Law and where a life-estate is attempted to be created, the donee takes an absolute title.

12 I. A. 91; 7 Bom. L. R. 306 followed.

17 I. A. 201 distinguished.

31 Cal. 319; 10 Cal. 1112; 9 Cal. 136; 17 W. R. 525; 8 Cal. 13 and 17 Bom. 1 referred to.

JUDGMENT.

The point for decision in this appeal is whether a deed of settlement is valid or not. A Sunni Mahomedan one Shaik Dawood Maistry on the 8th April, 1895, executed a deed of settlement, which sets out that on account of the natural love and affection which he bears to his daughter Amirun-Beebee he transfers and assigns to her and her heirs as mentioned hereinafter a certain plot of land with the buildings thereon in trust subject to the following terms and conditions.

* Appeal against the judgment and decree of the Chief Court on its Original Side dated 1st April, 1912 in Civil Regular No. 313 of 1911.

L. B.

P. M. P. A.
N. Annama-
lay Chetty
v.
Shaik Maho-
med Ismail.

The deed then proceeds :—

“ 1. That I appoint myself as sole trustee of the said property to realize the rents and profits thereof and apply the same towards the maintenance of the said Amirun Beebee who is now a minor till she attains her majority, that should I die before she attains her majority Sebina Beebee her mother will act as trustee for the aforesaid purpose.

2. That as soon as the said Amirun Beebee attains her majority she shall be the sole trustee of the said property to apply the rents and profits thereof for her own use and benefit.

3. That after the death of the said Amirun Beebee her children will enjoy the rents and profits thereof and on the youngest of them attaining his or her majority the said property is to be divided among them in equal shares and in the event of the said Amirun Beebee dying without any issue her brothers and sisters will share the said property among them in equal shares.”

The suit has arisen in this way. Amirun Beebee has married and her husband is the third respondent. She has a minor son, Shaik Mahomed Ismail who is the first respondent and plaintiff and is represented by his next friend and uncle Ali Ahmed. Shaik Dawood Maistry died in 1898. On the 23rd February, 1911, the appellant who is the first defendant obtained a mortgage decree against Amirun Beebee and her husband Shaik Goolam Kader the third respondent on the property described in the deed of settlement claiming the same to belong absolutely to Amirun Beebee. Shaik Mahomed Ismail claims that his mother has only a life interest in the property and asks for a declaration to such effect and that the mortgage decree obtained by appellant does not effect the property dealt with by the deed of settlement and that appellant has only a mortgage lien over the life-interest of Amirun Beebee in the income of the said property.

The learned Judge on the original side has decreed the suit on the authority of the case of *Umer Chunder Sircar v. Mussumat Zahoor Fatima* (1). The mortgagee—the appellant—urges that by the deed Amirun Beebee has acquired the full property in the premises mentioned in it.

The first point for decision is whether the Mahomedan law or the general law applies.

For the minor it is urged that this is not a question of succession or inheritance and so section 13 (1) of the Burma Laws Act does not apply. There is not sufficient on the record to show whether the case is one of succession or inheritance as there is nothing to show what other property the settlor had. If he settled all his property on his daughter and the others mentioned by the deed it would in my opinion be an attempt to evade the Mahomedan Law of succession and so would be a matter of succession or inheritance within the meaning of section 13 (1) of the Burma Laws Act. But supposing that it is only a disposal of his property that does not conflict with the rules of his personal law. The question arises whether the Mahomedan law is not applicable in the matter.

(1) 17 I. A. 201.

Section 13 (2) of the Burma Laws Act enacts that subject to the provisions of sub-section (1) and of any other enactment for the time being in force all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. That Court administers the provisions of the Transfer of Property Act, 1882. Section 2 of this Act enacts that nothing in the second chapter of it shall be deemed to affect any rule of Hindu Mahomedan or Buddhist Law. The deed of settlement is a transfer of property of the nature of that contemplated by sections 20 and 21 of the Act and they fall within chapter II. Taking the deed to be one falling within the provisions of Chapter II the law applicable to it in the High Court at Calcutta would be the Mahomedan Law and not the law contained in the Transfer of Property Act. Looking at the deed as a gift Chapter VII of Transfer of Property Act must be considered. Gift is defined in section 123 but section 129 enacts that nothing in the chapter shall be deemed to affect any rule of Mahomedan law. The following cases show that at Calcutta in cases of gifts by Mahomedans, the Mahomedan Law is followed *Fatima Beebee v. Ahmed Baksh* (2) *Mullick Abdool Gafoor v. Mulcka* (3). *Yusuff Ali v. The Collector of Tippera* (4). Therefore in any case I would hold that the law applicable in constructing the deed is the Mahomedan Law.

The consideration now arises as to what rule of the Mahomedan Law is applicable. The judgment appealed from says that Shaik Dawood Maistry was a Sunni Mahomedan and this statement was not contested nor traversed at the hearing. I will therefore take it that he belonged to the Sunni and not the Shiah School of Mahomedanism. The Hedaya is therefore applicable to him. The passages at pages 488 and 489 of Hamiltons' translation of that work—the second edition—are relied on by appellant and especially the passage concerning an *Amree* or life grant to this effect. "An *Amree* moreover is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated." The learned author is no doubt referring to the passage at page 488 where in dealing with a gift with a condition he writes: "Such gift or charity is valid; but the condition annexed is invalid; because it is contrary to the spirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition because the prophet approved of *Amrees* (gifts for life) but held the condition annexed to them by the grantor to be void. Learned counsel for respondent urged that the Imam Abu Hanifa and his disciples Qazi Abu Yusuf and Imam Mohammed differed on the rule of law. I am unable to find that they did on the rule relating to *Amree*; they differed on the rule of a gift by way of *Rikba*, which is a different form of gift. The question of gifts with conditions is dealt with by Mr. Syed Ameer Ali in his

L. B.
P. M. P. A.
N. Annamalai Chetty
v.
Shaik Mahomed Ismail.

(2) I. L. R. 31 Cal. 319. (3) I. L. R. 10 Cal. 1112. (4) I. L. R. 9 Cal. 138.

L. S.
P. M. P. A.
N. Annama-
lay Chetty
v.
Shaik Maho-
med Ismail.

learned book Vol. i (3rd Edition) p. 77 and also by Sir R. K. Wilson in his learned work 4th Edition page 350. He comments on the caselaw up to date in the preface to the last edition of the book. In the case of *Mussamat Hameeda v. Mussamin Budlun* (5) their Lordships of the Privy Council expressed the opinion that the creation of a life estate does not seem to be consistent with Mahomedan usage and there ought to be very clear proof of so unusual a transaction. In the case of *Suleman Kader v. Dorah Ali Khan* (6) their Lordships said. "Their Lordships are by no means satisfied that the gift to this lady of three Government promissory notes subject to a condition that she is to have the interest only for life and that after her death there is to be a trust in perpetuity for all her heirs to all time is not, according to Mahomedan Law in its legal effect, a gift to her absolutely, the condition being void." But they found that it was not necessary to determine the point. In the case of *Abdool Gafur v. Nizamudin* (7) their Lordships expressed the opinion that the creation of a series of life rents was a kind of estate which did not appear to be known to Mahomedan Law. But the two most important cases seem to be those of *Abdul Wahid Khan v. Mussamat Nuran Bibi* (8) and that of *Umer Chunder Sircar v. Mussamat Zahoor Fatima* (9) already referred to. In the latter case where, by a Mahomedan deed of settlement a husband granted lands to his second wife on condition that if she had a child by him the grant should be taken as a perpetual *mokarrari* and in the case of no child being born as a life *mokarrari* with remainder to the settlor's two sons it was held that the two sons took definite interests under the deed similar to vested remainders though liable to be displaced and that such interests were liable to attachment. The point under decision was which of the parties had acquired the ownership of certain lands first in point of time. There had been two sales in execution of two decrees, and in one case the respondent had bought the interest of her judgment-debtor in the lands, and in the other the appellants' predecessor in interest had also purchased the interest of his judgment-debtor the same man as respondents' judgment debtor in the same lands. The report of the case does not show that the question was ever raised as to whether the settlement was not practically a deed of gift disguised by a nominal consideration and whether, if that were so, the Mahomedan rule of law would invalidate either the gift itself or the limiting conditions. This question does not seem to have been raised for decision. In the other case that of *Abdul Wahid Khan v. Mussamat Nuran Beebee* (8) the legal effect of an instrument of compromise was directly for decision. The compromise was to the effect that one Gauhar Bibi, a widow of one Mouzzum Khan was to hold possession of and be mistress of certain lands but without power of alienation except in case of special emergency and that two sons of Mouzzum Khan by other wives were to possess and enjoy the lands after her death. The suit was by the sister of one of the sons and

(5) 17 W. R. 515.

(7) I.S.R. 17 Bom. 1.

(6) I. L. R. 8 Cal. 1.

(8) 22 I. A. 91.

half-sister of the other and others, who had acquired an interest in the estate, and was brought after the death of the half brothers and Gauhar Bibi against a daughter and widow of one of the half-brothers and the husband of the daughter. Gauhar Bibi had after the death of the half brothers executed a deed of gift in favour of the aforesaid daughter. The suit was for a share of the estate on the ground that it was settled that Gauhar Bibi should retain possession of the estate during her life time without power of alienation and that after her death both the sons should take the estate half and half. The claim was by virtue of inheritance from the two half-brothers. Their Lordships held that during Gauhar Bibi's life time the whole interest in the estate was to be in her and then said, "Then comes the question. What is the interest which is given by the compromise to the sons? To give the plaintiffs' a title to the estate it must be a vested interest which on the death of the sons passed to their heirs and is similar to a vested remainder under the English Law. Such an interest in an estate does not seem to be recognized by the Mahomedan Law." Their Lordships concluded their judgment by saying "Their Lordships think this is the reasonable construction of the compromise in this case and that it would be opposed to Mahomedan Law to hold that it created a vested interest in Abdul Rahman and Abdul Subhan which passed to their heirs on their death in the life time of Gauhar Bibi."

L. R.
F. M. P. A.
N. Annam-
lay Chetty
v.
Shaik Maho-
med Ismail.

The question arises as to which of these two cases should be followed in the present one, and as I have held that this case is one that must be determined by the rule of Mahomedan Law, I would decide that the case of *Abdul Wahid Khan v. Mussamat Nuran Beebee* (8) is the one to follow. In that case their Lordships decided on the rule of Mahomedan Law, and in the other the rule of Mahomedan Law was not referred to nor raised.

It only remains to consider what the actual rule of Mahomedan law is that is applicable to a deed like the one under discussion in the case of Sunni Mahomedans. I have already in this judgment set out the law and authorities relied on. In the case of *Abdoolla Khakhibhoy Readymoney v. Mahomed Hajj Suleman* (9) the Mahomedan law was discussed and it was held on a review of the authorities that the creation of a life estate is inconsistent with Mahomedan Law and that where a life estate is attempted to be created the donee takes an absolute estate. That view appears to me to be correct. I would therefore allow this appeal and reverse the decree passed by the learned Judge on the original side and dismiss the suit with costs to appellant in both courts.

YOUNG, J.—I concur.

(8) 22 I. A. 91.

(9) 7 Bom. L. R. 306.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 122 OF 1911.

MA TIN LUN AND ONE ... PLAINTIFF—APPELLANTS.

vs.

MA DWE AND ONE ... DEFENDANT—RESPONDENTS.

For Appellants—Giles.

For Respondents—Mc. Donnell.

Before Mr. Justice Ormond and Mr. Justice Parlett.

Dated 7th January 1914.

Buddhist Law—Exclusion of children from inheritance for neglect in the performance of filial duties—Husband's abandonment of wife and children no proof of divorce.

X being tired of his first wife who was older than he and had an unpleasant voice brought her and their two children the plaintiffs-appellants who were respectively about 7 and 2 years to the house of his father-in-law and left them there and married one Ma Gyi from whom he had the 2nd defendant and after Ma Gyi's death married the first defendant Ma Dwe. The plaintiffs lived with their mother till her death and then with her relations. In a suit brought by them for $\frac{1}{4}$ th share of the *lettetpwa* of X and 1st defendant Respondent.

Held that there was no divorce of the first marriage; that the first wife never ceased to regard herself as his wife; also that the separation was entirely the act of the father and not of the children and that it cannot therefore be said that the children (plaintiffs-appellants) voluntarily separated themselves from him or that the cessation of filial relations between them was due to any act or omission on their part.

Held that no child can be excluded from inheritance unless desertion or neglect of filial duties is proved against it.

JUDGMENT.

PARLETT J:—The history of the parties as it appears from the record is as follows:—The plaintiffs are the children of Maung Po Aung by his first wife Ma Hnin Yin, Ma Tin Lun, being born about a year after their marriage, while the couple were still living with Ma Hnin Yin's parents in Rangoon. In the year 1245 B.E. (1883-84) when Ma Tin Lun was five years old her parents moved to Prome to trade in tea. It appears that Ma Hnin Yin's father, U Paw Gyi, was one of Po Aung's partners in that business. The next year they returned to Rangoon to U Paw Gyi's house where Maung Ba Hla, the 2nd plaintiff, was born shortly afterwards. About three months later the family returned to Prome. The witnesses differ as to how long they stayed there; according to plaintiffs' witness, Maung In, it was until 1248, but according to the defendant's witness, Maung Po Maung, Po Aung had been living alone in Prome for about two years in 1248 (1886-87). At any rate he got tired of his wife, who was older than he and had an unpleasant voice and he brought her and the children down to Rangoon to her father's house, but refused to go there himself. He

and his father-in-law fell out, ostensibly over business matters and he was unsuccessfully prosecuted for misappropriation. Then he returned to Prome and in 1248 married Ma Gyi, a well connected lady, after assuring her father that he had divorced Ma Hnin Yin. In 1249 (1887-88) Maung On Kin, the 2nd defendant was born. Ma Gyi died in 1251 or 1252 (1890 or 1891), and Ma Hnin Yin in 1255 (1893-94). The latter and Po Aung had no communication with each other since they last came from Prome, some seven years or more before her death. The plaintiffs lived with their mother till her death, and afterwards with her relations. Po Aung came down to Rangoon again with his son On Kin and lived for two or three years with his cousin Po Zon. In 1897 he married Ma Dwe, the 1st defendant, and lived with her and Maung On Kin till his death in 1906. In the present suit the plaintiffs claim a one-eighth share of the joint property which he left at his death. Any such joint property as there may be was acquired during the marriage with Ma Dwe, as it is admitted that Po Aung brought no property whatever to that marriage.

The defence is that Po Aung and Ma Hnin Yin were divorced and that plaintiffs having gone to live with their mother are not entitled to inherit from their father, and further that in any case they have forfeited their right of inheritance by reason of their failure to maintain filial relations with their father.

It is admitted in this appeal that if there was a divorce, plaintiffs are, under the circumstances of this case, excluded from inheriting from their father. The District Court however held that the divorce was not established. The defendants challenge this finding in appeal. It is true that the parties were separated for six or seven years before Ma Hnin Yin's death and that Maung Po Aung gave out to Ma Gyi's relatives in Prome that he had divorced her, but there is no evidence that she ever consented to it, or ceased to regard herself as his wife. Nor is there any evidence that a division or surrender of property accompanied the separation from which a divorce might be inferred. It is true that Po Aung had nothing left by 1897 when he married Ma Dwe, but there is no evidence that he had nothing when he married Ma Gyi. He probably had property then, but if he had not, its absence was as likely due to the unfortunate outcome of his business venture with his father-in-law, as to his having surrendered it to Ma Hnin Yin. The latter's relations appear to have been quite well-off to support her and her children without her receiving anything from Maung Po Aung. I agree with the District Court that the divorce was not established.

That Court however held that plaintiffs were not entitled to inherit from Po Aung as they lived separately from him and ceased to maintain filial relations with him. It is admitted that they never associated with their father after he and their mother separated; they invited him to the ceremony of Maung Ba Hla's initiation into the Buddhist priesthood, but he neither came nor contributed to the expenses. They also attended his funeral. There is evidence that Po Aung thanked their uncle, Maung In, for taking

L. B.
 Ma Tin Lun
 and one
 v.
 Ma Dwe and
 one

L. B.
 Ma Tin Lun
 and one
 v.
 Ma Dwe and
 one.

care of them and asked him to keep them till he was settled. It appears to me that the separation was entirely the act of the father and not of the children and that it lay upon him to terminate it if he wished;—that it was not open to them to force themselves upon him, or to do more than they did. It is quite clear however that he did not want them back, though they on the other hand continued to regard him as their father. It cannot, he said, be said that they voluntarily separated themselves from him or that the cessation of filial relations between them was due to any act or omission on their part. In all the cases relied on by the District Judge there had been a divorce, and they therefore are not directly applicable to a case like the present where no divorce is proved or admitted. No doubt under *Burmese Buddhist Law* the duties of a child to a parent are more exacting than those of a parent to a child, but it has long been held that only when desertion or neglect is proved against those entitled to inherit can they be excluded *Ngc. San Yun v. Nga Myat Thin*,⁽¹⁾ In *Maung Sa So v. Ma Paw* and ⁽²⁾ it was held that living apart from parents and not attending in illness does not of itself rupture family ties or disqualify children from inheriting, and this apparently would be the rule even if the separate living was the voluntary act of the children and not, as in the present case, entirely the act of the parent.

Again in *Ma Taik and 1 v. Ma Nyun and 1* ⁽³⁾ it was laid down that there must be some filial neglect to exclude and that the burden of proving exclusion lies on the person who asserts it. That case, like the present, was one in which there was no divorce. The rule has since been held to apply to step-children in *Maung Kyaw Yan and 7 others v. Maung Po Win and 1* ⁽⁴⁾ In my opinion in the present case there has been no estrangement or neglect on the part of the children, who did all that could be expected of them and were apparently ready to renew filial relations with their father. The separation however was entirely his act and he showed clearly that he wished to have no more to do with them. Such conduct cannot deprive them of their right to inherit nor do I consider that they have done anything to forfeit it. I would reverse the decree of the District Court and instead would hold that plaintiffs are entitled between them to a $\frac{1}{3}$ th share of the joint property of Maung Po Aung and Ma Dwe left by Maung Po Aung, and would direct the District Court to decide the 6th and 7th issues and pass a decree accordingly.

I would order respondents to pay the costs of this appeal.

ORMOND, J :—I concur.

(1) S. J. 46.

(2) II U.B.R. 1902—03 Probate and Administration 7.

(3) II U. B. R. 1897—01 p. 193.

(4) II U. B. R. 1904—06 Buddhist Law. Inheritance 1.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 90 OF 1913.

MI AH PU MA	...	DEFENDANT—APPELLANT.
	vs.	
MI HNIN ZI U	...	PLAINTIFF—RESPONDENT.

For Appellant—Guha.
Respondent—Absent.

Before Mr. Justice Twomey.

Dated 16th January 1914.

Inheritance—Buddhist Law—Right of the children of a divorced wife to inherit—Maintenance of filial relations an essential condition—Immaterial whether property is ancestral or non-ancestral.

X married 3 wives in succession. Plaintiff, the only child of the first marriage sued the third wife for half the *lettetpwa* of the 1st marriage. It was found that plaintiff was taken away by her mother at the time of her divorce from X and never afterwards maintained filial relations with her father.

Held that the plaintiff respondent is not entitled to share in the property left by her father irrespective of the question as to whether the property is ancestral or non-ancestral.

JUDGMENT.

Maung Kyaw Bon, deceased, was married to three wives in succession and left issue by each of them.

The plaintiff Ma Hnin Zi U is the daughter of the 1st wife, Mi Tun Kra Pru who was divorced from Kyaw Bon when Ma Hnin Zi U was a small child. Kyaw Bon's second wife died about 10 years ago leaving a son who is not a party to this suit. Kyaw Bon's 3rd wife is the defendant Ma Ah Pu Ma.

Ma Hnin Zi U sued Ma Ah Pu Ma for a half share of certain land and a house left by Kyaw Bon. It has been found by both the Lower Courts that this property was acquired by Kyaw Bon during coverture with Mi Tun Kra Pru the plaintiff's mother.

At the time of the divorce, 16 or 17 years ago, Mi Hnin Zi U was taken away by her mother Mi Tun Kra Pru and never afterwards maintained filial relations with her father Kyaw Bon. There is some evidence that she occasionally visited her father and took him fruit and other eatables but it is admitted that she never spent a night in his house. It is clear that filial relations were not restored.

As to the terms of the divorce the evidence taken on remand shows that no partition of property was effected. As pointed out in *Shwe Lin v. Mi Nyein Bu* (1) it is presumed in the absence of special circumstances that the affairs of people divorcing and re-marrying are settled definitely at the divorce or re-marriage. This presumption is very strong in such a case as this where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the

(1) S.J. 175.

L. S.
 Mi Ah Pu Ma
 v.
 Mi Hnin Zi U

second marriage. It seems probable in the circumstances that (as conjectured by the District Judge) Mi Tun Kra Pru bought her husband's consent to the divorce by abandoning her share of the joint property. This view is favoured by the evidence of the plaintiff's own witnesses Ni Aung and Myat No who state that it was Mi Tun Kra Pru who wanted the divorce. It does not appear that she had any marital fault to allege against her husband and in such a case if she desired a divorce she would have to resign all claim to the joint property.

The present case is similar to that of *Ma Yi v. Ma Gale* (2) which was recently decided by a Bench of this Court and in which it was held that the plaintiff Ma Yi could not share in the property taken by her father to his second marriage because she failed to prove that she had any filial relations with him after his divorce from her mother. The Township Court held that the rule as to the resumption of filial relations was inapplicable in the present case because the property in suit was ancestral property. This view is shown to be incorrect in the leading Upper Burma Case *Ma Sein Nyo v. Ma Kywe* (3) when a child is taken away by her divorced mother the relationship of the child with her father for purposes of inheritance is *prima facie* severed and if she afterwards lays claim to a share in the inheritance it has to be shown by plain and unmistakable outward signs that the tie of relationship with her father was maintained. Mr. Burgess considered that this rule should be applied whether the inheritance consisted of ancestral or non-ancestral property and his reasons are stated in the following extract from the judgment :—

“The Judgments of the Courts below do not explain clearly why the plaintiff is qualified to inherit a share of that portion of her father's estate which has been distinguished as ancestral property and disqualified to inherit the other portion which has been found to be the joint property of himself and his wife, the defendant Ma Kywe. They have held that plaintiff has not maintained such a filial relation with her father as would entitle her to share in the joint property and subsequently it must be assumed that notwithstanding this failure of duty on her part, they consider that her claim to share in the ancestral property is not affected. It is apparently because plaintiff did not live with her father and assist in acquiring the property belonging to the second marriage that she has been excluded from the inheritance of such property, and this seems to involve the proposition that neglect of filial duty is immaterial when the inheritance claimed is not that of property acquired during the parent's last marriage, a proposition for which there seems to be no authority in Buddhist Law”. I cannot find that this Court has ever taken a different view.

On these grounds I find that the plaintiff-respondent is not entitled to share in the property left by her father Kyaw Bon. The decrees of the Lower Courts are reversed and the plaintiff's suit is dismissed with costs in all courts.

(2) 6 B.L. Times p. 75.

(3) U. B. R. Civil 1892-96 p. 159 ; 2 C. T. 360.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL * NO. 140 OF 1912.

ARACHAN AND ONE ... DEFENDANT—APPELLANT.
 vs.
 MAUNG PO WIN AND ONE ... PLAINTIFF—RESPONDENTS.

Before Mr. Justice Ormond.

For Appellant—Munshi.

For Respondent—Maung Po Han.

Dated 9th January 1914.

Lessor and Lessee—Can a lessor get a decree for same rent both against lessee and sub-lessee—English doctrine of lease of remainder of term amounting to an assignment.

Where the lessor of certain paddy lands sought to obtain decrees for the same rent against both the lessee and the sub-lessee,

Held that the plaintiff can have judgment only against one and not against both and he, in this case having already obtained a decree against the lessee cannot get one against the sub-lessee.

Held it is unnecessary and inappropriate to import into Indian Law the technical rule of English Law viz—a sub-lessee of the remainder of a term would operate as an assignment of the term.

Hoosain Ismail Atcha v. Ebrahim Mahomed Makda 3 L.B.R. 90 dissented from

JUDGMENT.

Plaintiff-Respondents leased certain paddy lands for the year 1272 to Maung Ne Dun for 1250 baskets of paddy. Maung Ne Dun leased the same lands for the same period at the same rent to the Appellant-Defendants. Plaintiff received 610 baskets towards the rent and sued both his lessee and the sub-lessees for the balance viz. 640 baskets or their value. The sub-lessees (Appellants) have paid 600 baskets of paddy to Maung Ne Dun who has accepted them in full satisfaction of the rent, there having been a theft of Appellants' paddy. Both the Lower Courts have found as a fact that the Appellants have thus paid the rent in full to the lessee Maung Ne Dun. In the Sub-divisional Court, the Plaintiff obtained a decree *ex parte* against the lessee Maung Ne Dun: and the suit was dismissed as against the sub-lessees, on the ground that there was no privity of contract between the Lessor and the sub-lessees. The Divisional Court on appeal by the Plaintiff, granted a decree against the sub-lessees, (the present Appellants) on the ground that there was privity of estate following the decision in *Hossain Ismail Atcha v. Ebrahim Mahomed Makda* (1). In that case it was held that a lessor could recover from a sub-lessee for the whole of the remainder of a term rent, because such a sub-lease operates under English Law as an assignment of the term, and rent is a covenant that runs with the land. I would observe that under

* Appeal against the judgment and decree of the Divisional Judge of Hanthawaddy dated 23rd May 1912 in Civil Appeal No. 4 of 1912 reversing the judgment and decree of the sub-divisional Court of Kyauktan in Civil Regular No. 71 of 1911.

(1) 3 L. B. R. 90; 11 Bur. L.R. 265.

l. B.
Arachan and
one
v.
Maung Po
Win and one.

English Law a sub-lease for the remainder of a term would not operate as an assignment of the term, unless it were by deed:— and the extent of the principle that a sub-lease for the whole of the sub lessor's term amounts to an assignment has been much controverted: see Woodfall's Landlord and Tenant 19th Edition page 297. The proposition rests upon the technical doctrine of English Law that a lease requires a reversion to support it. Under section 105 of the Transfer of Property Act, which defines a Lease, there is nothing to show that a Lessee cannot make a sub-lease for the whole of the remainder of his lease; and with all due deference, I think it is unnecessary and inappropriate to import into Indian Law the above technical rule of English Law.

It is not necessary to refer the matter to a Full Bench because this appeal must be allowed on the ground that the Plaintiffs cannot have a decree against both the lessee Maung Ne Dun and the sub-lessees (Appellants) for the same rent. They have a decree against Maung Ne Dun and this precludes them from asking for a decree against the appellants—See *Macnaghten v. Lalla Mewa Lall* (2). In *Kunhanujan v. Ahjelu* (3) (which is referred to in *Hossain Ismail Atcha v. Ebrahim*) it is stated “the original lessor may sue the original lessee upon his express covenant, and also the assignee upon the privity of estate, though he can have execution against one only”. If the Plaintiff can have execution against one only, he can have judgment against one only. The appeal is allowed with costs and the suit will stand dismissed as against the Appellants.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 213 OF 1912.

MAUNG PO MAUNG ... PLAINTIFF—APPELLANT.

MAUNG KAING & I ... DEFENDANT—RESPONDENTS.

For Appellant—Ba U.

For Respondent—Ba Dun.

Before Mr. Justice Ormond.

Dated, 23rd December 1913.

Burden of proof—Decree-holder alleging invalidity of sale of attached land—effect of invalidity—Charge on land to the extent of the amount advanced.

Where the defendant purchased, without any registered conveyance, the attached land from appellants' judgment debtor for Rs. 1,000 and was in uninterrupted possession of the same till the date of attachment and where the question of the validity of the sale depended upon the decision of the question as to whether the transaction was entered into before or after the 1st January 1905 (the date when the Transfer of Property Act was extended to Burma).

(2) 3 C. L. R. 285.

(3) 17 Mad. 296.

Held that the onus of proof lay on the appellant to show that the sale was invalid as being entered into subsequent to the 1st January 1905.

Held also that if the sale was found to be invalid the purchaser was entitled to a charge on the property for the amount paid by him in advance as purchase money, and for interest on that amount.

4 Bur. L. Times 115 dissented from.
28 Bom. 466 approved.

L. B.
—
Maung Po
Maung
v.
Maung Kaing
and one

JUDGMENT.

The plaintiff-appellant obtained a money decree against San Nyein and attached the land in question and a house thereon as being the property of his judgment-debtor. The defendant Maung Kaing applied to have the attachment removed and succeeded. The plaintiff then brought this suit for a declaration that the land and house was the property of his judgment-debtor and liable to be attached by him. In this appeal the plaintiff-appellant abandons his claim for a declaration as to the house. It is admitted that some years ago the defendant Maung Kaing agreed to purchase this land from San Nyein; that he paid San Nyein the purchase money Rs. 1,000 and was put into possession as owner and has continued in uninterrupted possession up to date. There was no registered conveyance. The question then arose whether the transaction was made before the 1st January 1905 or not. If the transaction was subsequent to that date, the Transfer of Property Act applies, and the sale was invalid:—but the defendant having paid the purchase money and being in possession under the contract of sale, has under section 55 sub-clause (6) clause (b) of that Act a charge on the property for the amount paid by him in advance as purchase money, and for interest on that amount.

I am referred to a case of *Ma Lone Ma v. Maung Shwe Byu* (1) in which the learned Judge held that the defendant was entitled to a charge on the property which he had bought under an invalid sale and of which he was in possession. I think the learned Judge over-looked the provision of section 55 sub-clause 6. (b) of the Transfer of Property Act. The case of *Lalchand Motiram v. Lakshman Sahadu*, (2) is an authority on the point. If then the transaction took place since the 1st January 1905, the plaintiff would be entitled to attach the land in question, subject to the charge of Maung Kaing for Rs. 1,000 plus interest at 6 per cent. from the time of the contract of purchase. But if the transaction took place before the 1st January 1905, the sale to Maung Kaing would be a good sale. The case was heard in March 1912. The plaintiff's witness San Nyein says he sold the land about 7 years before. The defendant and his witnesses say that the transaction took place about 8 years before—in 1903 or 1904. The evidence as to the date of the transaction is very indefinite. The District Judge thought the evidence for the defence was the more reliable. I think the decision on this point must depend upon the question: upon whom does the onus lie to shew that the transaction as a sale was valid or

(1) 4 Bur. L. T. 115

(2) 28 Bom. 466.

& H.
 Maung Po
 Maung
 v.
 Maung Kaing
 and one

invalid. It is admitted that the defendant is in possession and was put into possession as owner, by San Nyein who was then the owner. The onus I think is on the plaintiff to shew that the transaction took place since the 1st January 1905 and that the defendant did not thereby acquire the right of ownership in the land. This onus the plaintiff has failed to discharge. I therefore dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 251 OF 1912.

RATHNA PILLAY & 1 ... DEFENDANT—APPELLANT.

vs.

N. P. FIRM by its agent SIVARAMAN CHETTY PLAINTIFF—RESPONDENT.

For Appellant—Wiltshire.

For Respondent—Palit.

Before Sir Henry Hartnoll, the Offg. Chief Judge and Mr. Justice Twomey.

Dated, 5th January 1914.

Mortgage by one of joint property of himself and his mistress—Absence of mistress's consent—Effect of an acquiescence after the transaction.

The first and second appellants lived together, though not legally married and the first appellant mortgaged their joint property without the consent of the second. On an objection being raised to a mortgage decree affecting 2nd appellant's interests in the land,

Held that the tie of marriage did not exist between them and that they could separate at will and there was no binding contract between them.

Held further that no acquiescence after the deed was executed by the 1st appellant would create an estoppel or would change the past in any way.

JUDGMENT.

Hartnoll Offg. C. J.—The respondent firm sued appellants to recover Rs. 3,050 alleged to be due on a registered mortgage dated the 16th January 1905. The deed was only signed by Rathna Pillay, but it was stated that Ma Myit signed as a witness as she was unable to go to the registration office. Rathna Pillay admitted execution of the deed but pleaded that he had paid Rs. 1,500 of the principal and all interest due up to the date of payment of the principal Rs. 1,500. Ma Myit denied knowledge of the document and denied that she signed it. Rathna Pillay and Ma Myit are not husband and wife but they cohabited together. The District Court found that Ma Myit did attest the document 'and was aware of it physically and by the document being registered constructively.' He said that though both defendants did not live in wedlock yet they considered themselves partners in life as well as business, as in the case of a Burmese family; that

they worked as partners and had a joint interest in business to carry out which the money was borrowed. So he considered that the whole of the property comprised in the mortgage deed should be covered by the mortgage decree. He found the alleged payment of Rs. 1,500 not proved. He gave a mortgage decree for Rs. 3,050 costs and further interest against both the defendants.

They appealed to the Divisional Court, which found that Ma Myit did not attest the mortgage deed, and that therefore it was of no use to prove a mortgage as it was not proved to be attested by two witnesses. The Divisional Judge found the alleged payment of Rs. 1,500 not proved, and also that Ma Myit has no right to say that Rathna Pillay had no right to mortgage her properties as the latter admitted that he had told Ma Myit her properties were mortgaged and there was nothing to show that she had made any protest to the respondent firm. He changed the decree into a simple money decree for Rs. 3,050 plus costs in the District Court. Rathna Pillay and Ma Myit now appeal to this Court.

The first ground that, the instrument being held not to be a mortgage deed, the claim should have been dismissed as barred by limitation, was abandoned at the hearing.

As regards the second ground the first point for consideration is whether it is proved Ma Myit attested the deed. Maung Shwe Tha the writer of it does not swear that she did. The copy of it in the registration office does not show her signature. The copy filed on the record shows that the copy in the registration office was not only copied from but compared with the original. It is certainly not proved that Ma Myit signed the deed. It cannot therefore take effect as a mortgage. Ma Myit cannot be bound by it on the ground that she signed as a witness. The ground given by the District Court for binding her namely that she and Rathna Pilly should be regarded as a Burmese Buddhist husband and wife is equally untenable. The tie of marriage did not exist between them. They could separate at will and there was no binding contract between them. They did not enjoy the advantages of marriage nor were they bound by the obligations of marriage. The ground given by the Divisional Court for binding Ma Myit is also untenable. It was argued that she acquiesced after the deed was executed by Rathna Pillay. Mere acquiescence in this manner does not create an estoppel. It is not shown, that by any deed or omission of hers she intentionally caused the appellants to believe that she had authorized Rathna Pillay to mortgage her property, and so to accept a mortgage by him of her interest in the property. There is a great difference between acquiescence in an act which is still in progress and mere submission to it when it has been completed. In this last case acquiescence cannot change the past. It was urged that there is evidence to show that both appellants took part in the negotiations for a compromise—that they both agreed to pay Rs. 1,000. Even if this evidence were true it is not in my opinion conduct that should bind Ma Myit. She may merely have wished to save litigation for herself and Rathna Pillay. In my judgment it is not shown that Ma

L. B.
Rathna Pillay
and one
v.
N. P. Firmby
its agent
Sivaraman
Chetty.

l. 2.
Rathna Pillay
and one
v.
N. P. Firm by
its agent
Sivaraman
Chetty.

Myit is bound by Rathna Pillay's action in mortgaging her interest in the properties.

Lastly it was urged in the fifth ground of appeal that Rathna Pillay has proved payment of Rs 1,500. There are two concurrent findings of fact against Rathna Pillay and having read the evidence there is no ground whatsoever for differing from those findings. This ground was not pressed at the hearing.

There is the fifth cross objection that remains to be dealt with. There is no good reason for not allowing the respondent firm interest on the principal of the loan against Rathna Pillay.

I would alter the decree passed by the Divisional Court and instead thereof give the respondent firm a money decree against Rathna Pillay alone for Rs. 3,050 with interest on the principal Rs. 2,000 at the contract rate from the date of institution of the suit to date of decree and thereafter on the aggregate at 6 per cent. per annum to date of realization.

As regards costs appellants had one advocate in all three Courts. In the District Court I would give the respondent firm their costs. In the Divisional and this Court I would make each party pay their own costs.

TWOMEY J :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 20 OF 1912.

MG. MYA AND I ... DEFENDANT—APPELLANT.

vs.

MOOSAJI AHMED & CO. ... PLAINTIFF—RESPONDENT.

For Appellant—Halkar.
For Respondent—Auzam.

Before Mr. Justice Twomey.

Dated, 26th May 1913.

Indian Contract Act—Undue influence—S. 16—Did plaintiff use his dominating position in order to obtain an unfair advantage?

Where plaintiff released the 1st appellant on the two appellants and two sureties entering into a bond for paying Rs. 2,000 in cash and Rs. 2,800 within 2 years with interest at 6 per cent, on the whole amount Rs. 4,800.

Held that though the first appellant might have been sent to prison, had no such arrangement as the above described one been made and though the plaintiff was to that extent in a position to bring pressure to bear upon the appellants and dominate their wills, the appellants must further show that the plaintiff used his dominating position to obtain an unfair advantage.

Held, on the facts, that the bargain being fair and reasonable, there was no undue influence.

FACTS :—The appellant Mg. Mya owed Messrs. Moosajee Ahmed and Co. Rs. 4,800 which he was unable to pay. The debt was not paid and the firm instituted criminal proceedings against Mg.

Mya and a warrant was issued for his arrest. Mg. Mya's friends came to his assistance and a bond was signed whereby it was agreed that Rs. 2,000 in cash should be paid down and the remaining sum of Rs. 2,800 repaid within two years, with interest calculated at 6 per cent. per annum. Moosajee Ahmed and Co., sued for the payment of Rs. 400 unpaid principal and interest of Rs. 346/4. The appellants admitted execution of the bond, but in their first written statement pleaded that there was an oral agreement that the interest should not be enforced, and that they have offered to pay Rs. 400, the principal due. It was admitted on behalf of the firm that the latter sum had been tendered but refused as interest was not paid. Mg. Mya further pleaded that his consent to the bond had been obtained through undue influence and that the agreement was voidable.

The Sub-Divisional Judge found that there was no undue influence exercised and passed a decree against all the appellants for Rs. 400 with costs, and against Mg. Mya alone for the interest with costs and the pleader's fees on this sum.

L. B.
Mg. Mya and
one
v.
Moosaji
Ahmed & Co.

JUDGMENT.

TWOMEY, J:—I think the Lower Courts erred in thinking that any question of undue influence arose in this case. So far as the record shows the plaintiff respondent was lawfully entitled to the amount Rs. 4,800 which he claimed from Mg. Mya and his wife. As Mg. Mya absconded it appears that there were some grounds for proceeding against him not only civilly but in a Criminal Court. The plaintiff by way of compromise accepted an immediate payment of Rs. 2,000 and took a bond with 2 sureties for the balance Rs. 2,800 to be paid with interest at 6 per cent. on the whole debt within 2 years. These circumstances do not amount to undue influence. If the applicants refused to sign Mg. Mya might have been sent to prison as the result of the proceedings which the plaintiff-respondent was taking. The plaintiff-respondent was therefore in a position to bring pressure to bear upon the appellants and to that extent was in a position to dominate their wills. But more is required than this. The appellants have to show that the respondent used his dominating position to obtain an unfair advantage (section 16 Contract Act). It is clear that the Respondent did not do so. The bargain in the bond is fair and reasonable and therefore the plea of undue influence collapses.

The Lower Courts in my opinion should have decreed against the sureties as well as the principal debtors (the appellants) for the whole amount claimed. As it is, the appellants have been directed to pay the balance of the principal *plus* the interest on the whole debt as provided in the bond, while the sureties (who have not appealed) have been held liable only for the balance of the principal.

I cannot see that the appellants have any legitimate ground of complaint and I dismiss this appeal with costs.

Rs. 3-8. The learned Judge in the Small Causes Court has, I think, found that the plaintiff was not entitled to recover because he did not produce the bill of lading. There should therefore be a decree for the plaintiff for Rs. 75-8.

The plaintiff having lost the bill of lading, defendants were entitled to be satisfied that that was *bona-fide*.

The plaintiff's claim was evidently to a great extent fraudulent as to the amount; and in the circumstances I think both parties should bear their own costs throughout.

L. B.
Eng. Leong
& Co.
B. I. S. N.
& Co., Ltd.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 155 OF 1912.

A. T. K. P. L. Chetty ... DEFENDANT—APPLICANTS.

VS.

S. K. R. S. S. T. Chetty Firm... PLAINTIFF—RESPONDENTS.

For Appellant—Dantra.

For Respondent—Bilimoria.

Before Mr. Justice Robinson.

Dated 21st January 1914.

Delivery order—Is the giving of such order equivalent to putting donee in possession?—Is the assent of the original party essential to the assignment—Indian Contract Act s. 90 ill. e.

The handing over of a delivery order to the ware-houseman or mill unless accompanied by the latter's assent to the transfer is not equivalent to giving possession of the goods to the purchaser and no claim for non-delivery can be brought by the latter against the ware-houseman or mill under such circumstances.

JUDGMENT.

On 16th June 1911 Defendants bought from Messrs. Steel Bros., & Co, Ltd., A. 1 Coodee rice at Rs. 300-per 100 baskets the amount being 1,500 baskets minimum and 2,000 baskets maximum delivery to be taken *ex-hopper* in July. The contract number was 295.

On 23rd June 1911 Defendants sold 2,000 bags of the same quality at Rs. 305-per 100 bags to Plaintiffs the rice to be from Messrs. Steel Bros. and Co, Ltd., or the Burma Rice and Trading Co's. Mills.

Messrs. Steel Bros., had another contract with Defendants for 2,000 bags that was entered into on the 16th June 1911.

L. B.
 A. T. K. P. L.
 Chetty.
 v.
 S. K. R. S.
 S. T. Chetty.

As against their contract with Plaintiffs the Defendants handed over to them two delivery orders on Steel Bros., for 554 and 1,000 bags respectively. It is by no means clear whether Steel Bros., when these orders were presented, accepted them in full or not but it is certain that they did supply 54 bags less than the total amount. They at first thought they had supplied too little and a fresh delivery order was made out for 54 bags but this was subsequently cancelled. The reason was that under the contract No. 295 specified above they were not bound to supply more than 1,500 bags and this is pointed out in their letter Ex: D. They were willing to refund the value at their contract rate but Plaintiff had paid more.

Plaintiffs then sued Defendants for the value of 54 bags not supplied and for damages. They failed as to damages as the market rate had not altered but were given a decree for the rest of their claim.

Defendants now urge that the handing over of the delivery orders was equivalent to giving possession of the goods and that no claim exists against them.

Section 90 of the Contract Act and illustration E to that section clearly set out the legal position. The handing over of a delivery order is not sufficient without something further. The order to the warehouseman or miller must be accompanied by their assent to the transfer. This has been laid down in *Le Geyt v. Harvey* (1) and in the English cases cited under the section 90 in Sir F. Pollock's work on the Indian Contract Act.

It is urged that Messrs. Steel Bros., did assent but the only possible view on the evidence is, I think, that a mistake arose and they did not assent to more than the transfer of delivery orders relating to contract No. 295.

The delivery orders were "subject to the terms of Contract No. 295" and the bills of plaintiffs were against the same contract under which they were not bound to supply more than 1,500 bags in all.

In cases of constructive delivery the delivery must have the effect of putting the goods in the possession of the buyer and this effect must be clearly created and established.

It is admitted that the learned Judge was in error in calculating the amount. Plaintiffs only asked for Rs. 446-1.

In my opinion therefore the revision fails but the decree is modified and will stand for Rs. 446-1 otherwise the revision is dismissed with costs on Rs. 446-1.

Advocate's fees 2 gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 17 OF 1912.

BALLY SINGH v. BHUGWAN DASS KALWAR.

For Applicant—Bijapurkar.

For Respondent—R. N. Burjorjee.

Before Mr. Justice Twomey.

Dated, 13th Day of June 1913.

Pronote on an unstamped paper—Whether admissible—Is there independent cause of action?

Where the plaintiff sued for money lent but it was proved that at the time of the transaction defendant executed a pronote which was written on an unstamped paper,

Held that the said unstamped document could not be admitted in evidence or acted on, on account of its being insufficiently stamped and plaintiff can succeed only if he can show that he has a cause of action independently of the document.

Held further that in the case the promissory note was the contract and section 91 of the Evidence Act debarred the production of any other evidence but the writing itself.

JUDGMENT.

TWOMEY, J: The only argument urged before me is one that is not contained in the application for revision, namely that the defendant having admitted that he executed a promissory note for the amount claimed, it was unnecessary for the plaintiff to produce the document in evidence and the plaintiff was entitled to a decree on the failure of the defendant to prove payment.

It is admitted that the document itself could not be admitted in evidence or acted on because it is insufficiently stamped, and it is settled law that in such a case the plaintiff can succeed only if he can show that he has a cause of action independently of the document. The law on this subject is fully discussed in the Upper Burma Case (1) cited in the Judgment of the Township Court and it is unnecessary to go any further.

It is clear that in the present case the plaintiff has no cause of action apart from the document. The promissory note is the contract and section 91 of the Evidence Act debar the production of any other evidence but the writing itself. It is true that the plaintiff did not profess to sue on the promissory note. He knew that he could not do so as it is not properly stamped. But as he had no cause of action apart from it, if he got a decree on the promissory note, as the District Judge points out, that would be "acting on" the promissory note, in direct contravention of section 35 of the Stamp Act. (See the Upper Burma case *Ma Ein Min vs. Maung Tun Tha* (2) and the rulings cited therein.

On these grounds I think the decision of the Lower Courts is correct. I am also of opinion that even if the decision were wrong

(1) *Nga Waik vs. Nga Chet* U. B. R. 1907-09, Evidence P. 5.

(2) U. B. R. 1897-01 P. 556 Vol. 2.

L. E.
Bally Singh
v.
Bhugwan'
Dass Kalwar.

the case is not one in which this court could properly interfere in revision according to the principles set out in *Zeya vs. Mi On Kra Zan* (3). The facts and the law applicable to them have been duly considered by the Lower Courts, which have come to a concurrent decision.

I have not referred to the second and third paragraphs of the application in which it is urged that the document in question is not a promissory note at all but a mere receipt for money. This ground was not argued before me. It is a ground that apparently was never taken in the Lower Courts and so far as I can see there is no force in it. The document appears to be a promissory note as defined in section 4 of the Negotiable Instruments Act.

The application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISIONS NO. 147 AND 148 OF 1911.

SANA EMAN SAIB PLAINTIFF—APPLICANT.

vs.

MOOMA ENA MAHOMED MEFRA
SAIB & SIX OTHERS... DEFENDANT—RESPONDENTS.

For Applicant—Brown.

For Respondents—M. Auzam.

Before Mr. Justice Twomey.

Dated 26th May 1913.

"Promissory note payable to bearer on demand—Section 26 Indian Paper Currency Act 1910.

A promissory note payable to any person or order does not, by indorsement in blank, become "a promissory note payable to bearer on demand" within the meaning of section 26 of the Indian Paper Currency Act 1910; and is not invalid therefor.

Maung Po Thu v. L. D'Attoides 5 L.B.R. 191; 3 Bur. L.T. 123. } Referred to
Jetha Parkha v. Ramachandra Vithoba 16 Bom. 689. }

JUDGMENT.

TWOMEY, J:—In these cases Civil Revision Cases Nos. 147 and 148 of 1911 the only question for decision is whether it is an infringement of the Indian Paper Currency Act to indorce a promissory note in blank. The District Court of Amherst has held in suit No. 164 of 1910 that a person who gets a promissory note payable on demand to himself or order indorses it in blank makes out a promissory note payable to bearer on demand. A person who makes a promissory note payable to bearer on demand infringes the provisions of section 26, Indian Paper Currency Act 1910 (corresponding to section 24 of the Indian Paper Currency Act, 1905).

The learned Judge following the ruling *Maung Po Tha and one vs. L. D'Almeida* (1) held that the promissory notes sued upon in the present cases embodied contracts forbidden by law and consequently that the plaintiff could not recover on them. The Judgment of the learned Judge was passed in a case in the District Court, in which the same question arose, but it was made applicable to the cases now under revision which are two Small Cause Court Cases between the same parties as in the District Court Case.

I can find no authority for the learned Judge's view that the plaintiff by indorsing the notes in blank "made" promissory notes payable to bearer on demand. It appears to me that when a promissory note is drawn up signed and delivered to the payee it is "made" once and for all and a subsequent indorsement is no part of the "making". If the Legislature intended to prohibit indorsements in blank it may be presumed that the intention would have been clearly expressed in the section of the Paper Currency Act referred to above. The District Judge in support of his view quotes section 8 (3) of the English Bills of Exchange Act (1882) which defines a bill payable to bearer so as to include a bill on which the only or the last indorsement is in blank. Before that Act was passed a bill payable to bearer did not include a bill indorsed in blank. It required an express provision of law to bring about this change in England and similarly I think that an express provision of law would be necessary for the same purpose in India. The Bombay case *Jethi Parkha vs. Ramachandra Vilhoba* (2) is also relied upon. Mr. Justice Farran in that case gave it as his opinion that the section of the Indian Paper Currency Act embraces not only a promissory note which is expressed to be, but also one which in legal effect is payable to bearer on demand. I think the learned Judge was only contemplating cases in which the wording of the promissory note departs from common usage. In such cases the document as drawn or made has to be construed and its legal effect determined. There is nothing in the Bombay Case to suggest that the prohibition in section 26 of the Indian Currency Act extends to indorsements in blank.

I therefore decide that the construction which the District Court has put upon the section is incorrect.

In these circumstances it is not necessary to consider the further question whether it is impossible to recover on a promissory note made in contravention of the section. The learned Chief Judge in the Chief Court case cited above held that this is the effect of the prohibition. But Mr. Justice Farran seems to have held a different view (See Bombay Case already cited, page 700).

The decrees of the Moulmein Small Cause Court in the two cases, 64 and 65 of 1910, are set aside.

It appears doubtful from the concluding part of the District Court's Judgment whether the defendants, on whom the onus of proof lay, had a proper opportunity of calling witnesses. I think

L. S.

Sana Eman
Saib.v.
Mooma Ena
Mahomed
Meera Saib
and 6 others.

(1) 5 L.B. 191; 3 B.L.T. 123.

(2) 16 Bom. 689 (See page 696).

L. S.
Sana Eman
Saib.
v.
Mooma Ena
Mahomed
Meera Saib
and 6 others.

they should be given an opportunity now of satisfying the Judge of the Court below by affidavit or otherwise that they had reasonable grounds for not taking out summonses for their witnesses in time. If they succeed in satisfying the Judge on this point he should go into their defence on the merits. If they do not succeed in doing so the plaintiff's suits should be decreed. The two cases are remanded accordingly.

The costs in this Court will abide the final result in both cases.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISC: APPEAL * No. 79 OF 1913.

U GA ZAN APPELLANT.

vs.

HARI PRU RESPONDENT.

For Appellant—Mr. Lambert.

For Respondent—Mr. McDonnell.

Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Twomey.

Dated, 13th January 1914.

Indian Contract Act—S. 26.—Agreement in restraint of marriage—Agreement to repay money spent for son-in law's education in case he marries another woman during the life-time of his present wife whose father was to advance the money.

Where it was mutually agreed between the fathers of a newly married couple that the girl's father should advance money for the boy's education and the boy's father reimburse all such monies in case the boy took another wife during the life time of the girl held such a contract was void under s. 26 of the Contract Act as being in restraint of marriage as the burden of reimbursing to the girl's father the money spent would exercise a restraining influence on the boy if he thought of marrying another woman.

Held also that there is nothing in the section to restrain its operations to the case of first marriage only as the section is perfectly general in its terms and the Legislature well knew at the time of enacting the section that polygamy was practised by certain races in India.

JUDGMENT.

HARTNOLL, OFFG., C. J: Hari Pru married his niece Mi Ah Win to appellant's son Tha Do Aung. Hari Pru says that when the marriage took place it was mutually agreed as follows:—

“That the plaintiff would send the said Tha Do Aung either to Rangoon or Calcutta, whichever place he liked to go to, for education and for this the plaintiff would pay all necessary expenses and the defendant on his part promised to repay the plaintiff all the money that the plaintiff would spend on the education of his son the said Tha Do Aung if the latter in the life-time of his wife, the said Mi Ah Win, married again any other woman.”

* Appeal against the Judgment and decree of the Divisional Judge of Arakan dated 20th March 1913 in Civil Appeal No 6 of 1913 reversing the decree of the District Court passed in Regular Suit No. 102 of 1912.

The question to be decided in this appeal is whether, if there was such an agreement, it is not void under section 26 of the Contract Act as being an agreement in restraint of marriage.

Respondent's counsel argues that the section should not be held to apply to a person married already. I am unable to agree. When it was enacted, the legislature knew that polygamy was practised by certain races in India, and yet the section is perfectly general in its terms. There is nothing in it to restrain its operations to the case of first marriages only.

It was then urged that there is a difference between legal and moral restraint—that in the present case Tha Do Aung did not bind himself not to marry again, and that, if he did not marry another woman owing to the expense entailed on his father by virtue of this agreement there would only be a vague restraint on account of paternal affection.

It seems to me that the agreement, if it was made, comes within the meaning of the section. The intention was clearly to burden Mg. Tha Do Aung's father with considerable expense, if he married again during Mi Ah Win's life-time, and this, if he was a dutiful son with a reasonable sense of the duty and the fitness of things, would naturally exercise a restraining influence on him if he thought of marrying another woman. Not only would his own sense of what was right restrain him; but his father and relations would have an extra motive for endeavouring to prevent any other marriage. It was in my opinion clearly an agreement in restraint of marriage.

I would allow the appeal, set aside the decree of the Divisional Court and dismiss the suit awarding appellant costs in all Courts.

TWOMEY, J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 323 OF 1913.

PO HAN AND NGA AYE ... APPLICANT.
 vs.
 KING-EMPEROR ... RESPONDENT.

Before Mr. Justice Twomey.

Dated, 11th July 1913,

Special Laws—meaning thereof—Offence—Abetment of—S. 3, Whipping Act, 1909—S. 109 Penal Code.

Persons other than juvenile offenders convicted of abetment of theft (or of any other offence specified in section 3 of the Whipping Act 1909) cannot be punished with whipping under the provisions of that section.

Special laws are laws that create fresh offences i. e. make punishable certain things which are not already punishable under the general Penal Code e. g. Excise Opium, Cattle Trespass Acts, &c.

L. B.

U Ga Zan.
 v.
 Hari Pru.

Po Han and
Nga Aye
v.
King
Emperor.

TWOMEY, J:—The Cantonment Magistrate convicted the second accused of abetment of theft under section 380 read with section 109 of the Indian Penal Code and sentenced him to undergo a whipping. The second accused is not a juvenile offender as defined in the Whipping Act and it is necessary to consider whether the sentence of whipping passed upon him is authorised by section 3, which provides this punishment for the substantive offence of theft, but makes no mention of abetment.

The words "punishment provided for the offence" in section 109 I. P. C. mean the punishment provided for the offence either in the Penal Code or in some special or local law (see sections 40 and 41). It might be argued that the Whipping Act is a "special law" within the meaning of section 41, as it is a law "applicable to a particular subject" namely whipping, and accordingly that the abetment of theft is punishable with whipping because this form of punishment is provided for the substantive offence, theft, in section 3 of the Whipping Act. But it appears to me that the special laws contemplated in sections 40 and 41 of the Code are only laws, such as the Excise, Opium and Cattle Trespass Acts creating fresh offences, that is, laws making punishable certain things which are not already punishable under the general Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code or (in the case of juvenile offenders) other enactments. I think this is the only view consistent with the language of the Whipping Act itself. For section 4 expressly provides the punishment of whipping for abetment of rape, and section 5 expressly provides it for abetment by juvenile offenders. If it was intended that abetments of the offences mentioned in section 3 should also be punishable in this way, the intention would no doubt have been clearly expressed, and as it is not so expressed the intention of the law must be that abetments of these offences should be punishable under the Penal Code. This intention would be defeated if the Whipping Act were regarded as a special law under sections 40 and 41 I. P. C.

As the Whipping Act is a highly penal enactment it must be construed in the sense most favourable to the subject. It must be held therefore that persons convicted of abetment of theft or abetment of any of the other offences mentioned in section 3 of the Whipping Act, 1909, are not liable to the punishment of whipping. As the whipping in this case has been carried out, nothing can be done beyond pointing out the illegality of the sentence.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION* No. 38 B OF 1913.

NGA BA LIN APPLICANT.

vs.

KING-EMPEROR RESPONDENT.

For Applicant—McDonnell.

Before Mr. Justice Twomey.

Dated, 20th June 1913.

Indian Railways Act X of 1890 Sec. 101—Effect of breach of rules framed under the Act—Cases of actual danger distinguished from disobediences involving risk of danger.

A Railway servant cannot be convicted under Sec. 101 of the Indian Railways Act, 1890, unless he has, by his disregard of the rules, *actually* endangered the safety of some person. It is not sufficient that his act *might* have endangered the safety of some person.

Where the disobedience of a rule is merely *likely or calculated* to endanger the safety of any person the intention of the legislature was apparently to leave it to the railway authorities to deal departmentally with disobediences involving risk of danger without entailing actual danger.

(1873) Queen *vs.* Manphool 5 N. W. P. 240.

(1909) Emperor *vs.* Ganesh Das 6 Indian Cases p. 483. } Followed.

4 L. B. R. p. 139. }

Ib. p. 350. } Distinguished.

Ib. p. 353. }

ORDER.

TWOMEY, J.:—The accused Ba Lin, a Station Master at Gangaw on the Pegu-Martaban Railway line has been convicted under section 101 of the Railways Act of endangering the safety of persons travelling in No. 235 up-train by disobeying Rule 92 of the Rules framed under the Act, and he has been sentenced to simple imprisonment for one month. The rule referred to provides that no train shall be allowed to leave a station unless permission to approach has been received from the station ahead. It was found by the Magistrate that Ba Lin neglected to get a "line clear" message from Martaban, the station ahead, and that he nevertheless gave the driver of No. 235 up-train authority to proceed from Gangaw to Martaban. As a matter of fact no accident of any kind occurred and apparently the passengers in train No. 235 were not actually endangered in any way. There was no other train on the section between Gangaw and Martaban. When No. 235 approached Martaban the engine driver found the signals against him. He stopped his engine and whistled. The Martaban Station Master came out on a pilot engine and piloted No. 235 into the station yard. It was pleaded for the defence that Ba Lin

* Review of the order of the District Magistrate, Thaton, dated 20th November 1912 passed in Criminal Regular Trial No. 13 of 1912.

L. B.
Nga Ba Lin.
v.
King.
Emperor.

did in fact receive the necessary "line clear" telegram from Martaban and that the Assistant Station Master at Martaban put a false "private number" in the telegram so that he might afterwards be able to deny sending the telegram. It was pointed out that the Assistant Station Master at Martaban was next on the list for promotion to Station Master and that he therefore had a motive for getting Ba Lin into trouble. The Magistrate disbelieved this defence and I do not think that the Magistrate's finding on the facts should be disturbed in revision. The only question to be decided is whether the conviction was justified on the facts as found by the Magistrate. On this question of Law the learned Sessions Judge refers to the cases of *Queen vs. Manphool* (1) and *Emperor vs. Ganesh Das* (2). The following is the main part of the Judgment in the former case:—

"The prisoner has been found guilty of endangering the safety of persons in a certain goods train by negligence, but, although he is shown to have neglected his duty, there is no evidence whatever of the safety of any persons in any goods train having been endangered by his neglect of duty. On the contrary it is plainly apparent that, by reason of the precautions taken by other persons, any possible danger which might have resulted from his neglect was avoided. Although, therefore, he may be punishable departmentally or otherwise for neglect of duty, it does not seem that he can be convicted and punished under section 29, Act XXV of 1871. It is not a good and sufficient answer to the plea here urged on his behalf to argue that, because a neglect of duty such as he was guilty of, may sometimes lead to the endangering of the safety of persons in a goods train, or that because, had not precautionary measures been taken, and had the line not been clear, his neglect of duty would probably or certainly have endangered the safety of persons in a goods train, he should be held to have actually endangered the safety of persons in a goods train."

The latter case of Ganesh Das contains the following passage:—

"It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety. In the present case any possibility of an accident was averted by reason of the fact that the special goods train arrived at the Dogra distance signal before the mixed passenger train arrived at that station and, therefore it cannot be said that the safety of any person in either train was actually endangered on the occasion in question. We quite agree that if the facts had been different, if for instance, the mixed passenger train had been started off from Dogra, prior to the arrival of the goods special in the same line of

(1) (1873) 5 N. W. P. 240.

(2) (1909) 6 Chaudhri's Indian Cases p. 483.

raids, the accused would rightly have been convicted of an offence under Section 101 of the Act, and this, too, though no actual collision has occurred. In that event his act or omission would unquestionably have resulted in endangering the safety of persons in the two trains."

L. B.
 Ngaz Ba Lin
 v.
 King-
 Emperor.

These rulings strongly support the view of the Sessions Judge that the conviction in the present case cannot be sustained. It is pointed out moreover that the rulings in the Lower Burma Chief Court Cases *King-Emperor vs. Dass* (3), *King Emperor vs. Achctaramaya* (4) and *King-Emperor vs. Po Gyi* (5) on which the District Magistrate relied were all cases in which the personal safety of passengers was clearly endangered. In these cases there was not only a risk of danger; the danger actually arose. In the first case the breach of rule resulted in actual collisions, and in the third case a collision was narrowly averted. All that the Assistant Traffic Superintendent could say in this case was as follows:—

"The breach of the rules by the accused *did* entail a possibility of accident. For example if a bridge had been reported insecure or any other obstruction occurred on the section between Martaban and Gangaw and the Station Master Martaban had got information just before the train reached Gangaw, the fact of the Station Master Gangaw letting the train through without a "line clear" might have caused a serious accident or a waggon might have blown out of the yard at Martaban on the single line."

The Martaban Station Master stated that no accident could have taken place in the circumstances. Section 101 does not provide for cases in which the disobedience of a rule is merely *likely* or *calculated* to endanger the safety of any person. The intention of the Legislature was apparently to leave it to the Railway authorities to deal departmentally with disobedience involving risk of danger without entailing actual danger.

On these grounds I set aside the conviction and sentence and direct that the bail bond of the accused shall be cancelled.

(3) 4. L. B. R. 139.

(4) 4. L. B. R. 350.

(5) 4. L. B. R. 353; 2 Bur. L.T. 85.

THE BURMA LAW TIMES.

VOL. VII.]

APRIL, 1914.

[No. 4.

PRIVY COUNCIL APPEAL NO. 56 OF 1912.

MA NHIN BWIN APPELLANT.

vs.

U SHWE GONE RESPONDENT.

Buddhist Law—Inheritance—Father or elder sister to succeed to the estates of women living and trading in partnership with their elder sister separate from father.

Where three sisters lived together and traded together apart from their father and where after the death of the two younger ones there was a conflict as to succession to their estates between their eldest sister and their separate father,

Held that the balance of authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent.

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 25TH FEBRUARY 1914.

Present at the Hearing.

LORD SHAW.
LORD MOULTON.
MR. AMBER ALI.

[*Delivered by LORD SHAW.*]

This is an Appeal from a Judgment (1) and Decree of the Chief Court of Lower Burma. The Judgment is dated the 14th June 1910, and it reverses a Decree of the same Court in its Original Civil Jurisdiction, dated the 16th February 1905. The Appeal is also from an Order dated the 2nd September 1910 which rejected the Appellant's application for a review of the Decree first mentioned.

The question to be afterwards dealt with is one of wide-spread importance, affecting the rights of succession in Burma. It is, however, necessary to state the circumstances, which are few and

(1) 4 Bur. L. T. p. 1.

P. C.
 Ma Nhin
 Bwin
 v.
 U Shwe Gone

plain, in such a way as to show the limits of the decision which is about to be pronounced. These will appear as the narrative proceeds.

The Respondent, U Shwe Gone, had three daughters by his first marriage. These were Mah Nhin Bwin, the eldest, Mah Nhin Boo, about two years younger, and Mah Nhin Ghine, about six years her junior. The eldest, Mah Nhin Bwin, is the Appellant in this case. She was born about the year 1865.

These three sisters lived together apart from their father. They traded in cocoanuts in the Municipal Bazaar at Rangoon. This state of matters lasted for many years, and one of the outstanding facts in the case is the complete separation of these ladies from their father, who had married again. They were, in fact, independent traders. In later years their business appears to have been of considerable importance. One part of it, for instance, mentioned in the proceedings, is three cargoes of Nicobar nuts, of which one of the ladies was consignee, and the combined value of which amounted to a large sum. In the year 1889, the three sisters bought a house in Rangoon with money derived from the profits of their trading, and they thereafter always lived there together. What were the exact relations in the eye of the law as between these three ladies need not be determined in this case. Whether they were all or any two of them, in full partnership or in joint adventure with each other does not require to be decided in view of the events of death which happened, and the opinion on the legal point of succession which is afterwards to be announced.

In May 1905 Mah Nhin Ghine died. Her sister, Mah Nhin Boo, took out Letters of Administration and took possession of her property. Their father, the Respondent, however, made a claim thereto, and threatened proceedings, but nothing further was done. In June 1906 Mah Nhin Boo died of plague. Of the three sisters, the Appellant was thus the sole survivor.

Should it accordingly be determined, as the Respondent contends, that he, being the father of these two deceasing ladies, is entitled by the law of Burma to succeed to their property as their heir in preference to their surviving sister, then the corpus of the estate, whether it originally belonged to the one sister or the other, or to both, will go to him. If, on the other hand, as the Appellant, the surviving sister, contends, it be the case that she is entitled as such to succeed as heir to her sisters, then again the entire corpus of the estate of both will pass to her in preference to her father. The point to be determined in this case is which of those two contentions is correct according to Burmese Buddhist Law.

A subsidiary question was raised in the Appeal. It was founded upon allegations of commercial partnership existing between the Appellant and her sister, Mah Nhin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner, on the one hand in a full partnership, and on the other in a limited partnership or co-adventure. These questions have not been lost sight of, but they are superseded by

the conclusion to which their Lordships have come as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head.

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of First Instance held that by the Burmese Buddhist Law the Respondent, the father, was entitled to succeed to the estate of his two deceased daughters in preference to the Appellant, their sister. But he also held, however, that the father by his conduct, which in the opinion of the Court amounted to "desertion and intentional and deliberate neglect of the ordinary "duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the suit, which was to declare such a right of succession, must fail. On this latter point the Appellate Court came to a different conclusion, holding that the Respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did with the Court of First Instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they affirmed that right and gave decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the Appellant's conduct, showed very clearly by their Judgment that, so far as actual separation in life of the daughters from their father was concerned, this had been established beyond doubt, and in short it may be taken as a salient fact in the present case that the life lived for years by these ladies was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of a parent in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas, to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman Law with regard to the scope of the *patria potestas*. Many illustrations arise in the books, but one may suffice. It is mentioned in even the Manu-Kye, the authority of which is the subject of separate treatment hereafter, that an impoverished parent could sell his children into slavery. These observations are, of course, not made to give any colour to the view that rights to such an extent still remain in modern Burmese Law or Practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.

F. G.
Ma Nhin
Bwin
v.
U ShweGone.

P. C.
Ma Nhin
Bwin
v.
U Shwe Gone.

On the broad, distinct, and simple issue now to be determined, it might have been thought that the recorded traditions and legal institutes of the country would have been clear. Unfortunately, it is very far from being so. This may no doubt be accounted for to some extent by the fact alluded to by Burge ("Colonial and Foreign Law," I. 60), that litigation was appealed to "when the parties refuse such compromises as may be suggested by relations and village elders." This salutary practice of compromise has the disadvantage, however, that its results do not enter the records or procure the stamp of authority for a guide in future cases. So far as these results or the decisions of local native tribunals are concerned, they appear to have failed to find a place in the chronicles of the people.

There were, however, as there are still, documents that could be appealed to; all of them authoritative, but varying in the weight of their authority. These are the Dhammathats, usually reckoned as thirty-six in number. They form the expositions of *inter alia* customs and juridical rules, their dates of issue varying sometimes by many hundreds of years. It is no doubt true that with regard to them a certain evolution can be traced, and it seems by those who have written on the subject also to be admitted that they differ from the ordinary legal institutes in this sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new, and, it might be, a comprehensive Dhammathat, which, while not removing or extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine.

It appears to be acknowledged that the laws, or rules, contained in the earlier Dhammathats were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine came, in the course of time, the not unnatural desire to strengthen the sanctions of juridical rule by associating its foundations, the Dhammathats themselves, with the religious sentiments of the people, and in the later Dhammathats the commands, precepts, and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of Dhammathat with Dhammathat and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case, and one cannot peruse the judgments under review without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single clear or governing authority, or the Dhammathats as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their dicta. The Judges of the Court below have adopted the

latter course, and with regard to it their Lordships are not satisfied that even on such a collation the balance has been correctly struck. But the importance of the subject induces their Lordships to put on record how this matter stands according to all the Dhammathats, if the version contained in the Digest of the Burmese Buddhist Law concerning inheritance and marriage, prepared by Mr. U Gaung, be taken. Mr. Gaung was a member of the Legislative Council of the Lieutenant-Governor, and the Digest was prepared under the authority of the late Judicial Commissioner and is published with the sanction of the Government of Burma.

P. G.
Ma Nhin
Bwin
U ShweGone.

As showing the variety and conflict of the Dhammathats, reference may be made in particular to Sections 310 and 311 of Volume I of the Digest of Burmese Buddhist Law on the subject of inheritance. Section 310 refers to "relatives of previous generations who are not entitled to inherit," and the rule of the Manukye is thus cited.

"The Rule whereby elder relatives are debarred from inheritance is as follows:—The co-heirs live apart from one another; one of them dies without leaving a wife or a husband or a child; his or her estate shall be partitioned among his or her younger brothers and sisters, but not among the elder co-heirs."

The point of the citation is as to the significance of the word "co-heirs" in this passage, and that is illustrated by Section 311, where Mr. Gaung quotes from the Dhammasara:—

"The five kinds of co-heirs are the following, namely, one's elder and younger brothers, elder and younger sisters, and their children."

It would thus appear that it was not within the conception of the Manukye on this particular Section 310 to reckon the parent as having a preferred right to the co-heirs. The co-heirs came first, namely, the brothers and sisters of the deceased; and the point of the section is that as among these it was the younger brothers and sisters that were preferred to the elder co-heirs. As stated, the parent as to be preferred to brothers and sisters is completely negatived.

But their Lordships recognise that the real difficulties of the case—and that the difficulties are real is established not only by the consideration given to the matter by the learned Judges in the present case, but by the course of Burmese decisions to which they refer—arise from the construction of Section 311. That section deals with "relatives of previous generations who are entitled to inherit."

The conflict had better be exhaustively set forth, and the forces on either side stand in this way:—

On the side of preferring the parents and ignoring the brothers and sisters, the Dhammathats stand as follows:—

Manu.—"On the death of a person leaving not even a casually adopted son, his or her parents may inherit."

Various other Dhammathats are cited by Mr. Gaung to the same effect as this extract from Manu.

Vilasa.—"In the absence of descendants the parents are entitled to inherit."

F. G.
Ma Nhin
Bwin

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw*, and in *Vannana*.

Razathat.—"If the deceased person leaves no wife, children, grandchildren, or other descendants, his parents, grandparents, or other relatives of previous generations are entitled to succeed to the estate."

To the same effect is the extract from *Vareelinga*, namely, "In the absence of sons, including those publicly or casually adopted, the parents are entitled to inherit."

Finally comes *Kyannct*.—"In the absence of wife and children, the parents are entitled to inherit the estate of their son."

It is plain that these extracts do not proceed upon the principle of ~~express exclusion of a right of succession~~ by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

On the other side, the same section (Section 311) cites later *Dhammathats* which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later *Dhammathats* should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th Century of the Christian Era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that century a strong attempt was made to put the jurisprudence of Burma into a settled and more easily referable form. In the reign of Alompra, one of his Ministers, a Judge, completed a prose *Dhammathat*, known as the *Dhamma*, and the citation from the *Dhammathats* affirmatory of the right of succession on the part of brothers and sisters as in preference to parents becomes thereafter fairly clear.

These citations are as follows:—

The Dhamma.—"If a deceased person has neither co-heirs nor descendants, his or her parents shall inherit the estate."

It has been already made clear that co-heirs include brothers and sisters, and the exclusion of a right of succession by the parents if such brothers or sisters are alive is thus plain.

The Manukye.—"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

The Vannana has been already cited as ignoring the rights of brothers and sisters in one passage, but in another the situation is expressed thus:—"Failing children, the parents or brothers and sisters of the deceased are entitled to inherit."

The Rajabala.—"In the absence of husband or wife, children, and brothers or sisters, the parents are entitled to inherit."

The Manu.—"If children living apart from their parents die leaving neither heirs nor co-heirs, their parents inherit the estate."

Citra.—"In the absence of heirs, parents, grandparents, or other relatives are entitled to inherit."

Kyetyo.—"In the absence of other relatives, the parents are entitled to inherit."

It will be subsequently shown that by the use of the phrase, "in the absence of other relatives," is meant simply "in the absence of brothers and sisters." This would necessarily appear to be so. And it is from this body of authority quite manifest that the right of parents is not only not preferred, but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the Dhammathats as a whole it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the ocean after entering rivers and streams"; and in another passage, "When lakes are full, the overflow is returned to rivers and streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana*: "In the absence of wife and children, the parents inherit. Why so? Because of the water which flows into the sea a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as the Dhammathats develop it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent, without having exhausted the collaterals, namely, the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these Judgments, they rather perplex than help the mind.

In their Lordships' opinion the balance of the authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the Dhammathats a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest Dhammathats, where collaterals are, as has been stated, either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later Dhammathats holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given—that a clearer note is struck by the Dhammathats from the time of the 12th Century of the Burmese, or from about the middle of the 18th Century of the Christian Era. Brothers and sisters as such, co-heirs as such, and relatives as such, are all dealt with and find a place in the discussion, and wherever they appear as a class

P. C.
Ma Nhin
Bwin
vs
U ShweGone

P. C.
Ma Nhin
Bwin
v.
U Shwe Gone

they appear in the first rank, that is to say, in the rank preferred to parents.

But these views of their Lordships are fortunately confirmed by another and an historical consideration. There can be little doubt that in the middle of the 18th Century of the Christian Era the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of the country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the Royal authority one Dhammathat in prose, known briefly as the Dhamma. Another, "in charge of the "Moat of the City of Shwebal," and taken by Dr. Forchhammer to have been Alompra's Minister of War, compiled in prose the Manugye or Manu Kyay Dhammathat, and it is this document last mentioned which was issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of nearly 170 years.

What was the attitude of the British Government in respect to these particulars constituting the foundations of Burmese Law? A period of about a century in the case of Lower Burma and a period of about 130 years in the case of Upper Burma intervened between the Alompraic code and the British occupation. During this intervening period the Burmese jurisprudence had existed on the footing just described.

It would have been, of course, open to the British Government to adopt the ancient practice of issuing a fresh and authoritative Code. But it was more in accord with the genius and practice of the extension of British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people. This latter course was adopted. An instance to hand may be cited: In 1892, after the overthrow of King Theebaw and the establishment of settled order in Upper Burma under the British rule, a Circular was issued "for the assistance of the Courts in dealing with questions of Buddhist Law." The Circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of Dhammathats was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information regarding any copies that may be extant of any of these Dhammathats other than the more commonly known ones." After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice," the Circular proceeds thus:—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which We are the Sovereign Ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress, and judge. In case of dispute they must, in accordance with the Dhammathats, enquire into the causes of the people and decide between them. And for this purpose they are appointed to the Courts as Judges."

This is the general rule involving as it does that judicial task the difficulty of which has been already mentioned.

To recur to the *Manu Kyay*—which for so long had been recognised as the leading guide in the administration of justice. Prof. Forchhammer, in his *Treatise on the Sources and Development of Burmese Law*, thus describes it:—

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopaedic record of existing laws and customs and of the rulings preserved in former *Dhammathats*. *Manu Kyay* does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be a strict performer of his religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:—

"The *Manu Kyay* incorporates the contents of the Law Books of the first and second periods and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhist clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this text book, where it is clear, as among the *Dhammathats*, is of the highest rank. And accordingly, when British rule was extended over Burmese territory, the recommendation to the judicial officers substantially accepted this situation as it was found. In the words of Dr. Forchhammer:—

"The *Manu Kyay* is to this day the most widely read and studied law book in Burma, and after the British had taken possession of this province the natives pointed to this *Dhammathat* as containing the body of laws by which they had been governed."

Much has been done during the last thirty years to extend the knowledge of the various *Dhammathats*; and the labours and encouragement of the Judicial Commissioner, Sir John Jardine, have greatly assisted this extension. The *Manu Kyay* itself has been textually translated by Dr. Richardson, and is in familiar use as a work of reference; and their Lordships do not understand that the pre-eminent authority of this *Dhammathat* has been lowered by the labours of other authors or the translation of other *Dhammathats*.

On the point in issue in the present case, the *Digest* of Mr. Gaung represents the dicta of the *Manu Kyay* thus:—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

There does not seem to be any room for ambiguity here. Both classes are dealt with. The one class—wife, children, brothers, and sister—are specifically and exclusively preferred to the other class, namely, parents.

In the 10th book, chapter 19, of Dr. Richardson's translation, the text reads thus:—

"Though this is the law (that property shall not ascend) why is it also said the father and mother of the deceased have a right to his property? Because if the

F. G.
Ma Nhin
Bwin
v.
U Sire Gane.

P. C.
 Ma Nhin
 Bwin
 v.
 U ShweGone

parents be alive and the deceased has no other relations, they shall inherit his property."

In short, the Manu Kyay is clear that the property cannot ascend to parents unless there be no other relations, and "relations," it should be added, are, as appears clearly from chapters 17, 19, 22 and 25 of the same book, synonymous with brothers and sisters.

Their Lordships do not think it necessary accordingly to pursue the enquiry further. In this Dhammatat, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the development of authority on the subject.

The sense of the Manu Kyay and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894. On the 12th November of that year there occurred the case of Mi San Hla Me, (2) and the narrative is observable:—

"The two Lower Courts have held that according to Buddhist Law property cannot ascend where there are collateral heirs, and they have awarded plaintiff's claim. The general rule that property shall not ascend is laid down in the Manu Dhammathat, Book 10, Sections 1, 18, 19, but the rule is not without exceptions."

(It may be noted that the "Manu Dhammathat" here referred to is simply the Manu Kyay.)

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and to an adopted son living with his adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of Maung Chit Kywe (3) in the year 1895. The substantial question in the case is described as "whether the brothers and sisters of the father of the deceased, Mah Pean, who was unmarried, have, under the rules of inheritance in the Dhammathats, a title to the estate of Mah Pean superior to any title of the defendant as stepfather living with deceased." Here it is also quite clear that the broad and simple question now to be determined was not before the Court. The stepfather was held to have no equitable claim, but in the course of the judgment there occurs this sentence:—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and falling them, to the first line of collaterals, and in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals.

By "the first line of collaterals" is here meant the line of the father and mother, and it will be observed from this sentence that

(2) P. J. 116; 1 Chan Toon 279.

(3) 1 Chan Toon 388, 11 U. B. R. (1892-96) p. 184.

the true line of collaterals, namely, the sisters and brothers of the deceased themselves, appears to be excluded from the succession, although on each of the higher lines they are included; that is to say, uncles and aunts would be preferred to the grandfather, although brothers and sisters would not be preferred to the father. Whatever may be said of this reasoning, at all events it is probably sufficient to observe that it is not applicable to the question in the present case, and it was not necessary to that decision.

P. G.
Ma Nhin
Bwin
v.
U ShweGone

In 1897, however, the case of Mah Gun Bon (4) was tried, determining that the estate of a deceased stepparent or grandparent goes by descent to the stepchildren or grandchildren in preference to collateral relatives by blood. Again it must be observed that the broad and simple question now to be determined was not before the Court. Many citations are made from the Dhammathats and, as generally happens, these texts appear to be somewhat inconsistent with each other, but whether they are so in reality or not is difficult to say. After much examination the learned Judge says:—

“From these various authorities and from the other Dhammathats of which there are printed translations, it is clear that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents.”

No indications are given of what this probability is, and it may be sufficient with regard to this authority to say that it does not cover the simple point now to be determined.

The case of Mah E Dock (5) (18th May 1898) was referred to. It was a case with reference to adoptive parents. Various texts were cited, concluding with section 211 of the Attathankepa Vannana, which says:—

“Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grandparents.”

And the learned Judge says:—

“Although the last-quoted text throws some doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point.”

The “good authority” here referred to appears to have been the cases just cited, and in their Lordships’ judgment the case of Mah E Dock does not advance the proposition in any respect.

Reference was also made to the case of Maung Shwe Bo (6) (27th February 1899) the head-note of which is this:—

“The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals.”

It is to be noted that “the Respondents in this case were not represented by Counsel and were unable to afford the Court any assistance in dealing with the difficult point of law involved.” In those circumstances the Judge, perhaps not unnaturally, accepted

(4) 1 Chan Toon 406.

(5) 1 Chan Toon 445.

(6) 1 Chan Toon 476.

P. C.
Ma Nhin
Bwin
v.
ShweGone

the Chit Kywe case as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification of the Judgments of the Courts below. Out of respect to the Judges, and in view of the embarrassments produced by the cases cited and by the conflict among the Dhammathats, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the Respondent, the father of the deceased, cannot be maintained as against the right of the Appellant, her sister.

Their Lordships will accordingly humbly advise His Majesty that the Judgment of the Court below be reversed, and that the Suit stand dismissed, the Plaintiff-Respondent to pay to the Appellant the costs of the proceedings here and in the Courts below.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE * No. 84 OF 1913.

SEENA M. HANIFF & CO. by its managing
partner S.C. GHOSH APPELLANT.

vs.

LIPTONS LIMITED by its duly authorized
agent W. CUFFE RESPONDENT.

For Appellant—Dawson and Alexander.

For Respondent—Lentaigne McDonnell and Clipton.

Before Sir Henry Hartnoll Kt. Offg. Chief Judge and Mr.
Justice Ormond.

Dated, 2nd February, 1914.

*Indian Penal Code—S. 482 and 486—Can a corporate body be prosecuted criminally?
Mens rea—Meaning of 'whoever' and any person who'—Indian Merchandise Act
S. 7 to 11.*

Where there is an ambiguity or the language of an act is not clear the cause or necessity of the law being made should be considered to ascertain the real meaning. Also every clause of a statute should be construed with reference to the contents and other clauses of the Act.

Held that Limited Companies are not excluded from the operations of S. 482 and 486 I.P.C. and they may prove their innocence either by showing that they acted without intent to defraud or by any other means.

*Reference made by the Hon. Mr. Justice Twomey to a Bench under S. 11 of the Lower Burma Courts Act for the determination of the following question:—"Whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under S. 482 or Section 486 Indian Penal Code."

ORDER OF REFERENCE.

TWOMEY, J:—The complaint was of an offence under section 482 Indian Penal Code (Using a false trade property mark) but the Magistrate in his order of discharge refers to it as a complaint under section 486 (selling or possessing goods with a counterfeit trade or property mark). This discrepancy is however immaterial, for the same question of law arises in both cases namely whether a Limited Company is liable to prosecution for the offence. The District Magistrate decided that it is not.

No Indian cases bearing on the question have been cited. But there are many English cases showing that though a corporation aggregate cannot be guilty in ordinary cases of a criminal offence it may be indicted for libel or for nuisance and wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted (1). It has also been held that it is impossible now to apply the maxim as to *mens rea* generally to all statutes and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created (2). As pointed out in Maxwell's work on the interpretation of statutes (3) there is now a large body of Municipal Law which has been framed in such terms as to make an act criminal without any *mens rea*.

Sections 482 and 486 Indian Penal Code are based upon section 2 of the English Merchandise Marks Act 1887 and section 486 follows closely the wording of section 2 sub-section (2). In neither case is it necessary for the prosecution to establish *mens rea*, but in both cases *mens rea* is involved to the extent that the accused can rebut the charge against him by proving that he acted "without intent to defraud" (section 2 (1) English Statute, and section 482 Penal Code) or that he acted "innocently" (section 2 (2) English Act and section 486 Penal Code). With reference to the word "defraud" in the English Statute it has been held in *Starey v. the Chilworth Powder Company Limited* (4) that it is not used in the sense of putting off a bad article on a customer in order to get money unfairly. "The act is directed against the abuse of trade marks and the putting off on a purchaser of, not a bad article, but that which he intends to purchase and believes that he is purchasing. Also as regards the word "innocently" it has been decided that the innocence contemplated by the Act is merely innocence of an intention to infringe that act of Parliament (5). In *Starey v. Chilworth Powder Company Limited* (1890) (4) the Company was held guilty of the offence of applying false trade description to certain gunpowder supplied by them under a contract and it was

L. B.
Seena M,
Haniff & C.,
etc,
v.
Lipton Ltd.,
etc.

(1) Vol. 8, p. 391. Lord Halsbury's Laws of England. See also Archbold's Criminal Pleadings 24th Edn. p. 7.

(2) Cases given in Archbold *op cit* p. 21.

(3) 4th Edition p. 153.

(4) 24 Q.B.D. (1890) p. 90.

(5) per Channel J. in 2 Q.B.D. 1900 p. 528.

L. B.
Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

held that the Company acted with intent to defraud within the meaning of section 2 (1). It was not contended in that case that it would be impossible for a body corporate to prove such a defence as absence of fraudulent intent and the learned Judges (Coleridge L.C.J. and Mathew J.) apparently saw no such objection to the prosecution.

In another case, *Kirshenboim v. Salmon and Gluckestm Limited* (6) were found guilty of an offence under section 2 (2) in having sold goods under a false trade description. They sold as "guaranteed hand made," cigarettes which were in fact machine made. The Court consisting of five Judges (Russell, C. J. presiding) found that the Company had acted deliberately and not "innocently."

In the same year in the case of *Coppen v. Moore* (7) the construction of the Merchandise Marks Act was further considered as regards the criminal liability of a master for acts done by his servants in contravention of the Act when such acts were done by the servants within the scope or in the course of their employment. A Bench of six Judges (Russell, L.C.J. presiding) held that it was clearly the intention of the legislature to make the master criminally liable for such acts unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act. The Lord Chief Justice said: "We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants in all cases, within the sections with which we are dealing where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility where he can prove that he acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

Reading the judgment in *Coppen v. Moore* (7) with the judgment in the case of *Kirshenboim v. Salmon and Gluckstein* (6) it appears to me that a Limited liability Company is on the same footing as any other master or principal and can be held liable to the same extent for the acts of its agents and servants in contravention of the English Merchandise Marks Act. The decision in *Coppen v. Moore* (7) is based on the view that having regard to the language, scope and objects of the Act the legislature intended to fix criminal responsibility upon the master for acts done by his servants in the course of the employment though such acts were not authorized and might have been expressly forbidden (8).

As *mens rea*—a particular intent or state of mind is not of the essence of the offence there is no reason why a corporation should not be prosecuted like an individual master or principal. By way of defence, it is open to the corporation as it is to the individual

(6) 2 Q.B.D. (1898) p. 19.

(7) 2 Q.B.D. (1898) p. 306.

(8) See Maxwell p. 159.

master to prove good faith (*i.e.*, the exercise of due care and attention) and that all possible steps have been taken by the corporation to prevent breaches of the Act by its agents and servants.

For the respondents the later English cases *Christie Manson and Woods v. Cooper* (9) and *Pearks and Company Limited v. Ward, Hanen v. Southern Countries Dairies Company* (10) have also been referred to. But I can find nothing in these cases to weaken the authority of *Salmon and Gluckstein's* case, although Mr. Justice Channell in an *obiter dictum* in 2 K.B.D. 1902 expressed some hesitation as to the criminal liability of a body corporate under section 2 of the Merchandize Marks Act.

It is clear that the Limited Company could be prosecuted and punished in England for such an offence as that charged against the respondent Company in the present case.

The respondents, however, stand on much stronger ground in urging that the Indian Law at present differs in this respect from the law of England.

In the English Statute the penal provisions run:—"Every person who etc. shall be guilty of an offence against this act" and the word "person" is expressly defined in section 3 so as to include "any body of persons corporate or incorporate." The word is similarly defined in section 2 of the Indian Penal Code, but in the penal provisions, sections 452 and 486, and indeed in the penal clauses throughout the Code the word "person" is not be found. Each penal clause lays down that "whoever" commits the offence in question "shall be punished with" etc., etc., and though the Code defines "person," the word "whoever" is left to be interpreted according to ordinary usage. It is equivalent to "any person who" or "whatever person"; but the person contemplated in the word "whoever" according to ordinary usage is I think a natural person *i.e.* an individual human being, and it does not connote a corporation which is a "person" only in an artificial technical juridical sense. It is by no means clear that the framers of the Code intended to exempt corporations from punishment for offences under the Code. Indeed the use of the word "person" in section 268 (Definition of Public Nuisance) seems to point the other way, for in that section I think the word "person" should be construed according to the definition in section 2. Moreover the Chapter which begins with section 268 includes several offences for which corporations can be prosecuted in England (by virtue of the definition of "person" in special enactments and in the English Interpretation Act, 1889). But if the intention was to make corporations liable for offences under the Indian Penal Code, I think it has been frustrated by the use of the form "whoever" instead of "any person who" or "every person who" in the penal clauses. It is true that section 2 of the Code lays down that *every person* shall be liable to punishment. But the learned Commentators on the Code agree in thinking that "person" in this section has not the

L. S.

Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

(9) 2 Q.B.D. 1900 p. 522.

(10) 2 K.B.D. 1902 p. 1.

L. B.
 Seena M.
 Haniff & Co.,
 etc.
 v.
 Lipton, Ltd.,
 etc.

extended meaning given by section 11 and this view appears to me to be correct.

It is suggested that in adapting the English Statute of 1887 to India the legislature abstained from reproducing the form "every person who" merely because the form "whoever" was already the common form in the penal sections of the Indian Penal Code. But it might be argued with equal force that the Indian legislature in avoiding the use of the word "person" in the new sections thus abandoning the English form, enacted in 1889, signified their intention to exempt bodies corporate from prosecution for offences relating to Merchandise Marks. If the form "every person who" had been used, then these penal sections read with section 2 of the Code would have rendered bodies corporate liable to prosecution in India as they are in England.

I note that though the form "whoever" is used in the penal clauses throughout the Penal Code this form is not universal in special and local laws. For examples of the use of the form "any person who," reference may be made to the Sea Customs Act 1878 (Schedule of Chapter XVI Nos. 8, 9 etc.) Arms Act 1878, section 23, Excise Act, 1896, sections 46 to 52. By virtue of the definition of "person" in the General Clauses Act it appears that unless where a contrary intention appears expressly or impliedly, a corporation could be prosecuted for offences against special and local laws where the form of the penal provision is "Any person who" etc., or "Every person who" etc.

My opinion is therefore that the respondent Company is not liable to prosecution for an offence under section 482 or section 486 Indian Penal Code. But as the question is one of great public importance and as the learned counsel engaged on both sides have asked me to refrain from passing final orders and to refer the question to a Bench under section 11 of the Lower Burma Courts Act I think it is expedient to take this course. I refer the question whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or section 486 Indian Penal Code.

JUDGMENT.

The Chief Judge said :—The question referred to us is whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or section 486 of the Indian Penal Code. Mr. Justice Twomey has found that in England a limited company such as the respondent company can be prosecuted and punished for similar offences under the English Merchandise Marks Act, 1887 and from the cases cited by him there can be no doubt as to the correctness of his finding. But on a consideration of the meaning of the word "whoever" used in sections 482 and 486 of the Indian Penal Code he has formed the opinion that in India the prosecution of a company under those sections does not lie.

Sections 478 to 489 of the Indian Penal Code were enacted by section 3 of the Indian Merchandise Marks Act, 1889, and in enacting the penal sections amongst them the word "whoever" is used and not the words "any person who." The word "whoever" is used throughout the Penal Code in its penal sections. Section 11 of the Penal Code defines the word "person" thus: "The word "person" includes any company or association or body of persons whether incorporated or not." If the words "any person who" were used in sections 482 and 486 of the Penal Code, there is no doubt that there would be much stronger ground for holding that a company could be prosecuted under those sections, but, it is argued that the word "whoever" can only refer to a definite individual or definite individuals and cannot apply to a corporate body. It may possibly be said that the word "whoever" may be held to include a body of persons associated together in their collective capacity for the purpose of trade, but on the other hand taking the word in its strict grammatical meaning it may be said that it cannot have any such meaning. Assuming that this is so, then, it appears to me that there is an ambiguity in the Penal Code. Section 11 may be said to render a company criminally liable in certain classes of cases, whereas the use of the word "whoever" in the penal sections relating to such cases renders it impossible to punish them. To take a concrete instance section 263 of the Penal Code says: "A person is guilty of a public nuisance, who does any act or is guilty of an illegal omission, which causes any common injury danger, or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity." Taking the definition of the word "person" in section 11, it would certainly appear that a company can be guilty of a public nuisance, but in the ensuing penal sections as the word "whoever" is invariably used, a company cannot be punished. If the language of the Penal Code were clear and unambiguous as to whether a company can be prosecuted or not, it should beyond doubt be obeyed. But, where there is an ambiguity or the language is not clear, it is a well known principle, that to ascertain the real meaning the cause or necessity of the law being made should be considered. Again, it has been said that every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes, relating to the subject matter.⁽¹¹⁾ Now applying these principles to the present case, Act No. 4 of 1889 of the Indian Legislature is named "An Act to amend the law relating to fraudulent marks on merchandise." It clearly has the object of protecting the public in its purchases so that they be not deceived by false trade descriptions and another of its objects is clearly the protection of honest trade, for instance the prohibition of one trader using the mark of another or a similar mark with a view to selling his goods as those of such other firm. When Act No. 4 of 1889 was enacted the General Clauses Act 1 of 1868 was in force, and "person" is defined in

L. B.
Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

(11) Per Lord Davey in *Canada Sugar Refining Co v. Reg.* 1898 A. C. 741.

L. E.
 Seena M.
 Haniff & Co.,
 etc.
 v.
 Lipton Ltd.,
 etc.

section 2 (3) of it as follows: "Person" shall include any company or association or body of individuals whether incorporated or not. Act 1 of 1868 was repealed by the General Clauses Act, 1897, but section 4 (1) of this latter Act applies this definition unless there is something repugnant in the subject or context to all Acts of the Governor-General in Council made after the third day of January, 1868. It therefore applies to the Indian Merchandise Marks Act, 1889, subject to the above proviso. Section 6 of that Act says, that, if a person applies a false trade description to goods he shall, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, be punished according to law. The section is analogous to section 482 of the Indian Penal Code, except that one deals with a false trade description and the other with a false trade or property mark. Similarly section 7 of the Indian Merchandise Marks Act makes a person punishable, who sells or exposes or has in his possession for sale or any purpose of trade or manufacture any goods or things to which a false trade description is applied unless he proves certain facts. It is similar to section 486 of the Indian Penal Code except that that section refers to counterfeit trade or property marks. The facts by which an accused is allowed to prove his innocence are the same in section 486 of the Penal Code as in section 7 of the Indian Merchandise Marks Act. Now there is nothing in my opinion repugnant in the subject or context in sections 6 and 7 of the Indian Merchandise Marks Act to prevent a person including a company. There are many companies now-a-days and it is just as important to protect the public and other traders against their dealings as to protect them from the dealings of individuals. It may be argued that as the word "he" is used in referring to the word "person" in sections 6 and 7 of the Indian Merchandise Act, and that as under section 13 of the General Clauses Act, though the word "he" includes the word "she" it does not include the word "it," it is repugnant to the context to give the word "person" in these two sections the extended meaning given to it by the General Clauses Act. But in my opinion there is no substance in such an argument. The meaning to be attached to the word "he" in sections 6 and 7 of the Indian Merchandise Marks Act seems to be a question of grammar. Giving the word "person" in those sections the extended meaning enacted for it in the General Clauses Act in subsequently referring to it by means of a pronoun, the predominating pronoun "he" would be used and this would include "she" and "it." It would not be necessary to refer to the word "person" by the words "he, she, and it," whenever it became necessary to use a pronoun. To take an analogous sentence: "If one feels tired, he cannot work." Here the word "one" may be either of the masculine or feminine gender, and yet in referring to it the pronoun "he" is used not both "he" and "she." For the above reasons I can see no reason why a company cannot be prosecuted and punished under sections 6 and 7 of the Indian Merchandise Marks Act, and if this is permissive, it would be very incongruous to hold that a company is liable to punishment

in respect of dealings with false descriptions, whereas it is not so liable dealing with false trade and property marks. It seems to me that the intention of the legislature must have been to render a company liable, or not liable, as the case may be in respect of both classes of dealings and as it has, in my opinion, clearly made a company liable with respect to one class, the intention was no doubt to render them liable in respect of the other class. It must be remembered that sections 482 and 486 of the Penal Code are enacted in section 3 of the Indian Merchandise Marks Act just before sections 6 and 7 of it and that when the Indian Merchandise Marks Act was enacted, the General Clauses Act I of 1858 was in force which defined the word "person" as set out by me above. But the learned counsel for the respondent company argued that sections 482 and 486 of the Penal Code were not applicable to companies as a company can have no *mens rea* and so is unable to prove absence of intent to defraud and those facts set out in section 486 that establish innocence. Though the argument was not expressly raised in the cases of *Starey v. Chilworth Gunpowder Co.*(4) *Kirshenboim v. Salmon and Gluckstein Ltd.*,(6) yet it is not mentioned by the learned and eminent judges, who decided those cases, and if there was any substance in it, it is not probable that it would have escaped attention. In the case of *Peark, Gunston and Tee Ltd. v. Southern Countries Daigies Co.*(10) Channel J., considered the same argument in respect to sections 3 and 5 of the Sale of Food and Drugs Act, 1875 and though he did not decide the question definitely in an *obiter dictum*, he said that he was inclined to think that a corporation would come under section 3 as well as under section 6. It is clear that the prosecution has no *mens rea* to prove under sections 482 and 486 of the Indian Penal Code and as the burden of proving innocence is thrown on the accused under those sections when once a *prima facie* case has been established, I can see no reason why it cannot do so by the evidence of its agents or servants or otherwise as it thinks fit. I would answer the question referred in the affirmative.

L. B.
Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

ORMOND J:—Section 6 of the Indian Merchandise Marks Act and Section 2 (1) (d) of the English Act, both make the applying of a false trade description by a "person" an offence "unless he proves that he acted without intent to defraud." Both Section 48 of the Indian Penal Code and Section 2 (2) of the English Merchandise Marks Act make it an offence to sell or to have in possession, goods to which a counterfeit (or forged) trade mark is applied "unless he proves that otherwise he had acted innocently;" but section 2 (2) of the English Act begins with the words "every person who," and section 486 Indian Penal Code begins with the word "whoever."

The word "whoever" means the same thing as "every person who" and shews that the provisions of the section apply to persons generally. The scope of a penal section in an act would (so far as the language is concerned), be the same whether it began with the

L. B.
Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

words "every person who" or with the word "whoever", unless the word "person" is defined so as to have a more restricted or a more extended meaning than it in fact has. In law, a corporation (which includes a Limited Company) is a person,—apart altogether from any General Clauses or Interpretation Acts; and if, from the language of a section, its provisions apply to persons generally, a Limited Company being a person, would be included unless there was something to shew that the section was not intended to apply to such a person. Moreover there is, I think, a clear indication that the Indian Legislature intended that the word "whoever" in sections 482 and 486 Indian Penal Code should have the same meaning and scope as the words "every person who"—for these sections were inserted in the Indian Penal Code by section 3 of the Indian Merchandise Marks Act; and section 6 of that Act, which begins with the words "If a person" makes it an offence to apply a false trade description. It would be unreasonable to suppose that by the use of the word "whoever," a more restricted scope was intended in section 3 than was intended in section 6.

As to the possible argument that the language in both the English and Indian Acts shew that a corporation was not intended to be included because the word "he" is used; and the fact that under the General Clauses Act and the English Interpretation Act, though "he" would include "she," the word "he" would not include "it", in my opinion it would be correct to say "a male, female or artificial person *who*" (not "who or which") and it would be correct to say,— "if a male, female or artificial person does so and so, *he* shall . . ." (not "he, she or it shall . . ."). This point was not noticed—or probably was thought not worth considering, in the 2 cases of *Starey v. Chilworth Gunpowder Company* (4) and *Kivshenboim v. Salmon and Gluckstein Limited*. (3) In my opinion the language in Sections 482 and 486 Indian Penal Code does not exclude a Limited Company.

We come then to the question whether there is anything to shew that a Limited Company was intended to be excluded from the operation of Sections 482 and 485, by reason of the inherent nature of a Limited Company or of the object of the sections. The object of the sections is to prevent the use of a false trade mark and the selling of goods marked with a false trade mark. It is obvious that a Limited Company could do such things; and therefore it would *prima facie* come within the object of the sections. But it can act only through its agents. It is clear, I think, from the decision in *Coppen v. Moore* that upon a true construction of these sections the master was intended to be made criminally responsible for acts done by his servants in contravention of these provisions, where such acts are done within the scope or in the course of their employment unless he is able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the sections. It is contended that a Limited Company as such could not prove an absence of "*mens rea*" under section 482 and 486 in as much as it has on

mind. But because it can act only through its agents, if it proved that its agents had fulfilled the conditions mentioned in Clauses (a) and (b) or (c) of section 486, as the case might be, it would prove its own innocence. The two cases of *Starey v. Chilworth Gunpowder Company* (4) (1889) and of *Kishenboim v. Salmon and Gluckstein Limited* (6) (7th May 1898) are instances of a Limited Company having been convicted under the English provisions which correspond to sections 482 and 486 Indian Penal Code. In the first case the Justices held that there was no false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the Company, inasmuch as the gunpowder delivered was as good as the powder contracted for. It was held that the supplying of goods bearing a false trade description would be a "fraud" within the meaning of the statute although there was no intention to cheat, and the case was remitted to the Justices to determine whether the Company had acted without intent to defraud or that, having taken all reasonable precautions against committing an offence, they had no reason to suspect the genuineness of the trade description, or that they gave all information in their power with respect to the persons from whom they obtained the goods. I observe from the dates given in the reports that Salmon and Gluckstein's case was decided at a time when the case of *Coppen v. Moore* (7) was pending for judgment. Lord Russell C. J., and Wright J. were two of the Judges in both cases; thus both those cases must have been present to their minds at the time. In *Krishenboim v. Salmon and Gluckstein Limited* (6) it was held that the Company had sold goods under a false trade description; and that, because it had acted deliberately, it had not acted "innocently."

Being guided by the above English decisions, I am of opinion that Limited Companies are not excluded from the operation of sections 482 and 486, Indian Penal Code and that there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence either by shewing that it acted without intent to defraud under section 482, or under section 486 in any of the ways prescribed in that section. In the later case of *Pearks etc. Limited v. Ward* (10) a case under section 6 of the Sale of Food and Drugs Act which contained an absolute and unqualified prohibition, the Company was held liable, and Lord Alverstone, C. J., expressed *an obiter dictum* that different considerations might apply in cases under sections 3 and 4 of the Act inasmuch as absence of knowledge would be a good defence to charges under those sections. He did not say that in his opinion a Limited Company could not be liable under those sections and the above two cases against Limited Companies were not cited. Channell J., thought that a Limited Company could be liable.

In my opinion a Limited Company can be prosecuted for offences under sections 482 and 486, Indian Penal Code.

The question of jurisdiction in this case and the question of what is the proper procedure to adopt in prosecuting a Limited Company, are not before us.

L. S.
Seena M.
Haniff & Co.,
etc.
v.
Lipton Ltd.,
etc.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL * NO. 117 OF 1912.

RAMANATHAN CHETTY & 2 others ... APPELLANT.
 vs.
 BANK OF BENGAL RESPONDENT.

For Appellant—J. R. Das.
 For Respondent—Giles.

Before Mr. Justice Parlett and Mr. Justice Ormond.

Dated, 26th March 1914.

Agent—His authority to enter into a contract of guarantee—Is it a necessary incident of a Chetty's money-lending business to guarantee the loans of others?

Where the Power of Attorney granted to an agent by a Chetty did not include a power to make his principal a surety for another's loan or a power to borrow money in his principal's name for another or to sign promissory notes for his principal jointly with another principal, an authority to guarantee the debt of another person cannot be said to have been bestowed upon the agent.

Powers of Attorney must be construed strictly and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others or to execute negotiable instruments jointly with others it rests on the persons advancing money on such guarantees to show clearly that the agent had in fact authority to enter into such a transaction.

Held that it is not a necessary incident of a chetty's banking and money-lending business to stand guarantee for chetties or non-chetties.

JUDGMENT.

MR. JUSTICE ORMOND:—The plaintiff bank sues the defendant firm for the sum of Rs. 50,000 with interest in the following circumstances. On the 23rd May, 1908, one Hashim Ebrahim had a cash credit account with the plaintiff bank and in order to secure the same, upon the request of the plaintiff bank, executed a pro-note for Rs. 50,000, and interest in accordance with the practice of the bank in favour of the defendant firm. The agent of the defendant firm endorsed the said pro-note over to the bank and at the same time executed an agreement guaranteeing the payment of the cash credit account. The defence is a denial of the authority of the agent to enter into the contract of guarantee. It is proved that the defendant's agent entered into twenty-three transactions with the bank as surety for others between 1904 and May, 1908, 6½ of which were guarantees of persons other than chetties. On the 21st July, 1906, the defendant's agent guaranteed this man Hashim Ebrahim and on November 3, 1906, the defendant's agent was guaranteed by Hashim and the firm of S. R. M. The learned judge on the Original Side in his judgment says, "Now having regard to the approved practice and to the ordinary presumptions that must arise as to the ordinary course of business and human affairs it is impossible to hold that

* Appeal against the judgment and decree of this Honorable Court in its original side dated 16th August, 1912, in Civil Regular No. 78 of 1911.

these agents (defendant's agents) had never submitted accounts to their principal; that he should have remained in ignorance of the fact that they were not only carrying on this branch of chetty banking business, but were doing so to a very large extent. Defendant held out Chokalingam Chetty as his agent in Rangoon with a full general power to transact business on his behalf. The agent was guaranteeing other people's loans and no exception was taken by the principal to his conduct on his behalf for years; and in my opinion it must therefore be held that he held his agent out as having the power to guarantee the accounts, and further that the power in so guaranteeing was ratified and confirmed by him. . . . Notice was given him (defendant) to produce his account books but they had not been produced. These account books would have shown these transactions. They would have shown the receipt of commission which would be consideration. Further the agreement itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration." The judge therefore gave the plaintiff a decree. The defendant was the sole proprietor of that firm and is dead. The question of ratification was first raised by the plaintiff when the case came on for hearing. The books were not produced before, because the only question was, had the agent authority to enter into this transaction? The learned judge has assumed that commission was charged for this transaction, that these transactions must have been entered in the books and that the agent sent the books to his principal and therefore that the principal knew of these transactions of guarantee. In order to make the defendant liable upon a ratification the plaintiff must show that the defendant had full knowledge of the facts. There is no question whether there was consideration to support a contract of suretyship as between the bank and the defendant. Mr. Giles who appears for the plaintiff-respondent admits that the question is not really one of ratification, but whether the authority to enter into the transaction of guarantee must necessarily be implied from the powers conferred in the power of attorney. The power of attorney is in the form generally used amongst Chetties. It recites the desire of the principal to appoint the agent his attorney for the general management of his banking and money lending business. It then constitutes the agent the lawful attorney to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things in which the principal then was or thereafter might be in anywise interested and concerned and for that purpose to use or sign the principal's name on any documents whatsoever, to borrow money from banks, firms or persons either with or without a pledge of securities for money advanced to various persons; to make, draw, sign, accept, endorse, negotiate and transfer bills of exchange, pro-notes, etc., to which the principal's signature or endorsement might be required or which the attorney might in his absolute discretion think fit in the name of the principal. The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business, and an express power to

L. B.

Ramanathan
Chetty & 2
others
v.
Bank of Ben-
gal.

L. B.
Ramanathan
Chetty & 2
others
v.
Bank of Ben-
gal.

borrow money and to endorse promissory notes for the purpose of that business. He would not be authorised (without an express power to that effect), to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is, on the face of it, authorised by the power of attorney, the bank need not look to the application of the money by the agent; but if it is shown that the bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory note in favour of the bank in the name of his principal, and he has an express power to do so; but at the same time he signed for his principal on a letter of guarantee in favour of the bank on behalf of Hashim Ebrahim for the whole amount for which the promissory note was given. The bank, therefore, knew that none of the money was taken by the agent as a loan to his principal. The agent was given certain specified or express powers; but they do not include a power to make his principal a surety for another's loan, and they do not include a power to borrow money in his principal's name for another, or to sign promissory notes for his principal jointly with another principal. If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred—because since he clearly has no power to thrust a partner upon his principal—if he had the power to sign promissory notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note each is a surety for the other as to the amount taken by that other. The sole question then is: is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties, and the fact that the Presidency Banks Act requires two independent signatures for a loan on a promissory note, is not sufficient to show that such mutual accommodations are necessary for the business.

The bank have called two chetties in support of the proposition that it is a necessary incident in a chetty's money-lending business to guarantee the debts of others. Ramanathan Chetty, the second witness for the plaintiff, the agent for the R. M. M. S. T. firm says that his firm has not guaranteed overdrafts of accounts of persons other than chetties. He has heard that some chetties do guarantee; in such cases the chetty gets a commission. In cross-examination he states that "those whose principals allowed them to guarantee the overdrafts of other people guarantee." His own principal has told him that he should not guarantee for people other than chetties. The other Chetty Udiappa, fifth witness for the plaintiff, who is the agent of the V. A. R. firm, says. "It is left to the option

of the agents in Rangoon to guarantee the overdrafts of others. Some take the authority from the principal before for so doing and some do so after the transaction has been entered into. Some principals do not allow their agents to do this guarantee business at all." Mr. Giles contends that inasmuch as the Presidency Banks Act requires the signatures of two persons (who are not partners) for a loan on a promissory note, that the defendant must have known from the cash credit account at the Bank of Bengal that other persons had stood guarantee for him and that therefore he must have assumed that his agent was standing guarantee for others, and that it is a normal feature to mutually guarantee in chetty banking business. It is not shown that the defendant would know of the cash credit account at the Bank of Bengal, and I do not think it is made out that it is a necessary incident in chetty banking and money-lending business that the chetty must necessarily guarantee another chetty. It is certainly not made out in this case that it is part of the chetty business to stand guarantee for others who are not chetties. Powers of attorney must be construed strictly, and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others, or to execute negotiable instruments jointly with others, it rests on the bank or other persons lending the money to show that the agent had in fact authority to enter into such a transaction.

to Be
Ramanathan
Chetty & 2
others
v.
Bank of Ben-
gal.

I would allow the appeal and dismiss the suit with costs in both courts.

MR. JUSTICE PARLETT:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL* No. 29 OF 1913.

SAVARIAMMAL ... DEFENDANT—APPELLANT.
 vs.
SANTIAGO ... PLAINTIFF—RESPONDENT.

For Appellant—Robertson.

For Respondent—S. N. Sen.

Before Sir Henry Hartnoll Kt. Offg. Chief Judge and Mr. Justice Twomey.

Dated, 12th March 1914.

Indian Divorce Act—S. 7, 45 and 55—Civil Procedure Code—S. 99—Which side to begin—'Rules and Principles'—Meaning thereof—S. 33 of the Indian Divorce Act—absence of previous notice.

The appellant, in defending a suit for restitution of conjugal rights admitted that the marriage-ceremony and registration took place but pleaded that she was forced and coerced into a marriage against her will.

*Appeal against the judgment and decree of this Court on its original side dated 5th December 1912 in Civil Regular No. 170 of 1912.

B.
Savariammal
v.
Santiago.

Held that the appellant was the right party to begin. Unless she can prove coercion and non-consent the marriage was valid and binding on her.

Further even if it was for the Respondent to have begun, the Court would not interfere unless the appellant has been prejudiced in her case by being made to begin to prove her case.

The 'principles' and rules referred to in S. 7 of the Indian Divorce Act are not mere rules of procedure but rules and principles which determine the granting of refusing of the relief sought—rules of a *quasi* substantive rather than of mere adjective law. The right or obligation to begin a case and demand before institution of the case are mere matters of procedure and cannot come within 'principles and rules.'

The petitioner against whom a decree for restitution of conjugal rights was granted by the Lower Court appealed on the following grounds:—

1) That the learned Judge on the original side erred in ruling that appellant had to begin the case as such ruling prejudiced her in substantiating her defence.

(2) That the learned Judge on the original side should have held that the appellant did not consent to the marriage with the Respondent and that there was no marriage between them legally enforceable.

(3) That the learned Judge of the original side should have held that Respondent-Plaintiff failed to prove his case.

(4) That the learned Judge of the original side was wrong in holding that the Plaintiff-Respondent was the father of the children of the appellant

(5) That the learned Judge of the original side ought to have dismissed the Plaintiff-Respondent's suit as there was no demand as required by law before the institution of the suit.

(6) That the learned Judge ought not to have proceeded with the case without payment of proper Court fees on the petition of the Plaintiff-Respondent.

(7) That the learned Judge was wrong in awarding costs to the Respondent.

(8) That the judgment and decree is against the weight of evidence and probabilities of the case.

JUDGMENT.

HARTNOLL, C. J.—The respondent sued the appellant for a decree for restitution of conjugal rights and has obtained a decree for the relief asked for. Respondent's case is that he and appellant were married according to Christian rites on the 28th July 1902 and since then cohabited together, but that since the month of July 1910 appellant without any lawful cause has withdrawn herself and still does withdraw herself from bed board and mutual cohabitation with him and refused and still does refuse to render to him conjugal rights although requested by him to do so. Appellant's defence is that at no time was there celebrated a valid or legal marriage between her and the respondent, and that the marriage alleged by the respondent was brought about by force and intimidation. She at the same time does not deny that a marriage ceremony took place between them at a Roman Catholic Church. She alleges that after the said marriage respondent forcibly took her away to Danidaw and kept her in a house under confinement for a fortnight and that in or about the month of August 1902 as he found that she was unwilling to cohabit with him he allowed her to go to her mother's residence at Pazundaung at which place he resided till the suit was brought. She submits that she was never legally married to respondent and that such marriage was null and void and of no effect. She also says that since August 1902 till the institution of this suit respondent has never called on her to return to him and to render him marital duties.

The first ground of appeal is that the learned Judge on the original side erred in ruling that the appellant had to begin the

case as such ruling had prejudiced her in substantiating her defence. The learned Judge seems to have called on appellant to begin and at the hearing of this appeal her learned counsel allowed that he never objected to her beginning. So the learned Judge does not seem to have been asked to rule on who should begin. Sec. 99 of the Civil Procedure Code lays down that no decree is to be reversed or substantially varied nor shall any case be remanded in appeal on account of any error or irregularity in any proceedings in the suit not affecting the merits of the case and section 45 of the Indian Divorce Act enacts "subject to the provisions herein contained, all proceedings under this act between party and party shall be regulated by the Code of Civil Procedure" Sec. 7 of the same Act enacts "subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." Reliance is placed on the case of *Burroughs v Burroughs* (1) where in a case of the present nature the judge ordinary ruled that the petitioner had the right to begin though the substantive issue may be raised on the husband's—in the case—respondent's answer. The first ground of appeal is based on a point which is purely one of procedure and in my opinion the words 'principles and rules' used in S. 7 of the Indian Divorce Act should not be held to include such a point of procedure. The meaning to be attached to such words was considered in the case of *A v. B* (2) when Farran C. J. said:—"The principles and rules here referred to *i. e.*, in S. 7 of the Indian Divorce Act are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent Sections (45 and 55) of the Act but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of quasi-substantive rather than mere adjective law." I think that that view is right. Even therefore if it was for the respondent to have begun, I think that S. 99 of the Civil Procedure Code must be considered in determining whether the decree of the learned Judge on the original side should be interfered with and taking that section into consideration I am of opinion that even if it was for the respondent to have begun, the appellant has not been prejudiced thereby. She admits that the marriage ceremony took place and that she signed the register; but she pleads that she was forced and coerced into a marriage against her will. It was for her to prove this affirmatively and it seems to me that this being the case, it was immaterial to her who began. But I consider that she was the right party to begin. Holding as I do that the words "principles and rules" in Section 7 of the Indian Divorce Act do not include mere rules of procedure and having regard to Section 45 of

L. B.
Savariammal
v.
Santiago.

(1) 2 S. and J. 544.

(2) I. L. R. 22 Bom. 612.

L. B.
Savariammal
v.
Santiago.

the same Act and Order 8 Rule 1 of the Code of Civil Procedure, I think that it was for appellant to begin. She admits the ceremony but pleads coercion and non-consent. Unless she can prove such, the marriage was valid and binding on her.

The next ground of appeal is that appellant did not consent to the marriage with the respondent and that there was no marriage between them legally enforceable. She has most certainly not proved her allegations. Three children have been born to her, one before the marriage and two after it, one in 1903 and the other in 1906. The father of each of them was registered as Santiago Servai. The child born in 1906 was born some 4 years after the marriage. She endeavours to make out that another Santiago Servai which is respondent's name, is the father; but there is no evidence of any worth that such is the case. If she was forced and coerced as she says, surely she should have taken proceedings at the time. There is no good evidence to show that she was forced and coerced. The ground must in my opinion fail.

The next ground is that respondent has failed to prove his case. Appellant having admitted the marriage ceremony and having failed to prove her case, this ground has no substance in it. The fourth ground I have already dealt with. I have no doubt that respondent was father of her children.

The fifth ground is that the suit should have been dismissed as there was no demand as required by law before the institution of the suit. This ground refers to an English rule of procedure which is dealt with in the case of *Field v. Field* (3) Being a mere rule of procedure I do not think that it is included in the words "principles and rules," as used in S. 7 of the Indian Divorce Act. Moreover having regard to the words of Section 33 of the Indian Divorce Act and the beginning words of Section 7 absence of notice can not be pleaded as a defence to an action of this nature. Appellant does not wish to return to her husband and asks that his suit be dismissed. She in her evidence says that her father asked her to return to respondent and she refused.

The sixth ground was not argued. As regards the seventh ground it would appear that the parties have been separated for some years. During these years the respondent has taken no action. He says that he does so now as his wife is intimate with another man. It does not appear that she is possessed of any means. I think the ground should be allowed.

In the result I would confirm the decree of the learned Judge on the original side except that I would order that each party do pay their own costs.

TWOMEY J :—I agree.

(3) 14 P. D. 26.

THE
BURMA LAW TIMES.

VOL. VII.]

MAY, 1914.

[No. 5.]

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL * No. 26 OF 1913.

MAUNG CHIT MAUNG APPELLANT.

vs.

1. MA YAIT 2 MA NOO RESPONDENTS.

For Appellant—Giles.

For Respondents—Cawasji & Banerji.

Before the Offg. Chief Judge and Mr. Justice Young.

Dated, 22nd August 1913.

Probate and Administration Act.—Act V of 1881—Sec. 23, 41 and 150—Indian Succession Act S. 331 and 332—Hindu.

Where the intestate professed the Hindu religion, though he was of a mixed parentage held that letters of administration should issue under the Probate and Administration Act of 1881 and not under the Indian Succession Act.

Though under S. 23 of the Probate and Administration Act letters of administration should ordinarily be issued only to an heir or heirs S. 41 allows exceptions to be made in special cases. Where the Intestate made a large settlement and appointed his wife and daughter to be its trustees and not his eldest son and where the other heirs desire that their mother and sister rather than their eldest brother should administer the estate the Court held that letters were rightly granted to the wife and daughter of the deceased rather than to the eldest son.

JUDGMENT.

The Chief Judge:—Mah Yait has been given letters of administration to the estate of her deceased husband Maung Ohn Ghine. Her son, Maung Chit Maung, disputes her right to have them. It has not been settled whether letters should issue under the provisions of the Indian Succession Act, 1865, or under the provisions of the Probate and Administration Act, 1881, as it has not been decided whether Maung Ohn Ghine was a Hindu within the meaning of section 331 of the Indian Succession Act. As a matter of fact, the record shows that letters have been issued in the form provided for the Probate and Administration Act. Maung Chit Maung contends that his father was a Hindu, that letters should be issued under the Probate and Administration Act in which case he would have first claim to them, a claim that should not be passed over in favour of another without adequate cause. Mah Yait contends, on the other hand, that her deceased husband was not a Hindu within the meaning of section 331 of the Indian Succession Act and therefore that that Act applies to his estate.

Maung Ohn Ghine is described by Mah Yait as being a member of the community of mixed Hindu and Burmese descent known as Kalas, professing the Hindu religion. She describes

* Appeal against the order of the Judge on the original side in Civil Miscellaneous No. 182 of 1912 dated 10th day of February 1913.

L. B.
 Maung Chit
 Maung
 v.
 Ma Yait &
 Ma Noo.

Kalas as the descendants of Hindu settlers by Burmese women and says that U Ohn Ghine and all the members of the community also worshipped at the Pagoda, fed the hpoongyis, and observed Buddhist fasts and festivals.

I think that it must be definitely decided as to which Act is applicable. If Maung Ohn Ghine was a Hindu section 150 of the Probate and Administration Act renders it imperative that that Act should be applied to the administration of his estate. If he was not, section 2 read with section 331 of the Indian Succession Act equally renders it imperative that this latter Act should be applied to the administration of his estate. The powers of an administrator are different under the two Acts. The rules as to succession are different according to Hindu Law and according to the Succession Act. If the administrator has letters under the Indian Succession Act, the estate must be divided according to the rules laid down in it; if the letters are under the Probate and Administration Act, the distribution must be in the present case, according to the rule of Hindu Law. No authorities were quoted at the hearing as to which Act was applicable in the case. But, it was contended by respondent's counsel that Maung Ohn Ghine cannot be held to be a Hindu within the meaning of the two Acts inasmuch as he was not a pure Hindu by birth, that as his paternal ancestor, who was a Hindu, cohabited with a Burman Buddhist, the issue of that union and their descendants ceased to be Hindus and that persons can profess to be Hindu and yet be outside the pale of Hinduism. The subject was discussed in the case of *Dagree v. Pacotti San Jao*, (1) and I can see no good reason for differing from the reasoning followed in that case. I would follow it, and in that it is admitted by Mah Yait that Maung Ohn Ghine professed the Hindu religion I would rule that the Probate and Administration Act (5 of 1881) applies to his estate and that the letters issued to administer it must be held to be issued under the provisions of that Act.

The next point to be considered is whether in view of this decision Maung Chit Maung should not be preferred to his mother, Mah Yait. According to section 23 of the Probate and Administration Act the ordinary rule is that letters should issue to any person, who according to the rules for the administration of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. But section 41 of the Act allows an exception to be made. In the ordinary course, Maung Chit Maung should be given the letters; but Mah Yait objects to his having them on the ground that he forfeited Maung Ohn Ghine's confidence and that he has been foolish and extravagant. He, on the other hand, urges that his mother should not have them as she is trustee under a settlement that was made by Maung Ohn Ghine, which is invalid according to Hindu Law and that, if she is administratrix, she will not take measures to have it set aside. It is a fact that he was not appointed a trustee of the settlement by his father and this goes to support Mah Yait's allegations against him. The other two adult sons,

(1) 19 Bom. 783.

Maung Maung and Maung Aye Maung, wish their mother and sister to administer the estate and not Maung Chit Maung. Statements made by them in England have been filed to this effect. The learned judge on the Original Side has noted that Ma. Yait is supported by all the members of the family except Maung Chit Maung. Under the circumstances, therefore, I see no good reason for withdrawing the letters from Mah Yait.

I would, therefore, dismiss the appeal, but in doing so, would expressly rule that the letters are granted under the provisions of the Probate and Administration Act and that it will govern the administration of the estate. I would also order that the costs of both parties to this appeal shall come out of the estate. I would allow to each party a counsel's fee of two gold mohurs.

YOUNG, J:—This is an appeal from a decision of the learned Judge on the original side granting Letters of Administration of the estate of the late Maung Ohn Ghine to one Mah Yait his widow.

The main grounds of Appeal are that the learned Judge should have decided whether the applications for letters were to be dealt with under the Indian Succession Act or under the P. & A. Act, and should have decided that he was a Hindu and that the administration of his estate was governed by Hindu Law and the Probate and Administration Act, and should have held that the appellant who is the intestates' eldest son had the best right to administer the estate. The Respondent urged that the deceased was not a Hindu in the strict sense, that the succession Act applied and that under it the widow had the preferential claim.

The respondents' contention that Maung Ohn Ghine was not a Hindu in the strict sense has to be considered in the light of her own affidavit, which states that he professed the Hindu religion. S. 331 of the Succession Act provides that that act shall not apply to the property of any Hindu, Mahomedan or Buddhist, and it has been repeatedly held both in Bombay and Madras that the term Hindu as then used is denominative of a religion and not of a race. *Vide Dugree vs. Pacotti* I. L. R. 19, Bombay 783 and cases there cited. S. 2 of the P. and A. Act provides that chapters 2—13 of that Act shall apply to all Hindus, Mahomedans and Buddhists dying after April 1st 1881. The term Hindu must obviously be given the same construction in each Act and therefore on respondent's own affidavit I would hold that the P. and A. Act applied and not Succession Act. If this Act applies letters under S. 23 may be given to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate, and when several such apply it is in the discretion of the court to grant it to any one or more of such persons. The applicants were the widow and a daughter of the deceased on the one hand and the eldest son on the other.

In my opinion according to the ordinary principles of Hindu law a widow, where there are sons, is entitled to maintenance during her life and a daughter under the same circumstances to maintenance till her marriage out of the estate, but neither can, I think,

L. B.
—
Maung Chit
Maung
v.
Ma Yait &
Ma Noo.

L. S.
 Maung Chit
 Maung
 v.
 Ma Yait &
 Ma Noo.

be said to be entitled to the estate or any part of it within the meaning of S. 23.

The widow states that her husband was of mixed Burmese and Hindu descent and was a member of a community called Kales, which, according to her has heretofore not followed any fixed law of inheritance but in which the children divide the property (which, in other cases, has been small) as they think best. Succession amongst Hindus is intimately connected with religion but it may be that a custom at variance with the ordinary rules of succession might be proved. Even if it were proved however, it seems that under it she as widow has to depend on the children's sense of duty and is not entitled as widow to a share of the estate so as to enable the Court to exercise a discretion in her favour under S. 23, which apparently refers only to persons entitled to share. S. 41 however provides that the person who would ordinarily be entitled may be superseded where such a course appears to the court to be convenient and I cannot shut my eyes to the facts that the intestate in his life-time made a settlement of his property which was not only large in itself but was large in proportion to the rest of his property, and that he selected his wife and daughter to be trustees to manage such settlement but not his eldest son, and that all the other members of the family desire that she and not he should administer the residue. Her affidavit in respect of his unfitness is not so specific as it should be, but he is very young and there certainly seems reason to question his fitness and capacity. The section in question is wider than the analogous section of the English Probate Act of 1857, and on the whole, I see no reason to set aside the order of the Lower Court though for the reasons already stated I consider that letters should issue expressly under the Probate and Administration Act.

I also concur in the order as regards costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL IST APPEAL* No. 28 OF 1910.

HARDANDAS PALADROY ... PLAINTIFF—APPELLANT.

vs.

RAM MOHON BIBI and 4 others... DEFENDANT—RESPONDENTS.

For Appellant—N.M. Cowasji.

For Respondent—Ormiston.

Before Sir Henry Hartnoll, Offg. Chief Judge & Mr. Justice Twomey.

Dated, 11th March 1914.

Specific performance—Contract to sell—Offer and acceptance—was there a completed contract?

Where a Broker inquired of the owner the lowest prices for his 3 houses and where the owner stated them and asked for a reply.

Held that the mere statement of the lowest price at which the Vendor would sell contains no implied contract to sell at that price to the persons making the inquiry.

* Appeal against the judgment and decree of the Hon. Mr Justice Robinson sitting on the Original Side of the Chief Court, dated 17th January, 1910 in Civil Regular No. 327 of 1907.

JUDGMENT.

HARTNOLL, Offg. C. J.—The appellants sued the respondents to enforce specific performance of an agreement to sell 5th class lots Nos. 9 and 10 in Block D 1 in the town of Rangoon together with the building thereon known as house No. 8 in 29th Street for a sum of Rs. 45,000. Their case is that Raja Shew Bux Bagla now deceased whose representatives the first set of respondents are, agreed on the 18th September 1907 through Messrs. Balthazar and Son to sell to them the aforesaid properties. The second set of respondents are made parties to the suit as the appellants state that they are informed and verify believe that after the institution of the suit Raja Shew Bux Bagla on the 21st August 1908 by a registered deed of sale purported to transfer the aforesaid properties to the second set of respondents for the consideration mentioned in the sale deed. The appellants put the second set of respondents to strict proof of their alleged purchase and assert that prior to their purchase they had notice of the purchase of the properties by them. In the alternative the appellants also asked for damages to the extent of Rs. 15,000 by way of compensation if they were not given a decree for specific performance. This was against the first set of respondents. This alternative claim was abandoned on appeal.

There is no ground for doubting that the properties were sold to the second set of respondents for Rs. 12,000 on the 22nd September, 1907.

The first point for determination is whether there was an agreement to sell the properties to the appellants on the 18th September, 1907. The appellant Paladroy went to Messrs. Balthazar and Son and employed that firm to negotiate the sale for his firm, Shew Bux Bagla not only had the properties in dispute for sale but two others one being in Pazundaung and the other in Ahlone. The following Telegrams then passed between Balthazar and the firm of Shew Bux.

(1) From Balthazar to Shew Bux dated, 17th September 1907.
“Have likely purchaser your 3 properties, telegraph lowest price for each.”

(2) From Shew Bux to Balthazar dated, 17th September 1907.
“Puchandung 55,000, Ahlone 25,000, No. 9, 45,000. Reply by to-morrow.”

(3) From Balthazar to Shew Bux dated, 18th September 1907.
“Sold house No. 29th Street your limit, received earnest money. Rs. 5,000, forward deeds.”

(4) From Shew Bux to Balthazar dated, 18th September 1907.
“Cannot sell No. 9 Ahlone. Can sell 3 properties together. See our agent.”

(5) From Balthazar to Shew Bux dated, 19th September 1907.
“Agent has no instructions. Earnest money with us, forward deeds.”

(6) From Shew Bux to Balthazar dated, 20th September 1907.
“Received wire nineteenth. Strange you have accepted earnest money without authority, can't confirm sale. Letter follows.”

L. B.
Hardandas
Paladroy
v.
Ram Mohors
Bibi & 4
others.

H. B.
 Hardandas
 Paladroy
 v.
 Ram Mohon
 Bibi & 4
 others.

The telegrams passed between Rangoon and Calcutta.

On the authority of the case of *Harvey v. Facey* (1) the learned Judge on the original side has held that these telegrams do not amount to an agreement to sell the house and land in 29th Street and it is urged that he is wrong. I am unable to see that he was and the circumstances of the present case seem to me to be even stronger than the circumstances in the case of *Harvey v. Facey* (1) for holding that there was no completed contract for sale. The first telegram does not ask specifically whether Shew Bux will sell. It merely says "Have likely purchaser your 3 properties." It then goes on "telegraph lowest price for each." Shew Bux did so and then says "Reply by to-morrow." It is urged that there is special virtue in the words "Reply by tomorrow" and that Shew Bux's telegram is a firm offer to sell limited to time. I am unable to see that it was such an offer. It was a reply to Balthazar's telegram asking for telegraphic information as to the lowest price for each property. The words "reply by to-morrow" clearly mean that Shew Bux wished to know by to-morrow whether Balthazar's likely purchaser decided to buy. Then if the reply was in the affirmative it would be for Shew Bux to finally decide whether he would sell or not. In the words of their Lordships who decided the case of *Harvey v. Facey*. (1) I cannot treat the telegram from Shew Bux giving the lowest price for each property as binding him in any respect except to the extent it does by its terms *viz.*; the lowest price. Everything else is left open and the reply telegram from Balthazar cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by Shew Bux. The mere statement of the lowest price at which the Vendor would sell contains no implied contract to sell at that price to the persons making the enquiry. Again in the present case when Balthazar telegraphed that he had sold the house in 29th Street and had received earnest money Shew Bux promptly replied that he could not sell the house alone but only the 3 properties together. Evidence is led to show why he decided to sell the 3 properties together *viz.*, that he was closing his business in Rangoon. It seems very likely that he had no intention of selling the properties singly. The first telegram says "Have likely purchaser your three properties." Even supposing that Shew Bux first telegram was an offer to sell (and I have already held that it was not) the further consideration would arise whether it was an offer to sell the properties collectively or singly. Having in view the words of the first telegram I would hold that appellants have not proved it was an offer to sell only one of the properties, supposing it was an offer at all.

It is urged that Shew Bux's telegram giving the lowest prices for each and asking for a reply constituted Balthazar his agent to sell—that Balthazar became the broker for both parties; but it was admitted that Shew Bux's telegraph only constituted Balthazar his agent if it was an offer to sell.

I have already held that it was not and so the contention cannot prevail. The appeal must therefore in my opinion fail, and

(1) (1893) A. C. 552.

L. B.
Toon Chan
v.
P. C. Sen.

defendant had already paid in advance. In support of the contention that he could do so, the cases of *Nicholls vs. Saunders* (1) and *Cook vs. Guerra* (2) were relied on, but those cases are distinguishable from the present inasmuch as according to the contracts in those cases the rents were not due until the expiry of certain periods. In the present case the lessee made it a condition of her letting the premises that rents for five months should be paid in advance. There is no provision of law forbidding such a contract, and when such is the contract, the basis of the reasoning on which the abovementioned cases were decided is absent.

If a lessee pays his rent before it is due it may well be said that he does not pay in fulfilment of an obligation upon him, and that such payment must be regarded as an advance to the lessor with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay rent. But when it is part of the contract, as it was in the present case, that the lessee should pay rent in advance, and the lessee pays in advance, he does so in fulfilment of an obligation under the contract.

In such a case, section 50 of the Transfer of Property Act, in my opinion protects him from having to pay over again to a person who may subsequently become entitled to the rents or profits of the property leased.

On these grounds I think the decision of the Small Cause Court was erroneous in law.

The decree is set aside, and the suit is dismissed with costs.

The plaintiff must pay the defendants costs of this application.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL* No. 161 OF 1911.

KO KYO and 1 DEFENDANT—APPELLANTS.

vs.

A. K. CURPEN CHETTY and 1... PLAINTIFF—RESPONDENTS.

Before Mr. Justice Ormond and Mr. Justice Parlett.

For Appellants—Palit.

For Respondents—Giles.

Dated, 23rd February 1914.

Mortgage by deposit of title deeds—Such a mortgage entered into before the extension of the Transfer of Property to Burma—assignment of such mortgage.

Under S. 2 cl. (e) of the Transfer of Property Act, the equitable mortgage made prior to the 1st January 1905 can be assigned in the districts by deposit after that date. The equitable mortgage having been valid originally, the parties would be entitled by oral agreement to make the mortgage into one bearing compound interest by an oral agreement subsequent to 1st January 1905.

(1870) L.R. 5 C.P. 589.

(1872) L.R. 7 C.P. 132.

*Appeal against the judgment and decree of the District Judge of Thaton dated, 20th July 1911 in Civil Regular No. 4 of 1910.

JUDGMENT.

ORMOND, J:—This is an appeal by the 2nd and 3rd defendants only, against whom a mortgage decree has been given in favour of the plaintiffs in the Lower Court. The 2nd and 3rd defendants deposited certain title deeds with the 1st defendant a Chetty firm as security for a loan and gave him pronotes as collateral security. At the end of January 1905 the accounts were made up between the 1st defendant and 2nd and 3rd defendants and 2nd and 3rd defendants gave the 1st defendant as renewal of the pronotes then outstanding, two pronotes and a mortgage bond for Rs. 95. The title deeds were left in deposit with the 1st defendant. These documents were left as security with the 1st defendant for monies due from the 2nd and 3rd defendants to the 1st defendant before January 1905. The 1st defendant subsequently assigned this security and title deeds to the plaintiffs. It is contended for the appellants that inasmuch as new documents were given as collateral security after the 1st January 1905, when the transfer of Property Act came into force the deposit of title deeds and the transactions having taken place at Zathalin there was no valid mortgage;—and alternatively, that if the old mortgage continued, it would not cover the whole debt inasmuch as it would not cover the compound interest, the amount of the debt having been calculated and interest added to the principal. The case of *Aw Nin and others v. Ramen Chetty* (1) is an authority to show that under S. 2 (e) of the Transfer of Property Act the equitable mortgage made prior to the 1st January 1905 could be assigned in the districts by deposit after that date. It is also authority to show that the equitable mortgage having been valid originally, the parties would be entitled by oral agreement to make the mortgage into one bearing compound interest by an oral agreement subsequent to the 1st January 1905. This appeal therefore in my opinion should be dismissed with costs.

It must however be pointed out that as the bond for Rs. 95 executed on the 30th January 1905 by the appellants in favour of the defendant Chetty firm purported to be a simple mortgage only, it required registration and being unregistered it is inoperative to create any mortgage. The first paragraph of the decree of the District Court should accordingly be amended so as to make it clear that the house and site referred to in that bond are not liable to be sold under the mortgage decree passed against the defendant Chetty firm.

PARLETT, J.—I agree.

L. S.

Ko Kyo & 3
A. K. Curpen
Chetty & 3.

(1) 5 L.B.R. 93.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 72 OF 1912.

AHMED GULAM MAHOMED SADIQ ... APPELLANT;

vs.

MAHOMED CASSIM MAKDA & 18 OTHERS. RESPONDENT.

For Applicant—J. R. Das.

For 16th to 19th Respondents—Rutledge with Doctor.

Before Mr. Justice Ormond and Mr. Justice Parlett.

Dated 26th February 1914.

Mahomedan Law—Gift—Delivery to donee—Donor's order to third party having possession of the property to hand it to donee—gift invalid and revocable if no such order.

For a gift to be valid, the donor must do everything to put the donee into possession and to divest himself of his rights of ownership. If property is in the hands of a third person donor must give notice to that person to hand over the property to the gift. If the gift was not intended to take effect *in presenti*, it would be void. Registration cannot make an invalid gift valid. An invalid gift is revocable.

JUDGMENT.

The parties in this case are Mahomedans. One Rasool Bi executed a deed of gift on 15th October 1904 and registered it on the 19th October in favour of 20 of her great-grandchildren. Of the 20 great-grandchildren at the time of the gift, Mahomed and Ibrahim were two sons of Cassim Moosaji, grandson of Rasool Bi. She executed a deed of cancellation on the 10th November 1904. On the 11th November 1904 she executed a fresh gift to her heirs, that is to say, to the children of her son Ismail, who alone were her heirs, *i. e.*, excluding the other 16 descendants who were donees under the first deed of gift. Rasool Bi died in January 1905. The plaintiff is one of those 16 descendants who sues for Administrations of Rasool Bi's estate and for a declaration that he is entitled to 1-20th share in that estate under the deed of gift of the 15th October 1904. The learned Judge on the Original Side dismissed the suit on the ground that possession had not been given under that deed of gift. We have been referred to the case of *Kalidas Mullick v. Kanhaya Lal Punait* (1) also to the case of *Mahomed Buksh Khan v. Huseinbi*, (2). Both these are Privy Council cases. The first one deals with a gift under Hindu Law and is quoted with approval in the subsequent case. In the first case the donor supported the gift. The property was in the possession of a third party who claimed it as his own. Possession therefore was not given and it was held that if a donor does all that he can to put the donee into possession that gives the donee the right to possession. In the second case the donor sued to set aside the gift but she had herself put the donees into possession and the gift was held good. In the present case the subject of the gift was a 1-6th share in the estate of

(1) I. L. R. 11 Cal. 121. (2) I. L. R. 15 Cal. 684.

Rasool Bi's grandson Cassim who pre-deceased Rasool Bi and which share Rasool Bi inherited as his heir. Cassim's estate was in the possession of his brother Ahmed who was also the guardian of Cassim's minor children, defendants 3 to 8.

Ahmed the son of Fatima, and Ahmed and Ibrahim, sons of Ismail, were the only adults among the 20 great-grand-children. Of those adults Ahmed, the plaintiff, Mahomed and Ibrahim alone had notice of the gift, though the father of Fatima's children Gulam Mahomed who may be taken to be the guardian of his other children who were minors, had also notice; but no notice was given to the man in possession, viz. Ahmed. It is not suggested that Ahmed was in possession of the property otherwise than on behalf of those rightfully entitled to it. And if possession was intended to be given to the donees at the time of the gift, notice should have been given to Ahmed. It cannot be said that in the absence of such notice every thing was done by the donor to put the donee into possession and to divest herself of her rights of ownership. If the gift was not intended to take effect *in presenti* the gift would be void. If the gift is invalid under Mahomedan-Law registration could not make it valid. A gift under Mahomedan law can be orally made, and if A makes a gift of property to B orally, and it is in the possession of a trustee X, it might equally be contended in that case that the gift was complete at the time of the oral transaction without any notice being given to X. Inasmuch as the donor has not done everything in her power to put the donees into possession by giving notice to Ahmed and, inasmuch as the donees have not taken possession before the gift was revoked, we think the gift is invalid under Mahomedan Law. It is not necessary to go into the question whether the deed was obtained by undue influence, or not.

I would dismiss this appeal with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REFERENCE* No. 80 OF 1913.

TI YA & 6 OTHERS APPELLANTS.

vs.

KING-EMPEROR... .. RESPONDENT.

Before Sir Henry Hartnoll, Offg. Chief Judge, Justices

Ormond, Robinson, Parlett and Young.

Dated, 2nd April 1914.

Search—S. 103 of the Criminal Procedure Code—ard ward Headmen competent witnesses?—Presumption under S. 7 of the Gambling Act arises only if search is properly conducted.

*Reference made by Mr. Justice Twomey to a Full Bench under S. 11 of the Lower Burma Courts Act for the determination of the question:—Whether ward Headmen in towns other than Rangoon are competent witnesses of searches under S. 103 C. P. C. ?

L. B.
Ahmed
Gulam Ma-
homed Sadiq
v.
Mahomed
Cassim
Makda & 18
others.

L. B.
—
Ti Ya & 6
others
v.
King-
Emperor

Held by Ormond, Parlett and Young J.J.:—that ward headmen in towns other than Rangoon are not incompetent to witness a search under S. 103 of the Criminal Procedure Code merely because their duties require them to take measures for the prevention and discovery of crime.

Held by Sir Henry Hartnoll, Chief Judge and Robinson:—That such ward headmen cannot be competent witnesses for searches under S. 103 as their duties are connected with the police, and as they look for credit or reward from work done for or in conjunction with the police and as the persons searched cannot have sufficient confidence in them.

The reference was in the following terms:

The ruling of *Ah Shee v. K. E.* (1) was followed by a majority of the Full Bench in *K. E. v. Kwe Haw*, (2) but both these cases related to ward headmen in Rangoon only (where the headmen are appointed by the commissioner of police) and not to ward headmen in other towns (where the deputy commissioner is the appointing authority). The question whether ward headmen in towns other than Rangoon are competent witnesses of searches under section 103 of the Criminal Procedure Code was specifically raised in a later unreported case *K. E. v. Kan Haw and others* (3) and was considered by a Full Bench of this court. The case was decided partly on other grounds. The bench consisted of four judges and they were equally divided on the question whether ward headmen outside Rangoon could be regarded as competent witnesses of searches. It is desirable that the existing uncertainty on this point should be ended and I think it should again be referred to a Full Bench. I therefore, refer it under section 11 of the Lower Burma Courts Act. The gambling in this case appears to have been on a petty scale and the fines are, I think, excessive for a first offence. The expediency of reducing the fines will be considered, if necessary, after the decision of the Full Bench is received.

Mr. Eggar, appearing for the Crown, said:—This was a reference made for a decision as to whether a headman appointed under the Towns Act was a competent witness to a search under section 103 of the Criminal Procedure Code. The case out of which the reference arose was one in which the subdivisional officer of Paungde issued a warrant under the Gambling Act for the search of the house of one Ti Ya at Paungde. The house was searched with two witnesses present, one of whom was the headman of the locality and seven accused were found there and were sent up. The first accused Ti Ya was charged with being the occupier and using the house as a common gaming house and the others with being present. The search disclosed some cards with Chinese characters and cards were instruments of gaming so that if the search were properly conducted a presumption would arise that the house was a common gaming house and that the persons therein were present for the purpose of gaming under section 7 of the Gambling Act. The whole question here was as to whether the search was properly conducted and the difficulty arose out of a conflict of opinion among the learned Judges of the full bench, who had considered the

(1) 3 L.B.R. 229.

(2) 4 L. B. R. 213. 1 B. L. T. 139; 14 B. L. R. 81.

(3) 4 Bur. L. T. 91.

matter in 1911. That case is reported in 4 Burma Law Times, page 91. The point in that case was whether the words "respectable inhabitants" in section 103 of the Criminal Procedure Code should be construed so as to exclude ward headmen and block elders who were appointed by the deputy commissioner. The exclusion of those words had been dealt with in the case of 4 Lower Burma Rulings page 213. It was held there, Mr. Justice Irwin dissenting, that in view of the fact that ward headmen in Rangoon were appointed by the commissioner of police and had police duties to perform and were in some cases constantly called on to attend searches, they would not fall within the class of persons whom the legislature intended to call as witnesses and therefore the premises in question were not duly entered under section 6 of the Act. The distinction in that case was that ward headmen in Rangoon were appointed by the commissioner of police who exercised the functions of the deputy commissioner under the Towns Act. In the same case the question was raised whether outside Rangoon ward headmen who were appointed by the deputy commissioner were also excluded as not being persons within the contemplation of the legislature under section 103 of the code. Mr. Justice Ormond in that case held that the full bench in 4 L.B.R. 213 had decided that in the case of instruments of gaming being found in any house without any actual search being made, presumption under section 7 of the Act did not arise unless entry was made in the presence of two or three headmen and that ward headmen in Rangoon were not competent to act as witnesses to a search. Mr. Justice Twomey in that case did not think that the appointment of headmen should be regarded as a bar to being witnesses. Counsel went on to say that the duties of headmen were little more than those of landlords to tenants and if their disqualification should be based upon the ground that they had to assist the police in the prevention of crime, then logically the same disqualification would have to apply to every member of the public in general. But, on the other hand, there still remained a residue of doubt arising from the facts that the ward headmen of towns were certainly more closely connected with the police than any ordinary member of the public would be, and there might be the possibility in some cases that the accused and the public in general would consider that the articles which were supposed to have been in the search had been planted there by the police and that the headman had been a party to that. But counsel would support the opinion expressed by Mr. Justice Ormond in the reported case that each case should rest upon its own set of circumstances and that the test as to whether a ward headman of a town other than Rangoon was sufficiently respectable to be a witness should be, whether there were any suspicious facts in connection with the search to render it not *bona fide* or at any rate to impugn his *bona fides*, because if a general proposition be laid down that ward headmen merely on the ground of their connection with the police and performance of their duties for the prevention of crime should be disqualified, logically—though no one went so far as applying the rule to the public in general—it must

L. B.
T. Ya &
others
v.
King-
Emperor.

L. B.
 Ti Ya & 6
 others
 v.
 King-
 Emperor.

be applied to headmen of villages, and counsel thought that there could be no doubt that it would be carried too far in that extent.

The office of a headman of a village was different to that of a ward headman of a town. It was very often a hereditary office and carried with it functions which gave officially a very much higher status relatively to the rest of the village than that which was occupied by a mere headman of a ward. Logically, however, if the basis of disqualification for ward headmen was to be that they were to be connected with the police in rendering assistance, the argument must be taken to the extent of disqualifying village headmen. Counsel's submission was that the ground of disqualification should not be based on that, but the other ground should be adhered to namely, all that the legislature required was guarantee of the impartiality of the witnesses to a search and guarantee that the public should believe that the witnesses were impartial. And if there was any case which came forward in which either the accused could prove facts which might show that the headman of the town who was called as witness to the search, had any private grudge or any other reason for giving false evidence or would be likely to connive with the police against the accused, or if there were other independent witnesses who would give evidence that that particular ward headman had frequently been used as a witness to a search, one might go so far as to say that the search would not be properly conducted. It would be difficult in any case to get evidence that the ward headman was a party to a false discovery. But, it might be a safe ground to restrict the constant use of ward headmen by police officers by suggesting that if a man was constantly used as a search witness it certainly gave rise to a possibility that his presence at the search was not for the purpose which the legislature required, namely, protecting an accused against having false cases planted on him, but it was rather for the reason that it was more likely to make a case for the police. It was certainly hard to suggest any ground which could be laid down as a general ground to apply in all cases. The question seemed to have arisen only in courts in this Province. So far as counsel was able to find out there was no difficulty in other parts. The police manuals themselves did not indicate that difficulty had ever arisen. He had consulted the Madras Police Manual, and the only reference that he could find was a direction whenever possible that the presence of a headman of a village should be obtained to witness a search. That, counsel suggested, was in accordance with what would be the opinion of the courts in this country, namely, that the disqualification should not be extended to village headmen. In the Burma Police Manual they found it laid down in like terms that if possible the headman of the village tract should be present. The Bombay Police Manual did not refer to the question as to what persons should be witnesses at all. The Bengal Police Manual had a reference, which was quoted in Sohoni's Criminal Procedure Code in the notes to section 103 at p. 142, 7th Edition,

Mr. Justice Ormond: Have you looked at the other Gaming Acts to see if they are similar to ours?

Counsel: No, sir; I have not examined the local code of Madras.

Proceeding, counsel read the quotation from Sohoni's work and said with reference to the remark of Mr. Justice Ormond that it was possible that other Gaming Acts did not have the same presumption, otherwise one would find cases arising under section 103 and quoted in the reports. The only case on the question of what persons should be selected as witnesses under section 103, that he could find which had the slightest bearing on the present question was that reported in 21 Madras 83. That would not assist the court in the present case where the question was in relation to ward headmen. In that case the report discussed was as to whether the police were entitled to select witnesses to a search, and that case could not assist the court very much. There were no other cases that counsel had been able to find which would throw light on the present case. Counsel's submission, if he might take one side of the case more than the other, was that it would be distinctly hampering the execution of the duties of the police, in cases under the Gambling Act or of the Excise Act, or any other cases where section 103 was to be applied, to prevent them from calling into their service persons who were most likely to come forward as witnesses. There might be many cases in which a police officer would be unable to conduct a search with the expedition that was necessary owing to the neighbours in the locality being friends of the accused and refusing to come forward as search witnesses. There was nothing in the code which gave any power to the police to compel any man, whether passer—by or shopkeeper or neighbour, to be present at a search. All that they could do was to ask them to come and it was possible that the search could not be carried out when necessary, owing to a feeling in favour of the accused, and in such cases it would be in accordance with the intention of the legislature and certainly towards the assistance of justice if the headman was allowed to be a witness. Counsel's submission would be that to frame a general rule that headmen were disqualified as witnesses to a search merely on the ground of their position would be extremely dangerous and was unnecessary for the reason that the only protection which the legislature sought to enforce was to protect the accused from partial witnesses and from the possibility of a false case, and the rule, if any, should be if there be the slightest evidence of partiality on the part of the witnesses whether they be ward headmen or any other or if there be any evidence which gave rise to the slightest suspicion that the search might not have been *bona fide* that the provisions of section 103 should be construed strictly in favour of accused and the presumption under section 7 of the Gambling Act should not be applied.

L. B.
Ti Va & 6
others
v.
King-
Emperor.

JUDGMENT.

L. E.
 Ti Ya & 5
 others
 v.
 King
 Emperor

YOUNG, J.—The question referred is whether ward-headmen outside Rangoon can be regarded as competent witnesses of searches under section 103, Criminal Procedure Code. The question was raised in a gambling case and is of peculiar importance in cases of this nature inasmuch as the Gambling Act raises certain presumptions against the accused if the search is properly conducted. The arguments before us were also directed towards the provisions of this Act and I therefore propose to deal mainly with searches made under this Act. Section 6 of the Gambling Act provides that all searches shall be made in accordance with the provisions of section 103, Criminal Procedure Code and section 7 of the Gambling Act, provides that when any instruments of gaming are found in any house etc., entered under the provisions of section 6 or about the person of any of those who are found therein it shall be presumed until the contrary is proved that such house etc. is used as a common gaming house and that the persons found therein were then present for the purpose of gaming although no play was actually seen. Section 103 of the Criminal Procedure Code provides that the search shall be made in the presence of two or more respectable inhabitants of the locality. In the full bench case of *K.E. v. Kwe Haw* (2) heard before Sir C. Fox, C.J., Mr. Justice Irwin and Mr. Justice Hartnoll, it was held by Fox, C.J., and Hartnoll J., Irwin J. dissenting, that ward headmen in Rangoon being appointed by the commissioner of police and having certain police duties to perform did not fall within the class of persons whom the legislature intended to be called as witnesses to searches under this section. In *Paw Ya v. K.E.*, (4) Twomey, J. C. declined to follow this ruling so far as Upper Burma was concerned, and in the full bench of *K.E. v. Kan Haw*, (3) as judge of this court dissented in conjunction with Mr. Justice Ormond from Sir C. Fox, C. J. and Mr. Justice Hartnoll, who held that the principle enunciated in *K. E. v. Kwe Haw* should be extended so as to exclude all ward headmen and block-elders throughout Lower Burma from the category of competent witnesses of these searches. The appeal, however, was ultimately decided on other grounds. The question, however, has now been referred by the same learned Judge to a full bench of this court for final decision. We see therefore that out of the three judges who have had actual experience of the working of this provision of law on the executive side, only Mr. Justice Irwin declined to hold that a ward headman, even in Rangoon was not, till the contrary was proved, a respectable inhabitant within the meaning of section 103, Criminal Procedure Code and expressed the opinion that to extend the exclusion to village headmen would be not only absurd but detrimental to village administration. He declined on the ground that the case was not before him to consider whether the presumption would be forfeited if the police officer conducting the search called in two fellow policemen to witness it, a point on which Sir Charles

(2) 4 L.B.R. 213.

(4) 2 U.B.R. 1907-09.

Fox had relied as showing that at any rate some limitation must be placed on the term 'respectable inhabitant.' Twomey, J., while agreeing with Sir C. Fox that the employment of two policemen as witnesses would forfeit the presumption and therefore agreeing that the court was competent to interpret the wide expression "respectable inhabitant," also agreed in *K.E. v. Kan Haw* (3) with Irwin, J. that the ruling in *K.E. v. Kwe Haw* (2) unduly restricted the meaning of the word "respectable inhabitants," though he did not go so far as to characterise the proposal as absurd and detrimental. There is therefore a majority of learned Judges with actual experience of ward headmen in favour of retaining them. This may be an accident, but when we find it laid down by Lord Mersey in *Thompson v. Gould* (5) that "it is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do," it is an element that has to be considered by the court. In one of the two cases cited by Sir Charles Fox on this point namely that of *Curtis v. Stovin* (6), the necessity was contained within the four corners of the Act and was clear. Section 65 of the County Courts Act, 1888, had provided that "where in any action of contract brought in the High Court "the claim endorsed on the writ did not exceed £100 it should be lawful for either party . . . to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced." But as the jurisdiction of County Courts was limited to claims not exceeding £50 it followed that the action could not have been commenced in any County Court and the judges therefore read into the section the words "if the amount claimed had been such that it could have been commenced in a County Court." Here it is admitted that it is impossible to predicate of the class in question that it is not *prima facie* respectable, but it is contended that the legislature must have meant as an additional qualification that the witnesses must not only be respectable but unconnected with the police. This may or may not be an improvement on the law as it stands, but I am unable to hold that it is an addition necessary in the sense laid down in *Curtis v. Stovin*, "*ut res magis valeat quam pereat*." Nor do I understand that the learned judges who are in favour of the proposed construction would go so far as to say the addition was necessary in the above sense. Sir Charles Fox in *K.E. v. Kwe Haw* (2) argued that some limitation was necessary so as to exclude one policeman calling two others and that therefore, it was permissible and desirable to carry out the intentions of the legislature to their fullest extent. Hartnoll J. in *K. E. v. Kan Haw* (3) repeated the argument and added that it was desirable that one general rule should be laid down for all ward-headmen and block elders. These arguments seem to me to imply that while it was in the opinion of these learned Judges absolutely necessary to exclude policemen in the sense of *Curtis v. Stovin*(6) it was only a desirable improvement to exclude all ward headmen.

L. B.
Ti Ya & 6
others
v.
King-
Emperor.

(1) 4 Bur. L.T. 91.

(5) 79 L. J. K. B.

(6) 22 Q. B. D. 313.

1. B.
Ti Ya & 6
others
v.
King-
Emperor.

Curtis v. Stovin(6) therefore does not seem to me to be an authority that will support the proposed alteration, the object of which is not to preserve but improve the Act. Again if the proposed change is merely an improvement, there is clear authority that it does not lie in the province of the judiciary to alter a statute for such a purpose. The business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the Legislature meant but what its language means: what it has said it meant." Cockburn C. J. in *Palmer v. Thatcher*(7) and Lord Coleridge in *Coxhead v. Mullis* (8). Sir Charles Fox however also relied upon *Re v. Hall* (9) which brings into play another line of authorities dealing with the interpretation of general words, and the ordinary sense of which is sometimes restricted and sometimes enlarged in order to effectuate the intention of the Legislature. Thus, in the case cited by him which was a voting case dependent on the meaning of the term *house holder*, the word was construed so as to include merchants trading in partnership. Abbot C. J. held that "the object of the statute appeared to have been to unite respectability of character in the place with a habit of access and resort to that place and that it would be obvious that an exclusion of persons in the situation of the gentlemen (to whose votes exception was taken) would be an exclusion in this and many other cases of a very large portion of those who were best qualified for the discharge of the particular duty that might be the subject of enquiry." The judgment is interesting as the learned Chief Justice expressly instanced the term *inhabitants* as one of those general words which was construed according to the to the object of the statute in which it occurs, and it appears from *Maxwell on Statutes* that where the statute imposes a duty on the inhabitants of a certain place it construes the term in its popular sense, but when it imposes a pecuniary burden it excludes persons who though inhabitants have no rateable property and includes persons who though not inhabitants yet hold rateable property there.

Now the Imperial Legislature in Section 103 Criminal Procedure Code uses this very term '*inhabitant*,' but limits it by adding a qualification, viz., that the inhabitants are to be respectable and the Provincial Legislature in incorporating the provisions of this section into Section 6 of the Gambling Act have added a further qualification by enacting that the police-officer conducting the search shall not be below the rank of a sergeant or officer in charge of a police station. This further qualification is obviously introduced by the Local Legislature with a view to free searches under the Gambling Act, which raises the presumption already mentioned, from suspicion. The qualification '*respectable*' must have been considered and found insufficient, but instead of limiting it in the manner now proposed the Local Legislature preferred to impose a qualification upon the person employed to conduct the search. It is he and he only who may make the search, and the duties of the "respectable inhabitants" are confined to looking on while he searches. There is nothing in the section that entitles them so far

(7) 3 Q. B. D. 353.

(8) 3 C. P. D. 199.

(9) 1 B and C 123.

as I can see to lend the officer in charge any assistance whatsoever in making the search and I conceive that objection might properly be taken to any such assistance being given whether by actually participating in or pointing out omissions in the search. It is he and he alone who is authorised by the warrant to make the search, and they are to attend and witness it. The sole exception (and that is the subject of a special provision) is that if a person is to be searched and that person is a woman, the search shall be conducted by one of her own sex. May it not therefore be reasonably held that the Legislature considered that it had gone far enough by confining the right of search to a superior of police such as a serjeant or the officer in charge of the local police station? Brett L. J. in *Lion Insurance Co. v. Tucker* (10) a much later case than *R. v. Hall*(9) stated that whenever a statute is to be construed it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used, unless there is something which renders it necessary to read into them a sense which is not their ordinary sense in the English Language as so applied. To construe the term respectable as meaning respectable and independent would be to import a wholly different qualification totally alien to this ordinary sense of the term, for it is obvious that a man may be respectable though connected with the police, and I cannot see that any necessity, to use the words of Brett J., has been shown for the proposed construction. To add the additional qualification that the witness must be not only respectable but unconnected with the police may or may not be an improvement on the Act. From some points of view it obviously might or even would be so, but it is the business of the judiciary to declare and interpret, not to improve the law.

It is for the legislature to consider how to improve the law and in doing so to consider not only the claims of the subject but the good of the realm, and have in mind considerations that cannot conveniently be discussed in a court of law. While therefore though I can conceive that the proposed construction might be for the good of the subject, it is not clear to me especially in the face of its unmeasured condemnation by a judge of the experience of Irwin J., that the change would be for the good of the province as a whole. In my opinion therefore to impose the proposed construction on the Gambling Act is an intrusion on the domain of the legislature and one which circumstances do not seem to me to warrant. In cases other than those concerned with gambling no such presumption is raised and a police officer calls such witnesses at his own risk and it is a question for the court in each case to decide whether the search is reliable, even though the witnesses might not be shown to be other than respectable. If they are not so, the search is not made in accordance with section 103, but even if they are, no such presumption as arises under the Gambling Act, arises by force of the ordinary law. In these cases also, therefore, I would leave it to

L. B.
Ti Ya & 6
others
v.
King-
Emperor.

(9) 1 B. and C. 123.

(10) 53 L. J. Q. B. 189.

L. E.
Ti Ya & 6
others
v.
King-
Emperor,

the legislature to determine whether the safeguards provided are sufficient and refrain from altering under the guide of construing the law. My answer therefore to the question referred is in the affirmative.

Parlett J.—The question referred had arisen as it has arisen in all the reported decisions which have been quoted, in a gambling case in consequence of the strong presumption which section 7 of the Burma Gambling Act of 1899 compels to be drawn. That Act permits on the receipt of certain information a search warrant to be issued to a police officer of a prescribed standing. It directs the search to be made in accordance with the provisions of section 103, Criminal Procedure Code, and if at that search instruments of gaming are found it compels the court to presume until the contrary is proved that the house or place searched is used as a common gaming house and that the persons found therein are guilty of an offence under section 11 of the Act. It is noticeable that the law against common gaming houses in other provinces is less stringently worded than is the Burma Gambling Act; for instance, the Calcutta Police Act (Bengal Act V of 1866), the Bengal Public Gambling Act (Bengal Act II of 1867), the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) and the Madras City Police Act (Madras Act III of 1888) use wording similar to that of the Public Gambling Act (Act III of 1867), namely, that the finding of cards, etc., at the search should be evidence, until the contrary is made to appear, that the place is used as a common gaming house and that the persons found therein were present for the purpose of gaming. None of them provides that the searches shall be made in accordance with section 103, Criminal Procedure Code and it was not until Bengal Act III of 1910 was passed that the Calcutta Police Act was amended in this sense. It is therefore not surprising that the question should apparently have never arisen in other provinces. Even if persons are there appointed to positions analogous to that of ward headmen in Burma such headmen are appointed as being respectable inhabitants of the locality, and I think very strong and clear reasons are needed for holding that they do not fall into the category of persons competent to witness searches. I doubt if it would have occurred to any one to question their competency had it not been for the presumption created by section 7 of the Burma Gambling Act. Though at first sight that presumption taken by itself may appear almost a violent one the reason for it becomes clearer on a consideration of local habits and conditions, of the object of the Act and of its earlier provisions. When enacting the conditions under which the presumption should arise the legislature had before them these considerations and they deliberately added compliance with section 103 of the Criminal Procedure Code in respect to the search as one of those conditions. They also had before them the duties imposed on ward headmen by the Lower Burma Towns Act of 1892 which for the purposes of this case may be taken to be identical with those imposed by the Burma Towns Act of 1907. It would have been easy to make the provisions as to the search still more stringent had that been their

intention, and unless such intention is clearly indicated or must necessarily be implied, I think the court would be going beyond its province of interpreting in introducing further restrictions. Still more I think that this would be the case when the result of such restrictions is not merely to require the fulfilment of further conditions before the presumption under the Burma Gambling Act can arise but to add a very important qualification to the provisions of section 103, Criminal Procedure Code applicable to all searches under the code for which I think there is no sufficient warrant in any part of that code. The duties of a ward headman though principally of other natures include that of taking measures for the prevention and detection of certain forms of crime in his ward; but his duties are limited to the heinous offences and it cannot be supposed that the Local Government would sanction their extension to any but serious crimes. In this respect his obligations are even less than those imposed on every owner or occupier of land by section 45, Criminal Procedure Code, yet the legislature did not declare these obligations to disqualify such persons from witnessing searches under section 103. If a ward headman becomes disqualified because of his obligations under certain circumstances to assist the police, any inhabitant of his ward whom he requires to assist him might be held equally disqualified as being his assistant, and in the event of a general requisition it might become almost impossible to conduct a search in the ward at all. There are no means of compelling any private person to witness a search and if the police are not allowed to utilise the services of men whose duty it is to assist them and who from their status are most likely to act honestly and straightforwardly they may be tempted to fall back upon persons who are ready to do their bidding; and I think it may fairly be said that at any rate that was not the intention of the legislature. A rule excluding ward-headmen in towns from witnessing searches would, I think have to be extended logically to headmen in villages. The necessity or the desirability of so doing has, so far as I knew, never been suggested and I would note that ward headmen appear to be less directly under the control of the executive authorities than are village headmen. In my opinion the Criminal Procedure Code contains nothing from which it can be inferred that the legislature intended to exclude persons in the position of ward-headmen from the category of respectable inhabitants for the purposes of section 103 and that the subsequent enactment of the provisions of the Burma Gambling Act regarding the presumption which arises in certain circumstances after such a search does not warrant the court in so interpreting the language of the Criminal Procedure Code as in reality to modify its provisions. In my opinion a person who is appointed to be a ward headman in a town other than in Rangoon is not merely by reason of such appointment incompetent to witness a search under section 103, Criminal Procedure Code.

Robinson J.—It has been held by a majority of a full bench of this court that ward headmen in Rangoon, who are appointed by the commissioner of police, are not competent witnesses. The

L. B.
Ti Ya & 5
others
v.
King-
Emperor.

L. S.
 Ti Ya & 6
 others,
 v.
 King-
 Emperor.

only distinction between the two seems to be that one class are appointed by deputy commissioners while the other are appointed by the commissioner of police, and the former are not quite so closely in contact with the police as the latter. If the words "respectable inhabitants of the locality" are to be taken in their widest sense, then all these persons would presumably be *prima facie* competent witnesses. It is, however, generally agreed that if the witnesses selected were policemen living in the locality the requirements of the code would not be satisfied and that, not because the particular policemen were not respectable but because the legislature intended the witnesses to watch the search and to see that it was fairly and properly conducted, which requirement would not be satisfied by a policeman watching a policeman. I think there can be no question that that is the right view, but if this is so, the words are not to be interpreted in their widest sense. In order to arrive at a decision as to how far their ordinary meaning is to be limited, I think it is necessary to endeavour to find out the objects and intentions the legislature had in view in framing the section. I agree with and have nothing to add to the remarks of Sir Charles Fox in *K. E. v. Kwe Haw* (2) as to the rule of interpretation that should be followed in this case. We have to regard not so much the ordinary and popular meaning of the word "respectable," but the subject and occasion on which it is used in the section and the object which is intended to be attained. In section 103 the object, I think was to provide a safeguard against false charges, a check on the officer or other person making the search, and a guarantee that the search was properly and fairly conducted. The object in requiring two or more respectable persons was that the person searched or the owner or occupier of the premises searched might have someone to whom he could point out any wrong done and whom he could call as witnesses if necessary. They must be persons who would be impartial and on whom *prima facie* he could rely. They were to be "inhabitants of the locality" for the same reasons. It is not merely to the Government and the officers administering justice that they are to afford guarantee of fair dealing and the absence of chicanery, but also to the person immediately affected. That is in my opinion a very important point in arriving at a decision. The officers appointing ward headmen and others of a like status must be presumed to have made the appointments in the belief that those selected were honest and respectable men. But if their duties are connected with the police, if they look for credit or reward from work done for or in conjunction with the police, would they satisfy the requirements of the object the legislature had in view? I think not. It is only by giving the words their widest and most popular significance that it can be held that they are such persons as the legislature had in view. That in my opinion was not intended and that view would not fulfil the intention of the legislature and would stultify the reasons that led to the enactment of the provision. For the above reasons they are not in my opinion, competent witnesses.

MR. JUSTICE ORMOND:—For the reasons stated by me in my judgment in *K. E. v. Kan Haw* (3). I hold that ward headmen are competent witnesses to a search under section 103, Criminal Procedure Code. There is no necessary implication that the witnesses (not being policemen) should be persons who are free from any obligation of assisting in any way the police in the prevention and discovery of crime, or that they should be persons, who do not hold office under Government. I would answer the question referred in the affirmative.

THE CHIEF JUDGE:—I have further considered the matter and can see no good reason for changing the view expressed by me in the case of *K. E. v. Kan Haw*. I would, therefore, answer the question referred in the negative.

Three judges having answered the question in the affirmative, and two in the negative, the opinion of the majority prevailed as the opinion of the full bench.—*Ed.*

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEALS NOS. 53 & 58 OF 1912.

W. A. PROVIDENCE APPELLANT.
 vs.
 P. T. CHRISTENSON RESPONDENT.

For Appellant—Higinbotham.
 For Respondent—Giles.

Before Mr. Justice Hartnoll, Offg. C. J. and Mr. Twomey.

Dated, 3rd March 1914.

Defamation—Absence of intention to defame immaterial—Evidence of witnesses as to whom the article refers—Opinion based on rumours—Admissibility of such opinion.

In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff if reasonable people would think the language to be defamatory of the plaintiff. The question for decision in such cases is whether the article is libellous and whether it designates the plaintiff in such way as to let those who know him understand he is the person meant.

One of the ways in which people could form an opinion that the article refers to plaintiff is to use what they knew and have heard of his past history.

The existence of unproved rumours regarding the plaintiff is no reason for giving him slight damages.

JUDGMENT.

HARTNOLL, OFFG. C. J.:—This appeal and Civil 1st Appeal No. 53 of 1912 have been heard together. They both arise out of a suit in which P. T. Christensen sued the Revd. Father Boulanger, W. A. Providence and T. Mellican for Rs. 10,000 for libel in respect of an article entitled 'Public opinion' that appeared in a newspaper called *The Moulmein Advertiser* on Wednesday the 28th June 1911.

L. B.
 Ti Ya & Co.
 others
 v.
 King
 Emperor.

L. B.
W. A. Pro-
vidence
v.
P. T. Chris-
tensen.

The Revd. Father Boulanger was sued as the executor of the will of Robert Benjamin deceased, it being alleged that as such executor he at all times material to the suit owned a printing press and owned and published a newspaper circulating widely in Moulmein and elsewhere known as the '*Moulmein Advertiser*'. The Revd. Father Boulanger admits this. Providence was sued as Editor and Mellican as printer and publisher of the said newspaper and they admit that they were respectively Editor and printer and publisher. The learned District Judge found the libel on Christensen proved and has given him damages against all three defendants to the extent of Rs. 1,000 with costs of the suit in proportion. In consequence he has been ordered to pay to the defendants Rs. 411-8-0.

An appeal has now been laid by Providence asking for a reversal of the decree and by Christensen asking for enhanced damages. D. O'Sullivan has been made a fourth respondent as administrator of the estate of Robert Benjamin. He has not appeared to defend the appeal.

Providence contends that there is no proof on the record that the article complained of applied to Christensen and that the libel when read as a whole could not apply to him. The article complained of reads as follows:—

PUBLIC OPINION.

"A pleasant appearance is not all that is requisite as a pass-port for honesty, for there have been instances of very presentable fellows getting into business, and making themselves "Master" in their master's place who have been guilty of the vilest injustice before God and man". After such an introduction a correspondent asks: "Are these the kind of men to lead public opinion?" Our correspondent does not particularize, that is to say, he does not mention in what matter opinion was given, whether in a Municipal matter or *ought* else. He continues: "Ignorance and presumption, they say, go hand in hand. It was, no doubt, this which led the poet to say.

"Let such teach others who themselves excel.
And censure freely *who* have written well."

The poet, of course, meant writers, critics, *men who are in a* position to offer an opinion, not stray vagabonds and interlopers, without education, who cause destruction to families. What would you say, Mr. Editor, of a man who drives his master mad, a madness which leads ultimately to his death? and yet such fellows exist and thrive and the world countenances them. Another type of scoundrel that flourishes is the fellow who sells 90 per cent. of water with a dash of something. He thinks himself honest and desires to be supported. Strangely enough money or presents of some kind find favour with even people who are believed to be able to advise on important matters". There is no ground to doubt the veracity of our correspondent not knowing who or what h

refers to, but we are only surprised he did not quote from Hamlet and wind up as follows :—

“The serpent that did sting thy father’s life now wears his crown. With witchcraft of his wit, with traitorous gifts, (Oh wicked wit, and gifts, that have the power so to seduce) won to his shameful lust the will of my most semi-righteous queen ; Oh Hamlet, what a falling off was there ”.

The defendants say that they did not intend to defame Christensen, but that is no defence to the action. As was laid down in the case of *E. Hulton & Co. v. Jones* (1) by the House of Lords “in an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff if reasonable people would think the language to be defamatory of the plaintiff”. In that case the appellants, owners and publishers of a newspaper, published in an article defamatory statements of a named person believed by the author of the article and the Editor of the paper to be a fictitious personage with an unusual name. The name was that of the respondent who was unknown to the author and the Editor. In the action for libel against the appellants it was admitted that neither the writer nor the editor nor the appellants intended to defame the respondent, but evidence was given by his friends that they thought the article referred to him. Nevertheless it was held that the plaintiff was entitled to maintain the action. The same principle must be applied to the present case. The question for decision is whether the article is libellous, and whether it designates Christensen in such a way as to let those who know him understand that he is the person meant. It is not necessary that all the world should understand the libel ; it is sufficient if those who know him can make out that he is the person meant. Christensen called witnesses to prove that, when they read the article, they understood that it referred to him. They prove that Christensen was assistant to the late Mr. Mitchell that this gentleman became insane and died leaving a widow, who subsequently married Christensen, and that Mr. Mitchell’s business is now carried on, managed and controlled by Christensen under the name of Mitchell, Christensen & Co. Certain of the witnesses give evidence that since the publication of the article Christensen has been shunned. One of them Grey said : ‘I had heard rumours before, which, when I read this, made me think it referred to the plaintiff.’ This evidence is objected to by both sides and Providence urges that the District Judge should not have given weight to the evidence of any of the witnesses. The District Judge found that the witnesses in attributing the article to refer to the plaintiff must have acted on extraneous knowledge, that they must have known that he was suspected of having caused his master’s madness, of causing destruction to families or that there had been rumours about him of such charges against his conduct and character and he remarks that the importance of this

L. B.

W. A. Providence
v.
P. T. Christensen.

(1) (1910) A. C. 20.

L. S.
W. A. Providence
v.
P. T. Christensen.

opinion lies in the fact that though it may be reprehensible to repeat an existing libel, a person whose character has already suffered in this way even if undeservedly is obviously not in the same position as a person whose character and reputation are unsmirched. Strong objection is taken to this part of the judgment by Christensen. As regards the evidence of the witnesses they may exaggerate as to the extent that Christensen has been shunned by others but I can see no reason to doubt them when they say that when they read the article, they understood it to refer to Christensen. They do not give their reasons. They may possibly have fixed the article as referring to Christensen from rumours concerning him. The witness Grey refers to having heard rumours which led him to believe that the article referred to Christensen. Such a statement was in my opinion admissible. One of the ways in which the witnesses could form an opinion that the article referred to Christensen was to use what they knew and had heard of his past history. It is not as if there had been an attempt on the part of defendants to produce evidence of rumours. In such a case, evidence of such might not have been admissible—see *Scott v. Sampson* (2) a case referred to in the argument; but no attempt was made to prove any such rumours. At the same time this passage in Grey's evidence and the fact that the witnesses may have formed their opinion partly on rumours to the effect that Christensen had carried on an adulterous intercourse with his master's wife and had caused his madness and death should not in my opinion be considered as a ground for giving slight damages. There is nothing to show that such has been the case nor is it pleaded that Christensen has been guilty of such conduct. On the other hand it is urged that the article cannot be held to apply to him, which is a submission that he has not been so guilty. Stress was laid by learned counsel for Providence that Christensen did not go into the box and learned counsel analysed the article to show that it could not refer to Christensen; but after reading and studying it as I have said I am not prepared to discredit the witnesses, when they say that when they read it they understood it to refer to Christensen. I would especially refer to the words about very presentable fellows getting into business and making themselves master in their master's place, about the man who drives his master mad, a madness which leads ultimately to his death, and the quotation from Hamlet. Accepting therefore the evidence of the witnesses that they understood the article to refer to Christensen I am of opinion that he has established that he has been libelled and that he is entitled to damages from the defendants. The article is obviously grossly libellous of the man who has taken his master's place.

As regards damages I am of opinion that the order of the District Judge is unduly lenient. As the order stands Christensen is only to get a net sum of Rs. 588-8-0. Taking into account the fact that the witnesses may have exaggerated the extent to which

(2) (1882) 8 Q. B. D. 491.

he has been shunned I am still of opinion that he is entitled to substantial damages for so gross a libel.

I would therefore alter the decree and give Christensen a decree for Rs. 3,000 (three thousand) and costs on that amount in the District Court, and I would not give respondents their costs in that court on the unallowed portion of the claim.

As regards these appeals the effect of the above proposed order is that No. 58 is dismissed. Each party will pay their own costs in it.

As regards No. 53 Christensen will be given costs on the Rs. 3,000 decreed.

TWOMEY, J. :—In my opinion the witness Grey's evidence as to rumours should have been excluded altogether as irrelevant. The judgment of Mr. Justice Cave in *Scott vs. Sampson*⁽²⁾ explains clearly the principle on which evidence giving the substance of rumours and suspicions is held to be inadmissible in libel cases, and the principle applies even to evidence such as that given by the witness Grey who said: "I had heard rumours before which when I read this (article) made me think it referred to plaintiff". That is to say, the witness had heard much the same story about the plaintiff before. If there really were such rumours and they had in fact affected the plaintiff's reputation the defendants could have proved by general evidence that the plaintiff had a damaged reputation. But no attempt whatever was made to prove this. The danger of admitting evidence of rumours is well exemplified in the present case, for it is evident that the District judge in assessing damages took these rumours into account as if they were evidence of a sullied reputation. This course was in my opinion altogether without justification.

If the covert language of the article could not be shown to apply to the plaintiff I think that there would be no libel at all. But the application of the article to the plaintiff is indicated by a combination of facts, namely, that the plaintiff's master died insane and that the plaintiff has taken his master's place and married his master's widow. It would be surprising if such an unusual combination of facts were true of more than one individual in a comparatively small community like that of Moulmein. And the evidence shows that the plaintiff's acquaintances knowing these facts about the plaintiff's life at once perceived that the article must be aimed at him. No knowledge was necessary of rumours about the plaintiff's relations with his employer and his employer's wife.

It has been urged that the article deals primarily with men who lead public opinion and the plaintiff is not shown to be such a man. But it is not necessary that the whole of the article should be applicable to the plaintiff if there is enough in it for those who know him to see that he is meant.

I agree with my learned colleague that the amount of damages awarded is insufficient and that the amount should be increased to three thousand Rupees. I also concur in the proposed order as to costs.

W. A. Pro-
vidence
v.
P. T. Chris-
tensen.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEALS No. 6 & 8 OF 1913.

MAHOMED SALAY NAIKWARA ... APPELLANT.

vs.

MULLA GOOLAM MAHOMED & 7 others. RESPONDENTS.

For Appellant—Doctor.

For Respondents—Chari and Vertannes.

Before Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

Dated, 23rd February 1914.

Civil Procedure Code (Act V of 1908), S. 92 (1) (b)—Suit under section 92 compromised and trustee discharged from liability to account—Compromise decree attacked fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Advocate General's consent whether necessary for such declaratory suit—Ejusdem generis, principle of—"Further or other relief" meaning of.

A suit under the provisions of section 92, Civil Procedure Code, praying for the removal of trustees, appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship, and new trustees were appointed in their stead. The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust moneys was void and of no effect.

Held, that, although the direct object of the suit of beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked allege a breach of trust and involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within clause (b), sub-section (1) of section 92, Civil Procedure Code, and therefore, the suit was not maintainable without obtaining the consent of the Advocate-General.

Sir Dinshaw M. Petit v. Sir Jamsetji Jijibhai, 2 Ind. Cas. 701; 11 Bom. L. R. 85, 33 B. 509, 5 M. L. T. 301 referred to.

JUDGMENT.

HARTNOLL, OFFG. C. J.:—The point for decision in this appeal is whether the consent in writing of the Government Advocate was necessary for the institution of the suit out of which this appeal arises. In Civil Regular No. 417 of 1909 the fourth to seventh respondents brought a suit against appellant and Mynuddin Naikwara that clearly came within the provisions of section 92 of the Code of Civil Procedure. One Mariam Bi Bi alias Ma Htay by her will gave one-third part of her property after payment of her debts and funeral expenses to charitable purposes. It was alleged that appellant, who had been the agent and attorney of the deceased Mariam Bi Bi, had been in possession of her property, had obtained probate of the will and had continued to remain in possession

of the property. It was asserted that he had appropriated certain immoveable properties belonging to the estate for the said charitable trust and had been managing the trust properties and realizing the rents and profits thereof and had not divided the same. Mynuddin Naikwara was made a defendant as appellant alleged that he had appointed him to be a co-trustee, though the plaintiffs were not aware whether he had taken any part in the management of the said trust. It was asked that the defendants be called on to render an account and that appellant should be removed from the office of trustee, other trustees being appointed and the trust estate being vested in them and that a scheme be framed for the management of the trust. This suit was compromised. The defendants were discharged from their trusteeship and the fourth, fifth and eighth respondents were appointed trustees in their stead. The first two respondents then instituted the present suit. They charge that the terms contained in the petition of compromise are collusive and fraudulent in as much as the said compromise was made not for the benefit of the trust but for the purpose of concealing from the vigilance of the Court breaches of trust and fraud, committed by the appellant and Mynuddin Naikwara as trustees and that therefore the decree passed on the petition is *ipso facto* void against the plaintiffs who were beneficiaries under the said trust. Particulars of the alleged fraud were set out. They therefore asked that so much of the decree as related to the discharge of the appellant and Mynuddin Naikwara from their liability to render accounts for all the moneys received by them since the trust properties came into their hands as trustees thereof is void and of no effect. The learned Judge on the original side disallowed the objection that the suit was not maintainable on the ground that the leave of the Government Advocate had not been obtained under section 92 of the Code. He found that the relief asked for did not come within any of the reliefs specified in section 92. He accordingly ordered that the matter be referred to the second Deputy Registrar to investigate the accounts and report whether there was any justification for the charge of fraud being made.

The present section 92 of the code has considerable differences as compared with the corresponding section 539 of the repealed Code (Act XIV of 1882 as amended.) There were five reliefs in the old Code and then came the words "or granting such further or other relief as the nature of the case may require." The new section has eight reliefs, the last one "granting such further or other relief as the nature of the case may require" being made clearly a distinct form of relief as it is given a letter of the alphabet of its own. It is urged that further or other relief means relief *ejusdem generis* as the preceding reliefs. The word "other" is of wide import. As I have said, this form of relief has now been made clearly quite a separate form of relief. The principle underlying the section is that private persons shall not have unrestricted license to bring suits against trustees of trusts created for public purposes of a charitable and religious nature, but they must obtain the sanction of a crown officer first. The duty is

L. E.

Mahomed
Salay
Naikwar
v.
Mulla
Goolam
Mahomed
7 others.

l. B.
 Mahomed
 Salay
 Naikwar
 v.
 Mulla
 Goolam
 Mahomed
 & 7 others.

obviously imposed on such an officer of seeing that a *prima facie* case exists for bringing such a suit before he gives his consent. The present suit in any case involves the taking of an account and enquiries into the accounts. This is the fourth form of relief set out in the section. In discussing the meaning of the words "further or other relief" Beaman, J. said in the case of Sir. Dinshaw M. Petit v. Sir Jamsetji Jijibhai (1) "It will of course be at once observed that that section (i. e. section 539 of the repealed code) after an introduction containing very general words—as e. g. "Whenever the direction of the court is deemed necessary for the administration of any such trust—" goes on to say that the plaintiff may obtain a decree for five specified objects after which come the words "or granting such further or other relief." And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. . . . I am not myself—and never have been—much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous reaffirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind as to be practically identical. That would make the words mere surplusage. "I should be disposed to think they meant such further or other relief as, from the nature of the introductory words and the exemplification cases, appear to the Court to be appropriate in a suit of this kind. As for example removing fraudulent trustees, restraining a breach of the trust and so forth."

In the present case the direct object of the suit is to declare a portion of a decree void and of no effect, but the grounds on which such a declaration is asked allege a breach of trust and they involve the taking of accounts and enquiries before a decision can be given on the prayer for relief. I am of opinion that the relief asked for should be held to come within the eighth ground of relief set out in section 92. I would therefore allow the appeal, set aside the order of the learned Judge on the original side and dismiss the suit. It will be open to the first and second respondents to obtain the leave of the Government Advocate, and, if they obtain it, to file a fresh suit.

In view of the petition of the 1st and 2nd respondents of the 18th November 1912 and the order of the learned Judge on the original side passed on the 26th November 1912 each party will bear its own costs on appeal.

ORMOND J. :—I concur.

(1) XI Bom. L. R. 85 at p. 138.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL NO. 3 OF 1914.

HTAUNG AND 5 OTHERS ... APPELLANTS.

vs.

K. E. ... RESPONDENT.

For Appellants—Alexander.

For Respondent—Assistant Govt. Advocate.

Before Mr. Justice Twomey.

Dated, 23rd February 1914.

Burma Gambling Act section 6 and 7—section 103 of the Criminal Procedure Code—Common gaming house—section 3.

Though the Inspector of Police should not have added any new items to the list of things seized at a search held under section 103 of the Criminal Procedure Code held that his doing so was not a breach which could invalidate the search.

Though the profits of gambling were devoted to Club Premises and not for the profit or gain of the club, the place might still come under the definition of "common gaming house" under section 3 of the Act.

ORDER.

TWOMEY J.—In this appeal it is contended that the presumption allowed by section 7 Gambling Act, does not arise as the provisions of section 103 of the Criminal Procedure Code regarding searches were not observed as required by section 6 of Gambling Act. It is also contended that if the presumption does arise it has been rebutted by the defence evidence showing that the place was a club and that the money taken by way of commission from the players "was not spent for the profit or gain of the club but in payment of the regular club expenses."

As regards the first point it is alleged that when the list of property seized was signed by the two "respectable inhabitants" who witnessed the search, the list was not complete. I regard it as established that the list was drawn up at the place of search and signed there by the police officers and the two witnesses. The witness King said at first that he did not sign till he got to the police station, but he corrected himself afterwards and explained that what he signed at the police station was not the list of property seized but a security bond. In view of the other witnesses' statements I think this explanation is probably correct and King's statement as to signing the search list at the police station was a *bona-fide* mistake.

L. B.
Htaung and
15 others
v.
K. E.

There can be no doubt that items 28 and 29 were added to the list at the police station, that is to say after the witnesses had signed the list. These two entries relate to (1) a sum of Rs. 36.5 found in a locked box and (2) a bunch of keys taken from one of the accused when he reached the police station. The locked box was already in the list (item 6) though it was not opened till it reached the police station and the bunch of keys was obtained. The Inspector should not have added the Rs. 36.5 and the keys to the already completed list. But I cannot hold that his doing so was a breach of section 103 of the Criminal Procedure Code invalidating the search. The list was already complete and in order when he made these unnecessary entries. It appears also that two empty tin boxes that were taken away by the police were not shown in the list. These boxes had no bearing whatever on the case and it was pure officiousness to bring them away. I cannot regard their omission from the list as a circumstance invalidating the search.

In my opinion there are no sufficient grounds for holding that the provisions of section 103, Criminal Procedure Code were contravened and I therefore think that the presumption allowed by section 7 of the Gambling Act may properly be made.

The accused produced one witness who said the place was a club belonging to the "Ong" Chinese Clan, that he was the Honorary Secretary, and that the profits of the gaming carried on at the club are devoted to feasting and to the general purposes of the club. A place may be called a club and yet may be a "common gaming house" within the Act. It is not proved that the gambling at this club was confined to members of the club. Even if the profits of gambling were devoted to club purposes, the place might still be a "common gaming house" as defined in section 3 of the Act, for the word person in that section includes any body of individuals (Burma General Clauses Act, 1898 Section (44) *2 e. g.*, a club.

On these grounds I think the convictions should stand. But I can find no justification in the evidence for the imposition of heavier fines on the third, ninth and fourteenth accused than on the other accused convicted under section 11.

The fines imposed on Chin Kee, Shin Shwe and Kyin are reduced to five rupees each and the balance of the fines paid by these three appellants will be refunded to them. The appeals of the others are dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISIONS* No. 34 B TO 46 B OF 1914.

KING-EMPEROR APPELLANT.
 vs.
 ME THIN RESPONDENT.

For Appellant—Mr. Eggar.

Before Sir Henry Hartnoll, Offg. Chief Justice and Mr. Justice Ormond.

Dated, 31st March 1914.

Arms Act—S. 19 (a)—Clasp knives with the outer edge narrowing—for what use primarily intended—Can they be called Arms in ordinary parlance?

Though the exhibit knives were stout formidable ones, the outer edge narrowing as the end of the blade is reached, they cannot be called *arms* as they could not, from their appearance, be said to have been primarily manufactured with the intention of using them—for offence or defence. They are useful for domestic use or for cutting sticks.

JUDGMENT.

HARTNOLL, C. J. :—These revisions concern a batch of cases in which certain persons have been convicted under section 19 (a) of the Arms Act of exposing for sale certain clasp knives. The learned sessions judge has forwarded six of the knives for our inspection and says that they are typical of the rest with respect to which the convictions have been obtained. They are stout and formidable clasp knives, and five of them come to a point by virtue of the outer edge narrowing as the end of the blade is reached. When opened the blades are not held by a spring and so they differ from the weapons described in the case of Ebrahim Dawoodji Babi Bawa v. K. E. (1) It cannot be said that when manufactured they were primarily intended to be used for offence or defence. They are certainly useful for ordinary purposes such as for domestic use, or for cutting sticks. In ordinary parlance they would not be spoken of as arms. They are stout and formidable clasp knives. They can be used as efficient and very serious stabbing implements, but it cannot be said that from their appearance they were manufactured primarily for the purpose of being used as such. I would set aside the convictions and acquit the persons convicted and direct that the fines imposed be refunded and that the knives produced before the magistrate be returned to their owners.

MR. JUSTICE ORMOND :—I concur.

*Review of the order of the 4th Additional Magistrate of Bassein, dated, 30th October 1913 in Criminal Trial No. 296 of 1913 on a charge of keeping for sale certain clasp knives in contravention of S. 19 (a) of the Arms Act.

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

THE BURMA LAW TIMES.

VOL. VII.]

JUNE, 1914.

[No. 6.

PRIVY COUNCIL.

[Appeal from the Chief Court of Lower Burma].

PRIVY COUNCIL APPEAL No. 26 OF 1913.

CHANNING ARNOLD APPELLANT.
VS.
THE KING-EMPEROR RESPONDENT.

Present at the Hearing.

LORD SHAW. SIR JOHN EDGE.
LORD SUMNER. MR. AMBER ALI.
LORD PARMOOR.

Indian Penal Code (Act XLV of 1860), secs. 52, 499, Excep. 9—Defamation—Magistrate, allegation against, of corruption and conspiracy to save an accused under trial, by manipulating procedure—Magistrates' and Judges' public acts if above criticism—Press, if specially privileged in criticising such acts—Limits of legitimate comment—Libel, no plea of justification, et truth of charges asserted by innuendo, propriety of—Defence of good faith—Matters relevant to the enquiry and proper to be placed before jury—Judge's right to state his own views, without withdrawing case from the jury—Charge to jury—Misdirection—Misdirection when sufficient for interference by Privy Council—Privy Council practice of, in interfering with criminal trials—Libel published under mistake—Duty of apologising on discovery of mistake—Bail, discretion as to granting.

No privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist; but, apart from statute law, his privilege is no other and no higher.

No privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment.

A, as District Magistrate, having declined to commit one M for trial on a charge of having abducted and committed rape upon a Malay girl of about 11 years of age, the Appellant wrote an article in a newspaper charging A with being engaged with others in a corrupt plot to defeat justice in order to save M, with having bailed him out for a non-bailable offence and with having manoeuvred his procedure to that end. M had himself admitted that, being informed that the child was suffering from gonorrhoea, he had taken her to his house and himself had personally examined her—although there was a hospital 8 miles away. A, in declining to commit M, had further stated that in his opinion M's conduct was pure and philanthropic:

Held—That this declaration by the Magistrate with which the enquiry before him concluded, laid the whole trial open to searching and severe observations, and no blame could be attached to these. But it was not open to the Appellant to make against the Magistrate charges of corruption and conspiracy, which were admitted to

P. C.
—
Channing
Arnold
v.
The King-
Emperor.

be untrue, and were grossly libellous, and the Appellant could not justify them in a criminal proceeding for defamation, unless he was able to establish affirmatively that he believed them to be true and that on reasonable grounds, as provided in the ninth exception to sec. 499 of the Indian Penal Code.

That the conduct of M referred to above and of the Magistrate at the enquiry were relevant for a consideration of the question of accused's *bona fides* and were properly submitted to the jury in support of the defence.

That the Judicial Committee was not prepared to say that the granting of bail to M was an improper exercise of the Magistrate's discretion, but in any case it was a difficult and delicate point of law which could not have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel.

That the fact that every officer, judicial or administrative, except one, had agreed with the conclusion to which the Magistrate had arrived, and that an investigation in the department of a Lieutenant-Governor of great experience had, to the Appellant's knowledge, resulted in exonerating the Magistrate from blame, and the attitude of the Appellant who neither defended the articles as true nor gave any assistance on the subject of what were the actual things upon which he founded his own beliefs and what steps, if any, he took to investigate the truth of the charges before giving them publicity, were also matters for consideration by the jury.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will be the subjects of separate analysis, but in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the jury's province. In the region of fact, the Privy Council will not interfere, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

Where, in answer to a charge of defamation, the accused did not plead justification, but nevertheless the truth of the libels continued throughout the trial to be urged by way of repeated *innuendo*, the Judge was justified in stating his own view of the facts, in order to counteract the improper use which was being made of the procedure, provided he did not withdraw the case on facts from the jury.

When during the trial the accused was apprised from materials placed before the Court that certain serious charges against the complainant were quite without foundation, he should have at once acknowledged his mistake and should not have adhered to the libel.

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by Statute, is undoubted. But there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. Before they will interfere, it must be established demonstrably that justice itself in its very foundation has been subverted, and that it is therefore a matter of grave Imperial concern that by way of an appeal to the King it be restored to its rightful position in that particular part of the Empire.

The authority of DILLET's case (4) does not justify interference by the Privy Council in a criminal case wherever there has been misdirection, leaving it uncertain whether that misdirection did or did not affect the jury's mind. That would be to convert the Judicial Committee into a Court of Criminal Review or Appeal for the Indian and Colonial Empire.

The practice of the Committee in respect of criminal trials is to this effect: It is not guided by its own doubts of the Appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused, as has placed him outside the pale of regular law, or within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.

RE DILLET (4) *considered.*

MAKIN *v.* THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (5), PILLAI *v.* THE KING-EMPEROR (6), LANIER *v.* THE KING (7), CLIFFORD *v.* THE KING-EMPEROR (8) *referred to.*

THE QUEEN *v.* MOOKERJEE (2), THE FALKLAND ISLANDS COMPANY *v.* THE QUEEN (3) *followed.*

This was an appeal from a conviction under sec. 499 of the Indian Penal Code, by the Chief Court of Lower Burma by special leave. The facts of the case sufficiently appear from their Lordships' judgment.

Sir Robert Finlay, K. C., (with *Messrs. David Alec. Wilson and Arthur Page* for the Appellant), submitted that the Appellant had acted in good faith, and that he was protected by the Ninth Exception to sec. 499 of the Indian Penal Code. The Exception read with sec. 52, I. P. C., was fully made out. Although at the beginning of the trial, the Chief Judge intimated that the Court could not enter into that part of the case which related to proceedings against Captain McCormick, the Chief Judge in his summing up went very fully into that matter, and that prejudiced the defence. The guilt or innocence of Captain McCormick was not in issue in the case. The defence that the Appellant had exercised due care and attention in writing what he did, that the Appellant published the libels in good faith, believing them to be true, having taken due care and attention to see that they were true, that was the only question for the jury to try. The Chief Judge in his charge had misdirected the jury, and the jury's minds had been diverted from the true issue. The learned counsel discussed the evidence in detail and submitted that admitting for the sake of argument that the charge against Captain McCormick was false, the Appellant had materials before him from which he had formed the judgment, and believed that the libels were true in good faith. The Appellant was prejudiced by a series of observations made by the Chief Judge in his summing up, specially the reference to the English law and authorities relating to libel. His observations with reference to Mr. Buchanan's state of mind and the guilt or innocence of Captain McCormick which was not material to the trial, created the greatest prejudice against the Appellant. There was a serious misdirection of the jury, and the Appellant was not properly tried.

[LORD SHAW remarked that the Board were not in the position of a Court of Criminal Appeal. What they had to consider was whether—apart from the alleged misdirection of the Judge—they could advise his Majesty that, taking into account the nature of the libel and the flaw in the proceedings, he should upset the conviction.]

(2) 1 Moo. P. C. N. S. 272 (1862).

(3) 1 Moo. P. C. N. S. 299, 312 (1863).

(4) 12 A. C. 459 (1887).

(5) [1894] A. C. 57 (1893).

(6) L. R. 40 I. A. 193; S. C. 17 C. W. N. 1110 (1913).

(7) L. R. [1914] A. C. 221; s. c. 18 C. W. N. 98 (1913).

(8) L. R. 40 I. A. 241; s. c. 18 C. W. N. 374 (1913).

P. G.

Channing
Arnold
v.
The King-
Emperor.

P. C.
Channing
Arnold
v.
The King-
Emperor.

Sir Robert Finlay.—It was not a mere flaw, but a vice which permeates the greater part of the summing up, and renders the verdict one which should not be allowed to stand.

It was the right of every British subject to be tried according to law. There was a misdirection of the most serious nature, which had resulted in a grave miscarriage of justice and caused substantial wrong, and the Board ought to set aside the conviction and sentence. Reference was made to the following authorities:—

Reg. v. The Inhabitants of Newbold (9). *Woodgate v. Ridout* (10), *Mayne's Criminal Law*, p. 699, *Makin v. The Attorney-General for New South Wales* (5), *The Queen v. Gibson* (11), *The King v. Dyson* (12), *Rex v. Stoddart* (13), *Bray v. Ford* (14), *The King v. Norton* (15), *The King v. Rodley* (16), *Dille's case* (4), *Pillai v., The King-Emperor* (6), *Wafadar Khan v. The Queen* (17).

Mr. Wilson followed.

Sir Erle Richards, K. C., and *Mr. A. M. Dunne* for the Crown submitted that the Appellant had not made out a case in which the Board ought to interfere and quash the conviction. There was no misdirection of the jury, and even if there was, that would not be a ground for recommending to His Majesty in Council that the conviction should be set aside. The Judicial Committee was not a Court of Criminal Appeal. To allow such appeals on the mere ground of misdirection would be opening the door for criminal appeals in other cases, and that would paralyze the administration of criminal justice in the Empire. Reference was made to the authorities cited by counsel for the Appellant, relating to the practice of the Board. Misdirection of the jury was no ground to set aside a conviction in India under sec. 537 of the Code of Criminal Procedure. The Appellant's case did not come within the principle of *Dille's case* (4). *Pillai's case* (6) was an exceptional one. It was not the practice of the Board to interfere, except in rare cases, in which gross miscarriage of justice had taken place. The Board ought not to exercise powers greater than those given to the High Courts in India by the Legislature under the Indian Criminal Law. On the merits, the Appellant was properly convicted. Taken as a whole, the summing up of the jury was quite proper. In order to ascertain whether there was misdirection or not, the whole conduct of the case ought to be examined—the plea

(4) 12 A. C. pp. 459, 467, 469, (1887).

(5) [1894] A. C. pp. 57 and 68 (1893).

(6) L. R. 40 L. A. pp. 193, 199, 200, and also at p. 241: s. c. 17 C. W. N. 1110 (1913).

(9) 11 Cox C. C. p. 57 (1869).

(10) 4 F. & F. 221 (1865).

(11) L. R. 18 Q. B. D. 537 (1887).

(12) L. R. 2 K. B. 454 (1908).

(13) 25 T. L. R. 612 (1909).

(14) [1896] A. C. 44.

(15) L. R. 2 K. B. 497 (1910).

(16) L. R. 3 K. B. 468 (1913).

(17) I. L. R. 21 Cal. 955 (1894).

of the accused and the speeches of his advocates and the summing up of the Judge *Rex v. Stoddart* (13). The defence of the Appellant was under provisos 2 and 9 of sec. 499, I. P. C. The Appellant maintained in the Courts below that the libels were true, and in fact, he persisted in saying that even in his petition for special leave. The onus was on the Appellant to prove good faith, and in the absence of such proof, the jury and the Court held that the accused was guilty. The evidence on the record did not justify the view that the Appellant really believed what he wrote. There was a discharge of the accused by competent Courts, and the complainant had a remedy under the Code of Criminal Procedure by revision to the Chief Court. That was not done; there was not sufficient material to afford a reasonable basis to the Appellant for believing that the libels were true. The reference to the English Law in the summing up of the Judge was evidently made in answer to arguments of counsel. The Appellant's defence based on proviso 9 was fairly and properly put by the Judge to the jury who disbelieved it, and even if the Board looked at it as a Court of Criminal Appeal, the conviction was right. Reference was made to the following authorities: *Rex v. Stoddart* (13), *The Queen v. Mookerjee* (2) *Pillai v. The King-Emperor* (6), *Lanier v. The King* (7), *Bir Bhan v. The King* (18). [Sec. 45, 105 Evidence Act, sec. 52, I. P. C., sec. 497, 537, Cr. P. C., *Clarke v. Brojendra Kishore* (19)].

P. G.
Channing
Arnold
v.
The King-
Emperor.

Sir Robert Finlay in reply.—The Board had jurisdiction to set aside the conviction. *Dillet's case* (4) was decided without actually deciding the guilt or innocence of the accused. It was held that the trial was not properly conducted. It could not be laid down generally that misdirection was no ground for interference. It ought to be a question in each case. That view was supported by *Makin's case* (5), where there was other evidence on the record, which might possibly have supported the conviction. In the present case, misdirection was a vital part of the trial, and substantial wrong had been caused by it. *Dillet's case* (4) ought not to be nullified. That would be a calamity. It is a great thing, that there is in the Empire a Court that could interfere with the administration of justice in the Criminal Courts of the Empire in cases of gravity and injustice for proper reasons. It was no answer to the Appellant's argument to say that one of the advocates for the Appellant referred in argument to the guilt of Captain McCormick. That fact made it all the more incumbent upon the Judge that his charge to the jury should have been proper and should have been

(2) 1 Moo. P. C. N. S. 272, 295, 299 (1862).

(4) 12 A. C. 459, 467, 469 (1887).

(5) A. C. [1894] pp. 57, 68 (1893).

(6) L. R. 40 I. A. 193 and 241 : s. c. 17 C. W. N. 1110 (1913).

(7) L. R. [1914] A. C. 221 : s. c. 18 C. W. N. 98 (1913).

(13) 25 T. L. R. 612 (1909).

(18) 18 C. W. N. 220 (1913).

(19) 16 C. W. N. 865 (1912).

P. C.
 Channing
 Arnold
 v.
 The King-
 Emperor.

confined to the real issue, namely, whether or not the accused acted in good faith. It was the duty of the Judge to censure counsel, if necessary, and not to be misled by irrelevant considerations. There was no proper trial of the Appellant, and he was entitled to an acquittal.

JUDGMENT.

Their Lordship's Judgment was delivered by Lord Shaw:—

By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1912. The charge was one of defamation or criminal libel, and the prosecution was laid under 21st chapter of the Indian Penal Code. In that chapter Section 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By Section 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which may extend to two years, or with fine, or with both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper, on the 28th April 1912. These articles were entitled "A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the chief editor of the *Rangoon Times*. He ceased to be editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October 1912 the trial of the case began before Sir Charles Fox, the Chief Judge, with a jury. It was protracted and lasted from the 3rd to the 19th October. On the latter date the jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, first, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about 11 years of age; secondly, the conduct and proceedings of Mr. Andrew as District Magistrate at the investigation which was conducted before him into this charge and which ended in his

declining to commit McCormick for trial; and thirdly, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the appellant's counsel of his entire position. And secondly, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded still the circumstances demanded a prolonged investigation on this other issue, namely, whether the appellant, from the material placed before him when he wrote the libel, was acting in good faith. If he did so act he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal code which apply to the case.

"Whoever," says Section 498 of the Indian Penal Code, "by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the case hereinafter excepted, to defame that person." Of the ten exceptions under the section three were mentioned. The first exception is in these terms: "It is not defamation to impute anything which is true concerning any person if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact." It was admitted by the counsel for the appellant at their Lordships' bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainly made, their Lordships regret to observe that surreptitiously it did appear and reappear in the case by way of repeated innuendo. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the jury this passage occurs: "You will observe that under the first exception the only question, apart from the question of the public good, that could arise was whether what had been said was true or not. Now it is noticeable that the defence does not rely on that exception, although up to the end we have had it reiterated that what was said was true." Upon being questioned the learned counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the

P. S.
Channing
Arnold
v.
The King-
Emperor.

P. C.
 Channing
 Arnold
 v.
 The King-
 Emperor.

learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

The second exception is in these terms: "It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct, and no further." The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the expression of opinion. This also has nothing to do with the case as it now stands, because it was, as it must be, admitted that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends. That is in these terms:—"It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protecting of the interest of the person making it, or of any other person, or for the public good." In connection with this exception it is necessary to take its language along with that of section 52 of the Code, which is to this effect: "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels admitted to be false Mr. Arnold did so in good faith because he believed them to be true, having given due care and attention to seeing that they were so. If the jury were satisfied that he did give that due care and attention, and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian Criminal Law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the appellant that in the course of the charge there was misdirection by the Judge, and that the jury's minds were diverted from this, which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after

all indefensible and corrupt. Their Lordships recognise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion; but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the appellant's counsel that this is so. "What you will have to consider, said the learned Judge to the jury, is whether "the imputations in these articles were published in good faith, "after due care and attention had been exercised on the part of the "writer of them. What is 'due care and attention' must depend "on the circumstances of each particular case." It is also fair to the learned Judge to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: "It is now for you to consider these matters, and to decide whether "the accused has satisfied you that he used the reasonable care "that he ought to have used. If you are satisfied that he did, and "that he did not overstep the bounds of law as I have explained "the law to you, then you must acquit him, but if he has not "satisfied you that he has exercised such due care and attention "before he committed himself to paper in this way, then it is your "bounden duty to convict him."

Before the exception and the alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice," after a considerable amount of inflammatory matter, it proceeds to "speak out against "those officials who have forgotten their duty and have dared to "trifle with the fair fame of England. Having made these very "serious allegations the appellant added: The facts before us "indicate that he (Mr. Andrew) conspired with Mr. Finnie to burke "the case; that he conducted it *in camera*; that he refused to heed "the protest of the complainants that the interpreter employed was "a paid parasite of McCormick, and did, in fact, deliberately mis- "translate; that of the witnesses for the prosecution only those "called by the District Superintendent of Police, and not even all "of them, were allowed to give evidence; that in a word the whole "enquiry was an outrageous make-believe and a mockery of what "he is nominally representative, the fair play and judicial honour "associated with the name of England. By what looks like the "meanest of tricks, the unfortunate complainants were unrepresented by any lawyer at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged in a corrupt plot. They contain not one, but a series of libels of the grossest character. These libels were at least seven in number. First, of conspiracy with Finnie to prostitute justice by saving McCormick. Secondly, of having apparently knowingly and as part of the partnership, bailed out McCormick for a non-bailable offence. Thirdly, of having

P. G.
Channing
Arnold
v.
The King,
Emperor.

P. G.
Channing
Arnold
v.
The King-
Emperor.

mised the Malay girl, her parents and friends, by leaving them without professional advocacy, which they had been led to expect. Fourthly, of having perverted the course of truth by a partisan interpreter. Fifthly, of having tried the case *in camera*. (Very little was made of this in argument.) Sixthly, of not having called certain witnesses in the enquiry; and Seventhly, of Mr. Andrew having heard the case knowing that certain people objected to his doing so.

Of these libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth, for if it were true that the magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the appellant's favour as establishing that although the charges were false yet he was excused by statute because he believed them *bonâ fide* and had given due care and attention to their truth, were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the appellant was connected with that paper. It contains a long narrative incriminating McCormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the District of Tenasserim referred to, the position of Sub-divisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din, who had had legal differences with McCormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Sub-divisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerly lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhœa, that he had taken her to his house, and himself (there being a hospital eight miles away) had personally examined her, and had then passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the learned Judge when he says: "It is not surprising that there should be indignation and hot feeling on the part of the sympathisers with the mother of the child Aina, and good reason for feeling of indignation at some of the conduct—the admitted conduct—of McCormick. However strong his inclination for amateur doctoring may have been, there could have been no justification for that. It was a thing that no man with a proper sense of decency should have done."

Although accordingly it is no part of the submission of the Counsel for the appellant at their Lordships' Bar that McCormick was guilty, their Lordships think it is an element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to shew that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elements in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion, and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say that the humane view which was taken of

P. G.
Channing
Arnold
v.
The King-
Emperor.

F. G.
 Channing
 Arnold
 v.
 The King-
 Emperor.

an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken, and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and on the 31st October the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made and had found that the allegations against the officers were without foundation. By this time the appellant had ceased to be editor of the *Rangoon Times*, but on the 2nd November 1911 Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned, was closed.

This was not so, however, with regard to the appellant, for in the following spring, namely, on the 7th March 1912, an article appeared in the *Burma Critic*, of which he was then editor, entitled "Alleged Grave Scandals in Tenasserim." On inquiry being officially made of the appellant, asking for particulars, the answer given was that the case referred to was that inquired into and disposed of in the previous autumn. The appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published.

Their Lordships cannot see their way to hold this part of the appellant's case to be satisfactory.

An investigation in the department of a Lieutenant-Governor great experience having resulted in exonerating Mr. Andrew from blame, the appellant assumed the grave responsibility for reopening the matter. He gave the authorities no inkling of any fresh information which had come to his hand, and in answer to their enquiry he simply stated that it was the old incident which he was reviving. Up to the present the appellant has not given at

their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordships' opinion, well worthy of consideration by the jury.

In the second place, both Judge and Jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs nor finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that, Mr. Arnold's action when charged gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "Q. Do you wish to make any explanation of your position in the case as to your *bona fides*, &c.,? (I pointed out to the accused that, under "Section 105, the burden of proof lies upon him)." "A. No. I have nothing to say. Everyone, from the Lieutenant-Governor downward, knows my character, and I have it at that." But of course it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisalment of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the enquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to this effect—to engage a pleader. On the 3rd August 1911, Mr. Andrew had intimated to Mr. Buchanan that he would engage an advocate to prosecute, and that

P. S.
Channing
Arnold
vs.
The King
Emperor.

P. C.
Channing
Arnold
v.
The King-
Emperor.

his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th he specially wrote to Mr. Buchanan, "Can you bring up interpreter trusted by all parties? Ask complainants to choose between," two advocates named, "to conduct their case." On the 7th, Mr. Buchanan having been unable to get such an interpreter, but having stated that the complainant wished to consult a certain vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, "Kindly do so, and name advocate early. As regards interpreter, your Court interpreter must come along to assist at any rate." On the 10th sanction was asked to engage Mahomed Ayooob "on the terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke down, because upon the 12th August the Commissioner at Mergui declined to sanction the proposal to retain an advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short the refusal to provide an advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew, but in spite of him. With regard to the interpreter it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Goe and he recommended Musaji. As mentioned Mr. Andrew wanted an "interpreter trusted by all parties" and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *The Queen v. Newman*,⁽¹⁾ was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endea-

(1) 1 E. and B. 558 (1853).

voicing to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson, who had been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior counsel for the appellant somewhat diverged. It is, however, unnecessary to labour this matter, because no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the Judge in disentangling relevant from irrelevant topics and in presenting the true issue to the minds of the jury. The real objection taken at their Lordships' Bar to this charge was that the jury were misdirected in this sense, and that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel. Some portions of it here and there might be the subject of difference of opinion.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this Committee under the Constitution will be afterwards dealt with.

Channing
Arnold
v.
The King-
Emperor.

P. G.
Channing
Arnold
v.
The King-
Emperor.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in the general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the jury's minds with the innocence of Mr. Andrew and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships the narrative given by the learned Judge to the jury in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not

asserted formally, and while the admission of their falsehood was formally granted, an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true. Such things may occur; but it is the duty of Judges to put what check they can upon them, and in the present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships' opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *The Queen v. Mukerji* (2) and Lord Kingsdown, in the case of *The Falkland Islands Company v. The Queen* (3) stated the matter compendiously in these words: "It may be assumed that the Queen has authority by virtue of Her Prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success." Their

P. G.
Channing
Arnold
v.
The King-
Emperor.

(2) 1 Moo. P. C. N. S. 272 (1862).

(3) 1 Moo. P. C. N. S. 299, 312 (1863).

P. G.
Channing
Arnold
v.
The King-
Emperor.

Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown till remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *re Dillet*.⁽⁴⁾ It should be observed that while Dillet's case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to Lord Kingsdown's judgment in the Falkland Islands case⁽³⁾ as authoritative and binding. After citing that learned Judge, Lord Blackburn added: In this statement of the general practice their "Lordships agree. They are not prepared to advise Her Majesty "to make this conviction for perjury an exception if it were not "made the sole foundation for the subsequent Order of the 27th March 1885," and liberty accordingly was granted to appeal against the order of the 27th March 1885, striking him off the roll, "and also to the extent above stated, and no further, against "conviction for perjury."

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in Dillet's case⁽⁴⁾ observed that the rule has been repeatedly laid down and has been invariably followed that "Her Majesty will not review or interfere with the course of "criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of "natural justice or otherwise, substantial and grave injustice has "been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that mis-direction did or did not affect the jury's mind then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the

(4) 12 A. C. 459 (1887).

following effect: it is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in Dillet's case (4) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin v. The Attorney-General for New South Wales* was cited (5) Makin's case in truth did not raise the question at issue in the present case. It depended upon the construction of Section 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the Judges have not been substituted for the jury. As they said, "In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the verdict of the jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence."

The second case founded on is that of *Pillai v. The King-Emperor* (6) in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate and certain officials. "If true," observed Lord Atkinson, "they show that these officials, or at least the Sub-Inspector, induced the witness to forswear himself and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they show that the witness was ready to commit deliberate perjury

P. G.
Channing
Arnold
v.
The King-
Emperor.

(5) (1894) A. C. 57.

(6) L. R. 40 I. A. 193; S. C. 17 C. W. N. 1110 (1913).

P. C.
Channing
Arnold
v.
The King-
Emperor.

"whenever he was confronted with the inconsistencies in his former statements. There is no alternative." The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's* case (4) was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Lavier v. The King* (7) and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime." The Board were of opinion that the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case (4) was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the judge had been a judge in his own cause), justice had "gravely and injuriously miscarried." *Lavier* stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford v. The King-Emperor*, (8) on the 17th November last, and their Lordships refer to the judgment of the Lord Chancellor in this and the other refusals referred to.

(7) L. R. (1914) A. C. 221; S. C. 18 C. W. N. 98 (1913).

(8) L. R. 40, I.A. 241; s. c. 18 c. W. N. 374 (1913).

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the Appeal be dismissed. There will be no order as to costs.

P. G.
Channing
Arnold
v.
The King-
Emperor.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION* No. 247 B OF 1913.

KING-EMPEROR APPLICANT.

vs.

A. J. COOKE & 4 others RESPONDENTS.

For the Crown—Higginbotham.

For Respondents—McDonnell.

Before Sir Henry Hartnoll, Officiating Chief Judge and
Mr. Justice Ormond.

Dated, 23rd February 1914.

Penal Code (Act XLV of 1860), Sec. 11, 34, 294A—Committee of Club—Person—“keeps,” meaning of—Common object—Liability of members—Purpose, double effect of—Official Acts—Presumption—Government, Collector assessing income tax, whether—Assessing income-tax, whether tantamount to authorization—“Not authorized,” meaning of—Exception—Onus of proof—Evidence Act (1 of 1872), Sec. 105, 114—Proposal—Drawing list, whether proposal.

The members of the Committee of a club who exercise full control over club matters, inclusive of the premises, “keep” the premises of the club within the meaning of that expression as used in sec. 294A of the Indian Penal Code.

Where a house is kept open for a double purpose, *viz.*, as an honest social club for those who do not desire to play, as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.

Jenks v. Turpin, (1884) 13 Q. B. D. 505, 53 L. J. M. C. 161; 15 Cox C. C. 486; 49 J. P. 20; 56 L. T. 808, followed.

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally.

The presumption is that official acts are regularly performed.

A Collector who is a Revenue Officer is not authorized to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization.

In the matter of Ramanajam Chetti, *Weir's Law of offences*, Vol. 1, p. 252, followed.

The words ‘not authorized’ in Sec. 294A, Indian Penal Code mean no more and no less than ‘unless authorised, or not having been authorised or without authority,’ and are in the nature of an exception or proviso and under Sec. 105 of the

*Reference by the District Magistrate, Rangoon, who differed from the unanimous verdict of a jury acquitting accused under sec. 294A of the Indian Penal Code.

L. B.
King-Emperor
v.
A. J. Cooke
and 4 others.

Evidence Act, the burden of proof lies on the accused to show that the lottery was authorised by Government.

Apothecaries' Company v. Warburton, 2 B. and Ald. 40; 106 Eng. Rep. 578, and *Martin v. Benjamin*, (1907) 1 K. B. D. 64; 79 L. J. K. B. 81; 96 L. T. 197; 71 J. P. 30; 23 T. L. R. 53; 51 S. J. 60 followed.

Rex v. James (1902) 1 K. B. D. 540, 71 L. J. K. B. 211; 66 J. P. 217; 50 W. R. 286; 86 L. T. 202; 18 T. L. R. 284; 20 C. C. C. 156, distinguished.

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description: "The Sweep for June is now open. It will close on the 20th June 1913. Settling day 23rd June 1913. All tickets must be taken in the name of member, etc.," was held to be a proposal within the meaning of Sec. 294A, Indian Penal Code.

JUDGMENT.

HARTNOLL, OFFICIATING C. J.—This case has been referred to this court by the District Magistrate of Rangoon under the provisions of Sec. 307 of the Code of Criminal Procedure. The five accused A. J. Cooke, G. Shead, H. Henderson, F. J. Snow and T. D'Silva have been tried before the District Magistrate of Rangoon and a jury under the following charges.

Firstly—That you, between April 1910 and 22nd June 1913, did keep an office or place for the purpose of drawing a lottery not authorised by Government at 279, Dalhousie Street and thereby committed an offence punishable under Sec. 294A (i) of the Indian Penal Code and within my cognizance.

Secondly—That you on or about the (1) 22nd May 1912 (2) 22nd July 1912 (3) 22nd May 1913, did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of tickets in a lottery not authorised by Government by publishing lists of winners ascertained at drawings held on above dates and thereby committed an offence punishable under Sec. 294A (ii) of the Indian Penal Code and within my cognizance.

The jury brought in a verdict of not guilty on all the charges; but the District Magistrate differed from them. He considers that all the accused are guilty under the first head of the charges; and that A. J. Cooke and J. D'Silva are guilty under the second head of charge.

It is not denied that we have full powers to convict the accused in accordance with the opinion expressed by the District Magistrate; but it is submitted that in any case the verdict of the jury should not be interfered with. Sec. 307 (3) of the Code of Criminal Procedure enacts that we may exercise any of the powers which we may exercise on an appeal and that subject thereto we shall after considering the entire evidence, and after giving due weight to the opinions of the Session Judge and the jury acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. In this case the words "District Magistrate" and "Sessions Judge" are synonymous—Sec. 451 (b) of the same Code.

It is not denied that a lottery was drawn monthly from April 1910, to June 1913, at No. 279, Dalhousie Street, Rangoon. These premises were tenanted by the Indian Telegraph Association Club, at first in part but subsequently wholly. The lottery started

in a very small way but assumed in the end very large proportions, the takings for June 1913, amounted to Rs. 1,82,480. All the accused were members of the committee of the aforesaid Club but they submit that they did not keep any office or place for the purpose of drawing the lottery. They assert that the lotteries were managed by the Club through its committee, that the premises belonged to the Club, that in any case five members out of a committee of nineteen members could not be held to keep the premises, that it was the Club who kept the premises, that perhaps all the members of the Club might be held to keep the premises, or all the members of the committee, but certainly not only five members out of 19. Certain cases were quoted showing that Club servants or members of Club Committees could not be sued civilly for goods supplied to Clubs and it was urged that the five accused could not have a suit brought against them personally for use and occupation. So it is said—how can they be held to keep the premises? Such cases do not seem to me to be of assistance in arriving at a conclusion in the present case as to whether the five accused kept the premises within the meaning of Sec. 294 (a) 1st part of the I. P. C. They depend on whether there has been a contract according to which members of a club or club committee become personally liable or not for club debts. The circumstances must differ in each case and depend on matters such as the actual terms of contracts—the club rules—and so on. Even supposing that members of a club committee would not be personally liable for goods supplied to their Club, I consider that in certain circumstances they should be held to keep the premises within the meaning of Sec. 294 (a) 1st part of the I. P. C., and the evidence must be examined to see whether or not the accused should be held so to keep the premises in the present case. The minute book Ex. W shows that the management of the Club rested with the Committee.

At a meeting of the committee held on March 3, 1912, at which Cooke, Henderson, Shead and D'Silva were present, it was agreed that the lower flat of the premises alongside the club be engaged at a rental of Rs. 40 per mensem as well as two temporary clerks on Rs. 40 each (tentatively) in order to carry out the writing of money orders free of cost for the public with the object of gradually stopping cash sales, and encouraging the services of the post office, thereby safeguarding the interests of the sweep. At another meeting held on January 5, 1913, at which all the accused except Shead were present, it was proposed by Henderson, seconded by D'Silva, that the president enter into negotiations for a lower rental failing which the sum of Rs. 850 be given on a year's lease. This proposal was made in discussing Misquith's letter. Misquith was then the owner of 279, Dalhousie Street. The above extracts from the committee book show that the committee had the power of renting premises and the very premises set out in the charge in the second instance. This power must be taken to have been delegated to them by the general body of members. In Stroud's judicial dictionary it is said "to keep" a place or thing involves the idea of having over it the immediate control

L. B.
King-
Emperor
v.
A. J. Cooke
and 4 others.

L. E.
King-
Emperor
v.
A. J. Cooke
and 4 others.

of a character more or less permanent." The minute book and the accounts show that the committee exercised full control over club matters, inclusive of the premises. I would instance item No. 27 of the meeting of April 6, 1913. It was ordered that the accounts be audited every month by a committee member. This shows that the committee had full control over the accounts. Looking at the accounts for February, 1913, it is seen that a carpenter was paid for fixing wood work at the entrance to the club, that servants were paid and supplied with uniform. It seems needless to multiply instances. The immediate control of the premises was clearly vested in the committee of which the five accused were members. I would therefore hold that for the purposes of Sec. 294A of the Indian Penal Code the committee kept the premises, and that accused cannot be allowed to shift their responsibility on to the general body of members or to the club, which is an abstract entity or incorporeal body.

The next question for consideration is whether it is proved that the premises were kept for the purpose of drawing a lottery. They were clearly also kept for the purpose of a social club as well, and this being so, it is argued that they were not kept for the purpose of drawing a lottery, that to incur liability under Sec. 294A of the Indian Penal Code it must be shown that the premises were kept exclusively for such a purpose. In the case of *Jenks v. Turpin*,⁽¹⁾ where certain persons were convicted of keeping and using premises for the purpose of unlawful gaming and assisting in the management—Hawkins J. said: "If the house had been kept open for a double purpose viz., as an honest social club for those who did not desire to play as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept 'for the purpose of gaming.'" I agree with that view and hold that in the present case it is not necessary to show that the premises were used exclusively for the purpose of drawing a lottery. The evidence shows and it is admitted that a lottery was drawn monthly. *But* it must be shown that the committee kept the premises for such a purpose. The accounts and minute books showed that conclusively. I have already referred to the entry concerning the engaging of clerks for sweep purposes. I would quote a few more instances.

1. Meeting of the 12th March 1912 when all the accused except D'Silva were present—sale of tickets over the counter discussed.

2. Meeting of 31st March—Snow, Cooke, D'Silva and Henderson present—revision of task work and cash sale earnings discussed.

3. Meeting of 30th June 1912 all accused present—Cooke made Secretary on Rs. 400 dependant entirely on the conditions and continuance of the sweep, reaching a maximum of Rs. 500.

(1) (1884) 13 Q. B. D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 15 Cox. C. C. 486; 49 J. P. 20.

4. The same meeting—minute (13) With reference to certain questions raised by several members regarding the handling of sweep tickets—unanimously resolved that the Commissioner of Police be approached for his opinion—also that sound legal advice be obtained in the matter.

It is needless to multiply instances. I hold that the committee kept the premises for the purpose of drawing a lottery, but it is argued that on this finding, the accused cannot be convicted—that they are not the committee and are only a part of it. There seems to me to be no substance in such an argument. As is said by Mayne in his Criminal Law of India, second edition, page 466, "Where several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually being done." The principle is that laid down in section 34 of the Indian Penal Code which enacts that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for such act in the same manner as if the act were done by him alone." Here, the criminal act alleged is "keeping an office or place for the purpose of drawing a lottery not authorised by Government," and though learned counsel lays special stress on the word "keep" and argues that if a body of men is held to keep a place, a portion of that body cannot be said to keep it, I am unable to follow his argument. Whether the common object be the keeping of a place for the purpose of drawing a lottery not authorised by Government or the hiring of a gang of house-breakers to commit thefts, it seems to me that all who engage in such an object are each individually guilty, and that they can be prosecuted successfully in whole or part, jointly or severally. Here the five accused are shown to be five of a body of men who united together to draw and control a monthly lottery, and if that common purpose is illegal they are equally and individually guilty.

The next contention raised was that it has not been proved by the prosecution that the lottery was not authorised by Government. The Assistant Government Advocate allows that the burden of proof lies in the first instance on the Crown to show that it was not so authorised. "Government," is defined in section 17 of the Indian Penal Code as follows "the word 'Government' denotes the person or persons authorised by law to administer Executive Government in any part of British India." The Commissioner of Police, Mr. Tarleton, deposed that the sweep had not been authorised by Government and cross-examined said: "I say unauthorised as the result of inquiries. I mean to my knowledge there should be some record of it either in the club or with me." From such evidence it is clear that Mr. Tarleton has not expressly authorised it and knows of no such authorisation. The fact that the Local Government has sanctioned the prosecution may also, in my opinion, be taken into consideration as tending to show that the Local Government has never sanctioned it. It is extremely

E. B.

King-
EmperorA. J. Cooke
and 4 others.

L. B.
King.
Emperor
A. J. Cooke
and 4 others.

improbable that the Local Government would have sanctioned the prosecution, if it had ever sanctioned the sweep, and it may be presumed that official acts are regularly performed. In my opinion it would have been an irregular act to have sanctioned this prosecution, one of the essentials of the offence being that the lottery was not authorized by Government, if in fact it had been so authorized by the Local Government itself; and in the ordinary course of business, on the Local Government considering whether this prosecution should be sanctioned or not, it was surely its duty to satisfy itself from its papers or otherwise that no such sanction at any rate by itself existed. To have sanctioned the prosecution after the Local Government had itself authorized it, would, in my opinion, have been an irregular act.

I would also refer to those exhibits which display a desire for secrecy. I would especially refer to JJ. 12, which is headed "Private and Confidential" and has at the foot of the note "Note—this is a private communication and all recipients are earnestly requested not to post them up in any prominent place or public notice board." It is a drawing list for April 1913. There are also those exhibits that are marked "For members only. Private and Confidential." Then again there is the minute of the Committee which I have already referred to where it was resolved to consult the Commissioner of Police and obtain sound legal opinion and the notice of the 8th July 1913 which stops all remuneration. If this lottery had been expressly sanctioned, as it assumed such large proportions and became so widely known, surely this would have been within the knowledge of the Commissioner of Police. If there has ever been any express sanction, it would be the simplest thing in the world for accused to produce it or quote it. Considering that, I think that the prosecution made out a *prima facie* case that the lottery was never expressly authorized and that it is for accused to show that it was authorised. They do not plead that it was expressly authorised, but relied on Mr. Lucas's having visited their premises to settle a dispute with reference to a lottery prize and on the Collector of Rangoon assessing them income-tax as proving authorisation by Government. I should rather say that they relied on these facts at the trial, for they were not strongly pressed at the hearing of this reference. As regards the first incident, I am unable to say that the intervention of Mr. Lucas ever authorised the sweep. He merely went on a complaint being lodged to settle a dispute. As regards the second, it would not be within the scope of the Collector's authority to sanction a lottery. He is a Revenue Officer. The incident is analogous to the fact of the case of Ramanujan Chetty and others.⁽²⁾ Moreover the mere act of taking income-tax from the club on the profits of the lotteries would not authorise them. Although the Assistant Government Advocate allows that in the first instance the burden of proof lies on the Crown to show that the lottery was not authorised, my learned colleague for reasons given in his judgment considers that the burden

(2) 1 Weir 252.

of proof lies on the accused persons to show that the lottery was authorised by Government. The words in the section "not authorised by Government" are equivalent to meaning, "unless it (the lottery) has been authorised by Government." It is a reasonable view, in my opinion, to take that they are in the nature of an exception and as they appear in the section defining the offence it is reasonable to hold that section 105 of the Evidence Act applies and that the burden of proof lies on the accused persons to show that the lottery was authorised by Government. An analogous section in the Indian Penal Code would be section 325 and this is provided as an illustration to section 105 of the Evidence Act. I therefore agree in the opinion expressed by my learned colleague. Though the burden of proof in my opinion as regards authorisation was placed wrongly, I am unable to see that the accused were in any way prejudiced in consequence, nor is it suggested that they were. They have no doubt brought out all the facts on which they rely to prove authorisation—at any rate they had full opportunity to do so.

In the result, as regards the first head of charge, I am of opinion that the verdict of the jury was manifestly wrong and that all five accused were proved guilty.

As regards the second head of charge, the cases of Cooke and D'Silva only are concerned. It was urged that the drawing lists contained no proposal within the meaning of section 294A. In my opinion, they clearly do. KK 5 is the first. On the first page is set out the list of the winners drawn on the 22nd May 1912. Then at the back in English and Burmese is printed amongst other matter: "The sweep for June is now open. It will close on June 20, 1912. Settling day June 23, 1912. All tickets must be taken in the name of a member, Your name and address is registered against the number of the ticket sent you. No books are sent out and tickets must be applied for by postal money order addressed to a member." It is unnecessary to go further into what is written. KK 5 is clearly a proposal within the meaning of section 294A. KK 3 is to the same effect, except that it refers to July drawings and the August lottery. OO is to the same effect, except that it refers to the lottery drawn on May 22, 1913, as regards the winners and to the coming lottery for June, 1913. The Sangu Valley printing press printed many thousands of these drawing lists on the standing order of Cooke and D'Silva. In May 1912, that press printed 18,000 drawing lists, in July 1912, 32,000 and in May 1913, 33,000. There is clear evidence that a durwan used to distribute the drawing lists at the entrance to the club premises indiscriminately to those who wanted them, that drawings were witnessed by people of all nationalities and that the drawing lists were sent by post to those not being members of the club who requisitioned for them. The bills for the printing went into the accounts which were kept by D'Silva, the sweep secretary. See Exhibit H. Exhibit R., one of a thousand copies printed in January, 1913, says that two of the men to whom money orders should be addressed were Cooke and D'Silva, and the letter gave a description of the sweep and says that tickets

L. B.
—
King-
Emperor
v.
A. J. Cooke
and 4 others.

L. B.
King-
Emperor
v.
A. J. Cooke
and 4 others.

can only be obtained on application to a member by name through postal money order. The letter bore at the bottom "President I. T. A. Club." So the intention was for Cooke to sign it as he was the president of the club. Exhibit AA is another form of letter saying to whom application should be made for tickets. Cooke and D'Silva are two of these mentioned. The evidence, is in my opinion ample to convict Cooke and D'Silva. They were at any rate two of those who united together to publish these proposals and they clearly took a leading part in doing so.

The question of sentence remains. It is urged that this is a test case, that the lottery has been allowed to run on a long time without action being taken, and that everything has been fair and aboveboard, that certain undertakings were given in the court of the district magistrate with reference to the non-publication of drawing lists and not keeping a place for the purpose of drawing the lottery, that the 20 per cent. of the proceeds have been applied to benevolent purposes. I would take such arguments into consideration except that I think that pending the disposal of this case the lottery should have been stopped altogether. But I am of opinion that the case is not one for a nominal sentence. The lotteries assumed enormous proportions monthly as shown by the evidence of Mr. Lucas. To take the figures for a few months showing the gross takings and the 20 per cent. held up and not distributed, but kept for other purposes: 1912, March Rs. 74,000; 20 per cent. gross takings held up Rs. 14,800; August Rs. 116,250, Rs. 23,250; November Rs. 143,350; Rs. 26,870. 1913, January, April and June gross takings Rs. 1,57,221 Rs. 1,55,350 and Rs. 1,82,050 20 per cent. held up, Rs. 31,441 Rs. 31,270 and Rs. 35,110. The evidence shows contributors not only in Rangoon but in the Toungoo District and Moulmain. It is probable that many other tickets were taken from many places in Burma considering the number of drawing lists distributed. I would find Albert John Cooke, George Shead, Henry Henderson, Frank John Snow and Thomas D'Silva guilty of the offence of keeping a place for the purpose of drawing a lottery not authorised by Government and so of an offence punishable under the first part of section 294A of the Indian Penal Code and would direct that each pay a fine of Rs. 1,000, or that in default they be each rigorously imprisoned for six weeks. I would also find Cooke and D'Silva guilty under the second head of charge, viz., that on or about May 22, 1912, July 22, 1912, and May 22, 1913, they did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of a ticket in a lottery not authorised by Government, by publishing the lists of the winners ascertained at the drawings held on the above dates and that they thereby committed offences punishable under the second part of section 294A Indian Penal Code and I would direct that they do pay a fine of Rs. 5 each for each offence—one on or about May 22, 1912, a second on or about July 22, 1912, and a third on or about May 22, 1913; and that in default of payment of such fines the imprisonment be seven days' simple in respect of each fine.

ORMOND, J:—I agree generally with the conclusions arrived at by my learned colleague the officiating Chief Judge. There can be no doubt that the Club premises were kept for the purpose of drawing a lottery within the meaning of section 294 A of the I. P. C., and the only two questions that then arise, relate (i) to the proof of the fact of non authorization of the lottery by Government and (ii) to the liability of the accused who formed part only of the committee of the Club. Although Mr. Tarleton, the Commissioner of Police does not say that if the Government had authorized the lottery, he would have known it; I think there was evidence to go to the jury for a finding that the Government had not authorized the lottery; and I think it would be a fair and legitimate inference to draw from the facts proved in the case, that the Government had not authorized the lottery. But we are asked to upset the verdict of a jury and I would prefer to decide the case upon points of law as far as possible. In my opinion under sections 105 and 106 Evidence Act, the onus was on the defence to shew that the lottery was authorized. Section 105 of the Evidence Act lays the onus on the accused of "proving the existence of circumstances bringing the case within any special exception or proviso contained in any law defining the offence. Mr. McDonnell for the defence contends that this section does not apply if the proviso or exception is contained in the body of section. He refers us to the rule of English Law, which is based upon a technical difference between a proviso and an exception. The rule is stated by Lord Alverstone in *Rex v. James*(3) as follows:—"It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." No reference is made in that case to the provisions contained in section 14 of 11 and 12 Vict. c. 43. Apparently the rule stated above applies to trials upon indictment and not to summary proceedings before justices. It is unnecessary to decide if under the rule as above stated, the onus would be on the prosecution to prove non-authorization in this case. Section 105 of the Evidence Act must be construed without reference to any technical rule of English Law; and if the words "not authorized by the Government" are in effect a 'special exception or proviso contained in the law defining the offence', the onus is on the accused to prove authorization.

The words "not authorized" in section 294 A, I.P.C., mean no more and no less than "unless authorized" or "not having been authorized" or "Without authority," and they are clearly in the nature of an exception or proviso. Section 105 of the Evidence Act which applies generally to all criminal trials, is analogous to the last part of section 14 of 11 and 12 Vict. c. 43 which applies to summary proceedings before Magistrates and which runs as follows:—"If the information or complaint in any such case shall

R. B.
King-
Emperor
v.
A. J. Cooke
and 4 others.

(3) (1902) 1 K. B. D. 540 at p. 545; 71 L. J. K. B. 211; 66 J. P. 217; 50 W. R. 286; 86 L. T. 202; 18 T. L. R. 284; 20 Cox. C. C. 156.

L. B.
King-
Emperor
v.
A. J. Cooke
and 4 others,

negative any exemption, exception, proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same." In prosecutions under the old game laws which made certain acts offences unless the accused had certain qualifications, it was not necessary for the prosecution to prove the absence of such qualifications. So too in an action for a penalty under 55 Geo. 3 c. 194, section 20 for practising as an apothecary without having obtained a certificate of qualification, it was held that the onus lay on the defendant to shew that he had obtained a certificate and that it was not necessary for the plaintiff to prove the negative. *Apothecaries Company v. Warburton* (4).

Illustration (b) to section 106 of the Evidence Act is as follows:—"A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him." I see no difference in principle between that case and the present one. In my opinion the onus was on the defence to shew that the lottery had been authorized. It is not suggested that the accused were prejudiced in their defence by the prosecution having assumed the burden of proving the absence of authority. It is contended for the defence that the lottery must be taken to have been authorized by Government, because it had been going on for so long and the profits derived by the Club from the lottery had been assessed to income-tax; but this clearly does not amount to authorization. Then as to the liability of the accused:—The Club premises were undoubtedly "kept" for the purpose of drawing the lottery; the Committee had the control and management of the Club premises; the five accused were active members of the Committee and it was under the directions of all five that the place was kept for the purpose of drawing the lottery. The fact that others may have jointly kept the place with them, would not prevent these accused from being directly liable as principals as to the act of "keeping."

In all other respects I concur with the judgment and proposed order of my learned colleague.

We were told by Mr. McDonnell that the lotteries have not been stopped, but that lists are not published and that the lotteries are not drawn in the same place more than once. Reliance apparently is placed upon the judgment in *Martin v. Benjamin* (5) which was a case cited by the prosecution. I do not wish it to be understood that I accept this to be good law:—that a person who habitually holds a lottery does not commit the offence of keeping a place for the purpose of drawing a lottery, simply because he has a different place on each occasion. The above case in my opinion is not an authority for such a proposition.

(4) 1 Carrington and Payne's Reports 538; 2 B and Ald. 40; 106 Eng. Rep. 578.

(5) (1907) 1 K. B. D. 64; 76 L.J.K.B. 81; 96 L. T. 197; 71 J.P. 30; 23 T. L. R. 53; 51 S. J. 50.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL IST APPEAL No. 142 OF 1911.

MAUNG THA KADO APPELLANT.

vs.

MA THIN MYAING RESPONDENT.

For Appellant—Dhar.

For Respondent—Bomanji.

Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Ormond.

Dated, 16th February, 1914.

Buddhist Law—Husband and wife—Desertion for more than a year—Dissolution of the Marriage-tie—Effect of a subsequent suit for restitution of conjugal rights.

Where the wife left her husband and lived separate from him for a period of 6 years and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted and where 17 months after separation the husband took a second wife.

Held on a consideration of the facts, that the conditions contemplated by Sec. 17 of Chapter V of the *Mamgye* for the dissolution of a marriage were completed in this case and when the woman died in 1909 the status of husband and wife did not exist between the parties.

JUDGMENT.

ORMOND, J:—Ma Thin Myaing claims to be the adopted daughter of the deceased Ma Saung and the first matter to be decided is whether she has proved that she was. The learned Judge on the original side has found that she has proved the relationship which she alleges and on a perusal of the evidence I agree with this decision. There is no good reason to disbelieve U Tha Shwe, who was a very close neighbour of Ma Saung up to the time of her death. He says that he knows Ma Thin Myaing was Ma Saung's adopted daughter by repute and because Ma Saung told him so. From his evidence it is clear Ma Thin Myaing lived with Ma Saung before her marriage, and that she was married from Ma Saung's house. Mg. Tha Kado does not deny knowing of Ma Thin Myaing's existence. Why should Ma Saung have taken Ma Thin Myaing into her house and supported her and according to U Tha Shwe and Ma Thin Myaing in the life time of her father?

There seems no reason to disbelieve Ma Thin Myaing in this statement of hers. Maung Ba Than, who says he is a clerk in the employ of the Burma Railways and so *prima facie* a respectable man says that he once lived in Ma Saung's house and that the latter told him she had an adopted daughter at Tavoy. There is no reason to disbelieve this man. Ma Kyin Tha says that Ma Saung told her that Ma Thin Myaing was her daughter and treated her as such. She is a paddy trader and there is no good reason to

L. B.
Maung Tha
Kado
vs.
Ma Thin
Myaing.

L. B.
Maung Tha
Kado
vs.
Ma Thin
Myaing.

disbelieve her. Maung Aung Myat who says that he is a saw-pit owner says that about 1908 Ma Saung said she had adopted a daughter. Maung Tha Kado has not met Ma Thin Myaing's case satisfactorily and no desertion by Ma Thin Myaing is proved. Her son-in-law, who was also Ma Saung's nephew was with Ma Saung at her death, and according to U Tha Shwe her daughter used to live with Ma Saung. I consider Ma Thin Myaing's adoption established.

The next point for decision is whether the status of husband and wife existed between Ma Saung and Maung Tha Kado at the time of Ma Saung's death. They were married in 1896. In June 1903 Ma Saung left the house where she and Maung Tha Kado lived together, and sued him for divorce on the ground of cruelty. She failed to obtain a divorce. As she never returned to him, she must be taken to have deserted him in June 1903. She died in November 1909, and so the parties remained separate for some 6 years. But according to the F. B. ruling of this Court *Thein Pe v. U Pet* (1) desertion of the husband by the wife for one year does not *ipso facto* and without any further and expressed act of volition on the part of either party to the marriage dissolve the marriage tie. Have there in this case been any acts of volition dissolving it? In December, 1903, Maung Tha Kado sued Ma Saung for divorce on the ground of adultery. This was six months after her desertion of him. He may have been trying to get hold of her property by bringing such a suit, but in any case it shows that he wanted to divorce her. No divorce was granted as he was found not to have proved his case. In February 1905, he sued Ma Saung for restitution of conjugal rights, and lost his case. He may in such suit have been actuated by a desire to get hold of her property and not by a desire to again cohabit with her, for he in that case allowed he had taken a temporary wife one Ma Eik and that he had been living with her for some 12 months. He made this statement on 15th November, 1905. So that would indicate that he took Ma Eik about November 1904 or about 17 months after Ma Saung deserted him—at any rate after the expiration of the year of desertion laid down by the Dhammathat. He endeavoured to make out in 1905 that Ma Eik was not his wife. In the present case he allowed that Ma Eik was his wife. This was in August 1911.

He clearly took Ma Eik as his wife from the beginning and the taking of her as such was clearly an act of volition by him as indicating that he did not desire Ma Saung any longer, and that he finally severed the marriage tie between them by doing so. The whole of the conditions contemplated by section 17 of Chapter V of the *Manugye* for the dissolution of the marriage became complete. Ma Saung left his house. She did not return within the year. It is not shown that he maintained her in any manner after she left. Before he took Ma Eik as his wife he did not claim Ma Saung as such. On the contrary he tried to divorce her. He had the right to separate and marry again and he finally severed the tie

(1) 3 L. B. R. 175.

between them by doing so. The fact that he sued Ma Saung for restitution of conjugal rights after taking Ma Eik seems to me not to affect the matter. Apart from the probability that he was then merely endeavouring to get hold of Ma Saung's property and that he had no intention of again cohabiting with her or treating her as a wife, she was no longer his wife for the reasons which I have set out above. It is true that Ma Saung did not defend the suit for restitution of conjugal rights on the ground that she was no longer the wife of Maung Tha Kado, but that she defended it on other grounds, which show as far as she was concerned a fixed determination not to resume conjugal relations; but in my opinion it was open to her to make such a defence, and the argument can clearly be raised and considered in this case where the contest is between those left behind by Ma Saung as to who is entitled to inherit her property and where it is necessary to determine the legal status of each party to her. All facts showing what the status was must receive consideration. In my opinion at the time of Ma Saung's death there was no tie of marriage existing between her and Maung Tha Kado.

The second ground of appeal has manifestly no substance in it. I would dismiss this appeal with costs.

HARTNOLL, J :—I concur.

L. B.
Maung Tha
Kado
vs.
Ma Thin
Myaing.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL No. 69 OF 1912.

P.R.N. PALANIAPPA CHETTY ...DEFENDANT—APPELLANT.

vs.

P. M. R. M. FIKM by one of the partners,
A.R.P. PALANIAPPA CHETTY ...PLAINTIFF—RESPONDENTS.

For Appellant—S. N. Sen.

For Respondent—J. R. Das.

Before Mr. Justice Ormond and Mr. Justice Parlett.

Dated, 12th February, 1914.

Principal and Agent—Suit by principal against his agent for neglect or misconduct—Limitation Act, Art. 89 and 90 of Sch. II—Starting of limitation—From the time the misconduct of agent became known to principal.—Is such knowledge to be presumed before getting books of account—Recognised agent—his power.

In a suit by a principal against his agent for damages for misconduct and neglect, knowledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the agent.

Where after the termination of an agency, the agent first handed over the books of account to a Panchayat from whom the Principal secured them after some time held that the period of limitation under Art. 90 Sch. II of the Limitation Act for principal's suit against agent for his misconduct would run from the day on which he got the books of account from the Panchayat.

An agent authorized to enter appearance in suits can sign the amended plaint when once the suit has been instituted with the approval of the plaintiff.

JUDGMENT.

L. B.

P. R. N.
Palaniappa
Chetty
vs.
P. M. R. M.
Firm by one
of the
partners,
A. R. P.
Palaniappa
Chetty.

On the 1st April 1911 the plaintiffs-respondents P. M. R. M., a Chetty firm consisting of 4 partners mentioned by name in the plaint sued their agent the defendant for an account alleging mismanagement, neglect, fraud, etc., and assessed the amount due to them at Rs. 7,500 stating that the cause of action arose on the 5th May 1908 when the agency was terminated. They also estimated the value of the documents and securities etc., to be recovered at Rs. 500 making a total of Rs. 8,000. The defendant was originally appointed agent from November 1902 for a period of 3 years. In the plaint the plaintiffs stated that at the expiration of the 3 years owing to the mismanagement and neglect of defendant, large amounts were found outstanding and with a view to their realization the period of his services was extended on the same terms as originally agreed upon as regards rate of salary, that finding defendant unable to realize the said outstandings, the plaintiffs sent another agent for his relief and directed him (presumably the defendant) to render an account of all his dealings with the firm's money and to make over all the firm's properties, viz., cash, books of account, etc., to the said new agent. The defendant in his written statement denies that the new agent was sent out.

Narayanan, the son of one of the partners of the plaintiffs' firm, came to Rangoon in 1906 and from his evidence it appears that the defendant refused to make over the books of account, that the books of account were made over by the defendant to a Panchayat in November 1907 and only obtained by the plaintiff or his agent from the Panchayat in May 1908. The learned District Judge held that the claim for an account was barred under Art. 89 of the Limitation Act inasmuch as the agency must have been terminated before the 27th November 1907 when the books were handed over to the Panchayat and the suit was instituted more than 3 years after that date. The plaintiff then applied to amend his plaint by asking for damages for the debt, etc., alleging certain specific acts mentioned in the said schedule to the amended plaint. In that amended plaint the cause of action is said to have arisen on the 5th May 1908. The amendment was opposed by the defendant's Advocate but was allowed on 7th March 1912. Under Art. 90 a suit by a principal against an agent for neglect or misconduct could be brought within a period of 3 years from the time such neglect or misconduct became known to the plaintiff. The knowledge of these acts of misconduct could only be known to the plaintiff from the books and the evidence shows that he did not get these books until May 1908 which would be within 3 years from the date of institution of the suit; but would be more than 3 years from the time when the amendment was allowed. In one sense the amendment altered the cause of action. The plaintiff originally asked for an account only. By his amendment he asked for damages for negligence, but both cases would involve liability of the defendant for damages for these acts of negligence, and as pointed out the original plaint alleges

misconduct though it does not specify the specific acts. The onus is more heavily on the plaintiff in the amended plaint than in the original plaint. It is contended for the defendant that the amendment should not have been allowed and that if it was allowed the period of limitation should have been reckoned up to the date of the amendment. But if it is treated as an amendment, the time will run up to the date of the original plaint. Very wide powers are granted to the court for allowing amendments to pleadings, and we think the amendment was properly allowed. It is then contended for the defendant that under Art. 90 limitation would run from the time when the plaintiff should have known of defendants' misconduct, that he had knowledge of some misconduct on the part of the defendant at the end of 1905, and that therefore his claim under Art. 90 for damages should be held to be barred. We are not prepared to hold that in Art. 90 after the words "becomes known" we should read the words, or "might have become" or "should have become known" to the plaintiff. Moreover as pointed out above, the plaintiff could have no sufficient knowledge of negligence upon which he could bring a suit for damages as long as he was not in possession of the books.

The original plaint was signed by the managing partner of the plaintiff; subsequently one of the four partners (the managing partner) died and an agent who has been appointed under a general power by that managing partner, signed the amended plaint. It is contended that the amended plaint therefore was not duly signed and the agent was never authorized to sign it because the firm ceased to exist upon the death of one of their partners and the authority for the agent would thereby also cease. But the amended plaint states that the agent was carrying on the business for the surviving partners of the plaintiff's firm in their names and they were all resident outside the jurisdiction of the court. That fact has not been challenged. He would therefore be a recognised agent within the meaning of O. 3, R. 2 by whom appeals, applications and certain acts in the suit may be done. We were referred to the case of *M. E. Mootala and Co., v. Ponasawmy*, reported in 2 L.B.R. 41. There it was held that an agent carrying on business in the name of his absent principal could not sign a plaint unless he was authorized to do so either expressly or impliedly. One of the reasons in that judgment was that otherwise the principal would be subjected to the risk of being involved in litigation without his knowledge at the instance of an agent whom he had appointed merely for the purpose of carrying on the business and had not expressly authorized to institute suits. That reasoning would not apply to the case of an agent, even though not authorized to institute suits, being authorized or impliedly authorized to amend the plaint. Amendments vary in degree and it would be extremely inconvenient if the recognized agent who can enter an appearance should be incapable of agreeing to an amendment however small on behalf of his absent principal. We think such an agent would have the power to sign an amended plaint when once the suit has been instituted with the approval of the plaintiff.

L. B.

P. R. N.
Palaniappa
Chetty

vs.

P. M. R. M.
Firm by one
of the
partners,
A. R. P.
Palaniappa
Chetty.

L. B.
 P. R. N.
 Palaniappa
 Chetty
 vs.
 P. M. R. M.
 Firm by one
 of the
 partners,
 A. R. P.
 Palaniappa
 Chetty.

As to the facts of the case the defendant did not appear at the hearing: the evidence therefore is all *ex parte* and the acts of negligence have been, we think, sufficiently proved. They consist of lending money on mortgage bonds which were not registered, of which registration was compulsory and which therefore were no security and the money could not be collected from the debtors. In one instance the defendant had collected the money but had not entered it in his books. The other item is for monies overdrawn by the defendant.

We dismiss the appeal with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL* No. 156 OF 1911.

P. L. K. PALANEAPPA CHETTY... DEFENDANT—APPELLANT.

VS.

R. M. A. R. ARUNACHELLAM CHETTY...

PLAINTIFF—RESPONDENT.

For Appellant—Dantra.

For Respondent—Bilimoria.

Before Mr. Justice Twomey and Mr. Justice Robinson.

Dated, 6th February 1914.

Power of Attorney—Construction—Can an agent appointed to carry on the business of a money lending partnership sue for the dissolution of the partnership?—Amendment of plaint—Formal Defect—Civil Procedure Code—Order 6, Rule 14.

A power enabling the agent to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by requiring the Principal himself to sign the plaint since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal.

JUDGMENT.

TWOMEY, J. :—The Chetty Firm of R. M. A. R. consisted of two partners, Arunachellam Chetty who was Senior partner with a $\frac{7}{10}$ th share in the business and Palaneappa Chetty with a $\frac{3}{10}$ th share. The latter was also the agent of the firm at Tawa. Arunachellam gave his son Valliappa Chetty a power of attorney investing him with the usual powers of Chetty agents and also empowering him to dismiss other agents and take over the business from them and to sue them for an account. Under this power Valliappa filed a suit against Palaneappa alleging that the latter had refused to make over charge and to make over the monies in

*Appeal against the judgment and decree of the District Judge of Pegu dated 29th May 1911 in Civil Regular No. 21 of 1908.

his hands. He asked for an account to be taken and there was also a prayer that in the event of the court holding that Palaneappa was a partner, the partnership should be dissolved and a Receiver appointed. In the defendant Palaneappa's written statement it was contended that such a suit could not be maintained by Vulliappa. The District Court dealt with the preliminary point in a separate order and held that as Palaneappa was one of the agents of the firm it was clearly the intention of Arunachellam in granting the power of attorney that Vulliappa should, if necessary, sue for a dissolution of partnership. The suit then went on and as there was no dispute as to the facts a preliminary decree was granted declaring the shares of the two partners ordering the dissolution of the partnership and the appointment of a Receiver to get in outstandings, and ordering also the appointment of a commissioner to take accounts.

The second ground of appeal, *i. e.* that the judgment is against law and the weight of evidence has been abandoned and the appeal has been argued only on the ground that the District Court erred in holding that Vulliappa Chetty had authority to file the suit.

It is clear that the power granted to Vulliappa does not authorize a suit for dissolution. It is a power enabling him to carry on the business of the firm but the carrying on of the business cannot be regarded as including the winding up of the business. The power authorized Vulliappa to bring suits of various kinds against Palaneappa in his capacity as an agent but the relief asked for—dissolution of partnership—is not relief which could be granted against him *qua* agent. I would therefore hold that the decision of the District Court on the preliminary point is erroneous. The question however remains whether the suit should therefore have been dismissed or whether the proper course in the circumstances was to allow time for the principal Arunachellam to sign the plaint himself or to give Vulliappa the necessary power for signing it. In *Mootala & Co. v. Poonasawmy*⁽¹⁾ one of the two learned Judges (Mr. Justice Fox) composing the Bench said that when a plaint has not been signed by a plaintiff himself a Court must reject it unless it has been signed by an agent authorized by a power of attorney, either expressly or impliedly to sign a plaint on behalf of the plaintiff. The question referred to the Bench in that case was whether persons carrying on business for and in the names of parties not resident within the local limits of the jurisdiction of the Court could sign and verify a plaint on behalf of those parties without being expressly authorised to do so and the answer to the reference was in the negative. Mr. Justice Fox's opinion that the Court must reject the plaint outright appears to go beyond the terms of the reference. There was no doubt good reason in that case for holding that the plaint must be rejected for there was apparently no power of attorney at all, and as Mr. Justice Irwin pointed out it would be hard to subject a principal to the risk of being involved in litigation without his knowledge at the instance of an agent whom he has

L. B.

P. L. K.
Palaneappa
Chetty
vs.
R. M. A. R.
Arunachellam
Chetty.

(1) 2 L. B. R. 41.

L. B.
 P. L. K.
 Palaneappa
 Chetty
 vs.
 R. M. A. R.
 Arunachellam
 Chetty.

appointed merely for the purpose of carrying on a business and has not expressly authorized to institute suits. The circumstances of the present case are different. Vulliappa had a power of attorney authorizing him to bring suits of various kinds against Palaneappa and from the circumstances of this case it seems very probable that Arunachellam did intend Vulliappa to bring the suit which he actually brought. Arunachellam gave evidence fully avowing his agent's action in filing this particular suit. The right of the Senior partner Arunachellam to sue Palaneappa for dissolution and an account of the partnership is not disputed. Order 5, Rule 14, requires a plaint to be signed by the plaintiff or by a duly authorized person. As Vulliappa's power of attorney was defective in not authorizing him to file a suit for dissolution he was not duly authorized by the plaintiff for the purpose of bringing such a suit and the plaint was therefore not signed as required by Order 6 Rule 14. But it does not appear to follow that the plaint must be rejected. Order 7, Rule 11, does not require a plaint to be rejected for such a defect and it appears to me that the Court has to decide in each case whether the failure to comply with Order 6, Rule 14, is a defect which goes to the root of the case or whether it is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal (section 99 of the Civil Procedure Code). This view is in accordance with that taken by the Allahabad High Court in *Basdeo v. J. Smidt & others* (1899) (2) and by the Calcutta High Court in *Rakhai Chandra Tewary vs. The Secretary of State for India in Council* (1906) (3). I think that in the present instance the defect in the plaint may properly be regarded as one of form only and that we would not interfere with the decree of the Court.

At the same time, I think that when the defendant raised this objection the plaintiff-respondent should have asked leave to amend the plaint instead of persisting in his suit on the defective plaint. On this ground I would make no order as to costs of this appeal.

ROBINSON, J. :—I concur.

(2) 22. All. 55.
 (3) 10. C. W. N. 841.

IN THE COURT OF THE JUDICIAL COM-
MISSIONER, UPPER BURMA.

CRIMINAL MISCELLANEOUS CASE NO. 16 OF 1913.

KATAN APPLICANT.

vs.

NGA TIN AND ANOTHER RESPONDENT.

For Applicant—J. N. Basu.

For Respondent—Maung Sa.

Before Sir George W. Shaw, C.S.I., I.C.S.

Dated, 5th February 1914.

Criminal Procedure Code—Section 195 (6)—sanction—Application for revocation thereof—Is notice to other party necessary?

An application for the revocation of a sanction granted by the Lower Court should not be disposed of *ex parte* without giving notice to the person obtaining sanction or to the District Magistrate.

The Sessions Judge's *ex parte* order setting aside the sanction was set aside and he was asked to dispose of the application after giving notice to the other party.

ORDER.

On the application of the present Applicant Katan, the Additional Magistrate granted sanction to him to prosecute Respondents Nga Tin and Nga Saung, under section 193, Indian Penal Code. The Sessions Court on the application of Nga Saung revoked the sanction granted, without giving notice either to the present applicant or to the District Magistrate. This kind of *ex parte* proceeding is opposed to general principles; and there is also special authority for holding that notice is necessary in proceedings under Clause 6 of Section 195 Criminal Procedure Code. Compare *Ramnath Chumar v. Ram Saran Sale* (1) and *Raghubir Singh v. Jogeshwar Tewari* (2). It is true that in *Jhalan Jha v. Bucha Gope* (3) it was held that notice was not necessary to the party who had obtained sanction in an application for revocation, but notice in that case had been issued to the District Magistrate. In cases of this kind as well as in other cases, I think it is desirable that both sides should be heard. Only in this way can it be expected that orders will meet with satisfaction.

I set aside the order of the Sessions Judge revoking sanction and direct that he proceed to dispose of the application after giving notice to the present applicant.

(1) (1896) 1 C. W. N. 529.

(2) (1904) 8 C. W. N. 643.

(3) (1904) I. L. R. 31 Cal. 811.

IN THE CHIEF COURT OF THE JUDICIAL
COMMISSIONER, UPPER BURMA.

CIVIL MISCELLANEOUS CASE No. 28 OF 1913.

NGA NYUN and 3 APPLICANTS.

vs.

NGA PO O RESPONDENT.

Advocate for Applicants—Mr. S. Vasudevan.

„ Respondent—Mr. S. Mukerjee.

Before Sir George W. Shaw, C. S. I., I. C. S.

Dated, 6th February 1914.

Civil Procedure Code—Order III, Rule 2—Use of Special Powers-of-Attorney to evade the provisions of law relating to the appointment of Pleaders and Advocates—Upper Burma Civil Courts Regulation—Section 26.

Where Respondent, ex-petition-writer and ex-apprentice clerk made a business of appearing for parties under cover of special powers of attorney and thus practically performed the functions of an Advocate and thereby evaded the provisions of the law relating to the appointment of Advocates and Pleaders.

Held that he made himself liable to punishment under Section 26 of the Upper Burma Civil Courts Regulation.

Held further that it would be absurd if the provisions of Order III, Rule 2, should enable an unqualified person to practise as an Advocate in spite of the provisions of Section 25 *Seqq.* Upper Burma Civil Courts Regulation.

Tussudug Hosain v. Girhir Narayan 14 Cal. 556 followed.

ORDER.

This is a case of an unusual character and of considerable importance. The applicants are Pleaders practising at Kawlin in the Katha District. They complained to the District Judge that the respondent an ex-petition-writer and ex-apprentice clerk, under cover of special powers of attorney was appearing for parties in cases in the Township Court and practising as an Advocate. They stated that he sat at the Advocates' table and examined and cross-examined witnesses, and cited legal authorities to the Judge, and that the parties were not only resident in Kawlin but also present in Court. The District Judge refused to interfere on the ground that Order III, Rule 2, no longer laid any restrictions on the appointment of Attorneys as recognised agents as section 37 of the Civil Procedure Code of 1882 had done.

The District Judge was of course perfectly right in saying that Order III, Rule 2, no longer imposes any restrictions on the appointment of attorneys to represent parties, but I think he overlooked the fact that Order III, Rule 2, does not authorise a person to make

a business of appearing as an Attorney for parties in cases, and by means of special powers of attorney to evade the provisions of the law relating to the Appointment of Advocates and Pleaders.

U. B.
Nga Nyun
and 3
vs.
Nga Po O.

I think that the allegations of the applicants called for enquiry. If the Respondent was making a business of appearing as an attorney for parties and in effect performing the functions of an Advocate, I think that he would be liable to punishment under section 26 of the Upper Burma Civil Courts Regulation. The case of *Tussudug Losain vs. Girhir Narayan* (1) which has been referred to on behalf of the applicants furnishes I think, authority for this view. It was there held by a full Bench of the Calcutta High Court that "If any person other than a duly certificated and enrolled *muktear* constantly and as a means of livelihood performs any of the functions of a *muktear*, he practises as *muktear*, and is liable to a penalty under section 31 Legal Practitioners' Act." It would be absurd if the provisions of Order III, Rule 2, should enable an unqualified person to practise as an advocate in spite of the provisions of sections 25 *seqq.*, Upper Burma Civil Courts Regulation. It appears to me that the question to be determined is one of fact, whether the respondent is evading the provision of the sections just cited by taking special powers of attorney under Order III, Rule 2.

I direct that the District Judge instruct the Judge of the Township Court to enquire with reference to section 26 of the Upper Burma Civil Courts Regulation whether the respondent has been, under cover of special powers of attorney, appearing pleading or acting in contravention of the foregoing provisions of Chapter IV of the Civil Courts Regulation or the rules made thereunder, and if he finds that the respondent has done so, to impose a fine under the provisions of the section.

The District Judge is requested to report the result of the further proceedings and to submit the records at the same time.

The respondent will pay the applicants' costs in this application 2 gold mohurs.

(1) (1887) I. L. R. 14 Cal. 556.

THE BURMA LAW TIMES.

VOL. VII.]

JULY, 1914.

[No. 7.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REFERENCE* No. 91 OF 1913.

NGA PO YWET
vs.
KING-EMPEROR at the instance of Joseph
Heap & Sons

For Appellant—Hamlyn.
For Respondent—McDonnell.

Before Sir Henry Hartnoll, Offg. Chief Judge and Messrs.
Justices Ormond, Twomey, Robinson and Parlett.

Dated, 6th April 1914.

Penal Code—S. 405—Advance to Brokers—whether loan or a trust—Passing of the ownership to the Broker—Responsibility for loss caused by accident, theft or fall in price—Relation of principal and agent.

Held (by Ormond, Twomey, Robinson and Parlett, JJ., Hartnoll, Offg. C. J. dissenting) that monies advanced to a Broker for the specified purpose of the purchase and supply of paddy with the agreement that the broker is to suffer the loss or get the profit by a fall or rise in market price cannot be said to be entrusted to him within the meaning of Section 405, Indian Penal Code although by the agreement the Company bound itself to take delivery of the paddy purchased and an express trust was declared in regard to the amounts advanced.

Held (by Ormond, Twomey, Robinson and Parlett, JJ.) that the question whether A entrusted property to B is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties and that the Penal Code cannot be altered by agreement of parties.

Held (by Twomey and Robinson, JJ.) that Clause 5 providing that the paddy is to be delivered at the Rangoon market rate and not at the rate at which the Broker bought it and Clause 7 providing that the loss of money or paddy from any cause whatever is to fall on the Broker nullify the effect of the declaration of trust in the company's favour embodied in the agreement; that the clauses are incompatible with the view that the Broker was employed as an agent; that the company cannot retain dominion over the money until the Broker spends it and at the same time enjoy immunity from the ordinary risks and liabilities incidental to the ownership of the money and of the paddy bought with it.

* Reference made by the Hon. Mr. Justice Parlett to a Bench for the decision of the following question:—Whether monies advanced to the accused in pursuance of the agreement of the 12th March 1913 were entrusted to him within the meaning of Section 405, Indian Penal Code.

In B,
 —
 Nga Po Ywet
 v.
 King-
 Emperor.

Held by Robinson, J., that Clause 1 of the agreement declaring that the Broker shall not be at liberty to bind the company in any manner and that he is not the agent of the company makes the Broker a 'principal' in all the contracts he makes for the acquisition of paddy and all the incidents of the contracts fall on him; that on a consideration of all the terms of the agreement the ownership in the money and the paddy bought must be held to have vested in the Broker and the advance must be regarded as a loan accompanied by a promise to use it in a particular way.

Held by Hartnoll, Offg. C. J., (other judges dissenting) that as the money was advanced for a specific purpose and in consequence of confidence reposed in the appellant by the company and as he expressly agreed to hold it in trust, the agreement must be held to have created a trust and the mere provision that if the money or paddy is stolen or lost otherwise or if the market value falls between the time of the purchase and the time of supply to the company the Broker is to bear the loss, does not seem to remove the arrangement between the parties from one of entrustment.

ORDER OF REFERENCE.

PARLETT, J:—Nga Po Ywet has been convicted of criminal breach of trust in respect of Rs. 4,500 advanced to him by Joseph Heap and Sons for the purpose of purchasing paddy for them. At the hearing of the appeal it was urged that the payment of the money to him was not proved. It appears that for some time prior to March 12, 1913, accused had been supplying paddy to the firm as sub-broker under their broker, Maung Maung. The procedure was for the accused to bring consignments of paddy to the mill and receive from the firm the price of the same either direct, or through Maung Maung, and then after deducting the commission of Maung Maung and himself to pay the sellers of the paddy what was due to them. Such paddy is described as "outside paddy." The transactions in it appear to have been all cash transactions. On March 12, 1913, he entered into the agreement which gave rise to the present case. Under it he was to apply sums supplied to him by the firm in the purchase of paddy, tender the same to the firm, who were to pay for or credit him with the price of the same. The firm's manager gave evidence that on March 12, Rs. 4,000 was handed to the accused under the agreement, and a further Rs. 500 on March 14. He was corroborated by a broker Maung Po Hlaing. Accused's own witness Hla Baw also said that he saw the money paid. Accused himself admitted receipt of it, but afterwards said that the amount represented what he at the time owed the firm, and Hla Baw subsequently tried to make out the same. Apart, however, from the absence of any attempt to prove that he was then indebted to the firm in that sum and of any explanation of why, if he were so indebted, he did not give one acknowledgment for the whole amount, instead of two on different dates, in view of the evidence I have no doubt that he did receive the sums of Rs. 4,000 and Rs. 500 in cash on March 12 and 14 respectively. It appears further that on April 12 accused brought two boat-loads of paddy to the mill and the firm, believing that the paddy was purchased with the money advanced in the previous month, cancelled the two acknowledgments for these sums. It was in reality "outside" paddy, and on April 15 accused came with a man named Po E, the real seller of the paddy, and the price Rs. 3,728 was paid in cash, two new receipts being taken from

accused for Rs. 3,000 and Rs. 1,500. It is not clear why credit for Rs. 4,500 was given on April 12 for a consignment valued three days later at only Rs. 3,728, nor why on the 15th two separate receipts were taken. It is, however, admitted that such was the case and that no paddy has been purchased with or supplied against the Rs. 4,500 and that the accused is liable civilly for the money. He states that the amount has been set against heavy losses which he alleges he sustained in his dealings with the firm prior to March 12, 1913, and that at the time he was prosecuted he was unable to supply paddy for this Rs. 4,500 on account of the Rangoon price being much lower than that in the districts, but that if market conditions improved later on he might be able to do so. If the Rs. 4,500 was a trust fund the accused was not entitled to use it to recoup himself for losses of his own money. The real defence is that the money was not held by him in trust, but lent to him. This depends upon the legal effect of the agreement of March 12, which runs as follows:—

L. B.
Nga Po Ywet
v.
King-
Emperor.

PADDY BROKERS' AGREEMENT.

Agreement made on the 12th day of March 1913, between Joseph Heap and Sons, Ltd., hereinafter called 'The Company,' of the one part, and Maung Po Ywet, hereinafter called 'the Broker' of the other part.

WHEREAS the Broker has represented to the Company that he can purchase for their benefit paddy in the district and has requested the Company to entrust him with advances of money to be made at the discretion of the Company in order that he may make such purchases AND WHEREAS the Broker hereby acknowledges that he will receive all such advances as the Company shall make to him and hold the same in trust for the Company NOW IT IS HEREBY AGREED.

(1). The Broker is not the agent of the Company and shall not be at liberty to bind them in any manner whatsoever.

(2). The Broker shall employ the monies of the Company in and about the purchase and transport of paddy to the Company's Mill at Dawbong.

(3). The property in the money and paddy purchased therewith shall be and remain in the Company.

(4). The Broker shall immediately upon arrival of the paddy in Rangoon tender the same to the Company at their said mill.

(5). The Company shall take delivery of the paddy and at their option either pay for or credit the Broker with the price of the same at the current market rate of the day prevailing. The Broker agrees to accept payment for the paddy at the said current market rate whether the same shall be higher or lower than the rate at which he purchased the paddy.

(6). The Company shall pay to the Broker (either in cash or by crediting his account with the amount thereof) brokerage at the following rates.

L. B.
Nga Po Ywet
v.
King-
Emperor.

(7). The Broker shall be responsible for the payment of the money or the supply of paddy to the value thereof to the Company and has hereby expressly agreed that if either the money or the paddy shall be lost by any means (including the act of God, thieves, or other causes over which the Broker has no control) the Broker shall indemnify the Company against all loss.

(8). This agreement shall govern all advances hereafter to be made by the Company to the Broker so that if the Company shall hereafter make further advances to the Broker such further advances shall be subject to this agreement and the trusts hereof. AND it is hereby also agreed that if the Broker shall at any time obtain paddy with money advanced hereunder and receive the price thereof from the Company in cash he will set apart out of such price a sum equivalent to the amount of the outstandings so used and treat the same as a further advance holding it on the same trust as the original advance."

It is argued for accused that the terms of the 5th and 7th clauses of the agreement are contradictory of its other terms and are incompatible with accused being a trustee. No doubt if the effect of the agreement as a whole is *not* to create a trust and *is* to transfer the property in the money advanced to the accused then the mere statements in the documents that there *is* a trust and that the property *did not* pass to the accused cannot alter its effect. In *Hock Chong and Co. v. Tha Ka Do* (1) the agreement specified a time within which the paddy was to be supplied and the approximate quantity to be supplied: in other respects the agreement appears to have been essentially the same as that in the present case, except that here words are added that the money is held in trust and remains the property of the Company. The question whether this addition alters the effect of the agreement is one of importance and I therefore refer for the decision of a Bench the question whether the monies advanced to the accused in pursuance of the agreement of March 12, 1913, set out above were entrusted to him within the meaning of section 405, Indian Penal Code. Pending the decision of the appeal, accused may be released on bail in Rs. 5,000 with two sureties.

ARGUMENT.

MR. HAMLYN :—The appellant Po Ywet was convicted by the District Magistrate, Rangoon, on a charge of criminal breach of trust in respect of a sum of Rs. 4,500 alleged to have been advanced to him under an agreement dated March 12, 1913. The prosecutors were a firm of rice millers in Rangoon, Messrs. Joseph Heap and Sons Ltd. The magistrate sentenced accused to six months' rigorous imprisonment and a fine of Rs. 2,000 or in default to a further term of imprisonment for twelve months. The fine if recovered was to be paid to the prosecutors. The accused appealed from that conviction to the Chief Court and the matter came up

(1) 7 L. B. R. 16; 6 Bur. L. T. 13.

before Mr. Justice Parlett, who had referred this point to a bench. The point in a nutshell, which his honour has referred to this bench, is whether the advance was made as a trust within section 405 of the Indian Penal Code. Before dealing with the order of Mr. Justice Parlett I would like to state that this matter was of great importance to the rice merchants in Burma, at the same time of equal importance to those persons like the appellant who are engaged in buying paddy in the district and bringing it to Rangoon. The case is a kind of a corollary to the two recent well-known bench cases the one, *Nga Po Seik v. K. E.* (2) and the other, the case of *Hock Chong and Co.* (1). Before these two important appeals, rice millers were in a very comfortable position. They were in the habit of prosecuting those persons whom they engaged to buy paddy if they did not return the loan, for criminal breach of trust and for years they secured convictions. These two cases had very much upset their calculations, and apparently they made attempts to revert to the old practice, that is to say, to adopt the agreement of March 12 so that they would thus be able still to prosecute those individuals for criminal breach of trust. The mere fact that it is stated in the agreement that one of the party is a trustee does not make him a trustee. The context of the agreement shows in fact that the man is in a different position. The company said to the broker, "Here I lend you Rs. 5,000. Go and speculate in the jungle at your risk, knowledge and discretion. If you can make money it is yours. But you must bring the paddy and sell it at our own price." It did not matter to them whether the broker had to suffer. I submit that under the agreement of March 12, the mere fact of the insertion of the words that the appellant is a trustee is a mere subterfuge and does not make appellant a trustee, because the clauses which follow clearly show that he is not. My contention is that so far as Mr. Justice Parlett's order is concerned there is no difference whatever between the two cases he has cited and the present case. If I may put forward the argument in this way, assuming that a party sold to another a mule, and there was a written agreement drawn up and the two agreed among themselves to call it a horse the fact of their agreement to call it a horse would not make it a horse. It would still have the attributes of a mule, and would be a mule. On the other hand, if a party agreed to sell geese and they agreed to call them swans, they would be no more swans than the Shwe Dagon Pagoda could be called the Anglican church if they agreed to call it so.

L. B.
Nga Po Ywet
v.
King
Emperor.

MR. JUSTICE ORMOND:—Is not the question here one purely of fact as to whether the broker bought the paddy on his own account or on account of his miller?

MR. HAMLYN:—The point submitted by Mr. Justice Parlett is whether appellant was trustee within the meaning of section 405 I. P. C.

MR. JUSTICE ORMOND:—Is that not a question of fact?

L. B.
Nga Po Ywet
v.
King-
Emperor.

MR. HAMLYN:—I should say that it is a question of law, your honour, purely. Moreover, it is a question of the interpretation of the document of March 12 as to whether he was trustee within the meaning of that document.

MR. JUSTICE ORMOND.—Your point is that under the first paragraph of the agreement he is trustee and he is to hold the paddy as the property of the company. The second paragraph is contradictory you say, and it says that he is not to be an agent of the company and that means he has to buy paddy on his own account. That shows that the money is to be his, although, no doubt he makes a representation that he will buy paddy with the money. The document comes within the two rulings I quoted, and there is no distinction between the two cases and that appellant is not a trustee within the meaning of section 405 I. P. C.

MR. McDONNELL:—There is a difference between the present agreement and that in the case of the *K. E. v. Tha Kado*. The other document was not one of trust. There is a distinct declaration of trust. The document begins with that in the preamble. There is a distinct undertaking that appellant would receive advances and hold them in trust for the company. Furthermore there is a clear and distinct statement that the property in the money and paddy purchased thereafter shall be and remain with the company. These differences have as a matter of fact been pointed out by Mr. Justice Parlett in his reference order. There is a further difference, and that is that whereas under the agreement in *Tha Kado's* case the millers had the option of purchasing paddy or not under the agreement in the present case the millers have no option. They were bound to take the paddy and that seems to be an important difference between the two agreements. It is quite clear from the trend of the agreement that the paddy is bought on behalf of the company. The trust is none the less a trust because the trustee made a profit out of it and made it remunerative.

MR. HAMLYN:—I do not think that any of the cases which my friend has cited are applicable to the case, for my main contention is that the money which was handed over to the appellant vested in him as his property. The risk of it remained with him. He could spend it in paddy how he liked and he was not bound to account to the firm in any shape or form how it was spent. Assuming that he bought 10,000 baskets of paddy and brought it down to Rangoon and in the bringing, it got damaged by rain, so damaged that it was useless for milling purposes.

MR. JUSTICE TWOMEY:—They are bound to take it.

MR. HAMLYN:—At what price?

MR. JUSTICE TWOMEY:—At the current market rate.

MR. HAMLYN:—For damaged paddy?

MR. JUSTICE TWOMEY:—Yes, I suppose.

MR. HAMLYN:—Then the loss would fall upon him and not upon the cestui que trust.

JUDGMENTS.

HARTNOLL, OFFG. C. J.—Maung Po Ywet was advanced by Joseph Heap and Sons Rs. 4,500—4,000 on the receipt Ex. D dated March 12, 1913, and Rs. 500 on the promissory note Ex. E dated March 14, 1913, to purchase paddy for them. These sums were advanced in pursuance of an agreement he signed on March 12, 1913, and which is Exhibit A. Subsequently by mistake, Exhibits D and E were cancelled, but they were replaced by the receipts Exhibits B and C dated April 15, 1913, for Rs. 3,000 and Rs. 1,500 respectively. The order of reference gives the facts in detail and it is unnecessary to repeat them. The point referred to the court for decision is whether the monies advanced to Maung Po Ywet in pursuance of the agreement of March 12, 1913, were entrusted to him within the meaning of section 405 of the Indian Penal Code. The case is a sequel to the cases of *In re Po Seik v. K. E.* (2) and *Hock Chong and Co. v. Tha Kado and 1* (1) A new form of agreement has been entered into between the miller and the man who is advanced money for the purchase and supply of paddy in this instance of Maung Po Ywet and it is urged that in accordance with the terms of it there is an entrustment of the money within the meaning of section 405 of the Indian Penal Code. The essentials of the agreement between the two parties are practically the same as in the previous cases, except that in the present agreement the company binds itself to take delivery of the paddy purchased. The man taking the advance is to be credited for the paddy he supplies according to the rate current on the day of supply; if he has paid for the paddy at a higher rate he is to bear the loss, but if at a lower rate he is to enjoy the profit. Also if the money or paddy is lost by the act of God, thieves or other causes over which he has no control, he is to bear such loss. But the agreement expressly declares that the person to whom the advances are made and who is called the broker holds the same in trust, that the property in the money and paddy purchased therewith shall be and remain in the company and that the broker shall immediately upon arrival of the paddy in Rangoon tender the same to the company and that the company shall take delivery of it and at their option either pay for or credit the broker with its price at the current market rate. The reasons on which my decision was based in the former cases apply generally to the present case. But in this case an express trust is declared. It is stipulated that the property in the money and paddy purchased therewith remain in the company and the company bind themselves to take delivery of the paddy. The same arguments arise that such terms of the agreement are inconsistent with those relating to profit and loss. It is urged that as Maung Po Ywet has to bear all loss as set out in paragraph 7 in the agreement and also loss caused by a fall in market price between the time of his purchase and the time the company takes over the paddy, he can not be said to hold the advances and paddy purchased with such in

L. B.
Nga Po Ywet
v.
King-
Emperor.

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

(1) 7 L. B. R. 16; 6 Bur. L. T. 13.

L. B.
 Nga Po Ywet
 v.
 King-
 Emperor.

trust—that the mere fact that a trust is declared by the agreement can not create a trust, the other conditions of the agreement being as they are.

It seems to me that the present agreement evidences more than a loan with a condition attached and more than an advance with an undertaking to use it in the purchase of paddy, and that there is an entrustment within the meaning of section 405 of the Indian Penal Code. The money is advanced for a specific purpose and in consequence of confidence reposed in Maung Po Ywet by the company. He has expressly agreed to hold the monies in trust for the purchase of paddy and for no other purpose. It is expressly agreed that the property in the money and paddy purchased therewith is to remain in the company. The mere facts, that, if the money or paddy is stolen or lost otherwise, and if the market value falls between the time of the purchase and the time of supply to the company the broker is to bear the loss, do not seem to me to remove the arrangement between the parties from one of entrustment. The equitable interest in the property remains in the company, and the broker has agreed to apply the money or paddy purchased with it for the use and benefit of the company. The fact that he has contracted to bear any loss that may be incurred in the matter does not seem to me to make him any the less a trustee.

It is stated that the first paragraph of the agreement is inconsistent with the rest of it and that will appear to be so, as the broker will be the agent of the company for the purchase of paddy with the money advanced to him for the purpose; but even if it is so inconsistent I do not see that it affects the matter. Irrespective of whether a man was an agent or not, he may be a trustee.

I would answer the question referred by saying that in my opinion the monies advanced to Po Ywet in pursuance of the agreement of March 12, 1913 set out in the order of reference were entrusted to him within the meaning of section 405 of the Indian Penal Code.

ORMOND J.—It has been decided by a full bench of this court that a breach of trust can not be committed in respect of money taken on loan because the property in the money passes to the borrower. If A takes money from B, on loan or otherwise, upon a false representation of fact, he is guilty of cheating. The representation of fact may be that it is A's intention to buy paddy with the money and sell it to B. If A at the time of taking the money, had that intention, but subsequently abandoned that intention and spent the money in some other way, he would not be guilty of cheating and would not be guilty of criminal breach of trust unless the property in the money remained in B. In this case the dealer took the money from the company for the purpose of using it in his business in buying paddy and selling it to the company, in order that he might make as much profit as possible for himself. The company could not, at will, recover the money from the buyer because he had the right to retain it in order to use

it in the above manner and they could not recover the paddy bought by the dealer because they were entitled to receive only so much paddy at their mill in Rangoon the value of which at the current rate at the time of tender by the dealer would be equivalent to the amount advanced to the dealer; and any loss of money or paddy falls on the dealer. Thus, although there is a term in the contract that the property in the money and paddy purchased therewith should be and remain in the company; the usual incidents attaching to property so far as the company is concerned are altogether absent.

L. S.
Nga Fe Ywet
v.
King-
Emperor.

The agreement, no doubt says that the dealer should "indemnify" the company against all loss; thereby implying that the loss of the 'trust' property in the first place fell upon the company and that the dealer insured the company against loss. But this is merely an indirect way of saying that the dealer holds the money and the paddy until delivered at the mill at his own risk. As pointed out by Mr. Justice Parlett in his reference this agreement is in its effect the same as the agreement which was considered by the full bench in the *Hock Chong and Co. v. Tha Kado* (1). The question whether A entrusted property to B is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, or agree that for the purposes of the Indian Penal Code the property in the money shall be deemed to remain in the original owner, or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring the transaction within the scope of section 405 of the Indian Penal Code. The Penal Code cannot be altered by agreement of parties so as to make section 405 applicable to a transaction, which is in its real nature a loan. If A receives money from B for certain specified purposes I do not think the money is 'entrusted' to A within the meaning of section 405 of the Indian Penal Code if A is to be liable for the money to B in any event. In my opinion the trust, (if any,) in this case is merely a technical or colourable trust. I would answer the question referred in the negative.

TWOMEY, J:—It seems to me that if a trust arises at all in such cases as this, it can only arise from the relation of the parties to one another as principal and agent. This view is supported by the statement of the learned counsel for the prosecution (at the hearing of the Reference) that though the "Broker" as declared in clause 1 of the agreement under consideration not to be the agent of the company, he should nevertheless be regarded as their agent for the limited purpose of buying paddy. But it is difficult to understand how we can regard the "Broker" as an agent at the moment of expending the money and not as an agent previously when he received and held the money and subsequently when he has the paddy in his possession before delivering it to the Company.

L. B.
Nga Po Ywet
v.
King-
Emperor.

If the money was advanced to the accused as agent of the Company, the Company would retain the beneficial ownership thereof and a case of trust would necessarily arise, and conversely, if the beneficial ownership is shown to have remained in the Company then the accused must be regarded as an agent and as having held the money in trust. The agreement contains express declarations that the money is received in trust and that the property in the money and the paddy purchased therewith shall be and remain in the Company. But these declarations do not conclude the matter. They cannot have effect if the contract contains other terms which are plainly inconsistent with a continuance of the Company's ownership. To begin with I would point out to the word "tender" in clause 4 which seems to imply that the paddy is the property of the Broker till it is made over to the Company, the word "tender" would not be appropriate to the case of a man buying paddy as agent of another. This however is a small point and might be regarded as a mere slip in drafting the agreement. It would not be enough by itself to show that the paddy was not already the property of the Milling Company. Not so however as regards clauses 5 and 7 which are in my opinion altogether inconsistent with the contention of the Company. Clause 5 provides that they are to pay for the paddy at the rate prevailing (at Rangoon) on the day the Broker delivers it to them (and not the rate at which the Broker bought the paddy). Under clause 7 if the money or paddy is lost from any cause whatever the Broker is to bear the loss. These conditions nullify the effect of the declaration that the property in the money and paddy is to be and remain in the Company. They are consistent only with the interpretation that the beneficial ownership in the money passed to the broker at the time of the advance and that the property in the paddy is with him till he delivers it to the Company. Notwithstanding the express declarations referred to, it is the duty of the Court to examine all the terms of the transaction with the strictness required in a criminal matter and to determine whether it is really a case of "entrusting" money to an agent in the sense of the Penal Code. If it is found that the other terms are inconsistent with such an interpretation or even if there is any reasonable doubt about it the Court is bound to decide that the money was not "entrusted" within the meaning of Section 405, Indian Penal Code and that the property in the money did in fact pass to the Broker. If the property passed, there could be no "criminal breach of trust" for this offence always involves "criminal misappropriation" and a man cannot commit criminal misappropriation of his own property.

The terms of clauses 5 and 7 are incompatible with the view that the Broker was employed as an agent at all. An Agent would be required to exercise reasonable diligence but would not be responsible, as he is made responsible in this agreement, for loss in any event. Any paddy that an agent buys would be held by him entirely subject to the directions and control of the principal from the time of purchase, whereas this agreement does not bind the Broker as to his dealings with the paddy except that he shall

"tender" it to the company. He can choose his own time for delivery, can hold up the paddy he has bought and take advantage of a rise in the market before delivering it to the company. Moreover, if the market rises, he is not bound to deliver all the paddy he has bought but only the equivalent, at the increased market rate, of the amount of the advances received from the Company. On the other hand if the market falls he has to make good the difference out of his own pocket. These incidents are at variance with the notion of agency. The accused in this case was not subjected to the directions and control of the Company. He agreed to buy paddy from them, but the manner and means of performance were left to his discretion except so far as they are specified in the agreement. In these circumstances he must in my opinion be regarded as an independent Contractor and not as an Agent. The Company cannot have it both ways, that is to say they cannot retain dominion over the money until the Broker expends it, and at the same time enjoy immunity from the ordinary risks and liabilities incidental to the ownership of the money and of the paddy bought with it. The maxim *qui sentit commodum sentire debet et onus* (He who derives the advantage ought to sustain burden—Ed.) applies to the case.

L. B.
Nga Po Ywet
v.
King-
Emperor.

Not because this agreement contains an express declaration that the Broker is not the Agent of the Company, but because it further provides that the money and paddy are to be held entirely at the Broker's risk, and seeing that the Broker is left to conduct his paddy buying business at his own discretion unfettered by the control and direction of the Company, I would decide that the Broker cannot be regarded as the Agent of the Company, and that therefore he was not "entrusted" with the money *qua* Agent. Nor in my opinion is there any reason to hold that he was "entrusted" with the money otherwise.

On these grounds I would answer the reference in the negative.

ROBINSON, J.—The only apparent change in the facts of this case from those covered by the Full Bench decision in *Hock Chong and Company v. Tha Ka Do* (1) is that there is a declaration in the agreement executed that a trust is created and a statement that the property in the money advanced and the paddy purchased therewith remains in the Company.

More allegations of this kind cannot in themselves create a trust nor create ownership in the money after it has been handed over and in this as in every criminal case it is necessary to weigh all the facts and circumstances and then decide on them as a whole. For the purposes of a criminal charge under sec. 405 I. P. C. there must be an entrustment of the property or of dominion over property followed by a dishonest misappropriation or conversion or by a dishonest user or disposal of the property in violation of a legal contract made touching the discharge of such trust.

The entrustment may be "in any manner" but if this money when handed over became the property of the Appellant or if it ceased to be the property of the Company there can have been on

L. B.
Nga Po Ywet
v.
King-
Emperor.

entrustment. What there are the facts? I take it to be incontestable that the agreement in this case has been deliberately drafted so as to endeavour to create such a state of facts as will allow of a criminal charge if the money is not expended in purchasing paddy and supplying it to the Company. The difficulty experienced in arriving at such a result is due to the care necessary to avoid rendering the Company liable to third parties owing to the acts of the person receiving the advance. If such person becomes merely the Agent of the Company the latter may be liable to outside claims. Hence we find that the first clause declares the "Broker" shall not be at liberty to bind the Company in any manner and that he is not the Agent of the Company. If, not the Agent, I fail to see in what capacity he would act while the property in the money still remained in the Company and I understood during the argument that it was urged that he was not the Agent in one sense but was in another. In fact counsel was in a dilemma out of which he could not extricate himself satisfactorily. The agreement provides he is to employ the money only in the purchase of paddy and its transport to the Company's Mill; he is to tender it to the Company immediately on its arrival in Rangoon and the Company undertakes to take it over at the market rate current on the day of delivery and the Broker to accept that rate. The Broker is to get the brokerage. The "Broker" is to take in addition all profits arising from this arrangement and is also to bear all loss including the loss arising from the act of God, etc., over which he has no control.

The agreement states the "Broker" is not the Agent of the Company. If that is so, in my opinion the Company fails in its endeavour to make him criminally liable. But that statement will be of no avail if the result of all the terms and conditions is to create the legal status of principal and Agent. If the Company is to remain owner of the money it must be liable for losses arising from a proper expenditure of the money in terms of the agreement and it would be entitled to the profits. Under the agreement the "Broker" must act in all the contracts he makes for the acquisition of paddy as a principal and all the incidents of the contracts fall on him. He approaches the Company and says "I can get you the paddy you want and I will do so if you help me by lending me money." The Company agrees provided he will use the money for this purpose only but expressly stipulates that it undertakes no liabilities and will not claim any profits. If the ownership in the money remains in the Company then the ownership in any paddy acquired vests in the Company; it is merely the money converted into another form. But this is expressly provided against by the provision that the Company is not to be liable to third parties or for loss by the Act of God, etc. In my opinion the agreement merely shows that the Company being desirous of getting paddy employs the services of the "Broker" and gives him an advance but it declines to make the Broker its servant or agent. This being so, the ownership in the money is transferred to the Broker and no entrustment is created.

Let us suppose the "Broker" duly expends the money in strict accordance with the terms of the agreement but the paddy is then lost by the Act of God or owing to thieves through no fault of the "Broker." The Company claims in one clause that the ownership in the paddy lies in it and not in the Broker yet in another that the Broker must bear the loss and he is to be still liable for the advance. Can the Company be heard to say he is not their Agent for the purchase but that the paddy when bought belongs to it and yet again that when it is lost it belonged to the "Broker"?

L. B.
Nga Po Ywet
v.
King
Emperor.

In my opinion this agreement evidences a loan accompanied by a promise to use the money in a particular way but the ownership in the money and the paddy bought with it must on a consideration of all the terms of the agreement be held to have vested in the "Broker."

I would therefore answer the reference in the negative.

PARLETT, J:—The legal aspect of the agreement has been so fully dealt with in the foregoing judgments that I do not think that I can usefully add anything to what has been said, but it is interesting to trace how matters would work out according to the strict terms of the agreement in a simple concrete case.

Supposing there was only one advance to Po Ywet of Rs. 1,000 and that he found he could buy paddy in the district at such a rate that, delivered at the mill, it would cost him 90 per 100 baskets and that he expended the whole Rs. 1,000 in its purchase and transport, he would thus have approximately 1,111 baskets to deliver. If the market rate in Rangoon on the date of delivery was Rs. 100 per 100 baskets, the value of the paddy would be Rs. 1,111. By paragraph 5 of the agreement the Company have expressly reserved to themselves the option of paying for or crediting the Broker with the price of the paddy tendered. They could therefore insist upon forcing Rs. 1,111 upon Po Ywet and compelling him under paragraph 8 to hold Rs. 1,000 of it on trust for them; the agreement giving him no power to terminate the trust he would be driven to a suit if he wished to do so; meanwhile he would be responsible for the whole amount though he deposited it in a Bank and that Bank failed, Nay, if he so deposited it at interest he might be prosecuted criminally for using the money otherwise than in and about the purchase and transport of paddy to the Company's mill. On the other hand the Company might, if they wished, merely credit him with Rs. 1,111 wiping out the Rs. 1,000 advance and showing a balance in his favour of Rs. 111 but paying him nothing. A credit entry in his favour in the books of Joseph Heap and Sons, would be of little use to Po Ywet for the purpose of meeting his current expenses. Only if the Company designed to credit his account with Rs. 1,000 and so close it, and pay him Rs. 111 in cash, could the trust be terminated and could Po Ywet get any real profit out of the transaction at all. This shows how one-sided the agreement is and how completely designed merely to protect the Company from loss under all circumstances and in any event.

full, whereas the seller is bound to keep his offer open; it is not a sale within the meaning of sec. 78 of the Contract Act, the hirer being merely a bailee.

Therefore where a hirer of a sewing machine without making payments in full sells the machine, he is guilty of criminal breach of trust.

Musa Mia v. M. Dorabjee 5 L. B. R. 201 dissented from.

Helby v. Mathews (1895) A. C. 471 followed.

L. B.

Maung Mya

Gyi

v.

Nga Po Shwe.

ORDER OF REFERENCE.

PARLETT, J.—The facts alleged in this case are that on November 26, 1912, respondent obtained possession of a sewing machine from the complainant, an Agent of the Singer Manufacturing Co., upon payment of Rs. 15 down and executed an agreement to pay Rs. 10 per month in advance as rent so long as he retained the machine on condition that when the payments so made by him aggregated Rs. 120 the machine was to become his absolute property. He could, however, at any previous time terminate the agreement by returning the machine in good order. Meanwhile until he so returned it or until he had completed payments to the amount of Rs. 120 he was not to sell or pledge the machine. He was to keep it in his own custody at a place named in the agreement and was not to remove it thence without the previous consent in writing of the Company. On January 5, 1913, respondent paid Rs. 10, but it is alleged that he has never paid any more. On May 1, 1913, he sold the machine for Rs. 50 to Maung Kyaw Din and Ma Hnin Shwe to whose village it was removed. Respondent was prosecuted under S. 420 I. P. Code and discharged. It is now sought to have further inquiry made into the case against him on the ground that the facts alleged disclosed the offence of criminal breach of trust.

The magistrate in discharging the respondent quoted long extracts from the Judgment of this Court in *Musa Mia v. M. Dorabjee* (1) and based his order on the decision therein without, however, expressly referring to that ruling. The agreement in that case was substantially the same as that in the present case, and it was held to be simply an agreement to sell and buy a sewing machine for a price named by a payment down and by monthly instalments afterwards. In that view, I think, it would be a contract for sale of ascertained goods where part of the price was paid and the goods were delivered. Accordingly the property in the goods would pass to the respondent under S. 78 of the Contract Act, and if he was also the beneficial owner of the goods he would not be guilty of criminal breach of trust had he sold it. The decision was come to after a consideration of the Upper Burma case of the *Singer Manufacturing Co. v. Elahi Khan* (2) and the English case of *Helby v. Mathews* (3). The Upper Burma case was decided very soon after the English case which is dated May 9, 1894. But a year later the English decision was reversed by the House of Lords (4), which fact does not appear to have been

(1) 5 L. B. R. 201.

(2) U. B. R. 92—96 p. 291.

(3) (1894) L. R. 2 Q. B. 262; 63 L. J. Q. B. 577.

(4) (1895) A. C. 471; 72 L. T. 841.

L. B.
Maung Mya
Gyi
v.
Nga Po Shwe.

brought to the notice of this court at the hearing of the case referred to above. The agreement in *Helby v. Matthews* appears to be essentially similar to that involved in the present case, and had the interpretation put upon it by the House of Lords been before this court I think it probable that a different finding as to the full meaning and effect of the agreement would have been come to. In *Gopal Tukaram v. Sorabjee Nusserwanjee* (5), the Bombay High Court held that a similar agreement was one for hire and did not become one for purchase until the specified conditions were fulfilled. Though served with notice, the respondent has not appeared or instructed counsel to argue the matter. In view of the importance of the question involved and of the decision of the Bombay High Court, I think the question of the meaning and effect of the agreement entered into in this case should be reconsidered by a bench of this court and refer it accordingly.

JUDGMENT.

HARTNOLL, OFFICIATING C. J.—The facts have been set out by Mr. Justice Parlett and it is unnecessary to repeat them. The question is what is the true meaning of the contract entered into by the two parties. The contract entered into by Maung Po Shwe is not essentially different to that discussed in the case of *Helby v. Matthews* (3) and the same consideration which governed the decision in that case must govern the decision in the present one. It was held in that case that upon the same construction of the agreement the hiree was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full. Lord Watson said: "In order to constitute an agreement for sale and purchase there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could, in this case, be no contract by Brewster until he had complied with the terms of the option given him and had duly made the thirty-six monthly payments, which it prescribes as the condition of his becoming owner of the piano. . . . Whilst in popular language the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can in such a case, be no agreement to buy, within the meaning of the act of 1889, until the purchaser has exercised the option given him in terms of the agreement." So, in the present case, though there was a binding offer to sell by the Singer Manufacturing Co., through its agent, there was no agreement to buy by Maung Po Shwe until he had exercised the option given him by the agreement. He could terminate the agreement before paying the Rs. 120 by instalments by returning the

(5) 6 Bom. L. R. 871 (1904).

(3) (1895) A. C. 471.

machine. The agreement being construed in this manner, there was no agreement to buy and consequently no sale within the meaning of section 78 of the Contract Act. The property in the machine, therefore, remained with the company and the possession of Maung Po Shwe was merely that of a bailee, and he would be entrusted with the machine within the meaning of section 405 of the Indian Penal Code. The magistrate in his order of discharge, held that for breach of the agreement the company would only be entitled to damages in the civil court. In the case of *Musa Mea v. Dorabjee* (1) the House of Lords case was not brought to my notice, but only the case between the same parties as it was decided by the court of appeal. The question in *Musa Mea v. Dorabjee* (1) was the amount recoverable for breach of contract. I would direct the District Magistrate, Bassein, by himself or by any of the Magistrates subordinate to him to make further inquiry into this case with the object of deciding whether Maung Po Shwe is or is not guilty of an offence punishable under section 406 of the Indian Penal Code and of punishing him for such offence if it be found that he has committed it.

Mr. Justice Ormond : I concur.

L. B.
Maung Mya
Gyi
v.
Nga Po Shwe

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REFERENCE* NO. OF 1914.

ZAW TA APPELLANT.
... .. VS.
NAN MA YIN RESPONDENT.

Before Sir Henry Hartnoll, Kt., Chief Judge and Mr. Justice Ormond.

Dated, 8th May 1914.

Criminal Procedure Code (Act V of 1908) s. 438—Maximum sentence—Execution for arrears of maintenance for several months—Construction of cl. 3.

When a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after the execution of the warrant, he is not competent to pass a sentence of imprisonment exceeding one month. The words in subsection 3 "for the whole or any part of each month's allowance remaining unpaid "may mean" for the whole or any part of every month's or all months' allowance remaining unpaid" where the arrears remaining unpaid are for a period exceeding a month.

(1) 5 L. B. R. 201.

*Reference made by the Honourable Mr. Justice Parlett to a Bench of the Chief Court under Sec. 11 of the Lower Burma Courts Act for reconsideration of the following question:—

"Whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remain unpaid after execution of the warrant he is competent to pass a sentence of imprisonment exceeding one month?"

L. B.
Zaw Ta
v.
Nan Ma Yin.

The following reference was made to a Bench by Mr. Justice Parlett under section 111 of the Lower Burma Courts' Act.

On April 2, 1912, Nga Zaw Ta was ordered to pay Nan Ma Yin Rs. 5 a month as maintenance for her child. Nothing was paid up to August 30, 1912, when she applied to enforce the order and on September 20 arrears for five months were recovered. Nothing further was paid before April 29, 1913, when she again applied to enforce payment of arrears for seven months.

Nga Zaw Ta's attendance before the Magistrate was not procured till the 27th November and orders were not passed till the 11th December when he was sentenced by the Sub-divisional Magistrate, Pa-an, to one year's rigorous imprisonment for neglecting to pay arrears of maintenance for thirteen months. On 17th January, 1914, the Sessions Judge directed Nga Zaw Ta to be released and has referred the case for orders as he considers the magistrate's order bad on the ground among others, that on the authority of *Ma Me Ma v. Mra Tha Tun* (1) if a warrant is issued for accumulation of arrears for several months the magistrate has no power to give a greater sentence than if the warrant related to only one breach. That ruling followed the Allahabad case of *Q. E. v. Narain* (2) which was however, dissented from by the Madras High Court in *Allapichai Ravuthar v. Mohidin Bibi*. (3) Though the point was not actually decided in *Moung Po v. Ma Myit* (4) the learned judicial commissioner of Upper Burma there indicated that he held the opinion that the law provides for "the levy of arrears which may be for several months, with the consequential penalty, in their event of their not being realised, of imprisonment for several months." In view of the divergent views of the High Courts on the point, I think it desirable that the matter should be reconsidered by this court, and accordingly refer to a Bench the question whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more one month remains unpaid after execution of the warrant he is competent to pass a sentence of imprisonment exceeding one month.

JUDGMENT.

HARTNOLL, OFFG. C. J. :—The question referred to us relates to section 488 (3) of the Code of Criminal Procedure and is "whether when a magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant he is competent to pass a sentence of imprisonment exceeding one month." The sub-section is as follows :— "If any person so ordered wilfully neglects to comply with the order, any such magistrate may, for every breach of the order, issue a warrant for levying the

(1) P. J. L. B. 316.

(2) 9 A. 240; A. W. N. (1887) 54.

(3) 20 Mad. 3; 2 Weir. 638.

(4) 1 U. B. R. (1902-03) p. 3.

amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made." Then follows a proviso which it is not necessary to set out. The part of the sub-section I have set out agrees with the corresponding sub-section of the Code of Criminal Procedure (Act X of 1882) which preceded the code now in force except that the words "or until payment if sooner made" are new. The meaning of the words in the sub-section of Act X of 1882 has been considered in the following cases. *Q. E. v. Narain* (2) *Allapichai Ravuthar v. Mohidin Bibi* (3) *Bhiku Khan v. Zahuran* (5) *Mi Me Ma v. Mra Tha Tun* (1) and *Mg. Po v. Ma Myit* (4).

L. S.
Zaw Ta
v.
Nan Ma Yin.

The Allahabad Court found that where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the magistrate acting under section 488 has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant related to a single breach of the order. This view was followed in the Burma case of *Mi Me Ma v. Mra Tha Tun* (1) but it was dissented from in the Madras and Calcutta cases which I have quoted. In the Madras case it was held that the imprisonment provided by section 488 in default of payment of maintenance is not limited to one month and that the maximum imprisonment that can be imposed is one month for each month's arrears and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear. In this case an earlier case of the Madras High Court was considered and it was pointed out that the wording of the Criminal Procedure Code which was in force when it was decided (Act XXV of 1861) in the section of it corresponding to section 488 of Act X of 1882, differed from the wording of the latter section. As I have remarked the Calcutta case follows the Madras case. The Upper Burma case does not seem to be one in which any definite conclusion was arrived at.

My own view is that the meaning of the words of the section is not too clear. At first I was inclined to hold the view taken by the Madras and Calcutta High Courts, as the words "May sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month" at first sight would seem to mean that a month's imprisonment can

(1) P. J. (L.B.) 316.

(2) 9 All. 240.

(3) 20 Mad. 3.

(4) (1902-3) U. B. R. Crim. 3.

(5) 25 Cal 291.

L. B.
Zaw Ta
v.
Nai Ma Yin

be inflicted in respect of each month's arrear remaining unpaid or in respect of any portion of a month's arrear remaining unpaid. But I can see that another view can be taken as to the meaning of the words. Looking at the meaning of the word "each" I see that the Century Dictionary gives it as "each—every one, any one being—either or any unit of a numerical aggregate consisting of two or more, indefinitely" without saying that each has a plural meaning. It clearly when used in a sentence, may refer to more than one. For instance when we say: Each part of the engine is in order, "this is equivalent to saying: All parts of the engine are in order". The words in the sub-section "for the whole or any part of each month's allowance remaining unpaid" may therefore be read as meaning possibly "for the whole or any part of every month's or all months' allowance remaining unpaid where the arrears remaining unpaid are for a period exceeding a month." Reading the words in this way it may be that the legislature intended that the term of imprisonment to be awarded should extend to a period of one month only in respect of all arrears due after the execution of the warrant, whether they amount to several months', or portions of several months', allowance remaining unpaid or to a portion of a single months' allowance remaining unpaid. As I consider the words doubtful and not clear the benefit of the doubt must be given in favour of the subject and I would answer the question as follows:—

"When a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant he is not competent to pass a sentence of imprisonment exceeding one month."

ORMOND, J.—The maximum sentence which may be imposed on any one occasion under section 488 I. P. C. is in my opinion one month. One warrant only should be issued for levying the amount of arrears due at the time of the application for the warrant. The section means I think, that for successive defaults under one order for monthly payments of maintenance the defaulter (if able to pay) may on successive occasions be sentenced to imprisonment for a term not exceeding one month, whenever a warrant is applied for and issued and the arrears then due are not realized, whether the amount remaining unpaid on each occasion is as much as one month's maintenance or not. The defaulter could be imprisoned for one month although only a portion of a month's allowance remained unpaid under one warrant; and he could be imprisoned again for one month under a subsequent warrant although a portion only of another month's allowance remained unpaid. But there is nothing to shew that more than one warrant should issue on one occasion for the recovery of several months' arrears. On the contrary, "the Magistrate may, for every breach of the order, issue a warrant for levying the amount due",

i.e., the Magistrate may issue one warrant for levying the amount due; under the order, to the applicant at the time of the application. The section seems to contemplate an application being made for a warrant upon each occasion of default without delay so that not more than one month's maintenance would be in arrear, though the applicant is not debarred from applying for a warrant for the recovery of all arrears up to date. I can find nothing to support the conclusion that the section authorises one month's imprisonment for every month's arrears when one warrant is issued for the recovery of several months' arrears. To arrive at such a conclusion, the words, "for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant," must be read as if they were "for each whole month's allowance remaining unpaid after the execution of the warrant and (not "or") for any part of a (not "each") months' allowance remaining unpaid." It could then be said that the words "for each month's allowance, contemplated a case where the amount remaining unpaid is equivalent to several months' allowance, and shew that in such a case, a proportionate sentence of imprisonment exceeding one month, may be imposed. If the words are read as being: "For each whole month's allowance and for any part of each month's allowance remaining unpaid after the execution of the warrant, the words "any part of each month's allowance" should shew that if the words of the section referred to the case of several whole months' allowance remaining unpaid, after the execution of the warrant they must also refer to the case where portions of several months' allowance remained unpaid after the execution of the warrant which could not be: for the warrant is issued to recover the amount due, and though the amount remaining unpaid might very well represent several whole months' allowances the balance left over unpaid could not be more than one portion of a month's allowance. I read the above passage as meaning, for the whole amount or any part of a month's allowance, remaining unpaid on each occasion after the execution of a warrant.

Under section 316 of the Code of 1861 the maximum sentence on each occasion after the issuing of a warrant was one month's imprisonment; and there is no indication in sec. 488 of the present Code that the maximum sentence was intended to be increased beyond expressly allowing one month's imprisonment if the amount remaining unpaid is less than a whole month's allowance.

L. B.
Zaw Ta
v.
Nan Ma Yin.

IN THE CHIEF COURT OF LOWER BURMA

CIVIL MISCELLANEOUS APPEAL* NO. 45 OF 1914.

STUART SMITH & ALLEN ... APPELLANTS.

vs.

OFFICIAL LIQUIDATOR, BANK
OF BURMA, ... RESPONDENT.

For Appellants—DeGlanville.

For Respondent—McDonnell.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Dated, 27th May 1914.

Companies Act—Act V of 1882—s. 214—Is auditor an officer of the Company?—de facto officers of the Company.

Where the shareholders of a Bank assembled in general meeting appointed the appellants as auditors in the manner prescribed in the Articles of Association and where in pursuance of that appointment they entered upon and carried on the duties of auditors of the Bank.

Held that the appellants became *de jure* officers of the Bank.

On a contention that there was not a properly qualified quorum at the said general meeting and that consequently though the appellants acted as auditors, they were not properly appointed.

Held (by Ormond, J., Twomey, J., dissenting) that if the shareholders at that meeting were unable to appoint an auditor owing to want of a quorum there would be a casual vacancy of the office and the Directors present might be taken to have duly filled it under article 11 of the Company's rules.

The Judgment appealed against was as follows :—

YOUNG, J.:—This is an application by the official liquidator of the Bank of Burma, Ltd., for an order under section 214 of the Indian Companies Act, 1882, calling upon Messrs. Mower and Clifford, two of the directors of the late bank being the only two who signed the balance sheet on which the application is based, upon Mr. R. F. Strachan, the manager of the late bank, who also signed it, and upon the firm of Stuart Smith and Allen, who also signed it as auditors, to refund the sum of Rs. 61,687-8-0, on the ground that the said dividend was paid out of capital and not out of profits. The respondents, the firm of Messrs. Stuart Smith and Allen, have taken the preliminary objection that the proper course for the liquidator to follow is to file a suit, and that the section and the procedure authorised thereby is not applicable to them for the reasons hereinafter discussed, which with an application for particulars form the sole questions for determination at present before the court.

Section 214 provides that where in the course of the winding up of any company under this act it appears that any past or present director, manager, official or other liquidator or any officer of such company has done certain things he may be ordered to repay

* Appeal against the judgement and decree of Mr. Justice Young sitting on the original side of this Court dated 23rd February 1914, in Civil Miscellaneous No. 175 of 1913.

the losses incurred by his conduct, and in the first place it is to be observed that an auditor is not one of the persons specified by the section and only falls within it if he is an officer of the company.

Article 111 of the Bank's Articles of Association provides as follows:—"The number of auditors, the person or persons to fill the office of auditor or auditors and his or their remuneration and term of office may from time to time be determined and varied by the bank in general meeting. The auditor or auditors for the time being shall retire at the ordinary general meeting in every year. If any casual vacancy occurs in the office of auditor the directors shall forthwith fill up the same." Article 55 provides as follows:—"Three members personally present shall be a quorum for a general meeting for the choice of a chairman and the declaration of a dividend. For all other purposes the quorum for a general meeting shall be five shareholders present in person or by proxy and holding or representing by proxy not less than three-quarters of the issued capital of the company. No business shall be transacted at any general meeting unless the quorum requisite shall be present at the commencement of the business."

It is not disputed that from the opening to the close of the bank first Mr. Stuart Smith and for the final year of the bank's existence his firm did the work of auditing the bank's accounts, were elected at ordinary general meetings, resigned at and were re-elected by the subsequent annual ordinary general meetings. But what is contended is that at none of these general meetings was there a sufficient quorum present to render that meeting competent to elect any person or persons to the office of auditor within the meaning of article 111 and that therefore, though Mr. Stewart Smith or his firm did as a fact audit the accounts of the bank from its birth to its death, he and they were never elected to the office of auditor, and therefore, though auditors of the bank's accounts, never became its officers so as to bring them within section 214 of the Companies Act.

It being admitted that there was not the requisite quorum present to validate the election of this firm on February 16, 1911, it follows in my opinion that the firm was never appointed to the office of auditor and therefore never became *de jure* officers of the company. The authorities, however, seem to show that the case cannot be summarily dealt with on the footing that as the firm was not duly elected an officer, therefore he could not be responsible as though he were an officer, and have his alleged misfeasance inquired into summarily under this section instead of in a suit. Thus in *Gibson v. Barton* (1) Blackburn J. stated as follows:—"I think there is evidence that the appellant took upon himself to act and did act just as if he was such manager (*i. e.*) duly appointed. The question therefore is whether a manager *de son tort*—a manager in his own wrong—can protect himself from the liability cast upon a manager under section 27 (the corresponding English section) by saying 'I am not manager *de jure*.' I think he cannot. There are

L. B.
Stuart Smith
and Allen
v.
Official
Liquidator,
Bank of
Burma.

(1) L. R. 10 Q. B.

L. S.
Stuart Smith
and Alien
v.
Official
Liquidator,
Bank of
Burma.

many instances in which a person who *de facto* exercises an office cannot defend himself by saying when called on to bear liability in consequence of his wrong "I am not rightfully in the office; there is another who may turn me out." And the learned Judge proceeded to give instances. Lush J. agreed with him, and said that in section 27 the term "manager" must mean "manager *de facto*," and that it was not competent for him to say "True I acted as manager of the company, but yet not being manager *de jure* I can evade the liability imposed by section 26." Quain J. dissented and held that it was not enough to be manager *de facto*.

This decision was followed in *Coventry and Dixon's case* (2) in which Jessell, Master of the Rolls, held that persons not properly elected directors and therefore not *de jure* directors who had yet acted as directors could not be heard to deny that they were directors within the meaning of the section, and the court of appeal, though it reversed his decision on another ground, agreed with him on this point. Then in 1894 Cave and Collins, J. J. in *re the Liberator Building Society* (3) held that a solicitor of a company by accepting a fixed salary foregoing fees and other charges and undertaking to do all the solicitors' business ceased to be an independent solicitor and became from that time an officer of the society. None of these cases, however, dealt directly with an auditor, but in *re London and General Bank* (4) it was held that an auditor duly appointed might be and in that particular case was an officer of the company within the meaning of the section. Then the further question whether an auditor not appointed by the company could be held to be an officer of the company came up for consideration in *re Western Counties Steam Bakeries and Milling Co.* (5) The *ratio decidendi* and the *dicta* of the judges both seem to me to imply that a man not duly elected to the office of auditor might yet *de facto* be an officer of a company and liable under the section, though they held that on the facts of the particular case Messrs. Parsons and Robjert, the auditors in question, were not. "What has to be determined is," said Lindley, Lord J., "whether Messrs. Parsons and Robjert are officers of the company or have so acted that they cannot be heard to say that they are not" Smith, Lord J. said "If Messrs. Parsons and Robjert have done anything wrong as *de facto* officers they can be got at," and again "It is no good showing that a person performs auditor's work: it must be shown that he is a *de facto* officer of the company." But on the facts the appeal was allowed, Lindley, Lord J. holding that they were simply accountants called in by the directors to do a piece of work and never were or pretended to be or acted as if they were anything else and were no more *de facto* than they were *de jure* officers of the company. Smith, Lord J. agreed with him, holding that they had never become officers of the company at all either *de facto* or *de jure*,

(2) 14 Ch. D. 660.

(3) 71 L. T. 406.

(4) (1895) 2 Ch. 166.

(5) (1867) 1 Ch. 617.

and Rigby, Lord J. agreed, holding that they were simply asked by the directors to do a piece of work and were merely their servants. In my opinion therefore the case is an authority for holding that an auditor may be *de facto* an officer of the company and as such liable to be proceeded against under the section even though he is not *de jure* an officer not having been duly appointed, and that the question, as in the above cited case, is one of fact, namely whether the circumstances of the case show that Messrs. Stuart Smith and Allen were *de facto* officers of the company.

Now Messrs. Parsons and Robjert never purported to have been appointed by the company. They were simply called in by one of the directors to do a particular piece of work. It was very different with Mr. Stuart Smith and his firm. At the very first ordinary general meeting of the bank the resolution that Mr. Stuart Smith, chartered accountant, be appointed auditor of the bank and that his remuneration be fixed hereafter by the directors was proposed by a director, seconded by a shareholder, and declared to have been carried unanimously. Mr. de Glanville, who represented the auditors, asked Mr. McDonnell to admit that there was no sufficient quorum at the meeting. Mr. McDonnell declined to make any such admission with regard to any general meeting except the one that appointed Messrs. Stuart Smith and Allen auditors of the bank and which, except so far as the course of conduct is concerned, is the only one with which we are here concerned, but I see no reason to doubt Mr. de Glanville's assertion that three-quarters of the issued capital was not represented, though numerically there were the requisite number of shareholders present. But apart from the flaw and the fact that the general meeting, instead of determining the remuneration of the auditors, delegated their duty in this respect to the directors, the appointment seems to have followed the procedure laid down by Article III for the appointment of persons to fill the office of auditor. This article also provided that the auditor or auditors for the time being should retire at the ordinary general meeting in every year and at the next ordinary general meeting held the following year the proposal was again made by a director, seconded by a shareholder, and carried unanimously that Mr. Stuart Smith be re-elected "the auditor of the bank" at a remuneration to be settled thereafter. Similar resolutions were passed unanimously at the third and fourth general meetings.

At the fifth general meeting the minutes show that the auditor made a report, and article 115 provides that the report of the person appointed to fill the office of auditor should be read at the annual general meeting. This is shown by the minutes to have been done, and again the general meeting unanimously adopted the proposal that Mr. Stuart Smith be re-elected "the auditor of the bank for the ensuing year." At the sixth annual meeting the report of the auditor was again read and he was again re-elected "the auditor of the bank for the ensuing year." At the seventh annual meeting, which is the one with which we are concerned, the report of the auditor was again read and it was unanimously decided that the

L. B.,
Stuart Smith
and Allen
Official
Liquidator,
Bank of
Burma.

L. B.
Stuart Smith
and Allen
Official
Liquidator,
Bank of
Burma.

firm of Messrs. Stuart Smith and Allen be elected auditors of the bank for the ensuing year. It was also decided at this general meeting to "continue the audit of the branch accounts by the leading chartered accountants in the towns where the bank has branches." The difference in phraseology, and the omission to appoint any specific person seems to me significant and in this connection one may notice the fact that on the front page of the impugned balance sheet, which is the only balance sheet put in evidence we find the words "Auditors, Stuart Smith and Allen, chartered accountants." The balance sheet and abstract of profit and loss are signed by them as "auditors" and also by two of the directors and by the general manager, and article 107 provides that the balance sheet and accounts shall be signed by the directors, general manager and auditor of the bank. The only reference to the auditors of the branch balance sheets is contained in a passage in the directors' report stating that the branch balance sheets and accounts had been audited by Messrs. Lovelock and Lewis of Calcutta, Messrs. Ferguson and Co. of Bombay, and Messrs. Fraser and Ross of Madras. Too much must not be inferred from this as the names of the solicitors, who are not contended to have been officers of the bank, also figure on the front page; but the difference of treatment accorded to these gentlemen who audited the branch accounts on the one hand and to Messrs. Stuart Smith and Allen on the other hand seems to me to be significant. Finally, at the extraordinary general meeting at which it was proposed to wind up the bank voluntarily the chairman in his speech to the shareholders spoke again of the firm as the bank's auditors stating that the director would have preferred to nominate them as liquidators. On the face of this evidence the only opinion to which I can come is that this firm were in no sense servants of the directors or called in by the directors to do a particular piece of work, but believed themselves and were believed by all concerned to be duly appointed to the office of the auditor of the bank, and in that belief performed the duties appertaining to that office, and were therefore *de facto* officers of the bank. The question of their liability is not before me, and it is no longer alleged that there was more than gross negligence on their part, and so much of para 5 of the liquidator's petition as charged them alternatively with actual fraud is withdrawn. But it was not contended that if officers of the company they were not liable to be proceeded against under the section on the charge that through want of the exercise of ordinary skill and diligence they sanctioned accounts containing false statements resulting in damage to the company, and "*In re the Kingston Cotton Mill*" (6) is clear authority that such conduct is misfeasance within the section. With regard to the other branch of the application the liquidator, in addition to withdrawing all charges of actual fraud undertook to supply the auditors with a list of the debts of the bank on which he bases his statement that the profits of the bank for the half year ending June 30, 1911, were not and

(6) (1896) 1 Ch. 345.

should have been known by the auditors if they had exercised ordinary skill and diligence not to have been Rs. 1,62,227, which however, they certified to be the case. I must therefore decline to stay the proceedings under the section as against the auditors and to relegate the liquidator to a suit against them and dismiss the preliminary objection with three gold mohurs costs.

L. B.
Stuart Smith
and Allen
Official
Liquidator,
Bank of
Burma.

JUDGMENTS IN APPEAL.

MR. JUSTICE ORMOND:—Proceedings were taken against the appellant under section 214 of the Indian Companies Act for misfeasance as the auditor of the Bank of Burma. The question in this appeal is whether the appellant was an "officer" of the Bank within the meaning of that section. The appellant's firm were appointed by a unanimous resolution one of the auditors of the bank for the ensuing year, at the general meeting of the shareholders on June 24, 1911. The Appellant signed the balance sheet for the half year ending June, 1911, as auditor of the bank. Some time later it was discovered that the appointment as auditor was irregular owing to there not having been a properly qualified quorum at the general meeting sufficient for the appointment of auditor. It is admitted that if there had been a proper quorum the appellant would have been an "officer" within the meaning of the section. There is no doubt that he was a *de facto* auditor of the bank and that he filled that office.

Mr. de Glanville contends that no one could be an "officer" of the company unless such person had been properly appointed by the company. The learned Judge on the Original Side has held that the appellant was a *de facto* official of the bank and his decision, in my opinion, is correct. In the case of *In re Western Counties Steam Bakeries and Milling Co.*, (5) (the case referred to by the learned Judge) it was decided that the auditor was not the auditor of the company, but was a servant appointed by one of the directors to do a certain piece of work, namely, to audit the accounts of the company. But from the judgment in that case it is clear, I think, that the judges contemplate that an auditor not properly appointed by the company might be a *de facto* officer of the company and, therefore, liable to be proceeded against under section 10 of the English Company's (winding up) Act as an officer of the company. Rigby, L. J. pointed out that the director who appointed the auditors in that case could have removed them at his pleasure and was not bound to put the result of the audit before the company. But that was not the case here. The appellant was appointed to the office of an auditor of the bank for the ensuing year by shareholders in general meeting, who purported to have the power of making the appointment. A report of the proceeding of that general meeting was sent to all the shareholders of the bank and everyone considered that appellant's firm had been properly appointed to the office of auditors of the bank. The shareholders at a properly qualified general meeting could have repudiated the appointment, as

L. R.
Stuart Smith
and Allen
v.
Official
Liquidator,
Bank of
Burma.

an appointment made by the shareholders. But that was not done and in consequence appellant was allowed to remain in the office of auditor. Mr. de Glanville relies upon a dictum of Rigby, L. J., in the above case to the effect that an officer can only be removed upon just cause. But that judge says he entirely agrees with the judgment of Lindley, L. J., who says: "If persons are appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within section 10, and no irregularity in their appointment would, I conceive, avail them. A manager or director who has been irregularly appointed, *i. e.*, a *de facto* but not *de jure* manager or director, is within section 10 of the English Act." Mr. de Glanville contends that this is so, because a manager and director are expressly mentioned in the section. But the company could repudiate the appointment of such a manager or director, and a manager and a director are both officers of the company. Therefore a *de facto* but not *de jure* manager and director is a *de facto* but not *de jure* officer of the company. Moreover though it formed no part of Mr. McDonnell's case for the respondent in my opinion the appellant was not only a *de facto* auditor of the bank but he was also *de jure* auditor of the bank and therefore a *de jure* officer of the bank and was validly appointed. Under article III of the articles of association the person or persons to fill the office of an auditor or auditors may from time to time be determined by the bank in a general meeting "The auditor or auditors for the time being shall retire at the ordinary general meeting in every year, and if any casual vacancy occurs in the office of auditor, the directors shall forthwith fill up the same." This meeting was the ordinary annual general meeting which had certain powers but it required a certain qualified quorum to appoint an auditor. There were four directors of the bank of whom one was in England and the other three were at the meeting. The appellant was proposed and seconded by two of these directors. If the shareholders at that meeting were unable to appoint an auditor owing to the want of a quorum, that would occasion a "casual" vacancy in the office, the casuality being for the want of a quorum.

Mr. de Glanville contends that the acts of the directors at this meeting cannot be taken to be an appointment by the directors because they did not purport to act as directors but were acting as shareholders. It was the duty of the directors forthwith to fill up the office, and three of the directors so far as they were able, appointed the appellant the auditor of the bank at that meeting. No form was necessary for such an appointment by the directors and the fact that certain shareholders purported also to appoint the auditor would not detract from the power inherent in those three directors to make the appointment. I would therefore dismiss the appeal with costs.

TWOMEY, J.—I do not see how we can treat the appellants as having been appointed by the directors to a casual vacancy. It is true that three of the directors voted as shareholders at the meeting which purported to appoint the appellants to the office of auditor.

The votes at that meeting were ineffectual because the body of voters was not duly qualified under article 55 of the articles of association. But my learned colleague suggests that because three of the voters were persons who as directors could appoint to a casual vacancy, these three persons should be held to have exercised (unknown to themselves) their extra-ordinary powers of appointment under article III. I cannot agree in this view. The directors voted only in their capacity as shareholders. They did not intend or purport to exercise their powers as directors and cannot in my opinion be deemed to have done so unconsciously. Moreover, the vacancy was not in my opinion a casual vacancy. The office was an annual one. The previous holder of the office had retired in due course on the expiry of an annual period and the time had come for re-filling the office in the ordinary way. In other words, it was an ordinary and regular as distinguished from an extraordinary or casual vacancy.

The question we have to settle is whether the appellants, though not regularly appointed to the office of auditor, filled that office *de facto* and thereby became officers of the Company for the purpose of sec. 214 Indian Companies Act 1882. The English decisions leave no room for doubt that an auditor can be *de facto* an officer of a Company, although he is not an officer *de jure* owing to some irregularity in the appointment. There admittedly was such an office in the Bank of Burma, Limited, and I think the appellants not only performed the duties pertaining to that office but did so as holders of the office and not merely as auditors. It is not disputed that the appellants did the work of auditors for the Bank and it is not suggested that there was anything which the person duly appointed to the office of auditor of the Bank would have done in the ordinary course that the appellants did not do. But this is not enough. In the words of Lord Justice A. L. Smith in the English case of 1897, 1 Chancery Division 617: "It is no good showing that a person performs auditor's work; it must be shewn that he is *de facto* an officer of the Company. The officer of auditor of a Bank is not one that carries any special insignia. But I think the circumstances show that the appellants actually filled the office. The shareholders in general meeting purported to appoint them to it in the manner prescribed in the articles of association. It was in pursuance of that appointment that they entered upon and carried out the duties of auditors of the bank and no one else was appointed to the post. On the front page of the directors' report issued to the shareholders the appellants are shown as the auditors of the bank. It is not as if the report and balance sheet merely show that the accounts had been audited by Messrs. Stuart Smith and Allen and found correct. The case is distinguishable from that of the firm of auditors in the English case cited in 1 Chan. Div. 617, for the latter were only called in by the directors to do a particular piece of work, were never described as the auditors of the company and their services could have been dispensed with at any moment by the directors without reference to the shareholders. It was never contemplated

L. B.
Stuart Smith
and Allen
vs.
Official
Liquidator,
Bank of
Burma.

L. S.
Stuart Smith
and Allen
vs.
Official
Liquidator
Bank of
Burma.

that Messrs. Stuart Smith and Allen could cease to be the auditors of the bank except in accordance with the terms of article III of the articles of association which provided for the vacating of the office. They had the full status of auditors of the bank and I think it has been rightly held that they filled that office *de facto*. On these grounds I concur in dismissing the appeal.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION* No. 79 OF 1913.

BURMA RAILWAYS COMPANY ... APPELLANT.
vs.
HIRA LAL ... RESPONDENT.

For Appellant—Ormiston.

For Respondent—Gregory.

Before Mr. Justice Parlett.

Dated, 4th June 1914.

Attachment of a security deposit of a Railway Employee in the hands of the Auditor—Lien of the Railway Company on such deposit—Disbursing officers duty on receipt of a prohibitory order—Result of disregarding such order.

When the auditor of the Burma Railways Company paid out an employee's security deposit after receipt of prohibitory orders from Court,

Held that the Railway Company are liable to make good the loss caused to the person at whose instance the prohibitory orders were issued.

A security deposit can be attached subject to the railway company's lien, though it could not be realised free from that lien.

Though the salary of an employee is not disbursed before the end of the month in which it is earned, a disbursing officer receiving during that month an order attaching that salary is bound to give effect to it when the salary comes to be disbursed.

JUDGMENT.

PARLETT, J:—On July 25, 1912, respondent brought a civil suit against three persons, one of whom was a servant of the Burma Railways Co. and at the same time filed an application supported by affidavit to the effect that this defendant had resigned his appointment and would be paid up on August 11, and asking for prohibitory orders to issue to the auditor of the Burma Railways prohibiting him from paying to the defendant Rs. 140 being the amount of a security deposit made by him and also a moiety of the defendant's salary for July, 1912, and to the defendant prohibiting him from drawing the amounts. Prohibitory orders were issued accordingly. That issued to the auditor was returned endorsed: "Not accepted on account of insufficient particulars as to the identify of the employee," and with the note that "security

* Revision against the judgment and decree of the Small Causes Court of Rangoon, dated the 13th February 1913, in Civil Suit No. 7844 of 1912.

deposit cannot be attached if the judgment debtor is still in employment." Eventually on August 2, it was endorsed by the auditor as "Accepted as regards salary only." On August 5 the suit was decreed and on August 7, the plaintiff obtained another prohibitory order to the auditor to withhold payment of the Rs. 140. This, he endorsed on August 12, as "Not accepted. The security deposit is not at the disposal of the judgment debtor." This opinion of his was wrong. The deposit could be attached subject to the railway company's lien, though it could not be realised until freed from that lien. In the present case the railway company claimed no lien on any part of the deposit and though they advanced the defence that the money was not liable to attachment at all, they have now abandoned it. In this suit the plaintiff has obtained a decree against the railway company for the Rs. 140 disbursed by their auditor after receipt of the prohibitory orders referred to above. The railway company contend that they were not bound by the orders served on their auditor, who was not the proper officer to be served with such order. It will be noted that the creditor never suggested that he was not in a position to comply with the prohibitory orders, but merely disregarded them on the strength of his opinion, that the money in question was not liable to attachment. That opinion being erroneous and service on him being effected, the only point is whether it binds the railway company. It is admitted that at the time of the order, the monies in question were under the control, not of the auditor, but of the agent of the company without whose sanction payment to the defendant could not be made. It is contended for the company that under order 21, rule 46 (1) as the company was the debtor the order should have been addressed to the company, that is some officer of the company as specified in order 29, rule 2 read with order 48, rule 2, among whom the auditor does not appear. It is also pointed out that though under order 21, rule 48, the auditor has been notified as the officer to whom notice should be sent of orders attaching salary allowances of railway employees, that does not extend to security deposits.

On the other hand it is admitted that the auditor is the only disbursing officer of the railway and that when the agent has sanctioned the repayment of a deposit he is the officer who actually makes the payment. That being so, the prohibitory order would operate to forbid him to make that payment on receipt of the agent's sanction, notwithstanding that at the date of its service upon him, he was not yet in a position to make the payment for want of that sanction. There can be no doubt that under ordinary circumstances he is not empowered to disburse the salary of an employee, still in the company's employ, before the end of the month in which it is earned, yet, if during that month he received an order attaching that salary it cannot be contended that he would not be bound to give effect to it, when the salary came to be disbursed, and that if he disregarded it the company could be held liable for his default. Similarly in the present case, he, as the

L. B.
Burma Rail-
ways Com-
pany.
vs.
Hira Lal.

L. B.
 Burma Rail
 ways Com-
 pany
 vs.
 Hira Lal.

disbursing hand of the company, having paid out monies after the receipt of lawful orders, not to pay them, I consider that the company are liable to make good the results of his action. The appeal is dismissed with costs, advocate's fee two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL IST APPEAL* No. 6 OF 1912.

MA AUNG BYU & I DEFENDANT—
 APPELLANTS.

vs.

THET HNIN PLAINTIFF—
 RESPONDENT.

For Appellant—Hay.

For Respondent—Dantra.

Before Sir Henry Hartnoll, Officiating Chief Judge and
 Mr. Justice Twomey.

Dated, 6th April 1914.

Buddhist Law—Divorce—Desertion—Convict, whether deemed to desert wife—Wife of convict taking another husband, effect of—evidence—Arbitration proceedings—Clerk taking note of evidence—Note whether admissible.

Under Buddhist Law a man sentenced to imprisonment is not to be deemed to have deserted his wife; nor does desertion *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore, the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property.

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence.

JUDGMENT.

MR. JUSTICE TWOMEY:—The plaintiff respondent, Maung Thet Hnin, was convicted of murder and sentenced to transportation in 1889; but in 1911 the remainder of his sentence was remitted and he was released. At the time of his conviction he left a wife, Ma Aung Byu, with four children and the land and other joint property of the married couple was admittedly sufficient for the maintenance of Ma Aung Byu and the children. About three years after Thet Hnin's conviction Ma Aung Byu took another husband, Kyaw Zan Hla, with whom she has since lived. When Thet Hnin came back from transportation he demanded the joint property from Ma Aung Byu. She would agree only to give him

* Appeal against the Judgment and decree of the District Judge of Henzada, dated 22nd December 1911, in Civil Regular No. 5 of 1911.

a moiety of the joint property. There was a reference to arbitration, but nothing came of it and Thet Hnin brought the present suit against Ma Aung Byu and Kyaw Zan Hla for the recovery of the property acquired during the marriage of Thet Hnin and Ma Aung Byu.

The plaintiff's case is that Ma Aung Byu had no right to take a second husband and that in doing so she was guilty of adultery and desertion. Ma Aung Byu, on the other hand, contends that she was entitled to take another husband when three years had elapsed from the time of Thet Hnin's conviction and that by taking a second husband she did not forfeit her share in the joint property. There is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife. The dhammathats do not provide for such a contingency. But sections 244 to 249 and 390 to 393 of the ex-Kinwun Mingyi's digest deal with cases in which a husband goes on a journey or goes to war and they show that the wife must wait indefinitely for her husband's return, at any rate as long as she has adequate means of subsistence from the joint estate. Having regard to the spirit of these rules I think it is clear that Ma Aung Byu had no right to take a second husband, and I would accept the decision of the district court, that her conduct in doing so amounted to desertion and adultery.

It has been held however that desertion does not *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage-tie (1). We have therefore to consider when the marriage-tie was actually dissolved. Was it dissolved by the act of Ma Aung Byu in taking a second husband or did it subsist until 1911 when Thet Hnin returned from transportation? The Upper Burma case of *Ma Thin vs. Mg. Kyaw Ya* (2) is good authority for the view that the deserting party cannot claim a divorce by pleading the desertion and Sir Harvey Adams on expressed himself in favour of the same view in *Thein Pe vs. U Pet* (1) though the point was not decided in that case. I would follow the interpretation adopted by the learned Judicial Commissioner, Upper Burma, and hold that the marriage-tie between Thet Hnin and Ma Aung Byu was not dissolved by her action in deserting him but subsisted until Thet Hnin was released from jail and demanded the joint property from Ma Aung Byu. By that express act he took his stand upon the fact of the desertion and treated his marriage-tie with Ma Aung Byu as severed.

It is admitted that in the case of a divorce on the ground of the wife's adultery the husband is entitled to all the property and where as in this case the husband treats the marriage as at an end on the ground of his wife's desertion and adultery, there is no good reason to depart from the ordinary rule.

HARTNOLL, OFFG. C. J. :—I concur.

(1) *Thein Pe vs. U Pet* 3 L. B. R. 175.

(2) U. B. R. (1892-96) Vol. II p. 56.

L. B.
Ma Aung
Byu and r
v. 案
Thet Hnin.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL* No. 197 OF 1913.

CHAS. R. COWIE. & CO. APPELLANT.

vs.

W. H. A. SKIDMORE RESPONDENT.

For Appellant—McDonnell.

For Respondent—Bijapurkar.

Before Sir Henry Hartnoll, Officiating Chief Judge and Mr.
Justice Twomey.

Dated, 23rd February 1914.

Civil Procedure Code (Act V of 1908) O. 21, R. 40—Poverty or other sufficient cause—Burden of Proof—some part thereof—meaning of.

Where a judgment debtor is arrested and brought before a Court, the burden is on him to prove that from poverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments, the amount of the instalment due.

A Court should refuse to direct a release of a judgment-debtor under order 21, rule 40 of the Civil Procedure Code if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.

The words "some part thereof" in rule 40 (2) (d) of order 21, refer to decrees for payment of money generally and not only to instalment decrees.

ORDER.

HARTNOLL, OFFG. C. J. :—The appellants obtained a decree against the respondent on January 6, 1913 for Rs. 2,870 and costs. Two abortive attempts were made in May and July to execute this decree by applications for the arrest and imprisonment of the judgment debtor and on November 13 last, another application was made to the same effect. This time the judgment debtor was arrested and brought before the learned judge on the Original Side who passed the following order: "The judgment-debtor states that he is and has been since the passing of the decree unable to pay the debt. Mr. McDonnell for judgment creditor states that he could get evidence to show that the judgment-debtor has during the last twelve months been in a position to pay a portion of the decree and that he is not in a position to bring evidence to show that he was able to pay his debt in full. Under order 26, rule 40 (1) I order the release of the debtor as the decree was payable by instalments."

This order is appealed against and it is urged that the learned Judge on the Original Side erred in ordering the respondent's release. Order 21 rule 40 (1) is as follows: "Where a judgment debtor . . . is brought before the court after being arrested in execution of a decree for the payment of money and it appears to

*Appeal against the order of the Judge of the Chief of Court Lower Burma, sitting on the original side releasing the Respondent under Rule 40 sub-section (1) of the Civil Procedure Code.

the court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree, or if that amount is payable by instalments, the amount of any instalment thereof, the court may upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be." Appellant's counsel urges that the burden of proof lay on the respondent to prove that he was unable from poverty or other sufficient cause to pay the amount of the decree and quotes an Upper Burma case *Bhaimia Ahmed Ismailji v. Kadir Set* (1) in support of such contention. I am of opinion that he is right. The case is one that comes both under section 102 and section 106 of the Evidence Act. The law allows imprisonment to recover debt and *prima facie* the judgment-debtor was liable to be committed. It was for him to traverse that liability by proving poverty or other sufficient cause. Moreover such reasons would be especially within his knowledge and so section 106 was applicable.

It is further urged that the learned Judge erred in ordering the release of the judgment-debtor as the decree was not payable by instalments. O. 21 R. 40 (2) says: Before making an order under subrule (1) the Court may take into consideration any allegation of the decree holder touching any of the following matters.

- (a)
- (b)
- (c)
- (d) Refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has or since the date of the decree has had the means of paying it;
- (e)———"

The learned Judge was apparently of opinion that as the decree was not payable by instalments and as the decree-holders could not prove that, since the date of decree, the judgment-debtor could have paid the amount of the decree in full, he was entitled to be released. This seemed to be reading into order 21 rule 40 (2) when construing its meaning with reference to order 21, rule 40 (1) the following meaning, namely, that if the amount of the decree is not payable by instalments but payable in one lump sum, the decree holders had to prove that since the date of the decree the judgment-debtor could have paid the whole amount before they could ask the court to take his refusal or neglect to do so into consideration that it is only in the case of a decree payable by instalments that the court could take into consideration his refusal or neglect to pay a portion of the decree—the portion apparently to be the amount of the instalment due—when he has since the date of the decree had the means to do so. I do not read the sub-sections in this way. I read their meaning to be as follows. When the judgment-debtor is arrested and brought before the court it is open to him to prove to the court that from

E. S.
Chas.
R. Cowie
and Co.
vs.
W. H. A.
Skidmore.

(1) 1897-01 U. B. R. (Civil) 279.

L. S.
 Chas.
 R. Cowie
 and Co.
 W. H. A.
 Skidmore.

poverty or other sufficient cause he is unable to pay the amount of the decree, or if that amount is payable by instalments the amount of the instalment due. If he can do so, the burden of proof lying on him and the decree holders being given the opportunity of proving the contrary, the court can order his release. But before doing so the court can take into consideration any of the acts of bad faith set out in sub-rule (2) whether the decree is payable in one lump sum or by instalments. Sub-rule (2) refers to Sub-rule (1) generally and I can not read into sub-rule (2) the meaning that portions of the words in clause (d) of it are only to refer to portions of words in sub-rule (1). To read such a meaning into the section would mean that, if a decree was passed against a judgment-debtor for Rs. 5,000 and the decree holder could prove that since it was passed he had been able and was able to pay Rs. 4,950 he would not be able to get him committed as he could not prove that the judgment-debtor could pay the remaining Rs. 50. That in my opinion was never meant, and in my opinion, the ordinary meaning to attach to sub-rule (2) (d) is that if the decree holder can prove that since the passing of the decree the judgment-debtor has had the means to pay the amount of the decree, whether it is payable in one lump sum or by instalments, in whole or in part, the court can take into consideration such fact before passing an order under sub-rule (1).

It is urged by respondent's advocate that all witnesses should have been produced by the decree holder when the judgment-debtor was produced before the court. That seems unreasonable, as the decree holder is not in a position to tell when a judgment-debtor will be arrested, especially if he is trying to evade arrest, and he may not be able to collect his witnesses at a minute's notice. Order 21 rule 40 (3) provides for such a situation as it gives the court power while any of the matters in sub-rule (2) are being considered, to order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the court or release him on his furnishing security to the satisfaction of the court for his appearance when required by the court.

The question remains as to what should be done. I would set aside the order of the learned Judge on the Original Side and direct that on application by the decree holder, he do again secure the attendance of the judgment-debtor or attempt to do so, and that if such attendance be secured, the judge do proceed to dispose of the case in accordance with the procedure indicated by me in this order. I would give the appellants their costs in this appeal fixing their advocate's fee at three gold mohurs.

Mr. Justice Twomey:—I agree that we should construe the words "some part thereof" in rule 40 (2) (d) in their general sense and not as referring only to the case of a decree payable by instalments. Reading sub-sections (1) and (2) together I think the intention is clearly that even if the judgment-debtor succeeds in satisfying the court that he is unable to pay the full amount of the decree (or instalment, as the case may be) the court should nevertheless refuse to direct his release if the

judgment creditor shows that the debtor has been in a position to pay a substantial part of the decretal amount (or instalment as the case may be), and has refused or neglected to do so. For such refusal or neglect is an act of bad faith only less in degree than a similar refusal or neglect in respect of the whole amount due. Sub-section (2) (d) in its ordinary grammatical meaning permits the court take into account the minor as well as the major act of the bad faith, and it would in my opinion be unreasonable to interpret the clause otherwise. I therefore concur in the proposed orders.

L. S.
Chas.
R. Cowie
and Co.
vs.
W. H. A.
Skidmore.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL* No. 8 OF 1914.

MA E ME & I APPELLANT.

vs.

MA E RESPONDENT.

For Appellant—Agabeg.

For Respondent—Ba Dun.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Dated, 1st June 1914.

Probate and Administration Act—S. 90 cl. 4—Person interested in the property—Are creditors interested in property?

Held that a creditor has no interest in the immovable property of his deceased debtor unless he has charge on that property. He has no *locus standi* to come and object to a grant of probate or letters unless he objects to the grant on the ground that the will is set up in fraud of the creditors.

JUDGMENT.

Ma E Me as administratrix to the estate of her deceased husband had incurred certain costs in litigation with Ma E.

Ma E attached certain immovable property as being part of the estate of the deceased; but Ma Thi obtained the removal of that attachment on the ground that she had purchased the property from the administratrix, Ma E Me. Ma E then applied to set aside the sale by Ma E Me to Ma Thi as having been made by the administratrix without the leave of the court. The District Judge granted the application and set aside the sale and he held that by setting aside the sale, the order removing the attachment was *ipso facto* set aside.

Ma E Me and Ma Thi now appeal. The first question is whether Ma E as a creditor of the estate is a person "interested in the property" within the meaning of Section 90, Sub-section 4 of

* Appeal against the judgment and decree of the District Court of Tavoy in Civil Miscellaneous No. 11 of 1913 dated 10th October 1913.

L. B.
Ma E Me
and 1
Ma E.

the Probate and Administration Act. That provision relates to the alienation of immovable property and, therefore, the words "interested in the property" must be "interested in the immovable property disposed of." Now, a creditor has no interest in the immovable property of his deceased debtor unless he has a charge on that property. Under the provisions of Section 90 of the Probate and Administration Act and Section 250 of the Succession Act under which the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration, a creditor has no *locus standi* to come in and object to a grant of probate or letters unless he objects to the grant on the ground that the will is set up in fraud of the creditors. In this case the creditor does not allege that the sale was made in fraud of the creditors.

We think the creditor Ma E had no *locus standi* to have the sale set aside under section 90. Even if the sale by the administratrix had been properly set aside by the court under Section 90 the court had no power to set aside the order of the Township Court removing Ma Thi's attachment.

The sale by the administratrix to Ma Thi would be good until it was set aside and it was therefore good when the Township Court ordered the removal of Ma E's attachment. If the order of the District Court setting aside the sale, under Section 90, had been correct, it would still have been necessary for the creditor to make a fresh application for the attachment of the property. We allow the appeal and set aside the order of the District Court with costs, three gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL* No. 3 OF 1913.

MA THEIN SHIN and 1 APPELLANT.

vs.

AH SHEIN alias HOKE SHEIN, Minor by his
next friend MA TO RESPONDENT.

For Appellant—R. N. Burjorjee.

For Respondent—Ormiston.

Before Mr. Justice Twomey and Mr. Justice Parlett.

Dated, 19th May 1914.

Inheritance—Succession among Chinese Buddhists—Exclusion of females—Indian Succession Act not applicable to Chinese Buddhists—Absence of written law on inheritance among Chinese Buddhists—Justice Equity and good conscience.

Where a son by a former wife of a Chinese Buddhist claimed to inherit all the father's property to the total exclusion of his step-mother and her daughter.

* Appeal against the judgment and order of the District Judge, Maubin, dated the 21st October 1912, in Civil Regular No. 5 of 1912.

Held that, in the absence of any written law on the subject of inheritance among Chinese Buddhists and in the absence of definite evidence as to the customs prevailing in such matters, the proper course is to proceed according to justice equity and good conscience and that the mother be awarded one-third and the plaintiff two-thirds of his father's estate.

Though Parker in his Comparative Chinese Family Law mentions six preliminary steps as essential to a first class marriage, the evidence of Chinese Elders in this case shows that the customs are not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people.

L. B.
—
Ma Thein
Shin and I
s.
Ah Shein
alias Hoke
Shein, Minor
by his
next friend
Ma Toe.

JUDGMENT.

The Plaintiff—Respondent Ah Shein is the son of a Chinaman In Ya deceased. After the death of Ah Shein's mother Ma Le, In Ya married Ma Thein Shin the 1st Defendant—Appellant and had issue by her, a daughter, Ma E Chi the 2nd defendant. Ah Shein sued Ma Thein Shin and Ma E Chi for his father's estate. Ah Shein being a minor filed the suit through his next friend Ma To, and was allowed to sue as a pauper. The value of the estate is put at Rs. 6,005. Ah Shein pleaded that his father In Ya was a Chinese Buddhist and that according to the law applicable to the case he was entitled to the whole of his father's estate to the exclusion of his father's second wife, the widow Ma Thein Shin and her daughter Ma E Chi.

The Defendants—Appellants pleaded that Ah Shein's mother was not lawfully married to In Ya and that Ah Shein was therefore entitled to nothing. They denied that In Ya was a Buddhist. They also disputed the value of the property left by In Ya. The District Court has found that In Ya was a Chinese Buddhist, that Ah Shein is the legitimate son of In Ya by his first wife Ma Le and that under the customary law applicable to the case Ah Shein is entitled to the whole of his father's estate to the exclusion of the Defendants—Appellants. As regards the value of the estate the District Court came to no finding but appointed a commissioner "to find out what was the estate of In Ya, its value and any deduction which ought to be made therefrom such as debts and funeral expenses etc." The passing of orders as to court fees under Order 33 Rule 10 was postponed until the value of the estate should be ascertained.

In this appeal by the defendants it is urged that Ah Shein's mother Ma Le is not proved to have been legally married to In Ya, that the evidence as to the customary law applicable to the case is insufficient and that the plaintiff failed to prove his title to the whole estate to the exclusion of his step-mother and step-sister. Although the defendants denied in the Lower Court that In Ya was a Buddhist, they have not appealed against the finding on this issue and in their grounds of appeal paragraphs 1 and 6 are expressly based on the assumption that In Ya was a Chinese Buddhist. It follows that the Indian Succession Act is not applicable to the case (vide section 331) and that under section 13 Burma Laws Act (1) the case must be decided according to Buddhist Law. As

(1) Act XIII of 1898.

L. B.
 Ma Thein
 Shin and 1
 v.
 Ah Shein
 alias Hoke
 Shein, Minor
 by his
 next friend
 Ma Toe.

explained in *Fone Lan v. Ma Gyi* (2) the Buddhist Law in such a case as this means the customary law applicable to the deceased Chinaman, and it was for the plaintiff to prove his title under this law.

First, as regards In Ya's alleged marriage with the plaintiff's mother Ma Le. The evidence shows that a member of In Ya's family asked for the girl in marriage from her uncle Tha Ku. There was a wedding feast. Presents were brought by Ma To, In Ya's cousin, who had demanded the girl in marriage. In Ya and Ma Le lived together from that time up to her death. They opened a shop together at Alanmyo. They visited friends and relatives together and also went together to pagodas and kyaungs. Parker in his essay on Comparative Chinese Family Law mentions six preliminary steps to a first class marriage. But it is explained in a foot-note that though these forms are usual in China they are not indispensable. The evidence of Chinese elders produced for the plaintiff in this case shows that the customs are not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people. The allegation for the defence that In Ya and Ma Le merely eloped and then lived together is not proved. I think it is clear that In Ya had the intention of marrying Ma Le that he carried out this intention as far as he could, that the couple became man and wife in the eyes of their families and their neighbours and lived together as such up to the time of Ma Le's death. It is a case in which apart from the wedding proceedings, the ordinary presumption of marriage arises from long cohabitation with habit and repute, and this presumption has not been rebutted. I would therefore accept the District Court's finding as to the plaintiff's legitimacy.

There appears to be no written law on the subject of inheritance among Chinese Buddhists, and the case has to be decided according to the somewhat meagre oral evidence produced by the plaintiff. The defendant Ma Thein Shin produced no evidence at all on the subject. The evidence of Ko Sit Oh and Itaik shows that daughters are altogether excluded by sons. But neither of these witnesses supports the view taken by the District Court that the widow gets nothing. Ko Sit Oh says: "The wife inherits from the husband. I do not know to what extent. It is a small proportion." Itaik says: "The mother has a right somewhat over the estate," but he was unable to say what her share would be. In the absence of definite evidence I think we may proceed according to justice equity and good conscience and we shall not be far wrong in awarding the widow a third share which is the share she would have received if the Indian Succession Act were the law applicable to the case.

I would therefore modify the decree of the District Court by awarding Ah Shein two-thirds of the estate of his father In Ya.

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

The direction for the appointment of a Commissioner to take accounts will stand. The order as to costs is set aside. The whole of the costs in both courts will be borne by the estate. The court fee in both courts on Rs. 6,005-3-6 the amount at which the suit is valued in the plaint will be recovered from the estate and will be a first charge thereon. A copy of the decree will be sent to the Collector, Maulin District.

L. B.
 Ma Thein
 Shin and 1
 v.
 Ah Shein
 alias Hoke
 Shein Minor
 by his
 next friend
 Ma To.

IN THE COURT OF THE JUDICIAL
 COMMISSIONER, UPPER BURMA.

CIVIL 2ND APPEAL No. 55 OF 1912.

NGA TI, legal representative of }
 NGA TET (deceased). } ... APPELLANT.

vs.

NGA PAN and 1 RESPONDENTS.

For Appellant—S. Vasudevan for J. C. Chatterjee.

For Respondents—S. Mukerji.

Before Sir George W. Shaw, C.S.I., I.C.S.

Dated, 3rd December 1913.

Civil Procedure Code—Act V of 1908—S. 11.—Res judicata—finding of a Lower court objected to in Appeal but not disposed of by the Appellate Court—whether such a finding is final.

Where an appeal is preferred against the finding of an issue but the Appellate court has not decided finally on that point as the appeal was disposed of on other points, it cannot be held that the finding of the Lower Appellate Court is final and the decision cannot operate as *res judicata*.

JUDGMENT.

The only point for determination is whether the question of the reunion of Nga Tet and Mi Pan after divorce was *res judicata* in the present suit. It was raised and decided in a previous suit between the same parties by the court of first instance and the lower Appellate Court, but the judgment of the lower Appellate Court was appealed against and the judgment of this court in second appeal (Civil 2nd Appeal No. 228 of 1911) did not decide this point but upheld the decision of the Lower Appellate Court dismissing the Plaintiff—Appellant's suit on another ground, namely that he had not proved the mortgage which he alleged.

The Plaintiff—Appellant had made it one ground of his appeal in his memorandum of 2nd Appeal that the decision of the Lower Appellate Court in regard to the reunion was wrong, but the learned Additional Judge came to no decision on this point—the decision in regard to the proof of the mortgage being sufficient for the disposal of the case.

U. E.
 Nga Ti,
 legal repre-
 sentative of
 Nga Tet
 (deceased)
 v.
 Nga Pan
 and r.

As an appeal was preferred and an objection taken against the finding of the Lower Appellate Court on the point in question, I think it must be held that the matter of reunion was not heard and finally decided in the previous writ within the meaning of section 11 of the Code of Civil Procedure. This is in accordance with the decision of a Bench of the Calcutta High Court in *Rai Charan Ghosh vs. Kumud Mohan Dutt Choudhury* (1) where Mr. Justice Banerji read the words "heard and finally decided by such court" to mean heard and finally decided by such court either if no appeal is preferred from its judgment or if an appeal being preferred has been disposed of, and the judgment of the Appellate Court which takes the place of its judgment has decided the point".

The decree of the Lower Appellate Court is therefore set aside and it is directed to proceed to dispose of the appeal on the merits. Costs will abide the final result.

IN THE JUDICIAL COMMISSIONER'S COURT,
 UPPER BURMA.

CIVIL REVISION No. 91 OF 1912.

NGA PO KAN

vs.

NGA SHWE DAT.

For Applicant—J. N. Basu.

For Respondent—E. Ba Din.

Before H. E. McColl, Esquire, I. C. S.

Dated, 19th January 1914.

Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of Appeal to a wrong Court not sufficient cause.

Discretion when applied to a Court of Law means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular.

The presentation of an appeal to a wrong court through a mistake in or ignorance of law is not a sufficient cause for admitting an appeal after time.

In an appeal filed after its time the appellant should file his memorandum of appeal and state in it grounds on which he asks the court to admit it after time.

JUDGMENT.

The Plaintiff—Applicant sued the Defendant—Respondent alleging that he had stood surety for his deceased brother on a sale of goods and obtained a decree in the Township Court. The decree is dated 1st November 1911. On the 6th November the Defendant—Respondent applied for a copy of the Township Court's Judgment and decree. He was told next day what stamps to produce and he produced them on the 8th. He was told that copies would be ready on the 20th and they were delivered to him on that day, so that the time required for obtaining these copies was 14 days.

(1) 2. C. W. N. 297.

Then instead of appealing against the decree he filed a regular suit in the Sub-divisional Court for accounts. It is difficult to understand what he wanted as he referred only to transactions which had been dealt with in the suit in the Township Court. This suit for accounts was filed on the 28th November and on the 15th December the Sub-divisional Judge held that the suit was not maintainable and that the Defendant—Respondent's remedy was to appeal against the Township Court's decree. Instead of doing so at once, he waited for 8 days and then on the 23rd December applied for and obtained a copy of the Sub-divisional Judge's judgment though this was in no way necessary for the purpose of appeal. The courts were after that closed for the Christmas holidays. Again he did not appeal on the first day on which the courts were opened, but on the 4th January he filed a miscellaneous Application in which he asked for permission to appeal though the time for appealing has elapsed. It is not clear from the proceedings whether he filed his memorandum of appeal at the same time or not. In the Appellate record, the appeal is stated to have been presented on the 3rd February. That was the date on which the District Judge passed orders on the Miscellaneous Application and as the memorandum of appeal is dated the 3rd January 1912 it is possible that it was filed at the same time as the application. The District Judge heard the application *ex parte* and passed orders admitting the appeal. Notice was then issued to the Plaintiff—Applicant and the appeal was disposed of on the merits, the question of limitation not being considered again. The Township Court's decree was reversed and the suit dismissed.

The Plaintiff—Appellant has now applied for revision on various grounds but the preliminary point of limitation has been argued first.

The procedure followed in the District Court was wrong. The Defendant—Respondent should have filed his memorandum of appeal and in it stated the grounds on which he asked it to be admitted after time. After hearing him or his advocate the District Judge might have admitted the appeal provisionally and then at the hearing gone into the question of limitation and heard what the other side had to say on the point.

It is argued for the Defendant—Respondent that the admission of an appeal after time is a matter of discretion and that the discretion of the Lower Appellate Court should not be interfered with on 2nd appeal. It has been said that 'Discretion when applied to a Court of Law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular. The reasons given by the learned District Judge for admitting the appeal after time are given in the following words "It is explained on behalf of the applicant that he did not understand the law and thought the proper court to apply to was the Sub-divisional court. The Sub-divisional court indicated to him his error. Excluding the time between the date of institution in the Sub-divisional Court (28th November 1911) and the date the copy

J. B.
Nga Po Kan
v.
Nga Shwe
Dat.

U. S.
 Nga Po Kan
 v.
 Nga Shwe
 Dat.

of the Sub-divisional Court's Judgment was obtained (15th December (sic))—and I think in the circumstances this period should be excluded—the appeal would appear to be within time”.

The learned District Judge apparently had in mind S. 14 Limitation Act. This section does not apply to appeals but I have no doubt that the circumstances contemplated in that section would generally be held to be sufficient cause within the meaning of S. 5. But the District Judge omitted to consider whether the ground on which the Sub-Divisional Court was unable to entertain the Defendant—Respondent's suit was of a like nature as defect of jurisdiction. The High Court of Allahabad has held that the presentation of an appeal to the wrong court through a mistake in ignorance of law is not a sufficient cause. The High Courts are however not agreed upon this point. But in this case the Defendant—Respondent made a worse mistake than appealing to the wrong court. He did not attack the decree at all but filed a fresh suit. Again the learned District Judge omitted to consider whether the proceeding which the Defendant—Respondent prosecuted in the Sub-divisional Court was prosecuted with good faith *i. e.* with due care and attention. Had he exercised even the most ordinary care would he not have discovered that his remedy was to appeal to the District Court?

Again the learned District Judge failed to consider whether the Defendant—Respondent had been guilty of any laches after he had been informed of his proper remedy by the Sub-divisional Court, as it took 14 days to obtain copies of the Township Court's Judgment and decree the time for appealing expired on the 15th December *i. e.* the day on which the Sub-divisional Judge informed the Defendant—Respondent of his proper remedy. Had the Defendant—Respondent acted promptly then, his appeal would have been only a few days out of time but instead of doing so he did nothing until the last day before the holidays commenced and then he applied for a copy of the Sub-divisional Judge's judgment which was not required. Even after that he was guilty of further laches in that he did not file his appeal on the 1st day on which the courts opened.

As the learned District Judge passed orders without going into any of these matters it cannot be said that the discretion which he exercised was a judicial discretion and I think interference is justified.

Furthermore the District Judge acted under a mistake of fact. He says that if the period occupied in prosecuting the suit in the Sub-divisional Court be excluded the period allowed for appealing would have expired on the 6th January but that is not correct.

In the passage from the District Judge's order quoted above he says “Excluding the time between the date of the institution in the Sub-divisional Court and the date the copy of Sub-divisional Court's Judgment was obtained.” But as this last date is given as the 15th December which was the date on which the Sub-divisional Judge's Judgment was passed—a copy being supplied on the 23rd I think the period the District Judge intended to deduct was

the period between the date of institution and the date of judgment; obviously under no circumstances could Defendant—Respondent be allowed to deduct the time between the date of judgment and the date on which he thought fit to apply for a copy of it. Thus allowing 18 days for the time spent in the Sub-divisional Court and 14 days for obtaining copies of Township Court's judgment and decree and the usual 30 days, we have a total of 62 days and even if the one day necessary for obtaining a copy of the Sub-divisional Court's judgment though that copy was not required be added, the total becomes 63 days and the last day for filing the appeal would be the 3rd January 1912 whereas the Application for permission to appeal was filed on the 4th January 1912. Had the District Judge not made a mistake in his calculation I hardly think that he would have admitted the appeal.

The decree of the Lower Appellate Court is set aside and that of the Township Court restored with all costs.

U. S.
Nga Po Kan.
v.
Nga Shwe
Dat.

IN THE COURT OF THE JUDICIAL
COMMISSIONER, UPPER BURMA.

CIVIL SECOND APPEAL No. 136 OF 1913.

MI NGWE HMON vs. MI PWA SU.

Advocate for Appellant—A. C. Mukerjee.

Advocate for Respondent—Ba Din for San Wa.

Before H. E. McColl, Esq., I. C. S.

Dated, 11th December 1913.

Slander—repetition of rumour—equally actionable—English law about slanderous words imputing unchastity to a woman—Slander of Woman Act now makes such imputations actionable per se.

Repetition of slanders heard from others is actionable unless privileged.

In a civil suit for damages for slander, the criminal law of defamation has no application. The suit must be decided according to justice equity and good conscience.

Proof of the truth of the slander is a complete defence in a civil suit for damages.

JUDGMENT.

The Plaintiff—Respondent, a married woman, sued the Defendant—Appellant for damages for slander alleging that the latter had spread a rumour in the village that she had had sexual intercourse with one Pyaw Bwe. Her first witness stated that the Defendant—Appellant had told her that the Plaintiff—Respondent and Pyaw Bwe had been seen sleeping twisted together like snakes. The Township Judge appears to have believed this witness but he held that the evidence showed that Plaintiff—Respondent's relations with Pyaw Bwe were suspicious and that they were the subject of talk in the village and that the Defendant—Appellant had only repeated what she had heard and was therefore not liable.

U. S.
 Mi Ngwe
 Hmon.
 v.
 Mi Pwa Su.

On appeal the learned Additional Judge of the Lower Additional Court found that Defendant—Appellant had exaggerated what she had heard and had thus caused strained relations between Plaintiff Respondent and her husband and that whether what Defendant—Appellant said was true or not she was liable for damages as none of the exceptions contained in section 599 Indian Penal Code applied. He gave Plaintiff—Respondent a decree for Rs. 60.

The Defendant—Appellant has now appealed to this court.

Both of the courts below have erred in law. If slanderous words used by one man are actionable the repeating of them by another is also actionable unless privileged, and the Township Court erred in supposing that the Defendant—Appellant was not liable simply because she had only repeated what she had heard from others.

The Lower Appellate Court was wrong in supposing that the criminal Law of defamation had any application. The suit had to be decided according to justice equity and good conscience and in such matters the Common Law of England, though not binding is generally looked to for guidance.

According to the Common Law of England slanderous words imputing unchastity to a woman are not actionable without proof of special damage. This rule however has not been imported into the law in India and now even in England under the slander of woman Act such words are actionable *per se*. Another rule which has been generally recognised in India is that proof of the truth of the slander is a complete defence in a civil suit for damages for slander or libel "because the law will not permit a man to recover damages in respect of an injury to character which he either does not or ought not to possess". It is possible that there might be a case in which the application of this rule would not be in accordance with justice equity and good conscience but this is not such a case. If the Defendant—Appellant used the words complained of, they were certainly actionable but proof of their truth would be a complete defence.

It has been urged that there is not sufficient proof that Defendant—Appellant did use the words complained of, that the Plaintiff—Respondent's witness Ma E Nge is deaf and Ma Tha I who was admittedly present and in a better position to hear did not hear them. But Ma Tha I stated that after the Defendant—Appellant had made a remark against the Plaintiff—Respondent she moved a head—they were all three walking along the road in single file and did not hear what further conversation defendant—Appellant and Ma E Nge had. Besides there is evidence that the Defendant—Appellant made similar slanderous remarks to others.

Next it is contended that Plaintiff—Respondent's conduct was such as to disentitle her to any damages, that during her husband's absence Pyaw Bwe constantly visited her, that they were seen sleeping on the same mat and that Plaintiff—Respondent's mother-in-law actually requested Pyaw Bwe's father to forbid him to visit the house. The evidence was recorded in English by a Burmese Magistrate and I have no doubt that

he has translated the word ခဏ as 'sleep' and that what the witness Pyaw Bwe really said was that he had been lying on the same mat with the Plaintiff—Respondent which corresponds with what one of the witnesses for the defence stated *viz.*, that she had seen Pyaw Bwe and the Plaintiff—Respondent lying facing each other and talking. This no doubt implies intimacy and I do not disagree with the Township Judge's finding that the Plaintiff—Respondent's conduct was improper. If the Defendant—Appellant had merely told others of these proved improprieties she would not have been liable. But she stated in effect that Plaintiff—Respondent and Pyaw Bwe had had sexual intercourse and she stated this not as an inference from their proved intimacy but as an independent fact and she failed to prove anything more than impropriety.

I am of opinion therefore that she has rightly been held liable and I do not consider the damages awarded Rs. 60 excessive.

The appeal is accordingly dismissed with costs.

U. B.
Mi Ngwe
Hmon
v.
Mi Pwa Su.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CIVIL 2ND APPEAL No. 24 OF 1913.

NGA PO AND ONE	...	...	APPELLANTS.
		vs.	
NGA SO PE	...	...	RESPONDENT.

For Appellant—C. G. S. Pillay.

Dated, 26th February 1914.

Possession within 12 years of suit—Limitation Act—Art. 142—Undisturbed possession—Discontinuance of possession.

In a suit for ejection of a trespasser from certain land allowed to remain fallow for many years by the owner, the Defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation.

Held that the suit was governed by Art. 142 of the 1st Schedule of the Limitation Act and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit.

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person.

JUDGMENT.

The Plaintiff—Appellants sued for possession of some land alleging that they had allowed it to remain fallow for many years, that in 1271, the Defendant—Respondent entered upon it without their permission and worked it, that they protested, whereupon he promised to pay rent, that that year he only offered one basket of paddy as rent though they demanded five, that the next year he refused to pay any rent at all, that the lease was then determined and that in 1273 the Defendant—Respondent again entered upon her land without their permission and refused to give it up.

U. B.
Nga Po & 1
v.
Nga So Po.

The Defendant—Respondent pleaded that the land had been waste land for 40 years when he entered upon it and cleared the jungle with the permission of the Thugyi. He denied having attorned to the Plaintiff—Appellant.

The courts below having held that the suit was time-barred under Art. 142 of the 1st Schedule of the Limitation Act, the Plaintiff—Appellants have come up to this court in second Appeal.

The first court relied on *Mg. Nyun vs. Ma Nyein Zan and another* (1) but as the facts of that case are not very fully set out it is difficult to say how far it is a parallel case and I think Mr. Burgess dictum “if the land was left unworked for 14 years the Plaintiffs or their predecessors presumably relinquished possession” is open to question. A land-owner is under no obligation to cultivate his land, though of course if he allows it to remain uncultivated more than a certain number of years he is liable to be assessed to revenue at full rates instead of at fallow rates. The suit no doubt was governed by Art. 142 but the Appellants alleged dispossession in 1271 and again in 1273. What they had to prove therefore to show that the suit was within time was that they were in possession in 1271. Now the rule is that when no one exercises active dominion over land the possession remains with the rightful owner

Rajah Leelanund Singh and others vs. Mt. Basheeroomissa and others (2) so, that if the Plaintiff—Appellants showed that they were the rightful owners and they had once been in possession it would be presumed that their possession continued right down to 1271 if it appeared that their possession had not been interrupted till then. It was of course open to the Defendant—Respondent to prove that the Plaintiff—Appellants' possession had been interrupted and then the presumption that they were in possession in 1271 would have been rebutted, but no such evidence was given. The evidence given by the Defendant—Respondents' witnesses was to the effect that the land had been lying waste since the annexation. In view of the defence set up and the absence of rebutting evidence I consider that the evidence of the 2nd Plaintiff—Appellant and that of the witness Mg. Kaw together with an entry in a revenue map is sufficient evidence that the Plaintiff—Appellants are the rightful owners and the evidence of the witness Mg. Swe to the effect that he worked the land as Plaintiff—Appellants' tenant for two years about the time of the annexation of Upper Burma is sufficient evidence that the Plaintiff—Appellants were in possession then and they must be held to have continued in possession until they were dispossessed by the Defendant—Respondent. There was no discontinuance of possession. “Discontinuance means an abandonment of possession by one person followed by the actual possession of another person” (3)

The decrees of the courts below are set aside and the Plaintiff—Appellants will be given a decree for possession with all costs.

(1) 11 U. B. R. 1892—96 p. 375.

(2) 16 W. R. 102.

(3) Starling's Indian Limitation Act 5th Edn. p. 402.

THE BURMA LAW TIMES.

VOL. VII.] AUGUST & SEPTEMBER, 1914. [No. 8 & 9.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL * No. 152 OF 1912.

V. R. M. V. A. Chetty Firm ... PLAINTIFF—APPELLANT.
VS.
MG. PO SIN ... DEFENDANT—RESPONDENT.
For Appellant—Palit.
For Respondent—Moosaji.

Before Mr. Justice Robinson.

Dated 9th February 1914.

Transfer of Property Act (IV of 1882), Section 53—Fraudulent transfer—Suit to avoid—Frame of suit—Intent must be to defraud creditors generally—On creditor securing payment of his debt—Volunteer—Difference in their liability—Proof required of each Relationship—Presumption.

A suit founded on Section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. An objection on this ground, to prevail, must be taken in the first court, but if not so taken, cannot avail in the Appeal Court.

The intent, which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors generally. Therefore, a transfer, made with intent to defeat or delay any one particular creditor, cannot be avoided provided that there has been good consideration and the transaction is not a mere sham.

A transfer with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor, proof of valuable consideration is ordinarily sufficient, but not so in the case of a volunteer who must prove not only valuable consideration but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer.

Bhagwant Appaji v. Kidari Kashnath, 25 B. 202; 2 Bom. L. R. 986; *San Dun v. Mein Gale*, 3 L. B. R. 188; *Hakim Lal v. Mooshahar Saku* 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889; *Moung San v. Sit Tuan*, 8 Ind. Cas. 965; 5 L. B. R. 195, followed.

Relationship alone between the transferor and the transferee is not sufficient to establish such aiding, but it is a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered.

* Appeal against the judgment and decree of the Divisional Judge of Hanthawady, dated 27th April 1912 in Civil Appeal No. 2 of 1912 confirming the judgment and decree of the Sub-divisional Court of Insein in Civil Regular No. 73 of 1911.

L. B.

V. R. M.
V. A. Chetty
Firm
v.
Mg. Po Sin.

JUDGMENT.

ROBINSON, J.—This is a dispute between an attaching creditor and an alleged purchaser from the judgment debtor. Plaintiff obtained a decree for Rs. 1,400 and costs against one Mg. Ma Gyi, on the 25th June 1908. He applied for attachment of the property on the 10th November 1909. Mg. Ma Gyi then applied on the 13th December 1909, alleging that the decree had been satisfied. His application was rejected on the 12th February 1910.

Attachment was then affixed on the property on the 27th January 1910.

Then Mg. Po Sin applied for the removal of the attachment alleging that on the 22nd December 1909, he had purchased the property from Mg. Ma Gyi for Rs. 1,000 by a registered deed.

An *ex parte* order was passed removing the attachment on the 12th October 1910.

The present suit was filed on 4th August 1911 for a declaration that the property does not belong to Mg. Po Sin but at the date of attachment belonged to and was in the possession of Mg. Ma Gyi.

I have been referred to the following decisions. In *Bhagawant Appaji v. Kashinath and others* (1) it was held after a very full and complete examination of all the authorities that clause 2 of section 53 of the Transfer of Property Act did not apply as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration and also that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors generally so as to render clause 1 of the section applicable.

In this case the transferee was another creditor and it was held that the onus lay on plaintiff in the first instance to prove that the consideration or part of it was illusory.

This case was followed by Sir Charles Fox, C. J. in the case of *San Dun vs Mein Gale* (2) who held that the intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided must be an intent to defeat or delay his creditors generally. "If there has been good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor." In this case the purchasers were sons of the judgment-debtor.

In *Hakim Lal vs. Mooshahar Sahu* (3) the same was held, the transferee being another creditor. This case was followed by Sir Henry Hartnoll, in *Maung San vs. Sit Twan* (4). Mg. San was also a creditor and the question considered was whether Mg. San's purpose was merely to secure his debt or his intention was also to aid Mg. Pa Si in defeating Mg. Sit Twan in covering up his property, in giving him a secret interest therein and in looking it up for Mg. Pa Si's own use and benefit.

(1) 25 B. 202; 2 Bom. L. R. 986.

(2) 3 L. B. R. 188.

(3) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.

(4) 8 Ind. Cas. 965; 5 L. B. R. 195.

In the present case the transferee is Mg. Ma Gyi's son-in-law's brother according to the lower Appellate Court and he is his brother-in-law according to the plaintiff. He is however a *volunteer* in this matter and not a creditor securing payment of the debt due to himself by superior diligence. He purchased "for a present consideration; he had nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction" to use the language of *Lockrain vs. Raston*(5) quoted in *Hakim Lal vs. Mooshahar Sahu* (c). In the case of a creditor securing himself, proof of valuable consideration would ordinarily be sufficient. He may be aware of his vendor's intention to defeat his other creditors and yet this would not be enough to cause the transaction to be set aside. In the case of a volunteer, however, the law would say that he enters into it for the purpose of aiding that fraudulent purpose. Relationship alone is not sufficient to establish such aiding, but it must be a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered.

The learned Divisional Judge had some doubt owing to the two rulings of this court appearing to him to be somewhat in conflict and I think I should, therefore, state what I consider they lay down. Sir Charles Fox based his decision on what is a recognised rule, namely, that a suit founded on section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. If this objection be taken in the first court and the suit is one on section 53, the contention must prevail. The report does not show whether objection was taken in the earlier stages or only in second appeal. If taken in the second appeal for the first time, as has been pointed out in the cases cited above, it should not be allowed to prevail. It is so taken here and I cannot, therefore enforce that rule. Moreover, the plaintiff here alleges it was to defeat plaintiff and other creditors. Sir Henry Harcourt based his decision on another rule, the purchaser in his case being a creditor.

The questions to be decided in this case are in my opinion:—

1. Was valuable consideration paid?
2. Did Mg. Ma Gyi act with intent to defeat his creditors by removing the property out of his reach?
3. If so, was Mg. Pa Sin aware of this intent and did he purchase in order to aid and abet Mg. Ma Gyi?

If there was no consideration or no real consideration the transaction was merely a sham and must be void as against the creditors. If valuable consideration was paid, then, in the case of a pure volunteers that is not enough and the further questions, stated above, if answered against the purchaser, will avoid his purchase.

When Mg. Pa Sin applied to have the attachment removed, Mr. Dhar appeared for plaintiff and opposed it and a day was fixed for hearing. The Court took the case up and was apparently informed that Mr. Dhar was coming. The note to this effect in the diary records that the person appearing for plaintiff was only a

L. B.
V. R. M.
V. A. Chetty
Firm
v.
Mg. Pa Sin.

(5) (1899) 9 North Dakota 435; 81 N.W. 66.

L. B.
 V. R. M.
 V. A. Chetty
 Firm
 v.
 Mg. Po Sin.

clerk and had no Power-of-Attorney and could not instruct Mr. Dhar is then erased and the case taken up *ex parte*, the attachment being removed. However, the onus is on plaintiff to start with.

Plaintiff alleged defendant was Mg. Ma Gyi's son-in-law. In evidence his witness stated he was his son-in-law's brother. The allegation in the plaint was not specifically denied in the written statement but Mg. Pa Sin and Mg. Tha Mounng who was also said to be a son-in-law denied the fact absolutely. Plaintiff has not proved any relationship.

As to consideration, defendant states the land is worth Rs. 30 an acre and the area is nearly 42 acres. At this rate there is perhaps no very great inadequacy in the price, though Rs. 30 an acre does not seem to be much. No evidence of the value is, however, given and I must, therefore hold that the consideration, if paid, was valuable. As to payment defendant alleges that Mg. Ma Gyi and his wife came to him and asked him to buy. This was two days before the deed was executed, that is, therefore, on 22nd December, they came again and defendant went out and called in Mg. Tha Mounng and Mg. Shwe Kyin Ket. In their presence he paid Rs. 700. They all adjourned to Mr. Power's house and the deed was drawn up and registered the same day, the balance being paid at the Registration Office. Tha Mounng says he alone was present when Rs. 700 were paid. He had not forgotten Shwe Kyin Ket for he says he was at the Registration Office. The discrepancy is somewhat significant.

At Mr. Power's house Mg. Ma Gyi was questioned as to encumbrances. Plaintiff's claim was mentioned by Mg. Ma Gyi who said it had been satisfied by transfer of the land. By this manoeuvre he obtained postponement of the attachment and he employed it in selling the land to defendant. His application was dismissed.

Defendant says he had not owned any land before, but had worked other people's land and had made a profit of about Rs. 400 a year. Out of his earnings he had bought three pair of buffaloes and one pair of oxen. His savings he kept in his house and had Rs. 1,700 in cash in a box at the time of purchase. Rs. 700 seems a large sum to have been paid before the deed was drawn up but the matter was to be settled forthwith.

The land was said to have been sold as Mg. Ma Gyi did not want to live there any longer.

That Mg. Ma Gyi wanted to save what he could from the grip of the Chetty is clear. The Chetty had a mortgage but it was not registered and he only got a money decree. Then attachment is applied for on 10th November, and the judgment—debtors called upon to show cause, Mg. Ma Gyi appeared and alleged satisfaction and a few days later, sells before orders were passed. Defendant knew admittedly all about this, but makes out that he believed what was told him. He made no inquiries. I am satisfied that he knew all about the facts and I cannot believe he did not know what Mg. Ma Gyi's real object was. His explanation of how he had the money to pay is far from convincing and his statement in

proof of payment is contradicted by his only witness. The alleged price paid is Rs. 250 less than the value of the land on his own figures.

On a careful consideration of the whole case it is clear that defendant was a pure volunteer. At best I can only hold that it has not been proved that he did not pay nor that the price was quite inadequate though even if paid, it possibly was. I am satisfied that Mg. Ma Gyi intended to remove his property out of the reach of his creditor fraudulently and that defendant knew his intention and by his conduct aided him in doing so.

The claim for the costs of the miscellaneous case is not now pressed.

I accept the appeal and declare the sale void as regards the plaintiff who may attach this land in execution of his decree. Respondent must pay plaintiff's costs in all Courts.

L. R. M.
V. R. M.
V. A. Chett
Firm
v.
Mg. Po Sin.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 50 OF 1911.

OODAYAPPA CHETTY APPELLANT.

vs.

RAMASAWMY CHETTY and others ... RESPONDENTS.

For Appellant—Mr. Lentaigne.

For 1st Respondent—Mr. Billimoria.

For 2nd Respondent—Mr. Chari.

Before Sir Henry Hartnoll, Officiating Chief Judge and
Mr. Justice Twomey.

Dated 6th May 1914.

Contract Act (IX of 1872) S. 45—Partnership—Representative of deceased partner—Right to sue for recovery of debts due to partnership.

When one of the partners in a firm dies, the surviving partners can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partner parties to the suit. If the surviving partners refuse to bring the suit, the only remedy of the legal representatives of the deceased partner lies in a suit against the surviving partners for winding up and for an account of the partnership and in an application in that suit for the appointment of a Receiver. The Receiver will bring suits for recovery of debts due to the firm.

English Procedure and Section 45 of the Indian Contract Act compared with order 30 Rule 42 Civil Procedure Code of 1908.

L. B.
 Oodayappa
 Chetty
 v.
 Ramasawmy
 Chetty
 and others.

JUDGMENT.

HARTNOLL, OFFG. C. J.:—Appellant is the son and heir of one Chellappa Chetty deceased. He alleges that Chellappa Chetty when alive carried on business with the fourth respondent Pallaneappa Chetty in partnership under the mark S. O. S. and that such business was carried on by their Attorney Vyraven Chetty the 3rd respondent. A decree was then passed against Vyraven Chetty in his personal capacity for Rs. 10552-10 and costs in Civil Regular No. 352 of 1906 of this Court. In execution of such decree Vyraven Chetty was arrested and brought before the Court when he deposited as security for the payment of the decretal amount a registered deed of mortgage in favour of the S. O. S. firm.

His right, title and interest in such mortgage was sold and a sum of Rs. 17,000 was realised. After payment in full of the decretal amount in the suit there is now in judicial deposit in Civil Regular No. 352 of 1906 the sum of Rs. 4,460-6. The plaintiff goes on to set out that the first and second defendants Muthia Chetty and Pallaneappa Chetty claim to be entitled to attach and have attached part of the said moneys in execution of decrees obtained by each of them respectively in the Court of Small Causes, Rangoon in Civil Regular No. 2683 of 1907 and No. 2682 of 1907, and that Vyraven Chetty claims to be a partner in the said firm of S. O. S., that the Appellant denies that Vyraven Chetty was ever a partner in the firm of S. O. S. and submits that the moneys in deposit belong to the firm of S. O. S. and that Muthia Chetty and Pallaneappa Chetty have no right to attach the whole or any portion thereof in execution of the decrees obtained by them in the Small Causes Court. Appellant goes on to allege that Vyraven Chetty is the son of Pallaneappa, the 4th Defendant and that Pallaneappa has failed to carry on the business of the partnership of S. O. S. or to take any steps to protect the property of the partnership and is unwilling to do so, or to assist him in recovering and protecting the said property because Vyraven Chetty is his son and because the Appellant is taking other proceedings against Vyraven Chetty for breaches of trust as agent of the firm. The share of Chellappa Chetty in the partnership is alleged to be Rs. 7,500 out of Rs. 10,000. Appellant asked that it be declared that the Rs. 4460-6-0 in deposit is the property of the S. O. S. firm, that Muthia and Pallaneappa be declared not entitled to attach this sum in execution of their decrees, that it be declared that Vyraven never was a partner in the S. O. S. firm and that the Rs. 4,460-6-0 may either be ordered to be paid to the Appellant or be kept in the custody of the Court until a partnership suit has been decided between him and the fourth Defendant Pallaneappa or until he and Pallaneappa otherwise agree.

Vyraven Chetty and the fourth Defendant Pallaneappa Chetty did not appear to contest the suit, nor have they appeared on this appeal. So the contest has been between appellant and the first and second defendants Muthia and Pallaneappa Chetty. Muthia died in the course of the litigation and his legal representative Ramasawmy has taken his place. The suit has been dismissed by

the learned Judge on the original side on the ground that it cannot be brought by appellant because he is not a partner in the S. O. S. firm, but only the legal representative of a deceased partner, that his proper course would be to bring a suit against Pallaneappa the 4th defendant for dissolution of partnership and an account, and to apply in that suit for a receiver to be appointed to bring the present suit against Muthia and Ramasawmy. The learned judge has relied strongly on the case of *Gobin Prasad v. Phander Shekhar* (1). That suit was one in which a surviving partner sued a debtor of the firm without joining as plaintiffs the representatives of the deceased partner. It was held that such a suit would lie and that the English rule of law would apply. This rule is given at page 638 of Williams on Executors in the following words; "The general rule is that the interest which a testator has in a chose in action jointly with another shall not pass to his executor; yet *per legem mercatoriam* as formerly mentioned an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases although the right of the deceased partner devolves on his executor, it is now fully settled that the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased. The point of decision is whether this rule should be applied to the present case. In the case of *Gobin Prasad v. Chander Shekhar* (2) the point at issue was whether the legal representative of a deceased partner is a necessary party to a suit brought by the surviving partner. It was decided in the negative. An opposite view was taken in the case of *Ram Narain Nursing Doss v. Ram Chunder Jankee Loll* (3) but the same view was taken in the case of *Motilal Beechardass v. Chellabhai Hariram* (3). In all three of these cases the meaning and effect of section 45 of the Contract Act was considered. That section is not applicable directly to the present case as it is not one to enforce performance of a contract; but the question is whether the principle underlying it has not made such a difference in the law that since it was enacted the English rule should no longer be followed, and whether such a suit as the present is in order. O. 30. R. 4 of the Code of Civil Procedure (v of 1908) has settled the difference of opinion expressed in the cases which I have quoted by enacting that the legal representative of a deceased partner is not a necessary party to the suit; but at the same time section 45 of the Contract Act renders it permissible for such a representative to be a party to the suit. The rule of English Law has therefore been varied in India since section 45 of the Contract Act came into force. That being so, Counsel for appellant urges, that such a suit as the present will lie in as much as appellant is interested in the property of the partnership and all persons who can have any possible interest in the moneys in dispute have been made parties. He strongly

L. B.
 Oodayappa
 Chetty
 v.
 Ramasawmy
 Chetty
 and others.

(1) I. L. R. 9 All. 486.

(2) I. L. R. 18 Cal. 86

(3) I. L. R. 17 Bom. 6.

L. S.
 —
 Oodayappa
 Chetty
 v.
 Ramasawmy
 Chetty
 and others.

relies on the case of *Aga Gulam Hussain v. Sir Albert David Sassoon*(4) This was a case in which the legal representative of a deceased partner was allowed to sue to recover sums due to the partnership by a third party, making such third party and the surviving partner who would not join as a plaintiff, defendants. Now as was said by Farran J. in the case of *Motilal Beecharduss v. Chellabhai Hariram* (3) the Contract Act is not an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere; and in commenting on the Allahabad case the same learned Judge said: “Logical consistency has there yielded to long-established practice based on considerations of practical convenience. The inconvenience of altering the procedure is pointed out by Edge, C. J. in his Judgment in the above cited case of *Govind Prasad v. Chandra Sekhar*.”(5) In the last mentioned case Edge Chief judge said:—“The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action; his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets and it would in my judgment be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court by the appointment of a receiver in cases in which such interference by the Court might be necessary.” Lindley in his book on Partnership 7th Edition page 630 says: “unless all the partners have agreed to the contrary when one of them dies, his executors have no right to become partners with the surviving partners nor to interfere with the partnership business.”

The present suit, if allowed, might not lead to any mischievous result but that hardly seems to be the point. In the same class of suits it is expedient that only one rule of procedure should be followed, and the point is what should be the general rule. The English rule is based on grounds of common sense and expediency and it should in my judgment be followed. It is not as if the Appellant has no remedy if the English rule be followed. He has the remedy pointed out by the learned Judge on the original side. I would therefore dismiss the appeal with costs.

TWOMEY, J. :—According to the English law the right to sue for a debt owing to the firm devolves in the event of the death of one partner upon the surviving partners exclusively. (5)

The executors of the deceased partner have no right to interfere in the partnership business. They represent the deceased only for purposes of account and may sue the survivors for the winding up of the firm and for the share due to the estate of the deceased. (6) But they have no right to join in a suit for the recovery of partnership debts.

There would be no doubt about the application of the English rule to India were it not for Section 45, Contract Act. The effect

(4) I. L. R. 21 Bom. 412.

(5) Lindley on partnership 11 Edition P. 380.

(6) Ibid P. 650.

of this section on the English rule as to the surviving partners' exclusive right to sue for partnership debts has been the subject of several decisions of the Indian High Courts. The High Courts of Allahabad, Bombay and Madras held that notwithstanding the provisions of Section 45 as to the devolution of joint right, the English rule should still be followed to this extent namely that the legal representatives of a deceased partner should not be regarded as necessary parties to a suit by the surviving partners for the recovery of partnership debts. (7) The Calcutta High Court alone held the contrary. (8)

L. B.
Oodayappa
Chetty
v.
Ramasawmy
Chetty
and others.

The view of the majority of the High Courts has now been adopted in O. 30 R. 4. C. of C. P. 1908 which declares that the legal representatives of the deceased partner are not necessary parties to suits brought in the name of the firm, though the English rule is relaxed in Sub-rule (2) under which the legal representatives may apply to be joined as parties with the surviving partner.

The Indian Legislature having thus recognized the expediency of adhering to the English rule, I think we would not follow the isolated precedent in *Aga Gulam vs. Sassoon* (9) in which case it was held by a single Judge of the Bombay High Court sitting on the original side that the legal representatives of a deceased partner may sue to recover a partnership debt. That decision is directly opposed to the English rule which confines the executors to a suit against the survivors for an account and allows only the surviving partners to bring suits on behalf of the firm.

It is true that sub-rule (2) (b) of O. 30. R. 4. C. P. code allows the legal representatives to enforce any claim against the survivor or survivors. But this refers, I think, to a suit for an account as between the legal representatives and the survivors. The present suit goes much further. It is a suit for *inter alia* a declaration of the firm's right to certain money having been attached by outside creditors of one Vyraven, an attorney of the firm whose status as a partner in the firm is disputed and who is a son of the surviving partner. It is thus not only a claim against the survivors but it is also a claim on behalf of the firm against outsiders who were made defendants to the suit. Such a suit, can in my opinion, be brought only by the surviving partner, and if he refuses to bring it the only remedy of the legal representatives of the deceased partner lies in a suit against the surviving partner for winding up and for an account of the partnership, in pursuance of which suit the claim against the outsiders could be enforced by a Receiver appointed by the court.

On these grounds I would dismiss the appeal with costs.

(7) 9 All. 486 *Gobin Prasad vs. Chandra Shekhar*. 17 Bom. 6 *Mottial vs. Shalla-bai*. 17 Madras 108 *Vaidanatha Aiyar vs. Chinasami*.

(8) 18 Cal 86.

(9) 21 Bo : 412.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 21 OF 1913.

GAGGERO FRANCESCO APPELLANT.

vs.

L. P. R. CHETTY firm by their agent
Chinniah Pillay. RESPONDENTS.

For Appellant—P. N. Chari.

For Respondents—Auzam.

Before Mr. Justice Parlett.

Dated 7th May 1914.

Deposit of money—Value of deposit receipt payable to bearer—Deposit receipt stolen—Money paid to bearer—Banker's liability—Good faith—Paper Currency Act (II of 1910) Section 26—Banker.

According to the terms of a deposit receipt issued by a private banker, the deposit money was repayable on the production of the receipt. The receipt, being stolen from the depositor, was presented to the banker by a cooly, who according to the banker, was paid the whole of the money due under it without any inquiry as to how he came by the receipt:

Held on depositor suing the banker for recovery of his money, that the parties never understood or agreed that the depositor could pay the whole of his deposit to any one who produced this receipt without any inquiry as to how he came by it.

Held further that, even if the banker paid anything to the cooly who produced this receipt, it was not in the bona fide belief that the cooly was authorized by the depositor to receive it.

Doubted whether the receipt in question could be held to be an *engagement* for the payment of money within the meaning of Section 26 of the Paper Currency Act.

JUDGMENT.

PARLETT, J.—Appellant sued respondent Chetty firm for Rs. 1,702-11 balance of principal and interest due to him on a deposit account with respondents. On the 20th December 1911, he had Rs. 500 on deposit and on that day he deposited Rs. 1,000 more, receiving a receipt in Tamil for Rs. 1,500 bearing interest at the rate of $\frac{1}{2}$ per cent. per mensem. The last sentence of the receipt according to the translation runs as follows: "Whoever brings this, will be given the principal and interest and this receipt will be taken back by us." There were credits of Rs. 250 and Rs. 350 on February 29 and April 28, 1912, and debits of Rs. 300 and Rs. 200 on October 7 and 18. On October 24, 1912, there was due Rs. 1,694-6 for principal and interest. The defendants alleged that on that date they paid that sum to Mahalutchmi in accordance with the terms of the receipt and also believing on sufficient grounds and in good faith that Mahalutchmi was authorised by plaintiff to receive the money. The Small Cause Court has found on both points in defendants' favour and has dismissed the suit with costs. The plaintiff now appeals. The first

point taken is that the receipt in question infringes section 26 of the Paper Currency Act, 1910, and being a contract forbidden by law cannot be relied upon as a defence. That section enacts that "No person in British India shall draw, accept, make, or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand." The marginal note against this section describes it as "the prohibition of issue of private bills or notes payable to bearer on demand," and I doubt whether the receipt now in question can be held to be an engagement for the payment of money within the meaning of that section. I will therefore consider the other aspects of the defence. First it is alleged that defendants made the payment to Mahalutchmi in terms of their contract with the plaintiff and in accordance with the conditions on which they accepted the deposit. I am inclined to doubt even whether they meant to convey any more by the words used in the receipt than is conveyed by the words "repayable here on production of this receipt," the usual formula appearing on deposit receipts granted by European banks. But even if they did so, I have no doubt that plaintiff never understood or agreed that defendants could pay the whole of his deposit to any person who produced his receipt without any inquiry as to how he came by it. The defendants are at pains, therefore, to plead that they explained these terms to him and he accepted them. Annamale, the agent, in his evidence states, that he translated the receipt in Hindustani to the plaintiff. Achalingam, the clerk, says the plaintiff said that if he wanted to deposit or withdraw his money, he would send his man for the purpose, which would show that even if he said so at all he never intended the money to be paid to any one but his authorized messenger. The plaintiff denies that the receipt was read to him. Even if it was, there is nothing to show how much Hindustani the Chetty knew, or how much of the Chetty's Hindustani plaintiff could understand. He says that in May, 1912, he showed the receipt to a Chetty, who told him what it contained. But of one thing I feel certain and that is that at no time did he grasp the fact that the Chetty was entitled to hand all his money to any one who merely produced this receipt. I am satisfied that he and the chetty never did agree upon the meaning of that receipt in that sense. The defendant further attempted to prove that he had reasonable grounds for believing that Mahalutchimi was authorized by the plaintiff to draw the money and that he paid it to him in good faith.

Mahalutchimi is a coolie under a maistry, who worked for plaintiff. Plaintiff gave him the key of his house to hand it over to his head maistry when he went to Insein and in his absence, Mahalutchimi's brother opened his book and stole this receipt and presented it to the defendants. The defendant's case is that Mahalutchimi came with plaintiff, when he made his deposit on December 20, 1911, and also that Mahalutchmi alone drew and deposited with the firm subsequent sums. There is only Achalingam's word as to the firm's latter transactions. The plaintiff denied that Mahalutchmi ever went with him or was sent by him

L. E.
—
Gaggero
Francesco
v.
L. P. R.
Chetty.

Gaggero
 Francesco
 v.
 L. P. R.
 Chetty.

to the defendants. He calls Mudaliar, who, he says, accompanied him when he deposited Rs. 1,000 and says that he made all subsequent deposits and withdraws himself as one would certainly expect. I see no reason to prefer defendant's story to plaintiff's on the point. It appears to me in the highest degree improbable that plaintiff would trust a coolie, not even one directly under him, with large sums of money in the manner alleged. If he had done so, there seems little doubt in the light of subsequent events, that Mahalutchmi's honesty would not have been proof against the temptation. But there are additional reasons for disbelieving defendant's story. Admittedly the then agent, Chinnaya, sent Achalingam off with Mahalutchmi to see the plaintiff. Achalingam says it was because Chinnaya did not know of plaintiff's order to pay his man; but when reminded that he himself knew of it and could have reassured Chinnaya, he said it was in order to explain to plaintiff how the interest was calculated. This is what Chinnaya says. It is admittedly an unusual thing to do in such cases. One Singaram Pillay, who was said to have been present and lent Rs. 700 to defendants to make up the Rs. 1,600, had not been called. I feel little doubt that if defendants paid Mahalutchmi anything at all, it was much less than Rs. 1,694 and that they were only ready to do that on the understanding that he accompanied one of them to plaintiff to ascertain that he had indeed been sent by him. On the way Mahalutchmi disappeared, and having the receipt in their hands it was easy for defendants to allege that they had paid him in full. I doubt if they paid him anything, but if they did, it was not in the *bona fide* belief that Mahalutchmi was authorised by plaintiff to receive it. The decree of the lower court is reversed and plaintiff is granted a decree as prayed for with costs in both courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL IST APPEAL* No. 155 OF 1912.

THE SECRETARY OF STATE FOR INDIA

IN COUNCIL APPELLANT.

vs.

MA DWE & I RESPONDENTS.

For Appellant—Rutledge.

For Respondents—Coltman.

Before Mr. Justice Ormond & Mr. Justice Twomey.

Dated 4th June, 1914.

Limitation Act (XV of 1877) Sect. 11, Acts. 113, 131, 144—Landlord and Tenant—Covenant for renewal of lease of immovable property—Specific performance—immovable property.

* Appeal against the Judgment and decree of the District Court of Ahmerst, dated 2nd October 1912 in Civil Suit No. 276 of 1907.

When a covenant for renewal is expressed in a lease in the usual terms *i. e.*, an undertaking is given by the lessor to grant at its expiration a new lease containing the same covenants, such covenants will not include the covenant for renewal itself.

One who claims the right of perpetual renewal of a lease must strictly prove it.

Standing trees are immoveable property for the purpose of the Limitation Act.

An agreement to grant and renew a lease is not an interest in immoveable property and a suit for the specific performance of such an agreement, not being a suit for the recovery of such property or any interest in it, is governed by Article 131 and not by Article 144 of the Limitation Act.

L. S.

The Secy.
of State
for India
in Council
v.

Ma Dwe &

JUDGMENT.

TWOMEY, J:—The respondents Ma Dwe and Ma Ya Byu have jointly obtained letters of administration to the estate of Maung Si who was a Government permit holder in the Attaran forests of the Amherst District. Their claim is based on Exhibits B, C, D and E which were admitted in evidence by the District Court. Exhibit B is a permit entitling Maung Si to extract teak timber from a certain forest called the Poby forest or "No. 10 in Hooday's map." The permit holder was to pay duty at specified rates per log at the revenue station. The permit was for 30 years expiring on 1st October 1896. There is no reason to question the genuineness of Exhibits C and D which explain the circumstances in which the permit Exhibit B was issued. It appears that Maung Si or his father Maung Mu belonged to a body of persons who previously worked timber in the Attaran forests and that in consideration of their claims as such, the Government gave each of them the option of buying outright at Rs. 2-8-0 an acre, the whole forest tract in which he had been working, or else of taking out a new permit for 30 years in the form of Exhibit B. The orders in Exhibit D contained the following passage with reference to those who took the new permits: "And it being the object of Government to perpetuate the growth of teak which shall be the property of the *lethmat* holders, the *lethmats* will be renewed at the end of the term for which they are granted on condition that plantations are made as per notification to be shortly issued." These orders were apparently communicated to Maung Si by the letter Exhibit C of 30th August 1866 and as he elected to take out a permit, Exhibit B was issued to him on 1st October 1866. No notification was issued as to the conditions on which plantations were to be made. Maung Si died before the expiry of the 30 year's period for which the permit of 1866 was granted. In 1896, shortly before the expiry of the term, his son Maung Yan applied to the forest authorities for renewal of the permit. The application was refused by the Forest authorities (Exhibit E), no reason for the refusal being assigned. In May 1901 a large part (the exact proportion has not been ascertained) of the forest covered by Maung Si's permit was included in the area declared under Section 18, Burma Forest Act, 1881 as constituting the Kyungawon Forest Reserve. In the Forest Settlement enquiry which preceded the declaration, no claim was preferred by Maung Yan or by any other of Maung Si's representatives and the Settlement Proceedings contain no reference to the rights of any of these persons.

L. S.
 —
 The Secy.
 of State
 for India
 in Council
 v.
 Ma Dwe & 1.

The present suit against His Majesty's Secretary of State for India in Council was filed on the 20th September 1907 by some of the representatives of Maung Si. They asked

- (1) that they might be declared "entitled to claim the right of renewing the late U Si's *lethmat* every 30 years" and
- (2) that the defendant might be compelled to issue a *lethmat* to them in pursuance of the aforesaid right.

It was held by this Court in a former appeal in this case that, on the assumption that the proper period of limitation in the case is 12 years from 1896, the three original Plaintiffs were not barred when they filed the suit, but that they had not in fact the necessary legal status as legal representatives of U Si. Time was given them to obtain letters of administration and it was ordered that on their doing so the suit should proceed on the merits. It appears that the two plaintiffs—respondents then obtained Letters of Administration. The suit proceeded and has been decided entirely in favour of the Plaintiffs—respondents.

We have not heard counsel on the question whether it is lawful to deem the suit by the administrators to have been filed by Ma Dwe and Ma Ya Byu (with Maung Nge since deceased) who on that date were not yet technically qualified by means of Letters of Administration which were not obtained till 1912 and if limitation continued to run up to that year, the suit would be barred even if it is held that the proper period of limitation for the suit was so much as 12 years from 1896. But we find that the appeal can be determined on grounds which render it unnecessary to deal with this question; (it is actually raised in para 2 of the memo. of appeal).

We think it is clear that the documents Exhibits B, C and D must be read together, and reading them in this way, we are satisfied that the Conservator of Forests was bound to renew the permit in 1896. There is no force in the argument that the promise of renewal was conditional on the issue of the notification as to plantations foreshadowed in Exhibit D. If such a notification had been issued and if Maung Si failed to comply with its conditions there would no doubt be good ground for refusing the renewal at the end of the 30 years' term. But no conditions of any kind having been laid down the promise of renewal must be regarded as unqualified and binding on the Forest Department. If the permit holder had during the period of 30 years committed a breach of rules such as the permit provides for (by confiscation and ejection) that would probably be a valid reason for refusing to renew the permit. But short of this it seems to us that the permit holder had a good right to renewal at the end of the 30 years period.

The Plaintiffs—respondents however claim that under Exhibit D they were entitled not merely to a renewal at the end of the 30 years' period, but to further renewals at intervals of 30 years in perpetuity. They rely chiefly on the passage in Exhibit D declaring that it is "the object of Government to perpetuate the growth of teak which shall be the property of the *lethmat* holders",

followed by the reference to plantations which are to be made according to the notification (that was to but in fact never did issue). It is urged that as the teak trees planted by the permit holders are said to be their own property and it takes much longer than 30 or even 60 years for a teak tree to reach the proper size for extraction, the parties cannot have intended that there should be only one renewal for 30 years. It is not disputed that teak trees wherever growing are the property of Government, nor is it urged that the Government in 1806 intended to make any new departure in this respect. In our opinion the teak which was to be "the property of the *lethmat* holders" according to Exhibit D was mature teak felled and taken to a revenue station during the currency of the permit, and that only when duty was paid on it. We cannot interpret the words as implying that the *lethmat* holders were to be the owners of teak standing in the Forest or were to be given any special interest in the individual trees that they planted. Exhibit D appears to us to mean that in order to ensure a perpetual supply of mature teak the timber of which, after extraction and after payment of duty at the revenue station, shall belong to the extracting permit holders, it is proposed to issue regulations for the planting of teak to replace mature teak so extracted, and as a special inducement to the permit holders to plant young teak to replace the mature teak they extract, the Government promises to renew the permits at the end of the period of 30 years if the permit holders carry out regulations for re-planting to be shortly issued. There is a clear undertaking for renewal. But we cannot find in Exhibit D any undertaking express or implied to grant further renewals at periodic intervals, and there is no extrinsic evidence to show an intention to grant such further renewals. It is now established that when a covenant for renewal is expressed in a lease in the usual terms *i. e.* an undertaking by the lessor to grant at expiration a new lease to contain the same covenants, such covenants will not include the covenant for renewal itself. The burden of strict proof is imposed on any claiming the right of perpetual renewal and it is not to be inferred from any equivocal expressions which are fairly capable of being otherwise interpreted⁽¹⁾. The necessity for strict proof is all the greater when the promise of renewal is contained not in the dispositive document drawn in loose and informal terms. We are therefore constrained to hold that Exhibit D embodies no undertaking to grant more than one renewal and the attempt of the plaintiffs-respondents to save limitation by bringing their case under Article 131 of the Schedule of the Limitation Act must fail. The learned council for plaintiffs-respondents contends that if Article 131 does not apply then the appropriate Article is No. 144, the suit being one for possession of an interest in immovable property, namely the right to fell teak and extract the timber. Standing trees are immovable property for the purpose of the Limitation Act. But the plaintiff does not ask for

L. B.
The Secy.
of State
for India
in Council
v.
Ma Dwe & z.

(1) See English cases cited in Foa on the Law of Landlord and Tenant 4th Edition pages 308 and 309.

L. B.
The Secy.
of State
for India
in Council
v.
Ms. Dwe & I.

possession of an interest in immovable property:—he asks for specific performance of a promise to grant him such an interest. He does not claim to be in any way the owner of such interest, and therefore he has no title under which he can claim possession. For Article 144 to apply, the claim must be based on title and not on contract only. Maung Si was merely the promisee of a right in immovable property. Article 144 therefore does not apply to the case. We would refer to the case *Lalla Ram Sahay Lall v. Bibee Chowbein* (2) in which the Calcutta High Court held that an agreement to grant a lease is not an interest in immovable property and that a suit upon such an agreement is not a suit for the recovery of such property or of an interest in it. We are asked here to enforce an agreement to grant a permit for the extraction of teak timber. The plaintiffs ask for possession of the interest in the teak trees as the consequence of the permit being granted. Following the Calcutta case cited above we hold that the suit really brought to enforce the agreement in Exhibit D and that it is governed by Article 113 and not by Article 144.

It follows that the cause of action having arisen in 1896 when the renewal of the permit was refused, the suit was barred by limitation when it was filed in 1907. It becomes unnecessary therefore to deal with the further plea in defence that the rights of the plaintiffs, if any, over the whole or a part of the area covered by the permit of 1866 were extinguished in the year 1901 by the operation of section 19 Burma Forests Act, 1881. The appeal is allowed. The decree of the District Court is set aside and the plaintiffs-respondent's suit is dismissed with costs. It is further ordered that the plaintiffs-respondents shall pay the court fees which would have been payable by them if they had not been permitted to sue as paupers. A copy of the decree will be sent forthwith to the Collector, Amherst District.

ORMOND, J :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 5 OF 1914.

CATHERINE THADDEUS PETITIONER.

In re the Will of G. C. THADDEUS (DECEASED);

For Appellant—Dorabjee.

For the Government—Eggar, Assistant Government Advocate.

Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Ormond.

Dated, 18th June 1914.

Court Fees Act (Act VII of 1870) S. 19-I—Sch. I Art 11—Sch. III—Form—“Value” means net value—Interpretation of statute—Meaning not clear—Doubt in favour of subject.

(2) Sutherlands W. R. Vol. 22, P. 287.

The word "value" in Article 11 of Schedule I of the Court Fees Act means the nett value and therefore only the nett value of an estate should be taxed.

Where the meaning of the Legislature is not clear the doubt must be given in favour of the subject.

R. B.

*In re the
Will of G. C.
Thaddeus.*

ORDER OF REFERENCE.

YOUNG J:—This is an application for probate and the question arises as to the amount of court fees to be paid. It has been hitherto the practice of this court to assess the duty on the net value of the estate at the rate applicable to the gross value of the estate. The same practice seems to have been followed in Calcutta. But a question of its propriety was recently raised in the matter of "*In the goods of Harriett Kerr.*" and referred by the Chief Judge for decision to Mukerji J., who after full argument decided that the duty should be calculated at the rate applicable to the net value. As this decision raises some doubt in my mind as to the correctness of this court's practice, I refer the question as to whether the rate should be calculated on the gross or net value to be decided by a full bench or bench of this court as the Chief Judge may determine.

JUDGMENT.

HARTNOLL J:—The question for decision is as to the amount of duty to be paid on the probate of the will of Gregory Catchick Thaddeus deceased. It has hitherto been the practice of this court to assess the duty on the nett value of the estate at the rate applicable to the gross value of the estate, but in view of the decision in the case of "*In the goods of Harriett Tevoit Kerr deceased*" (1) the learned judge on the original side has referred the question to a Bench. Section 19-I of the Court fees Act enacts as follows:—

C. (1). No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the court a valuation of the property in the form set forth in the third Schedule and the Court is satisfied that the fee mentioned in No. II of the first schedule has been paid on such valuation. This section was enacted by Act XI of 1899. Schedule III is a form of valuation. Annexure A of it deals with all the property of the deceased and its value. Annexure B deals with the amount of debts, funeral expenses, mortgage encumbrances, property held in trust not beneficially or with general power to confer a beneficial interest and other property not subject to duty. The total shown by Annexure B *which is stated as not subject to duty* is then deducted from the total shown in Annexure A and is described as the nett total. It is clear therefore that the duty is leviable on this nett total. Art 11 of Schedule I lays down a sliding Scale and begins "when the amount or value of the property in respect of which the grant of probate or letters is made exceeds Rs. 1,000 but does not exceed Rs. 10,000 ... 2 per centum on *such amount or value* and

(1) 18 C. W. N. 121; 18 C. L. J. 398; 21 Ind. Cas. 502.

(1) 15 C. W. N. 121.

L. E.
 In re the
 Will of G. C.
 Thaddeus.

proceeds "when such amount or value exceeds Rs. 10,000 but does not exceed Rs. 50,000..... 2½ per centum on *such amount or value*, when such amount or value exceeds Rs. 50,000 3 per centum on *such amount or value*." The entries in cols. 2 and 3 of the Article were enacted by Act VII of 1910. The difficulty arises in construing the words 'amount or value of the property in respect of which the grant of probate or letters is made' as probate or letters are granted on the gross value of the estate, but according to sec. 19-I the fee is only to be paid on the nett value. Art. 11 makes the duty payable on the gross value, but section 19-I says that it is only to be paid on the nett value. The meaning of the legislature seems to me to be not clear, and where this is so, the doubt must in my opinion be given in favour of the subject. For the reasons given by Mookerjee J. in the case above quoted I am inclined to think that the intention was for the scale laid down in Art. 11 to be calculated on the nett value shown in schedule III. The provisions of Section 19-B of the Court Fees Act seem to me to lend support to such a view. I would therefore hold that the rate should be calculated on the nett value of the Estate according to the scale laid down in Art. 11 of the first schedule.

In the present case the nett value is said to be Rs. 6,232-9-7. Duty should therefore be paid on this amount at the rate of two per cent.

ORMOND, J:—I concur. Schedule III of the Court Fees Act shows that the value of an Estate is the net value for the purposes of taxation. I think that the words in the 2nd Column of the 1st schedule Art. 11 "value of the property in respect of which the grant of probate or letters is made"—are also intended to mean the net value of the estate:—or in other words, the actual or market value as a whole, of the estate which is to be administered, which would be the value of the assets less the amount of liabilities.

Only the net value is taxed, and presumably all estates of the same net value are intended to pay the same tax. But if the above words in Art. 11 are taken to mean the gross value, *i. e.* the value of all the property that will come into the hands of the Executor or Administrator, without taking into consideration the amount that must be paid out to creditors, an estate of the gross value of Rs. 51,000 but with liabilities to the extent of Rs. 42,000 and therefore of the net value of Rs. 9,000, would pay a tax of 3 per cent on Rs. 9,000, *i. e.* Rs. 270, whereas an estate of the value of Rs. 9,000 without liabilities would pay only 2 per cent *i. e.* Rs. 180.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 6 OF 1914.

In re CHIN AH YOUNG & 1.

For Appellant—Mr. Harvey.

For the Government—Mr. Eggar.

Before Sir Henry Hartnoll and Mr. Justice Ormond.

Dated, 18th June 1914.

Court Fees Act (VII of 1870) Section 19 (viii) Schedule I Article 11—Words “the amount or value of the property” refer to nett value—Nett value of estate less than Rs. 1,000—No fee chargeable on Probate or Letters—Construction of Statute—meaning doubtful.

The words “the amount or value of the property” in Article 11, Schedule I of the Court Fees Act, refer only to the nett value. Therefore, where the nett value of a property in respect of which Probate or Letters are granted does not exceed Rs. 1,000, the Probate or Letters are not chargeable with any fees.

Where the meaning of the legislature is not clear, the doubt must be given in favour of the subject.

The facts as well as the question of law referred to a Bench for decision are fully set forth in the following Order of Reference.

YOUNG, J.—This is an application for Probate in respect of an estate of which the gross value is Rs. 16,000 and the nett value is Rs. 540 and the question is whether any and if so, what duty is leviable. Schedule I, article 11 of the Court Fees Act, provides that if the amount or value of the property in respect of which the grant of Probate or Letters is issued exceeds Rs. 1,000 but does not exceed Rs. 10,000 the proper fee shall be 2 per cent. on such amount or value and 2½ per cent., if it is over Rs. 10,000 and so forth on a sliding scale.

Section 19 (viii) provides that no duty is payable where the amount or value of the property in respect of which the Probate or Letters shall be granted does not exceed Rs. 1,000. Heretofore the practice of this Court has been to construe the words “the amount or value of the estate” in article 11 as meaning what has been called the gross value of the estate, and therefore to calculate the rate of duty on such gross value but only to make it payable on such parts of the property as was liable to duty. The Calcutta High Court, following certain decisions of the Allahabad and Bombay Courts, in the recent case of *in re, Harriet Teriot Kerr* (1) now proposes to construe value in Article 11 as meaning nett value. If this construction is adopted the term “gross value” seems somewhat artificial in itself and also makes the word “amount” tautologous, and the value of an estate will be diminished by the debts payable out of it, and in the present case the value of the estate instead of being Rs. 16,000 will be Rs. 540 and consequently exempt from duty under Section 19 (viii). The practice both of this Court and the Calcutta Court has hitherto been otherwise, *Collector of Maldah v. Nirode Kamini Debya* (2)

The learned Judge who decided the case of *In re Harriet Teriot Kerr* (1) which was specially referred under section 5 and fully argued, stated that though the point decided in the *Collector of Malda v. Nirode Kamini Debya* (2) did not arise in that case, it might, when it arises again, require re-examination and further consideration. The same remarks seem to me applicable to our own practice and to this case in which the point is directly raised and I would therefore refer for the opinion of a Bench or Full Bench of this Court, as the Chief Judge may direct, the question whether when by reason of its debts the value of an estate does not exceed Rs. 1,000, any Court fee is payable before Probate or Letters can issue.

(1) 18 C. W. N. 121; 18 C. L. J. 308; 21 Ind. Cas. 502.

In re Chin
Ah Young
and 1.

JUDGMENT.

HARTNOLL, J. :—The question for decision in this case is what, if any, duty is leviable under Article 11 of the First Schedule of the Court Fees Act on an estate the gross value of which is Rs. 16,000 and the net value Rs. 540. The meaning and effect of Article 11 and Section 19-I of the Court Fees Act has just been considered by me in Civil Reference No. 5 of 14.

The present case in addition involves the consideration of the meaning of Section 19 (viii) of the same Act which is "Nothing contained in this Act shall render the following documents chargeable with any fee.

(viii) Probate of a will, letters of administration where the amount or value of the property in respect of which the probate or letters.....shall be granted does not exceed one thousand Rupees." Probate or letters are granted on the whole of the estate and so the amount or value on which they are granted would be the gross value of the estate. If therefore the gross value of the estate exceeds Rs. 1,000 it may be argued that there is no freedom from liability to duty by virtue of Section 19 (viii). But as pointed out in the former reference it may be that the intention was that the scale laid down in Article 11 should be calculated on the net value shown in the Schedule III or in other words that the words 'the amount or value of the property in respect of which the grant of probate or letters is made' in Article 11 should refer to the net value. If they are given that meaning in Article 11, it would seem to be consistent to give them the same meaning in Section 19 (viii). The matter seems to me to be again doubtful and I would give the doubt in favour of the subject. Where therefore the net value of a property in respect of which probate or letters is granted does not exceed Rs. 1,000 I would hold that the probate or letters are not chargeable with any fee. In the present case therefore I would hold that no fee is chargeable.

ORMOND, J. :—Exactly the same arguments apply in this case as in Civil Reference No. 5 of 14. Having held in that case that the words in Article 11 of the First Schedule of the Court Fees Act "Value of the property in respect of which the grant of probate or letters is made" mean the net value of the estate; the same construction must be placed upon those words in Section 19 (viii) of the same Act.

In my opinion therefore, Section 19 (viii) states that probate of a will or letters are not chargeable with any fee under the Court Fees Act where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

Moreover there is no provision under the Court Fees Act which renders such probate or letters chargeable with any fee; for under our decision in Civil Reference No. 5 of 1914 Article 11 would not apply in a case where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

IN THE COURT OF THE JUDICIAL
COMMISSIONER UPPER BURMA.

CIVIL REVISION No. 209 OF 1913.

RAMCHANDRA APPLICANT.
vs.
LATCHMAN PILLAY, agent of
VAIRAVEN CHETTY RESPONDENT.

For Applicant—A. C. Mukerji.

For Respondent.—J. C. Chatterji.

Before Sir George Shaw, C. S. I., I. C. S.

Dated, 19th October 1914.

Illegality of attaching money lying in Court's hands in another district—Order 21 rule 52—S. 63—Money detained under a temporary injunction liable to rateable distribution under S. 73—Proper course when money lying in another district is sought to be attached.

It is illegal for a Court to attach money lying in the hands of a Court in another District. The proper procedure for a decree holder in such a case is to have his decree transferred to the Court in that District for execution.

Money attached before judgment in a case is liable to rateable distribution in execution of decrees against the same defendant.

ORDER.

The facts were as follows:—

Applicant instituted a suit against one, Po Hlaing, on the 19th March 1912 in the Township Court, Pynmana, and while it was pending, namely on the 7th May 1912, he applied citing O, XXXIX. r. 1 for the issue of a temporary injunction restraining the defendant from drawing Rs. 500 belonging to him in possession of the Bombay Burma Trading Corporation. The Township Court immediately granted a temporary injunction in the old form prescribed for temporary injunctions under section 492 of the Code of Civil Procedure 1882, prohibiting the Bombay Burma Corporation's agent from paying Rs. 500 to the Defendant. On the 16th July 1912, the Township Court allowed the defendant to draw the money on his giving security. On the 4th March 1913 the Court passed a decree in favour of the applicant, and on the 8th April 1913, applicant applied for execution, that is, he applied that the sureties might be ordered to pay Rs. 500 into Court (with a view to the decree money and costs being disbursed to him.) On the 21st July 1913 the sureties deposited the amount of the decree and costs Rs. 477-15 in the Court. In the meanwhile, namely on the 21st January 1913, the respondent who had obtained a decree against the same defendant in 1908 in the Sub-divisional Court Yamethin, applied to that Court for the attachment of the Rs. 500

U. S.
 —
 Ramchandra
 v.
 Latchman
 Pillay, agent
 of Vairaven
 Chetty.

just mentioned as being in the Township Court, Pyinmana, and the Sub-divisional Court, Yamethin, granted an attachment accordingly under O, XXI r. 52 requesting the Township Court, Pyinmana, to make a rateable distribution. The Township Court accordingly, when the sureties had paid in Rs. 477-15 proceeded to distribute this sum rateably between the two decree holders.

The applicant now comes here in revision raising various objections of illegality or material irregularity. The principal objection is that the Sub-divisional Court, Yamethin, acted illegally and without jurisdiction in attaching money in the Township Court, Pyinmana. There seems to be no doubt that the Subdivisional Court, Yamethin, was not empowered to make this attachment. What the Court ought to have done was to tell the Respondent that if he wished an attachment in execution made in Pyinmana, he must apply to have his decree transferred to Pyinmana. The result of the Subdivisional Court, Yamethin's illegal procedure was that the Township Court, Pyinmana acted illegally in giving effect to the Respondent's attachment.

I do not think that the other objections raised call for particular notice. The Township Court seems to have satisfied itself that the Respondent's application was not barred by limitation and O, XXI v. 52 expressly laid upon the Township Court the duty of distributing the money if it was to be distributed.

It has been admitted before me on both sides that from the time when the defendant, Po Hlaing, was allowed to draw the Rs. 500 from the Bombay Burma Trading Corporation on security, that money must be taken to have been virtually in deposit in the Township Court. The case therefore was one to which O. XXI. r. 52 applied and not section 63.

Again while the applicant no doubt ought to have applied for an attachment before judgment and not a temporary injunction, he actually applied for a temporary injunction and the Court granted him a temporary injunction and not an attachment before judgment. The money in Court therefore was not actually under attachment by the applicant at the time when it was (illegally) attached by the Sub-divisional Court, Yamethin, at the instance of the Respondent. I think it must be considered to have been assets within the meaning of section 73. The case of *Surabji Kuvarji v. Kala Raghunath* (1) to which the learned Advocate for the applicant has referred is distinguishable. In that case judgment debtor paid into Court the amount of the decree money for payment to his decree holder, a step which *ipso facto* involved the withdrawal of a previous attachment. (O. XXI r. 55). It was accordingly held that the money having been paid into Court for a particular purpose must be applied to that purpose and could not be regarded as assets available for distribution. In the present case, the money was the money of the judgment debtor's which was in deposit in court but not under attachment and not expressly for the purpose of paying the

(1) (1911) I. L. R. 36 Bom. 156.

applicant's decree since at the date of the Respondent's attachment there was no decree yet in existence in favour of the applicant.

The question then is simply whether I ought to interfere in revision on the ground of the illegal procedure of the subdivisional Court, Yamethin. It was held under the section of the old code corresponding to O. XXI r. 52 that an order of distribution made under that section was not final, and that it was open to an aggrieved party to file a regular suit (see the commentaries). Such a procedure would be similar to that expressly provided in section 73.

On consideration, I am of opinion that the Lower Courts, proceedings being marked by illegality it is open to this Court to interfere under section 115 of the Civil Procedure Code although possibly the Applicant might have instituted a regular suit. The procedure by way of a regular suit is open to the aggrieved party in a case where the Lower Courts have not committed any illegality or material irregularity.

It has been contended on behalf of the Respondent that the Subdivisional Court, Yamethin's attachment was a mere technical error, but that is not the view which is taken of proceedings without jurisdiction, and the illegality in question consisted of making an attachment without jurisdiction, that is, on property situated outside the local jurisdiction of the court. The Respondent is an agent of a Chetty firm who ought to be perfectly well acquainted with matters of this kind. He must indeed be well aware that if he wishes to execute a decree beyond the local jurisdiction of the court which passed it, his proper course is to apply for the transfer of the decree. I cannot therefore regard the Respondent as in any way entitled to sympathy.

The order of the Township Court giving Respondent a share of the money in question is set aside, and it is directed that the Respondent repay the amount to the applicant, and also pay the applicants' costs. two gold mohurs.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CIVIL II APPEAL NO. 21 OF 1913.

NGA HLA GYAW and 1	...	...	APPELLANTS.
	VS.		
NGA AING and 1	...	...	RESPONDENTS.

For Appellants—Mr. C. G. S. Pillay.

For Respondents—Mr. D. Dutt.

Before Sir George Shaw, C.S.I., I.C.S.

Dated, 7th September 1913.

Distinction between application to file an award and a regular suit to enforce it—Difference in Court fee, limitation and right of appeal—Revocation of submission to arbitration—notice of hearing to party withdrawing from arbitration not necessary.

U. S.

—
Ramchandra
v.
Latchman
Pillay, agent
of Vairaven
Chetty.

U. B.
 —
 Nga Hla
 Gyaw & 1
 v.
 Nga Aing
 and 1.

Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award by paying an *ad valorem* fee on the value of the property in dispute.

Where a party to a reference gave the arbitrators notice that he withdrew from the reference and did not attend the hearing.

Held it was not incumbent on the arbitrators to give them any further notice of hearing and the omission to give notice of subsequent meeting or meetings of the arbitrators to that party does not invalidate the award.

JUDGMENT.

Plaintiff—Appellants sued to enforce an award of arbitration, in other words for specific performance of an award. The plaint was quite plain. It did not mention Schedule II, Clause 20, Civil Procedure Code, or ask that the award might be filed in Court but prayed that the award might be enforced, and a decree pronounced in accordance with it. The procedure laid down in the Civil Procedure Code is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award.

The distinction is important. The Court fee on an application to file an award is eight annas: the Court fee in a suit to enforce an award is *ad valorem* on the value of the property in dispute [sec. 7 (x) (d) Court Fees Act].

In the case of an application to file an award the period of limitation is 6 months and there are stringent restrictions on appeal [see schedule II, Clause 21 (2) and section 104 (2) Civil Procedure Code].

In the case of a regular suit to enforce an award the period of limitation is 3 years, at least in some land cases it may be 12 years and there is free right of appeal and second appeal.

The Courts below were in error in not observing this distinction and in speaking of the case as an application to file an award. There is the less excuse for them that the matter was explained, long ago in *Nga Pu and one v. Me Waing Da*, (1) *Kyan Pou v. Yan Nyein* (2) and *Mi Hla Win v. Sho Yan* (3).

In the present case the parties on the 15th February 1912 by a written submission, referred the partition of their inheritance to arbitrators, Tha Do and Po Se. On the 22nd April, the arbitrators pronounced an award. Before the hearing of the case, the Defendants—Respondents gave the arbitrators notice that they withdrew from the reference, and they did not attend the hearing or the delivery of the award. The arbitrators on receiving the notice proceeded *ex parte* without replying to the Defendants—Respondents' notice.

The defence to the Plaintiffs—Appellants' suit was that the award was invalid because it dealt with a piece of land which was not included in the reference, because Defendant—Respondents had no notice of the date on which the arbitrators intended to proceed with the case *ex parte*, and because Defendants—Respondents had withdrawn from the reference.

(1) II U. B. R. 92—96 P. 11.

(2) II U. B. R. 97—01 P. 10.

(3) (*Ibid.* 293).

The Subdivisional Court found against the Defendants—Respondents on all points, and ordered the award to be filed (sic) and a decree to issue in accordance therewith. The District Court on appeal, set aside that order and decree and dismissed the suit (sic) with costs.

The grounds on which the District Court came to this decision were that the arbitrators had omitted to reply to the Defendants—Respondents' notice or to make aware of the date of the *ex parte* hearing, and that the arbitrators did not discuss in the presence of the parties what award they are going to make. This ground was not raised by the Defendants—Respondents and was entirely unsustainable. The arbitrators were in no way bound to discuss in presence of the parties what award they were going to make. They deposed that they discussed the matter together, and that one of them, Tha Do, drew up the award and signed it and sent it for signature to the other arbitrator Po Si who then signed it. This was perfectly a legitimate method of preparing the award.

On the other point also, the Lower Appellate Court's decision cannot be supported. As the learned Additional Judge observed "when parties have agreed to submit a dispute to arbitration, no party can revoke the submission unless for good cause shown, and a mere arbitrary revocation is not permitted." This was laid down by the Privy Council in *Pestonji Nasarwanji v. Manukji* (4). The subject is fully explained in Banerji's Law of Arbitration in India, 1908, at page 118.

It has been clearly laid down that the omission to give notice of the meeting of the arbitrators to a party who has prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate the award. The case of *Subraya Prabhu v. Manjunath Bakhta* (5) where this was declared to be the law was very like the present case.

The Defendants—Respondents had no right to withdraw; they have never attempted to show that they had. It was their business to attend before the arbitrators, and when they failed to do so, it was not incumbent on the arbitrators to give them any further notice.

This was the position on general principles and apart from any special stipulation in the reference. The reference in the present case, however, expressly provided that if either party failed to appear before the arbitrators, the arbitrators might proceed *ex parte*.

The decree of the Lower Appellate Court is set aside, and the Plaintiffs—Appellants are granted a decree in the terms of the award as prayed.

Defendants—Respondents will pay the Plaintiffs—Appellants costs.

၇၇၇
—
Nga Hla
Gyaw & ၁
၁.
Nga Aing
and ၁.

(4) 12 Moore's Indian Appeals 112.

(5) I. L. R. 29 Mad. 44.

JUDICIAL COMMISSIONER'S COURT,
UPPER BURMA.

CIVIL SECOND APPEAL No. 387 OF 1912.

NGA PI & 1 vs. NGA KYAN THA.

For the Appellant—Mr. C. G. S. PILLAY.

For the Respondent—Mr. Dutt.

Before H. E. McColl, Esq., I. C. S.

Rights in a natural stream of owners of lands through which it flows.—Damming it up—Reasonable use of flowing water without diminishing the quantity or impairing the quality.

A riparian proprietor may take from a flowing stream as much water as he really requires for ordinary purposes such as for drinking, washing and so on even though he seriously diminish the quantity available for the proprietors below him but for purposes of irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case.

Where it was found that the Defendant appellant took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the Plaintiff Respondent's land,

Held the user was illegal, unless he had acquired any right of such use by prescription.

JUDGMENT.

The Plaintiff Respondent sued Defendant Appellant for damages for having dammed a natural watercourse flowing through his land so as to prevent any water from reaching it. He alleged that he had suffered damages to the extent of Rs. 250. He apparently based his claim not only on his natural right but also on prescription. He alleged that for 30 years the whole of the water in the stream flowed into his land and was penned up on it by a large dam and that the defendant appellants, whose lands are above his, irrigated his lands with the surplus water which flowed on to them owing to its being thus penned back if there was sufficient rain, but that in 1274 they had erected a dam above his land which stopped the flow completely.

The defendant—appellants contended that they had erected the dam yearly from the time of their grand-fathers and that it was owing to drought and not to this dam that the P—R. was unable to work his land in 1274. Apparently the argument was that if there had been a greater flow, water would have reached Plaintiff—Respondent's land in spite of the dam because the Defendant—Appellant admitted when giving evidence that had he not dammed the stream the Plaintiff—Respondent would have got about 100 baskets of paddy from his land in spite of the drought.

The Courts below found that the defendant—appellants had not acquired a prescriptive right to erect the dam and awarded the Plaintiff Respondent Rs. 300 damages.

The Defendant—Appellant has now appealed to this Court on various grounds. The first ground is that the Lower Appellate Court erred in procedure in not duly considering that it is customary to erect bunds and that there are in fact several such bunds above the appellant's land and that these bunds had to be made for the purpose of supplying water to the lands above Plaintiff—Respondent's land owing to the scarcity of water.

U. B.
 —
 Nga Pi & z.
 v.
 Nga Kyan
 Tha.

This raises the whole question of the rights in a natural stream of the owners of the lands through which it flows. In Alexander's Case—Law on Torts the author says "The natural rights possessed by each successive riparian proprietor in a natural watercourse is a right to use the water and pass it on. He has no right to pin back the water or divert it or the like unless he has acquired that right by an easement inconsistent with the natural right." This is too sweeping a statement and is in fact incorrect.

In *Miner vs. Gilmour* (1) Lord Kingdown said "By the General law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and his cattle and this without regard to the effect which such use may have, in a case of deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the right of other proprietors, either above or below him.

"Subject to this condition he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation."

"But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

Thus for ordinary purposes such as for drinking, washing and so on, a riparian proprietor may take as much water as he really requires for the purpose even though he seriously diminish the quantity available for the proprietors below him but for the purpose of irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case.

In *Swindon Waterworks Co. vs. Wilts & Berks Canal Navigation Co.* (2) it was held that in order to make the extraordinary use of water a reasonable use the exhaustion of water which thereby takes place must be so inconsiderable as not to form a subject of complaint by the lower riparian proprietor and the water must be restored after the object of irrigation or other work is answered in a volume substantially equal to that in which it passed before.

In *Perumal vs. Ramasami Chetty* (3) it was held that riparian proprietors are entitled to use and consume the water of the stream which their land adjoins for drinking and household purposes, for

(1) 12 M. I. A. 156.

(2) L. R. 7 H. L. 697.

(3) I. L. R. 11, Mad. 16.

U. B.
 Nga Pi & I
 v.
 Nga Kyan
 Tha.

watering their cattle, for irrigating their land, and for purposes of manufacture subject to the conditions that the use is reasonable, that it is required for purposes as owners of the land and that it does not destroy or render useless or materially diminish or affect the application of the water by lower riparian proprietors in the exercise of their rights. This case was followed in *Tha E vs. Son Ma Gale*. (4) In *Debi Pershad Singh vs. Jagannath Singh*(5) their lordships of the Privy Council said "The right claimed by the appellants is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land and to impound as much of its water as he may find convenient for the purposes of irrigation leaving only the surplus, if any, for the use of the proprietors below."

In the absence of a right acquired by contract with the lower heritors, or by prescriptive use the law concedes no such right. The common law of a proprietor, in the position of the appellants is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below and without impairing its quality. What quantity of water can be abstracted and consumed without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume."

In the present case the defendant—appellants took the whole of the water that reached their land and it was not for ordinary purposes only but for irrigating their lands; but it has been urged that it was necessary to erect their dam as otherwise they would have been unable to work their lands and that the dam was only 3 feet long and 2½ feet high. Whatever its size however this dam completely cut off the water from the plaintiff—respondent's land and whether this was the only way in which they could irrigate their land or not, I think it is clear from the cases cited above that they were not entitled to take the whole of the water, unless they had acquired such a right by prescription even if the water in the stream was so little that though of use to the defendant—appellants it would have been of no use at all for irrigation purposes to the plaintiff—respondent, which was admittedly not the case. The defendant—appellants not only prevented the plaintiff—respondent from using the water for extraordinary purposes and he had as much right to use it for such purposes, as the defendant—appellant but by their extraordinary use of it they deprived the plaintiff—respondent of his right to use the water for ordinary purposes.

The Courts below have found that the defendant—appellant had not acquired a right to erect the dam by prescription and though the 2nd ground of appeal is that the Lower Appellate Court disbelieved the witnesses for the defence for inadequate reasons I agree that

(4) 3 L. B. R. 23.

(5) I. L. R. 24 Cal. 865.

defendant—appellants failed to prove that they had acquired the right they claimed. It is not even clear whether their case was that they erected a dam every year; whether there was much rain or little; or whether they only erected one when rain was scarce and they had to prove that for 20 years they had peaceably and openly enjoyed the use of the water *as an easement*. Now the enjoyment of all the water would have been an easement because it would have been an act done in derogation of plaintiff—respondent's rights but the enjoyment of the water as a natural right—and that is how the defendant—appellant appears to have enjoyed the water previously—cannot support a claim to the user of it as an easement (*Chimanlal vs. Mangaldas* (6)). Nothing less than proof that the defendant—appellant had deprived the plaintiff—respondent of the whole of the water every year for 20 years could establish the right they claim. The dam is clearly not of a permanent nature and its building could not be an invasion of plaintiff—respondent's rights until the volume of water entering his land was sensibly diminished. It is not the erection of the dam on defendant—appellant's own land or rather in the bed of the stream that constitutes the invasion of plaintiff—respondent's right but the stopping of the water. The defendant—appellant certainly did not prove that they had deprived the plaintiff respondent of the use of the water every year for 20 years.

The 3rd ground of appeal need not be discussed. It was not for the plaintiff—respondent to prove that he had a prescriptive right to the use of the water; he had a natural right to it; it was for the defendant—appellants to prove that they had by prescription acquired the right to deprive the plaintiff—respondent of the water.

The last ground of appeal is that the Courts below erred in fixing the damages at Rs. 300 without allowing for expenses of cultivation and in taking the value of paddy at 150 a hundred baskets without any evidence, and it has been urged that the whole damage has not been done by the defendant—appellant as there are several dams above his. On the last point I would say that it has not been shown that these other riparian proprietors have taken more than a reasonable quantity of water and in the second place if they too have committed a tort the general rule is that joint-tortfeasors are jointly and severally liable.

As regards the actual damage caused plaintiff—appellant's witness Mg Pó Lat should have been a valuable witness as he is a revenue surveyor but he declined to make any statement on the point. The Lower Appellate Court assumed that the damage caused was the value of 200 baskets of paddy because plaintiff—respondent's land ordinarily grew that amount. But it is clear that it was a bad year with little rain. It is possible that nevertheless the plaintiff—respondent would have received sufficient water to raise the usual crop but for defendant—appellant's dam but this has not been proved and cannot be assumed especially as the defendant—appellants were entitled to take a reasonable proportion of the water for

U. B.
Nga Pi & r
v.
Nga Kyan
Tha.

(6) 16, Bom. 582.

U. S.
—
Nga Pi & 1
v.
Nga Kyan
Tha.

their own lands. It was for the plaintiff—respondent to prove the amount of damage which he had suffered and I do not consider that he proved that he could have raised 200 baskets of paddy that year. The amount admitted by defendants—appellants will be taken viz. 100 baskets.

As the defendant—appellant did not deny that the value of 100 baskets was Rs. 150 the courts below were right in taking it at that amount but the expenses of cultivation should have been allowed for. They may put down at a third.

I accordingly modify the decree of the courts below into a decree for Rs. 100 with costs on that amount in the courts below. There will be no order as to the costs incurred in this Court.

L. E.
P. L. M.
Subramonian
Chetty
v.
K. R. V. Vel-
lian Chetty

cedure Code that the award be filed in Court and that judgment be pronounced and a decree passed according to the award. The defendant objected on several grounds, amongst others, that the award left undetermined certain matters referred to arbitration. The District Court held that this objection was good and dismissed the suit. The plaintiff now appeals under section 104 (1) of the Civil Procedure Code.

His first contention is that instead of dismissing the suit, the District Court should have remitted the award for reconsideration of the arbitrators under paragraph 14 (a) of that Schedule to the Civil Procedure Code. The mention in paragraph 21 (1) of that schedule of the grounds referred to in paragraph 14 appears to mean only that proof of the existence of any such ground empowers the the Court to refuse to order the award to be filed, whereupon the only course is to dismiss the application. There is no provision for remitting to the arbitrators an award made in an arbitration without the intervention of a Court, such as is made in paragraphs 14 and 15 of the schedule in respect of awards made on an order of reference by a Court under paragraph 3 (1) or 17 (4). This construction was put upon the corresponding section of the Civil Procedure Code of 1882 in *Mustafa Khan vs. Phulja Bibi*,⁽¹⁾ where several decisions to a similar effect are referred to and there is no doubt that they are correct.

The second and main contention of the appellant is that the award did definitely and finally settle all matters referred to arbitration (vide clause 14 (a) of the second schedule, Code of Civil Procedure). The memorandum of agreement to go to arbitration sets out that "whereas differences and disputes have arisen between the said P. L. M. Subramonian Chetty and the said K. R. V. Vellian Chetty regarding the account of his agency and various other matters connected therewith and regarding the claims and counter-claims preferred by the one against the other in respect thereof, Now, therefore, for putting an end to all such disputes and differences and also all other disputes which may arise between the said parties regarding the conduct of the said Vellian Chetty in the management of the business of the said firm, it is hereby mutually agreed by and between them to refer the same to the arbitration of Maung Shwe Thwin, Advocate, and S.V.A.R. Subramonian Chetty and A.M.M. Murugappa Chetty of Moulmein who shall have power to examine the parties and their witnesses and to call for account books, deeds, vouchers and evidence in the possession or power of either of the said parties and whose award or the award of the majority, if made in writing under their hands ready to be delivered on or before the 30th of June next, shall be binding and conclusive on the parties."

The award sets out that the plaintiff claims a dissolution of partnership and the winding up of the business, a share in the profits of a certain K. V. R. firm and nine specified sums of money. Of these sums the defendant admitted two items and disputed all the others. He claimed certain sums from the plaintiff by way of commission and the return of the key of his private box which he said the plaintiff wrongfully withheld from him. After examination of

(1) 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416.

the parties they came to an understanding that the partnership should be dissolved, and that the plaintiff should take over all the outstandings except those due by Chetties, at a valuation of Rs. 70,000. The arbitrators then decided each one of both parties' claims and awarded Rs. 12,117-6-6, subsequently amended to Rs. 13,834-12-6, to be paid to the plaintiff, with the Chetties' rate of interest within 15 days. The award, however, contains the following clause: "As the plaintiff takes over all the outstandings at a valuation we direct that the defendant should render every assistance in his power to enable the plaintiff to realize the same and that the defendant should be responsible for any error or omission in the accounts regarding those outstandings." It is the latter part of this clause which the defendant chiefly objects to, as it does not finally settle the matters in dispute between the parties. If it referred merely to fraudulent errors and omissions it might be treated as mere surplusage and considered ineffective. Such, however, is not the case and clearly was not intended by the arbitrators to be the case as the evidence shows and the effect is, therefore, to leave without final settlement the largest item of the partnership assets and an integral portion of the accounts between the parties which it was the main, if not the sole, object of the arbitration to completely settle once for all and to expose the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts however innocent or unintentional it might be, whereas the intention of the arbitration agreement was certainly to preclude any such future litigation between the parties. In this view therefore, the award did not finally determine the questions which were referred for arbitration. It was, however, argued that the plaintiff had to take over the assets on the basis of the defendant's accounts as he had no means of verifying them. To this I cannot accede. He was in no way bound to accept any of the defendant's figures which he trusted and could have challenged any of them before the arbitrators just as he could before a Court in a suit for an account and if they had wished to do so, the parties could have fixed a longer time within which the award should be made. Having chosen to accept them as correct the plaintiff cannot re-open them later in his own interests, any more than the defendant could in his.

Another argument, so far as I could understand it, was that having taken over the outstandings at a valuation the plaintiff assumed a different position as a purchaser of the outstandings and and as such he must be allowed to reopen the accounts if he discovered that the valuation was based on error. I doubt if even an outsider who so purchased the outstandings would have any such remedy unless on the ground of fraud, but assuming that he would, the privilege could certainly not extend to one party to an arbitration particularly designed to finally settle all disputed accounts between the parties who voluntarily and deliberately took over the outstandings at a valuation agreed upon between them.

Lastly, it was sought to justify this clause on the ground that the parties signified their assent to it by themselves signing the

1. B.
P. L. M.
Subramonian
Chetty
2.
K. R. V. Ve-
lian Chetty.

L. B.
P. L. M.
Subramonian
Chetty.
v.
K. R. V. Vel-
lian Chetty.

award. The record itself contradicts this. It contains a memorandum of "facts admitted by the plaintiff and the defendant, one of which is" that the thumb impressions of the plaintiff and the defendant were taken on the award before the delivery of the award and before they knew its contents." The memorandum is not signed and it does not appear who wrote it, though the Judge mentions it in the Diary, but it seems that neither the Judge nor the writer referred in this connection to the award itself which bears no thumb impressions, but two signatures, which no doubt are those of the plaintiff and the defendant. The arguments of the Counsel in the lower Court show that the admission referred to these signatures and consequently it is clear that though the parties did affix their names below the award they did so before it was delivered and before they knew its contents. They cannot, therefore be held to have acquiesced in any part of it which was not in accordance with the agreement of reference. I am constrained to hold that the District Court's judgment was correct and would dismiss appeal with costs. Advocate's fees two gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 92 B OF 1914.

KING-EMPEROR APPELLANT.

vs.

KOTIYA ACCUSED.

For Appellant—De Glanville.

For Respondent—Assistant Government Advocate, Maung Kin.

Before Mr. Justice Twomey and Mr. Justice Ormond.

Dated, 20 May 1914.

Criminal Procedure Code (Act V of 1898), S. 307—Duty of High Court—Penal Code (Act XLV of 1860) Ss. 299, 300, 304—Murder—Culpable homicide not amounting to murder—Intention—Knowledge.

On a reference under section 307, Criminal Procedure Code, the High Court has all the powers of an Appellate Court and should form its own opinion after considering the entire evidence and giving weight to the opinion of the Sessions Judge and the Jury.

If a person strikes another on a vital part with a cutting instrument the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death; but it does not follow that the striker must be found guilty of murder. His act may fall under one of the exceptions to section 300, Indian Penal Code.

The parts of section 299, 300, 304, Indian Penal Code, dealing with knowledge are not applicable to a case in which bodily injury intended for a particular individual has resulted in death. Where a death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only "as a means of arriving at his intention when he committed the act and for that purpose, and not for the purpose of deciding whether the case falls within the last part of section 304, must the question be considered.

ORDER.

TWOMEY J.—Kotiya, a dhoby, was tried in the Tenasserim Sessions Court at Moulmein for murdering another dhoby named

Jaganath by stabbing him in the abdomen with a knife. The Jury found unanimously that the accused was guilty of the offence of culpable homicide not amounting to murder. The learned Sessions Judge disagreed with this verdict being of opinion that the facts constituted an offence under the 3rd clause of section 300, Indian Penal Code, and he has accordingly submitted the case to this court under section 307, Code of Criminal Procedure. The ruling cited by the Sessions Judge, *Hamid v. King Emperor* (1) no doubt supports the view that if a person strikes another in a vital part with a cutting instrument, the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death. But it does not necessarily follow that the striker must be found guilty of murder. His act may fall within one of the exceptions to section 300. In the present case there was some evidence of the deceased following the accused and some evidence of a fight. It may well be that the jury came to the conclusion that there was some provocation to reduce the offence to culpable homicide not amounting to murder, and it was open to them on the evidence and on the Judge's summing up to bring in such a verdict.

၂. ၆။
—
King-
Emperor,
v.
Kotiya.

It is, therefore, not easy to understand how the learned judge came to the conclusion that it was in the words of section 307, Criminal Procedure Code, "necessary for the ends of justice" to make this reference, and it is to be regretted that he has not recorded the grounds of his opinion more fully. I note however that though the verdict of the jury does not specify whether the accused was found guilty under the first part of section 304 or under the second part, the Judge has taken it as a verdict under the second part, and this is doubtless a correct view of the verdict, for the judge's summing up presented only two alternatives to the Jury if they should find that the accused was the man who stabbed the deceased. These alternatives were murder and culpable homicide not amounting to murder under the second part of section 304. But I would point out that there was an error of law in this presentation of the case. For, as explained in *Shwe Ein v. King-Emperor* (2), the parts of sections 299, 300, 304 of the Code dealing with "knowledge" are not applicable to a case in which bodily injury intended for a particular individual has resulted in death. Where death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only as a means of arriving at his intention when he committed the act and for that purpose and *not for the purpose of deciding whether the case falls within the last part of section 304*, must the question be considered." It follows that the second of the two alternatives presented to the jury in this case should have been culpable homicide not amounting to murder under the first part and not under the second part of section 304. There is no doubt, I think, as to the duty of the High Court in dealing with a case submitted under section 307, Criminal Procedure Code. Our

(1) 2 L. B. R. 63.

(2) 3 L. B. R. 122; 3 Cr. L. J. 355.

L. B.
King-
Emperor,
v.
Kotiya.

attention has been drawn to the Calcutta cases, *Emperor v. Lyall* (3) and *Queen Empress v. Pratab Chunder Ghose* (4), and I see no reason to dissent from the opinion there expressed by the learned Judges as to the scope of the section. It was held that on a reference such as this the High Court has all the powers of an Appellate Court and should form its own opinion after considering the entire evidence and giving due weight to the opinion of the Sessions Judge and the Jury. It is no doubt our duty to acquit the accused if we are not satisfied that the evidence is sufficient to establish his guilt. We are not bound to accept the opinion of the jury even if it is not shown to be perverse or manifestly wrong.

His Lordship after discussing the evidence in the case concluded as follows:—

It remains to be decided whether we should hold the act of the accused to be murder or culpable homicide amounting to murder. The accused was the aggressor and he used a knife against a man who was apparently unarmed. But it is clear that the deceased offered some provocation by following the accused into the next compound. There was a fight in the course of which the deceased was stabbed. In bringing in a verdict of the minor offence the jury no doubt took into consideration the admission of Miramma as to the fight, and the probability that Miramma and Jagannath have not told the whole truth as to the nature and extent of the provocation offered by Jagannath. In all the circumstances of the case I am not prepared to say that the Jury took too lenient a view of the offence in not bringing in a verdict of guilty on the charge of murder.

I would, therefore, find that the accused Kotiya is guilty of the offence of culpable homicide not amounting to murder under the first part of section 304, Indian Penal Code. But the offence is not far removed from murder and I would sentence Kotiya to transportation for life, the maximum punishment provided for the offence of which he is convicted.

ORMOND, J. :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 106 B. OF 1914.

KING EMPEROR APPELLANT.

vs.

PO BA ACCUSED.

Before Mr. Justice Townmey.

Dated, 25th May 1914.

Whipping Act (VI of 1864.) S. 5—Finding as to age final—Sentence of whipping in adequate but carried out—other punishment, whether it can be awarded.

The finding of a Magistrate as to the age of the accused is final under S. 5, Explanation, of the Whipping Act.

Where the sentence of whipping has been carried out, no other punishment can be awarded, even if the sentence was inadequate.

(3) 29 C. 128 ; 5 C. W. N. 253.

(4) 2 C. W. N. 593 ; 25 C. 852.

ORDER.

TWOMEY J.:—I agree with the learned Subdivisional Judge in thinking that the sentence of 15 stripes passed on Nga Po Ba for the offence of rape is very inadequate. I also agree that the Magistrate's finding as to the age of the accused is not justified by the evidence. But that finding is final and conclusive under section 5 of the Whipping Act (see the Explanation to the Section.) The sentence of whipping has been carried out.

A whipping under section 5 of the Whipping Act is "in lieu of any other punishment" and it would not be lawful to add any other punishment to the punishment which has been already inflicted in this case.

The records be returned.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION* No. 84 B. OF 1914.

MAUNG THA ZAN and 1 APPELLANTS.
 vs.
 MAUNG BA GALE alias MAUNG BA ... RESPONDENTS.
 Before Mr. Justice Twomey.
 For appellant—Palit.
 For Respondent—Hla Baw.

Dated, 25th May 1914.

*Criminal Procedure Code (Act V of 1898), ss. 146 (2), 435 (3) —Jurisdiction—
 Ultra vires order—Criminal Revision—Power of Chief Court.*

A Sub-Divisional Magistrate attached certain lands and appointed a Receiver under section 146 (2), Criminal Procedure Code, till a competent Civil Court would determine the rights of the parties, but refused to make over the possession to the successful party when the District Court determined the rights of the contesting parties on the ground that the losing party was going to appeal to the Chief Court.

Held that the Sub-Divisional Magistrate's order was clearly without jurisdiction, as a Magistrate ceases to have authority to retain the property after a competent Civil Court determines the rights of the parties.

The Chief Court has power to annul such orders in revision under section 435 (3), Criminal Procedure Code.

ORDER.

Twomey J.—The Sub-Divisional Magistrate attached the lands some 300 acres in this case, until a competent Court should determine the rights of the parties. A receiver was appointed under section 146 (2), Criminal Procedure Code. The respondent Maung Ba Gale's claim to possession was based on an alleged agreement to sell the land to him for Rs. 15,000. He brought a suit in the District Court claiming specific performance of the alleged agreement and the District Court has dismissed the suit. The only other claimants are the applicants, Tha Zan and Tun Myin, who admittedly bought the lands from the former owner. When the District Court had passed orders dismissing Ba Gale's suit, Tha Zan and Tun Myin applied to the Sub-Divisional Magistrate for

* Appeal against the order of the Sub-Divisional Magistrate of Nyaunglebin dated 10th February 1914 passed in Criminal Mis. No. 60 of 1913.

L. B.
 King-
 Emperor.
 v.
 Po Ba.

L. B.
Maung Tha
Zan and 1.
v.
Maung Ba
Gale alias
Maung Ba.

possession. The Sub-Divisional Magistrate refused on the ground that Ba Gale was appealing to the Chief Court. This is not a valid reason at all. The dispute having been determined by a competent Court, the Sub-Divisional Magistrate has no option but to give possession in pursuance of that determination.

It is urged that this Court has no power to grant the present application in revision because proceedings under Chapter XII, Code of Criminal Procedure, are not subject to revision under section 435 (3).

But this is clearly a case in which the Sub-Divisional Magistrate's Order is passed without jurisdiction. Once the Civil Court has determined the right of the parties the Magistrate ceases to have any authority to retain control of the property. I think it is within the power of this court to annul a Magistrate's order which is in the face of it *ultra vires*. The sub-Divisional Magistrate's order of 10th February 1914 is set aside, and it is ordered that the lands which were attached by the sub-Divisional Magistrate shall be made over to the applicants.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 168 OF 1913.

MATILDA HINDLE. vs. RICHARD JAMES HINDLE.

For Appellant—Coltman.

For Respondent—Nil.

Before Sir Henry Hartnoll, Offg. Chief Judge and Mr. Justice Twomey.

Dated the 14th day of June 1914.

Marriage, dissolution of—Adultery—Cruelty—Judicial Separation—Assault—Condonement—Revival of offence—Gonorrhoea, proof of adultery.

Mere adultery is not sufficient to grant a divorce for dissolution of marriage but it is sufficient to grant a decree for judicial separation. One act of assault, especially when there was provocation for it, is not sufficient to prove legal cruelty. The offence of assault, though condoned, may subsequently revive when adultery is proved.

Adultery was held to be sufficiently proved where the husband had contracted gonorrhoea and did not allege that he had contracted the disease from his wife or any other source.

JUDGMENT.

HORTNOLL OFFG., C. J. :—The appellant filed a petition praying for a decree for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. In the alternative she asked for a decree for judicial separation. Respondent in his answer denied the charges made against him and charged his wife with committing adultery with one B., an Inspector of Police. He therefore asked that the petition against him be dismissed and that he be granted a decree for dissolution of marriage. The learned Judge on the Original Side ordered that each petition stand dismissed. Appellant has appealed against this order and the appeal has been heard *ex-parte*.

The parties were married in 1904, and in 1910 came to live at Syriam, respondent taking employment in the Burma Oil Company. B., when the Hindles were at Syriam, was the Inspector in charge of the police station at the Burma Oil Company's works. The acts of adultery alleged are said to have occurred in May 1912, and on or about the 23rd Nov. 1912. Respondent is also alleged to have committed adultery in or about November, 1912, and contracted venereal disease. The learned Judge on the Original Side has found the acts of adultery alleged to have been committed with the woman mentioned by name in the plaint not proved but at the same time he has found that respondent was suffering from venereal disease in December 1912. He has, however, held that this latter fact is not sufficient to show that respondent was guilty of adultery.

The first ground of appeal deals with the adultery said to have been committed in May 1912, but at the hearing of the appeal, this ground was abandoned. The second ground of appeal deals with the adultery alleged to have been committed on the 23rd November 1912, with Ma Hla or some other prostitute at a brothel kept by one Ma Mya. The evidence to prove that act of adultery consists of the evidence of Jangaya, respondent's *mali*, who says that he took his master to the brothel, of the evidence of B. and Johns who say that they followed Hindle and saw him go into the brothel, of Kader Mira and Jangaya who depose to the subsequent sale and purchase of a syringe—Jangaya saying that it was for his master—and of the evidence showing that respondent contracted venereal disease and had it on him in December. Now there is evidence that petitioner and B. have been on familiar terms. There is no good reason to disbelieve the witnesses Paimon and Quick when they say that on the 17th December 1912 B. had his arm round petitioners' waist when they were on the way to church. The witnesses had been attending a christening which took place before the service and as they left the church they saw the incident. Again B. has been taking a prominent part throughout, according to him in the matrimonial differences of petitioner and respondent. He was the one who accompanied petitioner to the Kellys in May 1912 after she was assaulted. He brought her clothes and so on. As regards the book 'Her Point of View' it is not in my opinion proved that certain of the marginal notes are in B.'s hand-writing but it seems to me very probable that they are. Petitioner allows that the book was sent her by B., and that she read it, and she will not state that the notes were not there when she read it. She says she does not remember whether they were there or not. At the same time respondent may have caused them to be written, as, for reasons to be given, I do not consider him a trustworthy man. There is also the gravest suspicion that the diary said to be written by Mrs. Hindle and given by B. to her lawyers has been manufactured for the purpose of this case. I need only refer to the entry where Mrs. B.'s name is referred to. She was dead on the date stated. The letters Exhibits 1 and 2 show that petitioner is not above

L. B.
 Masilda
 Hindle.
 v.
 Richard
 James Hindle

L. B.
 Matilda
 Hindle,
 v.
 Richard
 James Hindle

carrying on with another man, who she allows to be married. When therefore B. says that he followed Hindle and saw him enter a brothel, I am unable to rely on his testimony. Johns is a great friend of his, and I do not trust his testimony. I think their story is improbable when they say that they followed Hindle and his *mah* on a moon-light night. If so, how is it that Hindle did not see them specially as it may be presumed that he would, in the circumstances, be on the look-out so as to see that he was not observed. Then as regards the *nichi* it may be that he may be telling the truth but I cannot rely on his testimony for the reasons given by the learned Judge on the Original Side. The evidence as to the purchase of the syringe is also contradictory. I cannot therefore take as proved the specific incident pleaded in para 5 of the plaint. At the same time I can see no reason to disbelieve the evidence that respondent was suffering from gonorrhoea in December 1912. There is the evidence that his clothes had stains containing the germs of that disease and I believe it. I do not consider petitioner is lying in her evidence in connection with this incident. It is in the highest degree improbable that petitioner and B., would manufacture such evidence and respondent has given no reason why petitioner left him on the 16th December. There must have been a reason and in the ordinary course he would know it. The letter Exhibit 5 which petitioner left assumes that he knew the reason of her leaving and also assumes that it was a reason that would give a right to a divorce. Respondent's letter to the petitioner of the 29th December also shows that he knew the reason. He asks her to forgive and forget. Holding therefore as I do, that Hindle was suffering from gonorrhoea in December, 1912, I am unable to consider that this is not sufficient to prove adultery. In the case of *Gleen v. Gleen* (1) it was held that adultery was sufficiently proved by showing that the respondent was admitted to hospital suffering from a certain illness. The parties had been married since 1904 and respondent does not allege that he contracted the disease from his wife or any other source. He contents himself with a false denial. I consider that it is a necessary inference from his condition in December 1912 and his conduct that he has committed adultery.

As regards the incidents alleged to prove cruelty there is no doubt that respondent did severely assault his wife on the 12th May 1912. Owing to the untrustworthy nature of petitioner's evidence it is impossible to find what were the exact facts that led to the assault. Respondent allows that he had been drinking that morning, and it may be that he received certain provocation from his wife. The offence was condoned, but, as I have held adultery to be proved, it revived. There is abundant authority for saying it revived. I would refer to the cases of *Palmer vs. Palmer* (2), *Blandford vs. Blandford* (3) and *Moore vs. Moore* (4).

(1) (1901) 17. Times Law Reports 62.

(2) L. J. P. & M. Vol: 27-31. (1858-62.) P. 124.

(3) L. R. 8 P. D. (1883) 19.

(4) L. R. P. D. (1892). 382.

As regards the incident of the 19th July the same difficulty arises in finding the true facts. Respondent's explanation in the face of the evidence of the policemen corroborated as they are by the entry in the general diary of the Police Station does not seem to be true, but petitioner may be much exaggerating the matter. Her verbal statement as compared with the entry in the diary differs. There seems to have been a quarrel between her and her husband; but the facts do not appear to be clear as to what happened. The story, that she was bitten on her breast, is perhaps improbable. It is not shown that she ever showed the mark to any one.

Again as regards the alleged incident of the 14th December the same remarks apply. We have only her statement and it cannot be relied on.

As regards the other incidents they are not proved.

We are therefore left with the facts that adultery is proved and also an assault on the 12th May 1912. The one assault, especially as there may have been provocation, is not sufficient in my opinion to prove legal cruelty. We are therefore left with the adultery. Mere adultery is not sufficient to grant a decree for dissolution of marriage; but it is sufficient to grant a decree for judicial separation. The question is whether such a decree should be granted in view of the relations that may exist or may have existed between petitioner and B. There is no good evidence of any adultery on petitioner's part. There is no trustworthy evidence of it and it is improbable in view of the respondent's letters (admittedly written after he had, as he says, been informed of the adultery) begging her to return to him. If he had good grounds for accusing her of adultery he would probably have said something about it in these letters. They would have been couched in very different terms. The question seems to be whether there has been any such wilful neglect or misconduct on the part of his wife to him as has conduced to his adultery. His allegations that his wife refused him conjugal intercourse for some 2 months rest on his own statement and I have already found him untruthful. I cannot therefore accept them. He says that before his *mali* told him in January 1913 of his wife's conduct he had no suspicions against B. He accepted a present from B. in August 1912 and allows that on 17th September he and B. were on friendly terms performing at a concert together. In the face of such admissions I cannot see how any relations between his wife and B. conduced to his adultery.

I would, therefore, setting aside the decree of the learned Judge on the Original Side, give petitioner a decree for judicial separation. I would also allow her the costs of this appeal fixing the advocate's fee at 8 gold mohurs.

The questions as to what alimony if any should be granted and who should have the custody of the child—the issue of the marriage may be dealt with on separate application.

TOWMEY J:—I concur.

L. S.
Matilda
Hindle.
v.
Richard
James Hindle

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 112 OF 1913.

MAHOMED ESOOF & 4 others ... APPELLANTS.

vs.

HAJEE MAHOMED ESOOF & 3 others ... RESPONDENTS.

For Appellants—N. M. Cowasjee.

For Respondents—Alexander.

Before Sir Henry Hartnoll and Towmey J. J.

Dated Rangoon, the 24th day of June 1914.

Civil Procedure Code (Act XIV of 1882) S. 539—Scheme framed by the Court—Mosque, scheme of management of—Election of trustee—Nature of election proceedings—Appeal—Execution proceedings—Doubtful points.

An appeal lies from the order of a judge on the original side deciding the question as to the election of a trustee of a mosque under a scheme framed by a Court as the proceedings would be in the nature of proceedings in execution of the decree passed in the suit originally sanctioning the scheme.

The proceedings of the election of a trustee in pursuance of a scheme should not be protracted. They should be as short, summary and inexpensive as possible.

Doubtful and defective provisions of a scheme can be made clear by an application to amend the scheme if the scheme contained a clause for future modification. If there is no such clause, the scheme can be amended only by means of a fresh suit.

JUDGMENT.

HARTNOLL, J:—The matter to be decided in this appeal is whether the order of the learned Judge on the Original Side appointing one Ali Mahomed as a trustee of the Moja mosque should be upheld or set aside. A scheme for the management of the Mosque was sanctioned in Civil Regular No. 71, of 1905 of this Court on the 16th May 1910. That suit was brought by five persons interested in the management with the sanction of the Government Advocate against the then manager, now deceased, under the provisions of section 539 of the Code of Civil Procedure (XIV of 1882) then in force. The scheme laid down the procedure to be followed in appointing trustees. There was a vacancy amongst the trustees to be filled and a meeting was called by the Managing Trustee on the 10th November 1912 to fill the vacancy. This meeting was held on the advertized date and two candidates were put up for election Ali Mahomed and Abdool Wahib. One Shabadeen Naikwara took the chair. He was proposed and seconded to do so, and the proposal was carried unanimously. Before the voting took place the question of who were entitled to vote was raised. It was contended that not only members of the Jamat but all Mahomedans born in Burma whether they belonged to the Jamat or not should be allowed to vote. The chairman said that he thought he had no power to decide who

were eligible, and arranged to note each vote which was objected to, leaving the matter of who were entitled to vote to be finally decided by the Court. According to the scheme the appointment of a trustee ultimately rested with the Court. The result of the voting was 586 votes for Ali Mahomed of which 474 were objected to and 368 votes for Abdool Wahid of which 190 were objected to. When the matter came before the Court the learned Judge directed the Chairman to report on the votes objected to

L. B.

 Mahomed
 Essoof and 4
 others.
 v.
 Hajee Ma-
 homed Essoof
 and 3 others.

(1) which of them were those of Narsapuris or Zerbadis of the Sunni faith residing in Rangoon and worshippers at the mosque ;

(2) which of them were those of Nursapuris or Zerbadis of the Sunni faith residing in Rangoon but not worshippers at the mosque ;

(3) which of them were those of Nursapuris or Zerbadis of the Sunni faith but not residing in Rangoon and worshippers at the mosque ;

(4) which of them were those of neither Nursapuris nor Zerbadis.

It was ordered that the Chairman was at liberty to base his decision or opinion on inquiry (if any) of any sort which he may deem fit to make. The Chairman made his report and by it found that out of the 474 votes for Ali Mahomed objected to 433 were those of Narsapuris and 31 those of Zerbadis residing in Rangoon and worshippers at the mosque, and that out of the 190 votes for Abdool Wahid objected to, 182 were those of Zerbadis not worshippers at the mosque. It is unnecessary to go into other details of the Chairman's report. The appellants objected to the report and urged that the Chairman had classed as Nursapuris those who were not, that the votes of all Zerbadis should be allowed whether they were worshippers at the mosque or not, and that, when the Chairman held his enquiries into the status of the voters, they had no opportunity to be present. According to the scheme the voters are to be Narsapuris and Zerbadis. It was claimed by appellants that a Narsapuri meant one born in Narsapur or a descendant of such person. The Chairman said that he had classed as Narsapuris those who came from Southern India Districts surrounding Narsapur and that the term Nursapuri is not confined to those people who came from Nursapur itself any more than the term Sooratee is confined to those persons who came from Surat itself. The learned Judge would not accept the narrow meaning contended for the term "Nursapuri" by the appellants. He also said that under the scheme he thought it was intended that voters should be confined to worshippers at the mosque or at all events the vote of a regular worshipper should count very much more than the vote of a stranger. He also refused to appoint a Commissioner to go into the matter as he said that for that purpose to take evidence on oath and accept only the evidence that would be admissible under the Evidence Act would be an absurd course to adopt, that it would entail a great deal of expense and would widen the breach between the parties who worship at the mosque and the proceedings would be interminable. The Chairman's report gave

L. E.
 ———
 Mahomed
 Essoof and 4
 others.
 v.
 Hajee Ma-
 homed Essoof
 and 3 others.

Ali Mahomed a large majority and so he was appointed the trustee.

The first point for consideration in the appeal is whether it lies. The Original suit was between persons interested in the management and the former manager. The present appellants are persons interested in the management and they are bound by the decree in the suit. The present respondents are the trustees now. They are the successors of the former manager, and are also bound by the decree. I consider that they are representatives of the former manager. In the cases of *Damodarbhat v. Bhogilal Karsondas*⁽¹⁾ and *Prayag Doss Ji Varu v. Trumala Sriranga Charluvaru*⁽²⁾ proceedings such as the present one are pronounced to be proceedings in execution, and there seems to be no good reason for differing from the view. That being so I consider that an appeal lies.

The same objections on the merits were taken before us as before the learned Judge on the Original Side. The scheme does not define what a "Narsapuri" is. Again it does not say that voters must be worshippers, but it does not at the same time lay down that all Zerbadis are entitled to vote whether they are worshippers or not. There are no provisions in the scheme to show how the voters' list is to be compiled. The question is whether these debatable points should be worked out and decided in the present proceedings which are whether Ali Mahomed should be appointed a trustee or not. His appointment rests on the provisions of the scheme as it stands, as reasonable a construction as possible being given to it where its provisions are doubtful or defective. It is obvious that election proceedings of a trustee should not be protracted and drawn out by considerations as to the meaning of the term "Narsapuri" and as to who is a regular worshipper at the mosque and who not. They should be as short, summary and inexpensive as possible. Moreover to pass decisions on the points raised by appellants would be tantamount to altering or adding to the scheme—matters that cannot be dealt with in execution. For these reasons I am not disposed to disagree with the learned Judge on the original Side in the conclusions he has drawn and in following the report of the Chairman. There is nothing to show that the Chairman has acted unfairly or with a bias in any way. He was unanimously elected to the chair and it was only after he submitted his report that his conduct was criticized. I would therefore dismiss this appeal with costs—3 gold mohurs advocate's fees being allowed.

At the same time I would say that it is open to persons interested to take legal steps to have the scheme amended so that doubtful and defective matters are made clear. They can take steps to have the term "Narsapuri" defined, to have it decided whether only worshippers at the mosque should be eligible to vote and to have provision made for keeping a list of voters up to date

(1) I. L. R. 24 Boms. 45; I. Bom. L. R. 509.

(2) I. L. R. 28 Mads. 319; 15 M. L. J. 133.

If the scheme be so amended, it will simplify the way in which future elections are held.

TWOMEY, J.:—The Bombay and Madras cases cited are good authority for the proposition that when a Trust Scheme has been framed by the court the directions in the scheme may be enforced by the Court in execution upon application by persons interested. For example, according to the scheme now under consideration, if there is a casualty among the Trustees the continuing Trustees are bound to take steps to fill the vacancy in the manner prescribed in 3, 4, and 5 if they fail to do so any persons interested may apply to the Court in execution to compel them to do so. But this is not a case in which the Trustees have failed to carry out the directions in the scheme. They have complied with clauses 3, 4, and 5 to the best of their ability and the authority designated in clause 4 viz: the Principal Court of Original Civil Jurisdiction has appointed the person chosen at the meeting. It appears to me that the decision of that authority in the matter of an appointment is final and I see no reason to entertain an appeal from such an appointment as a matter arising in execution. On these grounds I would dismiss the appeal as proposed by the learned Mr. Justice Hartnoll. I would add that in my opinion it is not open to persons interested to make a separate application to amend the scheme. Such an application would be admissible only if, as in the Bombay case, the original scheme contained a clause providing for future modification. In the present case there being no such clause as this I think the scheme can be amended only by means of a fresh suit.

L. D.
 Mahomed
 Essof and 4
 others.
 v.
 Hajee Ma-
 homed and 4
 others.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEALS * Nos. 324, 325, 326 AND 327 OF 1914.

KING-EMPEROR ... vs. { 1. KAMALI KHAN.
 { 2. DEEYAGYI.

Before Mr. Justice Twomey.

Dated the 30th day of June, 1914.

Hackney Carriages (Act XIV of 1879) S. 6 and 7—Insein Rules, rule 15—Refusal by driver to ply hackney carriage for hire—Liability of driver and owner for such refusal.

The driver of a hackney carriage who refuses it to ply for hire is not punishable for infringement of rule 15 of the Insein Rules under the Hackney Carriages Act because he can not properly be said to "keep" the carriage which he happens to be driving. And the owner or keeper of a carriage is not punishable for the refusal of his servant *i. e.* the driver. It must be shown that the hirer applied to the "owner" or "keeper" and was refused by him.

* Appeals against the order of acquittal passed by the Senior Magistrate of Insein in favour of the respondents on the 29th day of January 1914 of an offence punishable under section 7 of the Hackney Carriages Act.

၆. ၆.
 King-
 Emperor.
 v.
 ၁. Kamali
 Khan.
 ၂. Deeyagyi.

JUDGMENT.

TWOMBY J:—In these 4 appeals by the Local Government the accused persons are owners of hackney carriages at Insein. They were fined by the Honorary Magistrates' Bench for infringing Rule 15 of the Insein rules under the Hackney Carriages Act 1879 which lays down that "the owner of or person keeping a hackney carriage shall be bound to let such carriage to any person requiring the same at any hour of the day or night". It was the drivers who refused to ply but the Honorary Magistrates held the owners responsible and convicted them. The Senior Magistrate on appeal set aside the convictions and acquitted the accused persons holding that the "person keeping" in Rule 15 includes the driver and that it was the drivers and not the owners who should have been prosecuted: The Government in appeal from the acquittals contends that the Senior Magistrate's view is wrong and that the owners should be held liable for the acts of the drivers.

The Bench of Magistrates at Insein is a 2nd class Bench and had no power to try these cases at all (vide section 261, Code of Criminal Procedure). On this ground alone the present appeals must fail. But if it appeared to this Court that the accused persons were liable to prosecution before a duly empowered tribunal, it would be proper to order a fresh trial. I have therefore heard arguments as to the merits of the question raised in the Government appeals.

I think that the Lower Appellate Court misconstrued Rule 15 in holding that the drivers could be prosecuted under it. The words "person keeping" in the rule are taken from section 6 clause (b) of the Act. To "keep" a thing, as explained in Stroud's Legal Dictionary, involves the idea of having over it the immediate control of a character more or less permanent. It would apply to any person to whom the owner makes over charge of the gharry stables. But a driver, according to the orders of his employer may drive different gharries on different days, or one gharry in the morning and another in the evening. He cannot properly be said to "keep" the gharry which he happens to be driving. This view is supported by the definition of the word "proprietor" in the English Statute relating to Hackney Carriages in London 6 and 7 Vic. Chap. 86 section 2. It includes any person "keeping" a hackney carriage, but distinguishes a person "keeping" it from the driver. Moreover, if it were intended that the driver should be punishable under Rule 15, we should probably find the driver expressly mentioned in the rule, as he is made expressly responsible in several other rules (*e. g.* Rules 18, 19, 30 &c.).

But if the only persons who can be punished for breach of the rule are the owners or other persons holding control of the hackney carriage, it is clear that the accused persons in these cases could be convicted only on the assumption that they are liable as masters for the acts of their servants, the drivers. Under several English statutes employers have been held punishable in respect of violations of the Statutes by their servants, if the act done by the servant was within the scope of his authority as such. Most of

these cases were under the Licensing Acts, the Marchandize Marks Acts, the Sale of Drugs Acts and the Weights and Measures Acts. The wrongful act of the servant under these statutes is usually held to be the wrongful act of the master. But I have been referred to no case in which a hackney carriage owner has been vicariously punished for breaches of the law by his drivers, and I note that under the Statute 6 and 7 Vic, Chap. 86 such prosecutions as the present would not be possible in London for it is not the owner but the driver who is made punishable by the statute for "refusing to admit and carry at the lawful fare any passenger for whom there is room" (section 33). It is argued however that the Indian Hackney Carriages Act contemplates an owner acting through his drivers, that it is with the driver at a hackney carriage stand the hirer has usually to deal and not with the owner at the gharry stables, and consequently that when the Hackney Carriages Act, section 6, says the owner (or person "keeping" the Gharry) shall be bound to let, the intention must be that the owner through his driver should be bound to do so. I am not satisfied that this view of the Act and the rules is correct. Besides Rule 15, there are several other clauses which seem to contemplate the hirer dealing with the owner direct (see section 9 which provides for disputes between the hirer and the "owner or driver", Rule 21 which speaks of special agreements between owner and the hirer). It seems to me that before the owner is held liable under Rule 15 it should be shown that the hirer applied to the owner or keeper and was refused by him. The rule and the clause of the Act on which it is based lay the obligation distinctly on the owner or keeper and on no one else, and it seems reasonable that he should not be deemed to have disobeyed the law and incurred the penalty provided for this disobedience when he has not been given an opportunity of obeying. The case is not parallel to that of a servant selling liquor, drugs, &c., for his master, as in the English Statutes referred to above, and in those Statutes the duty or obligation is not definitely laid on the master in contradistinction to the servant as in the present case. It may be said that according to the view which I take the rule will be to a great extent inoperative, for a man who is refused by a driver will not take the trouble to seek out the owner. That may be a good reason for amending the Act, but it is not a reason for unduly straining the law as it stands. I therefore dismiss the four appeals.

L. B.

King-
Emperor.
s.

1. Kamali Khan.
2. Deeyayyi.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION No. 29 OF 1913.

In the matter of a Second Grade Pleader.

Before Sir Henry Hartnoll and Mr. Justice Ormond.

Dated, 30th June 1914.

Pleader—Application for enrolment—Concealment of conviction—Misconduct—Dismissal.

A Pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is liable to be dismissed.

ORDERS.

HARTNOLL J:—

* * * * *

Considering the case as a whole I am of opinion for the reasons I have given that respondent is proved to be the Farid Ahmed who was convicted in 1899 at Myitkyina. He concealed this fact when applying for admission to this Court as a second grade Pleader. Such conduct was inexcusable and his past history is such that he should not be allowed to practise as a pleader. I would therefore dismiss him.

ORMOND J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 10 OF 1914.

In the matter of I. A. SOFAER—Insolvent and others.

Before Sir Charles Fox Kt. Chief Judge and Justice Sir Henry Hartnoll.

*Mr Glanville for Mr. Sofaer.**Mr. McDonnell for the Hongkong Bank and certain other creditors.**Mr. N. M. Cowasjee for the Official Assignee.*

Dated, 11th August 1914.

Adjudication in firm's name—Can it be made?—What will be the effect of such adjudication on individual partners? Presidency Towns Insolvency Act (III of 1909) ss. 17 and 99—Rule 83 under the Insolvency Act. ultra vires.

Under subsection 1 of section 99 of the Presidency Towns Insolvency Act III of 1909 an adjudication order can be made against a firm in the name of the firm and the order operates on the property of each partner.

Rule 83 of the Lower Burma Chief Court Insolvency Rules is *ultra vires*.

JUDGMENT.

The facts are fully set out in the following order of reference:—

ROBINSON J:—An application was made on July 6, 1913, headed: "In the matter of Sofaer and Co." and then corrected to "of I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer and Co." The prayer at the end of the petition is "wherefore we hereby petition the court for an order adjudicating the said Sofaer and Co. insolvents." The order on this is "I therefore make an order of adjudication as prayed, schedules to be filed within thirty days." The formal order of adjudication follows the phraseology of the heading of the petition, that is, it adjudges I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer and Co., insolvents. I. A. Sofaer appealed against this order but his appeal was dismissed. He has filed his schedules.

On January 24th 1914, the National Bank of India Ltd., one of the creditors, petitioned for an order under section 99 of the Act for an order directing the disclosure of the names of the partners in Sofaer and Co. I. A. Sofaer then filed an affidavit that his brother M. A. Sofaer was his partner and that a deed of partnership was executed. He does not state this explicitly but sets out various facts and acts and leaves it to the court to decide if his brother is his partner. Some correspondence then passed between the official assignee and M. A. Sofaer's counsel as to M. A. Sofaer filing his schedules and finally the petition on which orders have now to be passed was filed. It recites that Sofaer and Co. were adjudicated and prays that the court will direct M. A. Sofaer to file his schedule. For M. A. Sofaer it was urged that although a deed of partnership was drawn up, the facts were that it had not the legal effect of making him a partner. I, however, told counsel I would not hear him on that point at present as it appeared to me that what had to be decided was whether the firm of Sofaer and Co. had been adjudicated and if so whether M. A. Sofaer, assuming he was a partner, had been adjudicated, although the partners were not individually adjudicated by name.

The first question is, can a firm be adjudicated in the firm's name? On May 6th 1913, in the matter of the M. L. R. M. A. firm, case No. 51 of 1913, my brother Ormond passed the following order:—"The question whether a firm can be adjudicated in the firm's name to be argued hereafter. Section 99 of the Act would seem to allow it but rule 83 expressly forbids it. Subject to objection let the firm of M. L. R. M. A. be adjudicated insolvent." This was an *ex parte* order. The matter came up again on the petition of an alleged partner and my brother Young apparently also thought the section allowed this and that rule 83 was *ultra vires*. The matter is one of considerable difficulty and of very great importance. Section 99 of the Presidency Towns Insolvency Act which follows section 115 of the English Act clearly provides that any two or more persons carrying on business under a partnership name may be proceeded against under the Act in the name of the firm. It

L. E.

In the matter
of I. A.
Sofaer—In-
solvent and
others.

L. S.
 In the matter
 of I. A.
 Sosaer—L.
 solvent and
 others.

then provides that the court may order the disclosure of the names of the persons who are partners in the firm. Then the section provides that in the case of a firm in which one partner is an infant an adjudication order may be made against the firm other than the infant partner. To my mind it is clear that whatever may be the value of the argument that the first sub-section only refers to the initiation of proceedings in the firm's name, the section as a whole does contemplate and authorise the court to pass an order of adjudication against a firm in the firm's name. If this is so then in my opinion rule 83 of our rules is *ultra vires*. Section 112 gives the courts power to make rules "for carrying into effect the objects of the Act" and in particular such rules may provide for and regulate (o) the conduct of proceedings under this Act in the name of a firm." Rule 83 however, directly forbids what section 99 allows, that is, an order of adjudication being made against a firm in the firm's name. If I am right in my view of section 99 it is *ultra vires* as overriding instead of carrying into effect one of the objects of the Act. Again it is, I consider, open to grave doubt if this rule can properly be said to regulate the conduct of the proceedings against the firm. However right and proper it may be to permit proceedings to be initiated against a firm in the firm's name, and however right and proper the provision made by this rule may be, I have now to deal with the Act and the order of adjudication passed.

Before, however, expressing my own opinion I think I should note certain facts in relation to the English Act, on which our Act is based, and as contained in the rules of the High Courts. Under the English Act the procedure is different and the present difficulty seems to be due to an attempt to utilise certain provisions of and certain decisions under the English Act and embody them in our Act. Under the English Act proceedings may be said to commence with a receiving order. A receiving order may be made against a firm in the firm's name other than an infant partner, see *Lovell v. Beauchamp* (1). The English Rule 264 which is the same as our rule 83 has reference to this stage of the proceedings. Under the English Act the adjudication order comes at the end and it must be made against individual partners by name. Our Act places the adjudication order at the commencement of the proceedings, but has not made the salutary provision as to specifying individual partners by name. Our rules strive to cure the defect by incorporating an English rule dealing with a totally different stage of the proceedings. The rules of the Madras High Court seem to be the same as those of this court. There is no such rule in the rules of the Calcutta High Court (*cf.* rules 150 and 151) nor in those of the Bombay High Court; but rule 154 of the latter lays down that the effect of an adjudication of a firm in the firm's name is to adjudicate every person who was at the date of the order a partner, insolvent.

(1) (1894) A. C. 607; 11 R. 45; 71 L. T. 587.

To return to the present case. In my opinion the order of adjudication here, namely the adjudication of "I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer and Co." is an adjudication made against the firm in the firm's name. I see no force in the argument addressed to me that this could only be done by adjudicating "Sofaer and Co." insolvents.

The question as to what is the effect of such an adjudication of a firm on individual partners is much more difficult. The adjudication of a firm vests the firm's property in the official assignee. It, as the Bombay rule lays down, the effect is that each partner individually is adjudicated then apparently his individual property also so vests, but this may not be so. It is easy to conceive cases where individual partners have never committed an act of insolvency except in their capacity as partners, of which acts they may have been totally ignorant while they may be in no sense insolvent. As our Act at present stands and as I understand it, I am inclined to think that the effect is that an order in the firm's name adjudicates each partner. If so, M. A. Sofaer has been adjudicated and must file his schedule. He can still, however, move the court to annul the adjudication as regards himself and in doing so could raise the question whether he is a partner, or if I passed orders he could appeal.

I am of opinion that the questions arising are so important and far-reaching and so difficult that I should refer certain questions for a decision by a bench of this court or by a full bench as the Chief Judge may decide. I accordingly refer under section 11 of the Lower Burma Courts Act the following questions:—

- (1) Can an adjudication order be made against a firm in the firm's name?
- (2) If no, what is the effect of such an order on partners in the firm not named individually in the order?
- (3) Is Rule 83 of this court's Insolvency Rules *ultra vires*.

JUDGMENT.

The Judgment of the Bench consisting of the Chief Judge and Sir Henry Hartnoll J. was as follows:—

It is clear that under sub-section 1 of section 99 of the Presidency Towns Insolvency Act, 1909, an adjudication order can be made against a firm in the name of the firm. The answer to the first question is in the affirmative.

The necessary effect of such an order on the adult partners in the firm is that stated in section 17 of the Act, and the order operates on the property of each partner.

The second question is answered accordingly.

The answer to the third question referred is in the affirmative.

L. S.
—
In the matter
of I. A.
Sofaer—In-
solvent and
others

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 5 OF 1913.

R. M. A. R. Firm vs. M. R. M. S. Firm & 2 others.

For Appellant—B. P. Lentaigne.

For 1st and 2nd Respondents—Ormiston.

For 3rd Respondent—Chari.

Before Mr. Justice Twomey and Mr. Justice Parlett.

Dated, 9th July 1914.

Arbitration—Award—Bar to further action—Limitation—Specific Relief Act (I of 1877) Section 21—Civil Procedure Code (Act V of 1908) Schedule II, paragraph 18

Held that a valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure (Second Schedule).

An award extinguishes all claims embraced in the submission and after it has been made, the submission and the award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from Section 21 of the Specific Relief Act which, to some extent, is replaced by paragraph 18 of the Second Schedule of the Civil Procedure Code.

JUDGMENT.

TWOMBY, J:—The plaintiff firm M. R. M. S. and three defendant firms owned and worked a certain rice mill in partnership from July 1907 to February 1909 when they sold the concern. The plaintiff firm sued the other partners for an account. One of the three defendant firms, R. M. N. was allowed to join as co-plaintiff and the Court granted a decree for accounts against the other two partners, the R. A. M. R. and M. L. M. firm. Costs were calculated on the assumption, (entirely gratuitous), that each of the plaintiff firms was to get four thousand rupees at the final settlement, and it was ordered that the total amount of costs should be borne by the defendant firms R. M. A. R. and M. L. M. in the proportion of $\frac{2}{3}$ rds by the former and $\frac{1}{3}$ rd by the latter.

There were disputes between the partners in the first year of working, 1907-1908, and they submitted the matters in dispute to a *panchayat* of Chetties who went into the accounts and made an award in May 1908. Up to that time the R. M. A. R. firm had been the managing partner and kept the accounts. But the award directed that the plaintiff firms R. M. N. and M. R. M. S. should take over the mill as from the date of the submission to arbitration. The award was carried out. The payments directed by it to be made by each firm were made. The R. M. N. and M. R. M. S. firms took over and managed the mill up to the time of the sale in February 1909. The evidence also shows that there was some distribution of profits during the period of the management by R. M. N. and M. R. M. S. There is a dispute as to what became of the accounts books for the period prior to the arbitration. It is

proved that these books were produced by the agent of the R. M. A. R. firm before the arbitrators, and one of the arbitrators Udayappa states that he made them over to the new managers (the R. M. N. and M. R. M. S. firms) when the arbitration was finished. Udayappa is the arbitrator in whose house the *panchayat* was held and the accounts would naturally be with him. He does not remember who actually took the account books away; but he asked the representatives of the new managers of the mill to take them. No complaint was subsequently made that they had not received the accounts. There is every probability that the M. R. M. S. and R. M. N. firms got them, for it was provided in the award that the new managers should take over any debits and credits shown in the accounts as outstanding. From the evidence of the R. M. A. R. agent, Raman Chetty, (taken on commission) it appears that these outstandings were in relation to servants' wages and certain bran contracts and that all accounts with customers of the mill had been adjusted. The accounts prior to the arbitration proceedings would be required by the subsequent managers only for the purpose of ascertaining and adjusting these outstandings. Any payments made or monies received in pursuance of article 2 of the award would appear in the accounts of the later managers. The later managers would not be absolved from accounting fully for their stewardship even if it were shown that the previous managers had withheld the account books dealing with the period prior to the arbitration.

In bringing their suit for an account the plaintiffs ignored altogether the settlement of May 1908. The District Court noted that the award was incapable of execution because it was not filed in Court and that it had become barred by limitation when the suit was filed in March 1910. The learned Judge treats these as self-evident propositions and cites no authority in support of them. There is abundant authority to the contrary. It is sufficient to refer to the Calcutta case *B. S. Banikya vs. B. L. Basak* (1) and the rulings cited therein. There can be no doubt that a valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure (Second Schedule). The validity of the award in the present case is not impugned and the evidence shows that it was acted upon by all parties and that the plaintiffs received benefits under it. In the words of Mukerji, J. in the above case, the award extinguishes all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand. The award of May 1908 settles the accounts of the partnership finally up to the date of the submission April 11th, 1908. The provisions of clause 22 of the second schedule of the Code of Civil Procedure have been referred to and it has been contended that this clause read with the last 37 words of the Specific Relief Act, section 21, prevent the award from concluding the

L. S.

R. M. A. R.
Firm.v.
M. R. M. S.
Firm and
others.

(1) 33 Cal. 881; 4 C. L. J. 162.

I. D.
 R. M. A. R.
 Firm.
 v.
 M. R. M. R.
 Firm and 2
 others.

accounts up to April 11th, 1908. There is no force in this contention. What the appellants set up in bar is not a mere contract to refer to arbitration but an actual award in which all the parties concerned fully acquiesced and which they proceeded to carry out. The award operates as a bar apart altogether from the provisions of section 21 of the Specific Relief Act and apart from the provisions of clause 18 of the second schedule, Code of Civil Procedure, (which to some extent replaces section 21 of the Specific Relief Act in relation to arbitration proceedings under the Code of Civil Procedure). It follows that the account should be taken only from the date of submission in April 1908 and will relate only to the period of the plaintiff's stewardship. There are no accounts for the defendants to render and they have been wrongly cast in costs. I think the order of the District Court should be modified accordingly, order as to the payment of costs by the defendants being set aside. As the defendant-appellants and respondent No. 3 have been put to unnecessary trouble and expense by the action of the plaintiffs respondents Nos. 1 and 2, I would order the plaintiffs to pay the costs of the defendants-appellants and of the 3rd respondent in both Courts up to this stage. Subsequent costs should be a charge against the partnership estate. Pleader's fee has been calculated at 5 per cent. on Rs. 4,000 in the District Court. This *ad valorem* calculation was wrong in a preliminary decree when the amounts due to the various partners had not been ascertained. A special fee of 5 (five) gold *Mohurs* will be substituted for the amount of Pleader's fee of the 1st defendant. In this Court the appellants paid Rs. 395 Court-fee which they will recover from the plaintiffs.

The Advocate's fee in this Court to be recovered from the plaintiffs by the appellants and by the 3rd respondent is fixed at 5 (five) gold *Mohurs* in each case.

PARLETT, J.:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 99 OF 1913.

MA THA and 3 others DEFENDANT—
 APPELLANTS.

vs.

P. L. M. M. CHETTY firm PLAINTIFF—
 RESPONDENT.

For Appellant—Anklesaria.

For Respondent—Chari.

Before Sir Charles Fox, Chief Judge.

Dated, 13th November 1914.

Appeal, second—Concurrent findings of Lower Courts based on no evidence—High Court's power of interference—Plaint, signing and verification of—Practise—Parties not getting summons served on witnesses—power of Court,—Procedure.

Where the lower appellate Court gives a decree not based on evidence, it is a substantial defect or error in the procedure of that court which entitles the High Court to interfere in second appeal.

Judges are bound to see that plaints are signed by persons authorised to sign them and that verifications are not treated as mere formalities.

Where parties do not get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should proceed to deal with the case on the materials at the time before him.

L. S.

Ma Tha and
3 others.P. L. M. M.
Chetty firm.

JUDGMENT.

Fox J. :—The suit was for Rs. 950 due on a promissory note for Rs. 500 dated the 20th November 1905, and was filed on the 20th July 1910. It was *prima facie* time-barred but two sums of interest were alleged to have been paid by the defendants viz. Rs. 60 on the 19th May 1906 and Rs. 50 on the 21st July 1907, the latter of which saved the bar of limitation.

Much carelessness in procedure is displayed by the record. In the plaint the plaintiff or plaintiffs is or are described as P. L. M. M. Muthayah Chetty a firm carrying on business of money lenders in partnership at Pyapon by the managing partner Sattappah Chetty residing in Dedaye now at Pyapon. Sattappah Chetty was not examined at any stage of the case. He signed the plaint as "power holder" and he alone signed the verification which is as follows :—

"We, the plaintiffs declare that what is stated in the plaint paragraphs 1, 2, 3 are true to our knowledge and paragraphs 4 and 5 true to our belief." If this was correct he must have been called as a witness, but he was not. He was not even called upon to produce the power of attorney which his signature betokened he held. Judges are bound to see that plaints are signed by persons authorized to sign them and that verifications are not treated as mere formalities.

The promissory note sued on was not produced in Court until nearly eleven months after the suit was filed. This was another non-observance of prescribed procedure which should not have been allowed by the Judge if he had been careful. Many postponements and adjournments were allowed which should not have been allowed. Most of them were because witnesses had not appeared. When the parties had not taken the trouble to get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should have proceeded to deal with the case on the materials at the time before him. One long adjournment was granted to suit the convenience of the parties and witnesses and because the plaintiff (presumably Sattappah) was going to India on business. Three witnesses were examined for the plaintiff on the 9th June 1911. One was examined as to the Burmese handwriting on the promissory note. He said that he did not think the hand-writing and signature on the note were those of the male defendant, yet the note was admitted in evidence. The second witness knows nothing about the case. The third said he had made a translation from some account books produced before the Court. No one was called to say what these books were or whose they were or whether

L. E.
 —
 Ms. Tha and
 3 others.
 v.
 P. L. M. M.
 Chetty firm.

they were books kept in the ordinary course of business. Yet the translations were admitted in evidence. Another witness was examined on the 1st November 1911. He spoke not to the execution of the promissory note but to the later payment of interest. At the time of payment he was a clerk in another Chetty firm, and had been shown the promissory note by the plaintiff's pleader shortly before he was called to give evidence. He professed to remember that the male defendant had written an endorsement on the note about the payment of the sum, and that one of the female defendants had touched the pen. This man's evidence was obviously worthless.

On the 1st November 1911 that is nearly sixteen months after the suit was filed a petition by one Chena Tamby described as agent of P. L. M. M. Sathapah Chetty was presented asking that a commission might be issued to Sivaganga District in Madras to take the evidence of P. L. M. M. Moothayah Chetty, the man who was alleged to have lent the money and taken the promissory note from the defendants and of Murugappah Chetty the man who wrote the note:

Perhaps the strangest occurrence in the case is that the advocate for the defendants did not object to the issue of the commission at that stage. The promissory note was not sent with the commission. There is no record of it having left the court and neither Muthayah nor Murugapah in their evidence said that the defendants signed or in any other way executed this promissory note then before. No evidence has been given in the case proving the execution by the defendants of the particular note sued upon entitling it to admission in evidence yet both courts have given a decree for the amount sued for on it. This very simple suit in the Subdivisional Court dragged on from the 20th July 1910 until the 14th May 1912 or for nearly 2 years.

The Divisional Judge confirmed the decree of the Sub-divisional Judge. The course of thought of the Divisional Judge in his consideration of the case is difficult to follow. Most of his remarks tend to a conclusion that the suit should be dismissed, but finally he dismissed the appeal on the ground that he considered forgery of the note unlikely. He did not deal directly with the 2nd ground of appeal which was that the Lower Court erred in holding that the plaintiff had discharged the burden lying on him of proving that the promissory note had been executed by the defendants.

The defendants have an appeal to this court from the decree of the Divisional Court only on the limited grounds set out in section 100. The defendant's pleader relies on those stated in clause (c) viz. substantial error or defect in the procedure provided by this 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 on the merits.

In my view there was no evidence given in the case which justified a court in giving a decree for the amount due on a note because execution of the note sued on was not spoken to or proved by any one. In *Hemanth Kumari Debi vs. Brojindra Kisho Roy*

Chowdry (1) their Lordships of the Privy Council held that where the Lower Appellate Court had given a decree not based on evidence this was a substantial error or defect in the procedure of that Court which entitled the High Court to interfere in 2nd appeal under the provisions in the Code of 1882 corresponding to section 100 of the present Code. This view of the scope of the provision justifies me in holding that where, as in this case, there is absence of necessary evidence of execution of a document sued on and not admitted, clause (c) of section 100 of the Code justifies interference with the decree of the Lower Courts.

For these reasons I allow the appeal and reverse the decrees of both the Lower Courts and dismiss the suit with costs. The plaintiff firm must pay the defendants costs in all the Courts.

L. E.
—
Ma Tha and
3 others.
v.
P. L. M. M.
Chetty firm.

(1) (1890) L. L. R. 17 Cal. 875.

INDEX

TO

BURMA LAW TIMES, Vol. VII—1914.

	PAGE.
A	
Abandonment by husband of wife and children—Not proof of divorce. See Buddhist Law	80
Adjudication in firm's name—Can it be made?—What will be the effect of such adjudication on individual partners?—Presidency Towns Insolvency Act (III of 1909) ss. 17 and 23—Rule 83 under the Insolvency Act. <i>ultra vires</i> . Under subsection 1 of section 99 of the Presidency Towns Insolvency Act III of 1909 an adjudication order can be made against a firm in the name of the firm and the order operates on the property of each partner. Rule 83 of the Lower Burma Chief Court Insolvency Rules is <i>ultra vires</i> . In the matter of I. A. Sofaer	304
Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of Appeal to a wrong Court not sufficient cause. Discretion when applied to a Court of Law means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular. The presentation of an appeal to a wrong court through a mistake or in ignorance of law is not a sufficient cause for admitting an appeal after time. In an appeal filed after its time the appellant should file his memorandum of appeal and state in it grounds on which he asks the court to admit it after time. Nga Po Kan vs. Nga Shwe Dat	250
Agent—His authority to enter into a contract of guarantee—Is it a necessary incident of a Chetty's money-lending business to guarantee the loans of others? Where the Power of Attorney granted to an agent by a Chetty did not include a power to make his principal a surety for another's loan or a power to borrow money in his principal's name for another or to sign promissory notes for his principal jointly with another principal, an authority to guarantee the debt of another person cannot be said to have been bestowed upon the agent. Powers of Attorney must be construed strictly and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others or to execute negotiable instruments jointly with others it rests on the persons advancing money on such guarantee to show clearly that the agent had in fact authority to enter into such a transaction.	

A—continued.	Page.
<i>Held</i> that it is not a necessary incident of a chetty's banking and money-lending business to stand guarantee for chetties or non-chetties. Ramanathan Chetty and 2 vs. Bank of Bengal	125
Agreement in restraint of marriage void—Agreement to be re-imbursed in money if bridegroom chooses to enter second marriage void. See Contract Act	98
Amendment of claim—suit for possession sought to be amended to suit for declaration of charge.—Alteration of nature of suit. See Notice	59
Amendment of scheme by application to Court if provision is made in scheme for such amendment—Otherwise by a regular suit. See Civil Procedure Code	298
Appeal from order dismissing applicant's petition for adjudication—when does it lie? See Provincial Insolvency Act	53
Appeal presented after time—Cause of delay to be stated in memo of appeal—Previous presentation of appeal to a wrong Court not a sufficient cause. See Admission	250
Appeal, second—Concurrent findings of Lower Courts based on no evidence—High Court's power of interference—Plaint, signing and verification of—Practice—Parties not getting summonses served on witnesses—power of Court,—Procedure. Where the lower appellate Court gives a decree not based on evidence, it is a substantial defect or error in the procedure of that court which entitles the High Court to interfere in second appeal. Judges are bound to see that plaints are signed by persons authorised to sign them and that verifications are not treated as mere formalities. When parties do not get summonses served on their witnesses in time for them to appear on the day of hearing the Judge should proceed to deal with the case on the materials at the time before him. Ma Tha vs. P. L. M. M. firm	310
Appeal—whether to the Chief Court or Divisional Court—whether suit was lodged under S. 9 of the specific Relief Act based on dispossession or a suit based on title? See Suit	10
Arbitration—Award—Bar to further action—Limitation—Specific Relief Act (I of 1877) Section 21—Civil Procedure Code (Act V of 1908) Schedule II, paragraph 18. <i>Held</i> that a valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure (Second Schedule). An award extinguishes all claims embraced in the submission and after it has been made, the submission and the award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from section 21 of the Specific Relief Act which, to some extent, is replaced by paragraph 18 of the Second Schedule of the Civil Procedure Code. R. M. A. R. vs. M. R. M. S.	30

A—continued.		PAGE.
Arbitration—Award—failure to finally determine questions referred to—No protection for remitting it if the arbitration is made without intervention of Court.		
See Civil Procedure Code	... ..	287
Arrears of Maintenance—Warrant—Imprisonment for arrears for more than one month cannot exceed one month.		
See Criminal Procedure Code	... ..	225
Arms Act—S. 19 (e)—Clasp knives with the outer edge narrowing—for what use primarily intended—Can they be called Arms in ordinary parlance?		
<p>Though the exhibit knives were stout formidable ones, the outer edge narrowing as the end of the blade is reached, they cannot be called <i>arms</i> as they could not, from their appearance, be said to have been primarily manufactured with the intention of using them—for offence or defence. They are useful for domestic use or for cutting sticks.</p>		
King Emperor vs. Me Thin	... ..	165
Assignment of Contract—When the consent of the other party to the contract necessary—Actionable claim.		
See Contract	... ..	51
Attachment of a security deposit of a Railway Employee in the hands of the Auditor—Lien of the Railway Company on such deposit—Disbursing officer's duty on receipt of a prohibitory order—Result of disregarding such order.		
<p>When the auditor of the Burma Railways Company paid out an employee's security deposit after receipt of prohibitory orders from Court,</p> <p><i>Held</i> that the Railway Company are liable to make good the loss caused to the person at whose instance the prohibitory orders were issued.</p> <p>A security deposit can be attached subject to the railway company's lien though it could not be realised free from that lien.</p> <p>Though the salary of an employee is not disbursed before the end of the month in which it is earned, a disbursing officer receiving during that month an order attaching that salary is bound to give effect to it when the salary comes to be disbursed.</p>		
Burma Railways Co. vs. Hira Lal	... ..	238
Auction sale in execution of a decree not set aside—No saleable interest in portion only of property attached and sold.		
See Civil Procedure Code	... ..	18
Award—Party may institute a regular suit to enforce award instead of applying to file it.		
See Distinction	... ..	279

B

Benamidar and real owner—Transaction entered into by Benamidar alleged to be unauthorised by real owner—Effect—Estoppel by fraud.

Where property is held Benami and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act: So if the property is purchased in the name of a benamidar, and the indicæ of ownership are placed in his hands, the true

owner can only get rid of the effects of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact.

The consideration of Rs. 650 of the conveyance of the 12th May 1903 whereby the 1st Defendant purported to purchase the land in suit proceeded from the former owner; this conveyance was in his possession and showed him to be the purchaser and he was recorded as in possession in the revenue registers. The only fact which can be alleged as existing which should have put plaintiff on enquiry is the 2nd Defendant's claim that he was in possession of the land; but as at that season, the 12th June, probably agricultural operations had not commenced, it may be doubted whether he or any one was in actual occupation of the land.

Held that the plaintiff cannot be fixed with constructive notice of the alleged defect in his mortgagor's title and that accordingly the mortgage was good.

Maung Kyaw and 3 v. V. P. L. V. N. Firm ... 8

Benami transfer made to defeat claim of creditors—Real owner suing for possession from Benamidar on the ground that the intended fraud was wholly inoperative—Burden of proof—Real owner to prove that fraud was inoperative.

The respondents sought to recover some land which they alleged they had transferred benami to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative.

Held that if this be so, they are entitled to recover the land under the Privy Council Ruling in *T. P. Pethepermal Chetty v. R. Muniandy Servai* 4 L. B. R. 266.

As to the question upon whom the burden of proof on the point lay.

Held that it lay upon the plaintiff to prove that no part of the intended fraud had in fact been carried out; that as the plaintiff was alleging an intended fraud on his own part and seeking to escape the consequences of it, he was bound to allege and to prove that the intended fraud was in fact wholly inoperative; and further that unless he alleged and proved that fact his suit must fail, and therefore the burden lies on him to prove it.

Sweyadali v. Esmail Abdul Majid ... 12

Bill of Lading—Failure to produce it on the part of the consignee—Does it justify the carrying Company in refusing delivery of goods or exempt it from liability for not delivering the goods?

Where the consignee, having lost the bill of lading, was unable to produce it and where the carrying Company consequently refused to deliver the goods although the Company's manifest clearly showed the shipment of those goods to the consignee.

Held that, under the circumstances, the Company was bound to deliver the goods or their price after making certain that the loss of the bill of lading was a *bona fide* one.

Eng Leong & Co. v. B. I. S. N. & Co., Ltd. ... 92

	B—continued.	PAGE.
Brokers—advances to them for paddy purchase—Loans or Trusts— Does property in goods purchased pass to Brokers or remain in mill- owners advancing money?	... ..	209
See Penal Code		

Buddhist Law—Children of a divorced wife—their rights to inherit father's property—maintenance of filial relations.	... ..	83
See Inheritance		

Buddhist Law—Divorce—Desertion—Convict, whether deemed to desert wife—Wife of convict taking another husband, effect of—evidence—Arbitration proceedings—Clerk taking note of evidence—Note whether admissible.

Under Buddhist Law a man sentenced to imprisonment is not to be deemed to have deserted his wife ; nor does desertion *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore, the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property.

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence.

Ma Aung Byu v. Thet Hnin.	240
---------------------------	--------	-----

Buddhist Law—Divorce—Mere caprice and Petty quarrels not sufficient ground for granting a divorce.

A divorce cannot be granted on mere caprice and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce.

Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent which has been confirmed on appeal. This appeal was lodged on the ground that the decree was passed on grounds insufficient in law.

The facts in the present case were that the parties had both been married before, the appellant being 53 and the respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On the 28th October 1911 the appellant missed rice, plantains and cocoanuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parent's house. She then attempted to get a divorce before the headman without success and on the 11th November 1911, the 14th day after the quarrel, she filed this suit.

Held that the facts stated above did not constitute such cruelty as entitled her to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms.

Maung Kyaw Yan v. Ma Nyo U	16
----------------------------	--------	----

Buddhist Law—Ecclesiastical property—Mere verbal declaration or delivery of possession sufficient to constitute a religious offering.
See Buddhist Law

... ..	63
--------	----

B—continued.

PAGE.

Buddhist Law—Exclusion of children from inheritance for neglect in the performance of filial duties—Husband's abandonment of wife and children no proof of divorce.

X being tired of his first wife who was older than he and had an unpleasant voice brought her and their two children the plaintiffs-appellants who were respectively about 7 and 2 years to the house of his father-in-law and left them there and married one Ma Gyi from whom he had the 2nd defendant and after Ma Gyi's death married the first defendant Ma Dwe. The plaintiffs lived with their mother till her death and then with her relations. In a suit brought by them for $\frac{1}{8}$ th share of the *lettetpwa* of X and 1st defendant Respondent.

Held that there was no divorce of the first marriage; that the first wife never ceased to regard herself as his wife; also that the separation was entirely the act of the father and not of the children and that it cannot therefore be said that the children (plaintiffs-appellants) voluntarily separated themselves from him or that the cessation of filial relations between them was due to any act or omission on their part.

Held that no child can be excluded from inheritance unless desertion or neglect of filial duties is proved against it.

Ma Tin Lun and 1 v. Ma Dwe and 1 80

Buddhist Law—Husband and Wife—Desertion for more than a year—Dissolution of the Marriage Tie.

Where the wife left her husband and lived separate from him for a period of 6 years and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted and where 17 months after separation the husband took a second wife,

Held on a consideration of the facts, that the conditions contemplated by Sec. 17 of Chapter V of the *Manugye* for the dissolution of a marriage were completed in this case and when the woman died in 1909 the status of husband and wife did not exist between the parties.

Maung Tha Kado v. Ma Thin Myaing 197

Buddhist Law—Inheritance—Father or elder sister to succeed to the estates of women living and trading in partnership with their elder sister separate from father.

Where three sisters lived together and traded together apart from their father and where after the death of the two younger ones there was a conflict as to succession to their estates between their eldest sister and their separate father,

Held that the balance of authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent.

Ma Nhin Bwin v. U Shwe Gon 105

Buddhist Law—religious offering irrevocable when.

A verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable even without the formal dedication ceremony. A building erected on religious land with the permission of the presiding monk partakes of the nature of the ground on which it stands and becomes ecclesiastical property.

Yeo Kyaw Sum v. U Ke Tu 63

B—continued.		PAGE.
Burden of proof—Acts within agents' authority—Burden on person advancing moneys on contracts of guarantee by agents.		
See Agent	...	126
Burden of proof—Decree-holder alleging invalidity of sale of attached land—effect of invalidity—Charge on land to the extent of the amount advanced.		
Where the defendant purchased, without any registered conveyance, the attached land from appellants' judgment debtor for Rs. 1,000 and was in uninterrupted possession of the same till the date of attachment and where the question of the validity of the sale depended upon the decision of the question as to whether the transaction was entered into before or after 1st January 1905 (the date when the Transfer of Property Act was extended to Burma).		
<i>Held</i> that the onus of proof lay on the appellant to show that the sale was invalid as being entered into subsequent to 1st January 1905.		
<i>Held</i> also that if the sale was found to be invalid the purchaser was entitled to a charge on the property for the amount paid by him in advance as purchase money, and for interest on that amount.		
4 Bur. L. Times 115 dissented from.		
28 Bom. 466 approved.		
Maung Po Maung v. Maung Kaing and 1	...	86
Burden of proof—Fraud in defraud of creditors proving inoperative—Real owner suing Benamidar for possession must show that intended fraud was wholly inoperative.		
See Benami Transfer	...	12
Burden of proof—Judgment debtor to prove his poverty when arrested.		
See Civil Procedure Code	...	242
Burma Municipal Act—Section 46 (1) (A) and Section 46 (4)—Valuation of premises containing Machinery—Principle of valuation.		
<i>Held</i> (1) Machinery placed for use in the building is not liable as such to taxation under section 46 (1) (A) (a) of the Burma Municipal Act but Machinery which is on the premises to be rated and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used, is to be taken into account in ascertaining the rateable value of such premises. It is not all things on the premises, or that are used on the premises which are to be taken into account but things which are there for the purpose of making and which do make them fit as premises for the particular purposes for which they are used.		
Rangoon Electric Tramway and Supply Co., Ltd. v. Rangoon Municipality	...	44
C		
Carriers—can they refuse to deliver goods when Consignee can not produce a Bill of Lading which, he says, was lost? Inquiry whether the loss was real.		
See Bill of Lading.	...	92
Chetty—Agency to carry on a banking and moneylending business—are contracts of guarantee covered by such agency?		
See Agent	...	126

C—continued.	PAGE.
Chinese—Buddhists—Conditions essential to their marriage. See Criminal Procedure Code	71
Chinese Buddhists—Inheritance—No Written law on Inheritance— Principles of Justice, Equity & Good Conscience to be followed. See Inheritance	246
Civil Procedure Code—Act XIV of 1882—S. 20—Venue of suit—Plain- tiff's option—Preponderance of convenience when cause for transfer. See Venue of suit	1
Civil Procedure Code (Act XIV of 1882) S. 539—Scheme framed by the Court—Mosque, scheme of management of—Election of trustee— Nature of election proceedings—Appeal—Execution proceedings— Doubtful points. An appeal lies from the order of a Judge on the original side de- ciding the question as to the election of a trustee of a mosque under a scheme framed by a Court as the proceedings would be in the na- ture of proceedings in execution of the decree passed in the suit originally sanctioning the scheme. The proceedings of the election of a trustee in pursuance of a scheme should not be protracted. They should be as short, summary and inexpensive as possible. Doubtful and defective provisions of a scheme can be made clear by an application to amend the scheme if the scheme contained a clause for future modification. If there is no such clause, the scheme can be amended only by means of a fresh suit. Mahomed Esoof v. Haji Mahomed Esoof	298
Civil Procedure Code—Act V, of 1908—S 11.—Res judicata—finding of a Lower Court objected to in Appeal but not disposed of by the Appellate Court—Whether such a finding is final. Where an appeal is preferred against the finding of an issue but the Appellate court has not decided finally on that point as the appeal was disposed of on other points, it cannot be held that the finding of the Lower Court is final and the decision cannot operate as <i>res judicata</i> . Nga Ti v. Nga Pan and 1	249
Civil Procedure Code—Amendment of claim from suit for possession to one for declaration of a charge not allowed—Alteration of nature of suit. See Notice	69
Civil Procedure Code—S. 47—Mesne profits of mills worked by judg- ment creditor sought to be set off against amount of the decree— question to be dealt with in execution Proceedings and not by a separate suit. See Proclamation of sale	64
Civil Procedure Code—section 73 of Act V of 1908—Section 298 of Act XIV of 1882—Rateable distribution—Meaning of same judgment debtor. Where certain property was attached and sold in execution of a decree obtained against X in his personal capacity and where the holder of a decree passed against X as heir to his wife sought ratea- ble distribution of the proceeds of the sale,	

C—continued.

PAGE.

Held that the provisions of section 73 of the Civil Procedure Code cannot be invoked unless the judgment-debtor occupies the same character in each decree.

I. L. R. 26 All. 28, I. L. R. 25 Bom. 494 followed.

Toola Ram v. Abdul Gaffoor 67

Civil Procedure Code (Act V of 1908), S. 92 (1) (b)—Suit under Section 92 compromised and trustee discharged from liability to account—Compromise decree attacked as fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Advocate General's consent whether necessary for such declaratory suit—Ejusdem generis, principle of—“Further or other relief” meaning of.

A suit under the provisions of section 92, Civil Procedure Code, praying for the removal of trustees, appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship, and new trustees were appointed in their stead. The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust moneys was void and of no effect.

Held, that although the direct object of the suit of beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked allege a breach of trust and involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within clause (b), sub-section (1) of section 92, Civil Procedure Code, and therefore, the suit was not maintainable without obtaining the consent of the Advocate-General.

Sir Dinshaw M. Petit v. Sir Jamsetji Jijibhai, 2 Ind. Cas. 701 ;

11 Bom. L. K. 85, 33 B. 509, 5 M. L. T. 301 referred to.

Mahomed Salay Naikwara v. Mulla Goolam Mahomed and 7 ... 160

Civil Procedure Code—S. 90 Right to begin.

See Divorce Act 129

Civil Procedure Code (Act V of 1908), Section 104 (1), Schedule II, paragraph 20—Arbitration—Award—Conditional purchase of partnership outstandings by one partner—Remission of private award.

The partners in a money-lending firm referred their disputes and differences regarding certain items to arbitrators agreeing in writing to abide by their award if made by a certain date. The arbitrators made the award by the specified date and directed that as the plaintiff purchased outstandings at a certain valuation the defendant should be responsible for any error or omission in the accounts regarding those outstandings.

Held, that the award did not finally determine the questions referred for arbitration as it exposed the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts, however unintentional it might be.

There is no provision for remitting to the arbitrators an award made in an arbitration without the intervention of a Court.

P. L. M. Subramonian Chetty, v. K. R. V. Vellian Chetty ... 287

C—continued.		PAGE.
Civil Procedure Code—S. 115—High Court's power of interference even where there are concurrent findings of fact based on no evidence.		
See appeal		310
Civil Procedure Code—Order III Rule 2—Use of Special Powers of Attorney to evade the provisions of law relating to the appointment of Pleaders and Advocates—Upper Burma Civil Courts Regulation—Section 26.		
Where Respondent, ex-petition-writer and ex-apprentice clerk made a business of appearing for parties under cover of special powers of attorney and thus practically performed the functions of an Advocate and thereby evaded the provisions of the law relating to the appointment of Advocates and Pleaders.		
<i>Held</i> that he made himself liable to punishment under Section 26 of the Upper Burma Civil Courts Regulation.		
<i>Held</i> further that it would be absurd if the provisions of Order III, Rule 2, should enable an unqualified person to practise as an Advocate in spite of the provisions of Section 25 <i>Seqq.</i> Upper Burma Civil Courts Regulation.		
Tussuduq Hosain v. Girhir Narayan 14 Cal. 556 followed.		
Nga Nyun and 3 v. Nga Po O		206
Civil Procedure Code (Act V of 1908) O. 21 R. 40—Poverty or other sufficient cause—Burden of Proof—Some part thereof—meaning of.		
Where a judgment-debtor is arrested and brought before a Court, the burden is on him to prove that from poverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments, the amount of the instalment due.		
A Court should refuse to direct a release of a judgment-debtor under order 21, rule 40 of the Civil Procedure Code if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.		
The words "some part thereof" in rule 40 (2) (d) of order 21, refer to decrees for payment of money generally and not only to instalment decrees.		
C. R. Cowie and Co. v. W. H. A. Skidmore		242
Civil Procedure Code—Order 21, rule 52—S. 63—Attaching money lying in Court's hands in another district illegal—Rateable Distribution under S. 73.		
See Illegality		277
Civil Procedure Code—Order 21 Rule 66—Proclamation of sale—Statement of facts material for ascertaining the nature and value of Property to be sold—Value and capacity of outturn of a mill material facts in a proclamation of sale.		
See Proclamation of sale		64
Civil Procedure Code—Order 21, Rule 89—Is the judgment debtor liable to pay interest on the amount specified in the Proclamation of sale from the date of payment made by the auction-purchaser to the date he actually paid money under this rule?		
<i>Held</i> that an order requiring the judgment-debtor to pay to the mortgagee interest on the amount due to him from the date of payment into Court by the auction-purchaser till the date of payment made by the judgment-debtor under this rule was illegal.		
L. D. Attaiades v. R. M. K. Chetty		68

C—continued.		PAGE.
Civil Procedure Code—Order 21, Rule 91—setting aside Auction Sale on the ground that Judgment-debtor had no saleable interest—Fraud of decree holder concealing his knowledge.		
Where an auction purchaser of land and 2 houses on it at a Court sale found that the judgment-debtor had interest only in the houses and not in the land and then sought to set aside the sale.		
<i>Held</i> that Rule 91 of Order 21 does not apply where the judgment-debtor has no saleable interest in a portion only of the property sold at the auction.		
<i>Held</i> further that the contention that the decree-holder knew that the judgment-debtor had no interest in the land and fraudulently concealed that knowledge thus inducing the auction purchaser to buy the land was not supported by the facts found in the case.		
Maung Tha Dun v. S. S. Chokalingam Chetty ...	...	18
Claspknives with the outer edge narrowing—are they arms?—Test whether primarily manufactured for offence or defence or for domestic use.		
See Arms Act ...	...	165
Companies Act—Act V of 1882—S. 214—Is an auditor an officer of the Company?—de facto Officers of the Company.		
Where the shareholders of a Bank assembled in general meeting appointed the appellants as auditors in the manner prescribed in the Articles of Association and where in pursuance of that appointment they entered upon and carried on the duties of auditors of the Bank.		
<i>Held</i> that the appellants became <i>de jure</i> officers of the Bank.		
On a contention that there was not a properly qualified quorum at the said general meeting and that consequently though the appellants acted as auditors, they were not properly appointed.		
<i>Held</i> (by Ormond, J., Twomey, J., dissenting) that if the shareholders at that meeting were unable to appoint an auditor owing to want of a quorum there would be a casual vacancy of the office and the Directors present might be taken to have duly filled it under article 11 of the Company's rules.		
Stuart Smith and Allen v. O. L. Bank of Burma ...	...	230
Construction of statute when meaning doubtful—Court fees act on Letters or Probate.		
See Court Fees Act ...	...	275
Contract Act—Undue influence—S. 16—Did plaintiff use his dominating position in order to obtain an unfair advantage?		
Where plaintiff released the 1st appellant on the two appellants and two sureties entering into a bond for paying Rs. 2,000 in cash and Rs. 2,800 within 2 years with interest at 6 per cent. on the whole amount Rs. 4,800.		
<i>Held</i> that though the first appellant might have been sent to prison, had no such arrangement as the above described one been made and though the plaintiff was to that extent in a position to bring pressure to bear upon the appellants and dominate their wills, the appellants must further show that the plaintiff used his dominating position to obtain an unfair advantage.		
<i>Held</i> , on the facts, that the bargain being fair and reasonable, there was no undue influence.		
Maung Mya and 1 v. Moosaji Ahmed & Co. ...	...	90

Contract Act—S. 26—Agreement in restraint of marriage—Agreement to repay money spent for son-in-law's education in case he marries another woman during the life time of his present wife whose father was to advance the money.

Where it was mutually agreed between the fathers of a newly married couple that the girl's father should advance money for the boy's education and the boy's father reimburse all such monies in case the boy took another wife during the life time of the girl,

Held such a contract was void under S. 26 of the Contract Act as being in restraint of marriage as the burden of reimbursing to the girl's father the money spent would exercise a restraining influence on the boy if he thought of marrying another woman.

Held also that there is nothing in the section to restrict its operation to the case of a first marriage only as the section is perfectly general in its terms and the Legislature well knew at the time of enacting the section that polygamy was practised by certain races in India.

U Ga Zan v. Hari Pru 98

Contract Act (IX of 1872) S. 45—Partnership—Representative of deceased partner—Right to sue for recovery of debts due to partnership.

When one of the partners in a firm dies, the surviving partners can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partner parties to the suit. If the surviving partners refuse to bring the suit, the only remedy of the legal representatives of the deceased partner lies in a suit against the surviving partners for winding up and for an account of the partnership and in an application in that suit for the appointment of a Receiver. The Receiver will bring suits for recovery of debts due to the firm.

English Procedure and Section 45 of the Indian Contract Act compared with order 30 Rule 42 Civil Procedure Code of 1908.

Oodayappa Chetty v. Ramasawmy Chetty 261

Contract Act Section 90 III. e—Assignment of a delivery order without assent of promisor—effect thereof.

See Delivery order 93

Contract—Assignment of contract—Transfer of Property Act, Chapter VIII—When benefit of a contract may be assigned.

Though the benefit of a contract may be assignable by one party, the burden is not so assignable without the consent of the other party.

Held that looking at the contract in this case it clearly imposed such liability on the purchasers as would preclude their transferring it without the consent of the sellers.

Held also that an actionable claim such as could be transferred under chapter VIII of the Transfer of Property Act did not arise until the sellers had refused delivery to the purchaser.

Diekmann Bros. & Co. vs. Suleman Haji Bros. & Co. 51

Contract of guarantee—Agent's authority—Powers of Attorney to be construed strictly—Burden of proving transaction was within Agent's authority.

See Agent 126

	PAGE.
C—continued.	
Contract to sell—Specific performance—mere statement of lowest price does not imply willingness to sell at that price. See Specific performance	136
Contracts—Void as wagers—Test whether differences only are intended to be paid—Resources of contracting parties to be considered. See Wagering Contracts	54
Court Fees Act (Act VII of 1870) S. 19-I—Sch. I Art. 11—Sch. III—Form—“Value” means nett value—Interpretation of statute—Meaning not clear—Doubt in favour of subject. The word “value” in Article 11 of Schedule I of the Court Fees Act means the nett value and therefore only the nett value of an estate should be taxed. Where the meaning of the Legislature is not clear the doubt must be given in favour of the subject. <i>In re Will of G. C. Thaddeus</i>	272
Court Fees Act (VII of 1870) Section 19 (iii) Schedule I Article 11—Words “the amount or value of the property” refer to nett value—Nett value of estate less than Rs. 1,000—No fee chargeable on Probate or Letters—Construction of Statute—meaning doubtful. The words “the amount or value of the property” in Article 11, Schedule I of the Court Fees Act, refer only to the nett value. Therefore, where the nett value of a property in respect of which Probate or Letters are granted does not exceed Rs. 1,000, the Probate or Letters are not chargeable with any fees. Where the meaning of the legislature is not clear, the doubt must be given in favour of the subject. <i>In re Chin Ah Young and 1</i>	275
Creditor of deceased—when can he object to a grant of probate or letters? See Probate	245
Criminal Breach of Trust by a hirer of sawing machine—His selling the machine without making payments in full. See Hire-Purchase Agreement	222
Criminal Breach of Trust—Section 495 of the Indian Penal Code—Advances to Brokers for purchase of paddy loans or trusts—Does the ownership in paddy purchased pass to the Broker? See Penal Code	209
Criminal Procedure Code—Section 103—search not vitiated by addition of new items to the list of things seized. See Gambling Act	163
Criminal Procedure Code—Section 103—Search—Ward Headmen—Their competency as witnesses to searches. See Search	143
Criminal Procedure Code (Act V of 1898), ss. 146 (2), 435 (3)—Jurisdiction—Ultra vires order—Criminal Revision—Power of Chief Court. A Sub-Divisional Magistrate attached certain lands and appointed a Receiver under section 146 (2), Criminal Procedure Code, till a competent Civil Court would determine the rights of the parties, but refused to make over the possession to the successful	

C—continued.

PAGE.

party when the District Court determined the rights of the contesting parties on the ground that the losing party was going to appeal to the Chief Court.

Held that the Sub-Divisional Magistrate's order was clearly without jurisdiction, as a Magistrate ceases to have authority to retain the property after a competent Civil Court determines the rights of the parties.

The Chief Court has power to annul such orders in revision under section 435 (3), Criminal Procedure Code.

Maung Tha Zan and 1 v. Maung Ba Gale *alias* Mauug Ba ... 293.

Criminal Procedure—Sections 133, 135, 138—Time for setting up *bona fide* claims to land.

Where a conditional order is passed under section 133 Criminal Procedure Code and the person against whom the order is made raises a *bona fide* claim that the subject of contention is private property the Magistrate is bound to investigate into the claim and cannot leave it to a jury appointed under section 138. There is however no authority for holding that once a jury is appointed it is open to the person against whom the order is made under section 133 to set up such a claim and to have it determined by the Magistrate before the Jury proceeds with the matter.

L. V. Banerji vs. R. K. Mukerji, I C. L. J. 434 (436) followed.

Obiter—If the jury decided that the order was reasonable and proper the appellant would not be estopped from bringing a civil suit to establish his right to the exclusive enjoyment of the land.

M. R. Sahoo vs. M. L. Roy, I. L. R. 6 Cal. 201 referred to.

Ah Yway vs. Ma Gyi 23.

Criminal Procedure Code—Section 195 (6)—sanction—Application for revocation thereof—Is notice to other party necessary?

An application for the revocation of a sanction granted by the Lower Court should not be disposed of *ex parte* without giving notice to the person obtaining sanction or to the District Magistrate.

The Sessions Judge's *ex parte* order setting aside the sanction was set aside and he was asked to dispose of the application after giving notice to the other party.

Katan vs. Nga Tin and 1 205.

Criminal Procedure Code Sections 215 and 537—quashing of a committal order—*nolle prosequi* when not sufficient evidence.

See commitment order 26.

Commitment order—Quashing of—Criminal Procedure Code sections 215, 537, 494.

A commitment order can be quashed only on a point of law under section 215 of the Code of Criminal Procedure such as want of territorial jurisdiction in the Committing Magistrate. But the commitment would be valid unless a failure of justice had been in fact caused by such commitment (section 537). A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such a case to instruct the Public Prosecutor to withdraw under section 494 Criminal Procedure Code.

King-Emperor v. Nga Taung Thu and 2 26

Criminal Procedure Code (Act V of 1898), S. 307—Duty of High Court—Penal Code (Act XLV of 1860) Ss. 299, 300, 304—Murder—Culpable homicide not amounting to murder—Intention—Knowledge.

On a reference under section 307, Criminal Procedure Code, the High Court has all the powers of an Appellate Court and should form its own opinion after considering the entire evidence and giving weight to the opinion of the Sessions Judge and the jury.

If a person strikes another on a vital part with a cutting instrument the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death; but it does not follow that the striker must be found guilty of murder. His act may fall under one of the exceptions to section 300, Indian Penal Code.

The parts of section 299, 300, 304 Indian Penal Code, dealing with knowledge are not applicable to a case in which bodily injury intended for a particular individual has resulted in death. Where a death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only "as a means of arriving at his intention when he committed the act" and for that purpose, and not for the purpose of deciding whether the case falls within the last part of section 304, must the question be considered.

King-Emperor v. Kotiya 290

Criminal Procedure Code—Section 488—Maintenance of Child—Mother's ability to maintain—Bona fide offer to maintain if child lives with him.

Held that the father is bound to maintain his child whatever the position of the mother may be.

Merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him.

Mi Thein v. Nga Po Nyun 34

Criminal Procedure Code (Act V of 1908) S. 488—Maximum sentence—Execution for arrears of maintenance for several months—construction of cl. 3.

When a Magistrate issues a warrant for arrears of maintenance due for more than one month and when the allowance for more than one month remains unpaid after the execution of the warrant, he is not competent to pass a sentence of imprisonment exceeding one month. The words in subsection 3 "for the whole or any part of each month's allowance remaining unpaid may mean for the whole or any part of every month's, or all months' allowance remaining unpaid" where the arrears remaining unpaid are for a period exceeding a month.

Zaw Ta v. Nan Ma Yin 225

Criminal Procedure Code—Section 488—Validity of marriage of a Chinese Buddhist with a Burman Buddhist—No maintenance where marriage not according to Chinese Buddhist Law.

Where a Burman Buddhist female applied for maintenance as wife against a Chinese Buddhist who denied that he was ever married according to law.

C—continued.

PAGE.

Held that the personal law of a Chinese Buddhist would be applicable to such a case. That law is considerably restricted than the Burmese Buddhist Law according to which living together by mutual consent constitutes a valid marriage. Amongst the Chinese Buddhists the following three conditions are essential *viz* :—

- (1) Consent of the parents, the consent of the parties themselves being unimportant.
- (2) Certain formalities and ceremonials.
- (3) The suitability of the parties in the matter of their respective positions.

Wa Foon v. Ma Thein Tin 71

Criminal Procedure Code—Section 297—No sufficient compliance where meaning of 'wrongful gains' 'wrongful loss' not explained to jury—Misdirection of jury.

See Misdirection 20

D

Damages—Civil Suit for—for slander—Truth a good defence—Criminal Law of defamation not applicable.

See Slander 253

Damages for breach of contract of marriage—a suit for them may be lodged by the man to be married—Measure of damages—actual loss in money or reputation to be considered.

See Marriage 14

Defamation—Absence of intention to defame immaterial—Evidence of witnesses as to whom the article refers—Opinion based on rumours—Admissibility of such opinion.

In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff if reasonable people would think the language to be defamatory of the plaintiff. The question for decision in such cases is whether the article is libellous and whether it designates the plaintiff in such a way as to let those who know him understand he is the person meant.

One of the ways in which people could form an opinion that the article refers to plaintiff is to use what they knew and have heard of his past history.

The existence of unproved rumours regarding the plaintiff is no reason for giving him slight damages.

W. A. Providence vs. P. T. Christenson 155

Delivery order—Is the giving of such order equivalent to putting donee in possession?—Is the assent of the original party essential to the assignment?—Indian Contract Act s. 90 ill. e.

The handing over of a delivery order to the ware-houseman or mill unless accompanied by the latter's assent to the transfer is not equivalent to giving possession of the goods to the purchaser and no claim for non-delivery can be brought by the latter against the ware-houseman or mill under such circumstances.

A. T. K. P. L. Chetty vs. S. K. R. S. S. T. Chetty firm 93

Delivery by Flotilla Company without production of mate's receipt—
Mate's receipt—Does it fulfil the condition of a negotiable instrument?
—Effect of representation in Rate circular.

Held that the document in suit though headed "Mate's Receipt" was not negotiable as a bill of lading and was not such a document of title as could have been transferred except upon the usual form of assignment as between the shipper and his assignee accompanied by notice to the ship-owner charging him with the fact of the assignment and making him responsible to the assignee instead of the original shipper.

The document in suit is a simple ordinary receipt for goods and charges the Respondents with receipt of certain goods from one Chowdhry under a bargain to convey them by ship to Rangoon for a stipulated freight and to deliver the goods to Chowdhry or his nominee at Rangoon.

There is therefore no legal foundation for the position that the document was a document of title and that the goods passed upon its transfer.

As to the terms and conditions of the Company's Rate Circular *held* that they set forth a mode in which in conducting their own business they would protect themselves and it is wholly *jus tertii* for any person in the position of the appellants (who as moneylenders had made advances to Chowdhry and now make claims against him for the paddy) to plead that those claims and conditions constitute an obligation upon which they as outside parties are entitled to found any claims.

T. S. Natcheappu Chetty and others vs. Irawaddy Flotilla Company 40

Deposit of money—Value of deposit receipt payable to bearer—Deposit receipt stolen—Money paid to bearer—Banker's liability—Good faith—Paper Currency Act (II of 1910) Section 26—Banker.

According to the terms of a deposit receipt issued by a private banker, the deposit money was repayable on the production of the receipt. The receipt, being stolen from the depositor, was presented to the banker by a cooly, who according to the banker, was paid the whole of the money due under it without any inquiry as to how he came by the receipt.

Held on depositor suing the banker for recovery of his money, that the parties never understood or agreed that the deposit could pay the whole of his deposit to any one who produced this receipt without any inquiry as to how he came by it.

Held further that, even if the banker paid anything to the cooly who produced this receipt, it was not in the *bona fide* belief that the cooly was authorized by the depositor to receive it.

Doubted whether the receipt in question could be held to be an *engagement* for the payment of money within the meaning of Section 26 of the Paper Currency Act.

Gaggero Francesco vs. L. P. R. Chetty 266

Discretion—Must be one guided by law—Must not be arbitrary, vague and fanciful but legal and regular.

See Admission 250

D—continued.

PAGE.

Distinction between application to file an award and a regular suit to enforce it—Difference in Court fee, limitation and right of appeal—Revocation of submission to arbitration—notice of hearing to party withdrawing from arbitration not necessary.

Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award by paying an *ad valorem* fee on the value of the property in dispute.

Where a party to a reference gave the arbitrators notice that he withdrew from the reference and did not attend the hearing,

Held it was not incumbent on the arbitrators to give them any further notice of hearing and the omission to give notice of subsequent meeting or meetings of the arbitrators to that party does not invalidate the award.

Nga Hla Gyaw vs. Maung Aing and 1 279

Divorce Act—S. 7, 45 and 55—Civil Procedure Code—S. 99—Which side to begin—'Rules and Principles'—Meaning thereof—S. 33 of the Indian Divorce Act—absence of previous notice.

The appellant, in defending a suit for restitution of conjugal rights admitted that the marriage-ceremony and registration took place but pleaded that she was forced and coerced into a marriage against her will.

Held that the appellant was the right party to begin. Unless she can prove coercion and non-consent the marriage was valid and binding on her.

Further even if it was for the Respondent to have begun, the Court would not interfere unless the appellant has been prejudiced in her case by being made to begin to prove her case.

The 'principles' and rules referred to in S. 7 of the Indian Divorce Act are not mere rules of procedure but rules and principles which determine the granting or refusing of the relief sought—rules of a *quasi* substantive rather than of mere adjective law. The right or obligation to begin a case and demand before institution of the case are mere matters of procedure and cannot come within 'principles and rules.'

Savariammal vs. Santiago 129

Divorce—Mere caprice or petty quarrels not sufficient ground for divorce.

See Buddhist Law 16

E

Ecclesiastical property—Building erected on dedicated land with permission of presiding monk.

See Buddhist Law 63

Estoppel by acquiescence—Distinction between acquiescence in an act which is still in progress and mere submission to it when completed.

See Mortgage 88

Estoppel by fraud—Allowing Benamidar to possess indicæ of ownership—Real owner cannot be allowed to object and to any disposal of property by Benamidar.

See Benamidar 8

Evidence Act—s. 91—Admissibility of proof of a cause of action independent of a pronote?

See Pro-note 95

	PAGE.
F	
Fraud in defraud of creditors—Burden on real owner to prove that it was wholly inoperative in a suit for possession from Benamidar.	
See Benami Transfer	12
Fraudulent transfer by a debtor—Distinction between transfer to a pressing creditor and to a volunteer—Intent to defraud must be to defraud creditors generally.	
See Transfer	257
G	
Gambling Act section 6 and 7—section 103 of the Criminal Procedure Code—Common gaming house—section 3.	
Though the Inspector of Police should not have added any new items to the list of things seized at a search held under section 103 of the Criminal Procedure Code.	
<i>Held</i> that his doing so was not a breach which could invalidate the search.	
Though the profits of gambling were devoted to Club Premises and not for the profit or gain of the club, the place might still come under the definition of "common gaming house" under section 3 of the Act.	
Htaung and 15 others vs. King Emperor	163
Gifts among Mahomedans—Mahomedan Law applicable—Burma Laws Act 1898—section 13 (2).	
See Mahomedan Law	75
Gift—Validity—Donor must do every thing to perfect it—Invalid gift revocable—must take effect in present.	
See Mahomedan Law	142
H	
Hackney Carriages Act (XIV of 1897) S. 6 and 7—Insein Rules, rule 15—Refusal by driver to ply hackney carriage for hire—Liability of driver and owner for such refusal.	
The driver of a hackney carriage who refuses to ply for hire is not punishable for infringement of rule 15 of the Insein Rules under the Hackney Carriages Act because he can not properly be said to "keep" the carriage which he happens to be driving. And the owner or keeper of a carriage is not punishable for the refusal of his servant <i>i. e.</i> the driver. It must be shown that the hirer applied to the "owner" or "keeper" and was refused by him.	
King Emperor vs. Kamali Khan and 1	301
Hire—purchase agreement—Instalments—Rent—Possession—Sale of Article Hired—Penal Code (Act XLV of 1860) sec. 405—Criminal breach of trust.	
In a <i>hire-purchase</i> agreement the hirer is under no legal obligation to buy but has an option either to return the article hired or to become its owner on payment in full, whereas the seller is bound to keep his offer open; it is not a sale within the meaning of sec. 78 of the Contract Act, the hirer being merely a bailee.	
Therefore where a hirer of a sewing machine without making payments in full sells the machine, he is guilty of criminal breach of trust.	
<i>Musa Mia v. M. Dorabjee</i> 5 L. B. R. 201 dissented from.	
<i>Helby vs. Mathews</i> (1895) A. C. 471 followed.	
Maung Mya Gyi vs. Nga Po Shwe	222

I		PAGE.
Illegality of attaching money lying in Court's hands in another district—Order 21 rule 52—S. 63—Money detained under a temporary injunction liable to rateable distribution under S. 73—Proper course when money lying in another district is sought to be attached.		
It is illegal for a Court to attach money lying in the hands of a Court in another District. The proper procedure for a decree-holder in such a case is to have his decree transferred to the Court in that District for execution.		
Money attached before judgment in a case is liable to rateable distribution in execution of decrees against the same defendant.		
Ramachandra v. Latchmanan Chetty...	...	277
Immoveable property—Standing trees—An agreement to renew lease not an interest in immoveable property.		
See Limitation Act	... ..	258
Inheritance—Buddhist Law—Right of the children of a divorced wife to inherit—Maintenance of filial relations an essential condition—Immaterial whether property is ancestral or non-ancestral.		
X married 3 wives in succession. Plaintiff, the only child of the first marriage sued the third wife for half the <i>lettetpwa</i> of the 1st marriage. It was found that plaintiff was taken away by her mother at the time of her divorce from X and never afterwards maintained filial relations with her father.		
<i>Held</i> that the plaintiff respondent is not entitled to share in the property left by her father irrespective of the question as to whether the property is ancestral or non-ancestral.		
Mi Ah Pu Ma vs. Mi Hnin Zi U	... ..	83
Inheritance—Exclusion from inheritance for desertion or neglect of filial duties—father's keeping wife and children with wife's relations not amounting to divorce.		
See Buddhist Law	... ..	80
Inheritance—Father or elder sister—Brothers and sisters to be preferred to parents.		
See Buddhist Law	... ..	105
Inheritance—Succession among Chinese Buddhists—Exclusion of females—Indian Succession Act not applicable to Chinese Buddhists—Absence of written law on inheritance among Chinese Buddhists—Justice equity and good conscience.		
Where a son by a former wife of a Chinese Buddhist claimed to inherit all the father's property to the total exclusion of his step-mother and her daughter,		
<i>Held</i> that, in the absence of any written law on the subject of inheritance among Chinese Buddhists and in the absence of definite evidence as to the customs prevailing in such matters, the proper course is to proceed according to justice equity and good conscience and that the mother be awarded one-third and the plaintiff two-thirds of his father's estate.		
Though Parker in his Comparative Chinese Family Law mentions six preliminary steps as essential to a first class marriage, the evidence of Chinese Elders in this case shows that the customs are		

	PAGE.
I—continued	
not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people.	
Ma Thein Shin and 1 vs. Ah Shein	247
Interest—not chargeable on judgment Debtor for the days intervening between Payment by auction purchaser and payment by judgment Debtor under order 21, r. 89	
See Civil Procedure Code	68
J	
Jurisdiction of Civil Courts—Suits between monks and laymen— <i>Vinaya</i> and <i>Bhrammathats</i> .	
See Suit	27
Jury—Duty of Judge—technical terms to be properly explained.	
See Misdirection	26
K	
Lease—Clause for renewal of a lease containing same covenants at expiration of first lease—Perpetual lease.	
See Limitation Act	268
Lessor and Lessee—Can a lessor get a decree for same rent both against lessee and sub-lessee?—English doctrine of lease of remainder of term amounting to an assignment.	
Where the lessor of certain paddy lands sought to obtain decrees for the same rent against both the lessee and the sub-lessee,	
<i>Held</i> that the plaintiff can have judgment only against one and not against both and he, in this case having already obtained a decree against the lessee cannot get one against the sub-lessee.	
<i>Held</i> it is unnecessary and inappropriate to import into Indian Law the technical rule of English Law viz—a sub-lease of the remainder of a term would operate as an assignment of the term.	
<i>Hoosain Ismail Atcha v. Ebrahim Mahomed Makda</i> 3 L. B. R. 90 dissented from.	
Archan and 1 vs. Maung Po Win and 1	85
Libel—Damages therefor—need not be slight because of vague rumours regarding plaintiff.	
See Defamation	155
Limitation Act (XV of 1877) Sch. II, Arts. 113, 131, 144—Landlord and Tenant—Covenant for renewal of lease of immoveable property—Specific performance—immoveable Property.	
When a covenant for renewal is expressed in a lease in the usual terms <i>i. e.</i> , an undertaking is given by the lessor to grant at its expiration a new lease containing the same covenants, such covenants will not include the covenant for renewal itself.	
One who claims the right of perpetual renewal of a lease must strictly prove it.	
Standing trees are immoveable property for the purpose of the Limitation Act.	

L—continued.	PAGE.
An agreement to grant and renew a lease is not an interest in immovable property and a suit for the specific performance of such an agreement, not being a suit for the recovery of such property or any interest in it, is governed by Article 131 and not by Article 144 of the Limitation Act.	
Secretary of State v. Ma Dwe and 1	268
Limitation Act—Art. 142—Plaintiff to prove his possession at some time within 12 years before the suit.	
See Possession	255
Lottery—Penal Code S. 294 A—meaning of 'Keeppang' the premises by a club committee—May not be the sole object of a club—Punishment for unauthorized lottery.	
See Penal Code	187
M	
Machinery on the premises—Whether taxable by the Municipality or not—Distinction between machinery placed for use in the building and machinery making the premises fit for the particular purpose for which they are used.	
See Burma Municipal Act... ..	44
Magistrate—exercising proper discretion in staying Criminal Suit when same issues are being tried before District Judge.	
See Stay	73
Magistrate—Order under S. 133 of the Crim. P. C.—duty to investigate claim raised <i>Bona fide</i>.	
See Criminal Procedure Code	23
Mahomedan Law—Gift—Delivery to donee—Donor's order to third party having possession of the property to hand it to donee—gift invalid and revocable if no such order.	
For a gift to be valid, the donor must do everything to put the donee into possession and to divest himself of his rights of ownership. If property is in the hands of a third person donor must give notice to that person to hand over the property to the donee. If the gift was not intended to take effect <i>in presenti</i> , it would be void. Registration cannot make an invalid gift valid. An invalid gift is revocable.	
Ahmed Gulam v. Mahomed Cassim and 1	142
Mahomedan Law—Gift—Settlement—Creation of life-estate—Burma Laws Act 1898, Sec. 13 (2)—Transfer of Property Act 1882 Sec. 2, 20, 21, 123 and 129.	
The Mahomedan Law is to be applied in all suits instituted in the Chief Court of Lower Burma relating to gifts among Mahomedans.	
The creation of a life-estate is inconsistent with Mahomedan Law and where a life-estate is attempted to be created, the donee takes an absolute title.	
P. M. P. A. N. vs. Shaikh Mahomed Ismail	75
Maintenance—Burman Buddhist cannot claim if not married to a Chinese Buddhist according to Chinese Buddhist Law.	
See Criminal Procedure Code	71

	PAGE.
M—continued.	
Maintenance—Father's duty irrespective of mother's ability to maintain child—Bogus offer to maintain if child stays with him. See Criminal Procedure Code	34
Marriage—Agreement in restraint of marriage Void—Sec. 26 of contract Act not intended to apply to first marriage only. See Contract Act	98
Marriage among Chinese Buddhists—6 essential steps preliminary to a first class marriage—Custom not strictly followed in Burma. See Inheritance... ..	246
Marriage—Between Burman Buddhist and Chinese Buddhist—Not valid if not according to Chinese Buddhist Law. See Criminal Procedure Code	71
Marriage between Burman Buddhists—dissolved by husband being sentenced to imprisonment. See Buddhist Law	240
Marriage—Breach of contract of marriage—Damages—Will a suit for such damages lie? Damages for breach of a contract of marriage may be awarded to a man. <i>P. Tribhovandas vs. P. M. Nathubhoy</i> 21 Bom. 23 followed. Between Burman Buddhists a suit by the man will lie, unless it can be shewn to be forbidden by the Burmese Buddhist Law. The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public. Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and his reputation. The defendant now appeals on the grounds <i>inter alia</i> that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation. <i>Held</i> that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that, therefore, there was nothing to base the finding of either Rs. 13 or Rs. 30 upon. <i>Held</i> also that there was nothing on the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury. <i>Held</i> further that the fact that a man has merely become the butt of his acquaintances' jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature. <i>Ma Ngwe Yin vs. Maung Po Taw</i>	14
Marriage—Co-ercion and non-consent suit for restitution of conjugal rights—Right to begin. See Divorce Act	129

M—continued.

PAGE.

Marriage, dissolution of—Adultery—Cruelty—Judicial Separation—Assault—Condonement—Revival of offence—Gonorrhoea, proof of adultery.

Mere adultery is not sufficient to grant a divorce for dissolution of marriage but it is sufficient to grant a decree for judicial separation. One act of assault, especially when there was provocation for it, is not sufficient to prove legal cruelty. The offence of assault, though condoned, may subsequently revive when adultery is proved.

Adultery was held to be sufficiently proved where the husband had contracted gonorrhoea and did not allege that he had contracted the disease from his wife or any other source.

Matilda Hindle vs. Richard James Hindle 294

Mate's Receipt—not negotiable as a bill of lading—transfer by assignment and notice.

See Delivery 40

Merchandise Marks Act S. 7 to 11—is a Limited Company liable to be prosecuted for an offence? Meaning of 'whoever.'

See Penal Code 116

Misdirection—charge to jury—Criminal Procedure Code, Section 297—"Dishonesty."

When the accused was tried for criminal breach of trust by a District Magistrate with the aid of a jury and the District Magistrate in summing up did not expressly tell the jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss' and where they were not told what those terms meant.

Held that there had not been sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict could not stand.

C. H. Browne vs. King-Emperor 20

Mortgage by deposit of title deeds—Such a mortgage entered into before the extension of the Transfer of Property Act to Burma—assignment of such mortgage.

Under S. 2 cl. (e) of the Transfer of Property Act, the equitable mortgage made prior to the 1st January 1915 can be assigned in the districts by deposit after that date. The equitable mortgage having been valid originally, the parties would be entitled to make the mortgage into one bearing compound interest by an oral agreement subsequent to 1st January 1905.

Ko Kyo & 1 vs. A. K. Curpen Chetty and 1 140

Mortgage by one of joint property of himself and his mistress—Absence of mistress's consent—Effect of an acquiescence after the transaction.

The first and second appellants lived together, though not legally married and the first appellant mortgaged their joint property without the consent of the second. On an objection being raised to a mortgage decree affecting 2nd appellant's interests in the land,

Held that the tie of marriage did not exist between them and that they could separate at will and there was no binding contract between them.

M—continued.		PAGE.
<i>Held</i> further that no acquiescence after the deed was executed by the 1st appellant would create an estoppel or would change the past in any way.		
Ratnam Pillay & 1 vs. N. P. Firm		88
Mortgage—Notice to mortgagee of defective title of mortgagor—when imputed.		
See Benamidar		8
Municipal Act—Section 46 (1) A—Taxation of Machinery.		
See Burma Municipal Act		44
Murder—Culpable homicide not amounting to murder—Intention—Knowledge—Duty of High Court in appeals from the decisions of Sessions Judge and Jury.		
See Criminal Procedure Code		290

N

Nolle Prosequi—S. 494, C. P. C. when not sufficient evidence.		
See Commitment order		26
Notice—Constructive notice when imputed.		
See Benamidar		8

Notice—Purchaser aware of a previous mortgage by his vendor and his father—Sufficient notice to purchaser of father's interest in the property—Amendment of claim.

Where the purchaser of a land from X became aware before the sale of a previous mortgage of the same land by X and his father together and where X's father was living in a house on the land, *held* he was put upon his enquiry as to X's father's interest in the land and could not be deemed to have purchased anything except X's interest in the property though the land stood in X's name in the Revenue Registers and he had the landholder's certificate in his name.

Where the suit, originally brought for possession of land purchased from X but in the occupation jointly of X and his father was afterwards sought to be amended into one for declaration for a charge to the extent of the amount paid out of the purchase money towards the redemption of a previous mortgage on the same land executed by X and his father jointly.

Held such an amendment cannot be allowed as it would alter the nature of the suit.

Mahomed Ibrahim Saib Khateeb vs. Maung Ba Gyaw ... 69

P

Paper Currency Act, 1910—S. 26—Effect of blank endorsement of a note payable to a person or order.		
See Promissory Note		96
Partnership—Effect of death of partner—Power of surviving partners to sue without making the legal representatives of the deceased parties to suit—Remedy of the legal representatives in case of refusal of surviving partners to see outstanding debtors.		
See Contract Act		261

Penal Code Section 183—Authority of Revenue Officers—Criminal Procedure Code—Section 239.

Ten persons were tried together for disobeying the Deputy Commissioner's order to remove certain Zayats built by them on land granted to some other persons.

Held that the Land and Revenue Act and the rules framed under it do not confer on Revenue Officers any power to deal with third parties who trespass on grant land or who otherwise interfere with grantees' enjoyment thereof.

Held also that the case did not fall within Section 239 Criminal Procedure Code.

Ba Nyun & 9 vs. King-Emperor 25

Penal Code (Act XLV of 1860), Sec. 11, 34, 294 A—Committee of Club—Person—"keeps," meaning of—Common object—Liability of members—Purpose, double effect of—Official Acts—Presumption—Government, Collector assessing income tax, whether—Assessing income-tax, whether tantamount to authorization—"Not authorized," meaning of—Exception—Onus of proof—Evidence Act (1 of 1872), Sec. 105, 114—Proposal—Drawing list, whether proposal.

The members of the Committee of a club who exercise full control over club matters, inclusive of the premises "keep" the premises of the club within the meaning of that expression as used in sec. 294A of the Indian Penal Code.

Where a house is kept open for a double purpose, viz., as an honest social club for those who do not desire to play, as well for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally.

The presumption is that official acts are regularly performed.

A Collector who is a Revenue Officer is not authorised to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization.

The words 'not authorized' in Sec. 294A, Indian Penal Code mean no more and no less than 'unless authorised, or not having been authorised or without authority,' and are in the nature of an exception or proviso and under Sec. 105 of the Evidence Act, the burden of proof lies on the accused to show that the lottery was authorised by Government.

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description: "The Sweep for June is now open. It will close on the 20th June 1913. Settling day 23rd June 1913. All tickets must be taken in the name of a member, etc.," was *held* to be a proposal within the meaning of Sec. 294A, Indian Penal Code.

King-Emperor vs. A. J. Cooke and 4 others 187

Penal Code (Act XLV of 1860) S. 299, 300, 304—Murder—Culpable
and not amounting to murder—Intention—Knowledge.

See Criminal Procedure Code S. 307 290

Penal Code—S. 405—Advance to Brokers—whether loan or trust—
Passing of the ownership to the Broker—Responsibility for loss caused
by accident, theft or fall in price—Relation of principal and agent.

Held (BY ORMOND, TWOMEY, ROBINSON AND PARLETT, JJ.,
HARTNOLL, OFFG. C. J. DISSIDENTING) that monies advanced to a
Broker for the specified purpose of the purchase and supply of paddy
with the agreement that the broker is to suffer the loss or get the
profit by a fall or rise in market price cannot be said to be entrusted
to him within the meaning of Section 405, Indian Penal Code
although by the agreement the Company bound itself to take
delivery of the paddy purchased and an express trust was declared
in regard to the amounts advanced.

Held (BY ORMOND, TWOMEY, ROBINSON AND PARLETT, JJ.)
that the question whether A entrusted property to B is one which
depends upon the actual facts of the case and not merely upon the
legal terms employed by the parties and that the Penal Code cannot
be altered by agreement of parties.

Held (BY TWOMEY AND ROBINSON, JJ.) that Clause 5 providing
that the paddy is to be delivered at the Rangoon market rate and not
at the rate at which the Broker bought it and Clause 7 providing that
the loss of money or paddy from any cause whatever is to fall on the
Broker nullify the effect of the declaration of trust in the company's
favour embodied in the agreement; that the clauses are incompatible
with the view that the Broker was employed as an agent; that the
company cannot retain dominion over the money until the Broker
spends it and at the same time enjoy immunity from the ordinary
risks and liabilities incidental to the ownership of the money and of
the paddy bought with it.

Held BY ROBINSON, J., that Clause 1 of agreement declaring
that the Broker shall not be at liberty to bind the company in any
manner and that he is not the agent of the company makes the
Broker a 'principal' in all the contracts he makes for the acquisi-
tion of paddy and all the incidents of the contracts fall on him; that
on a consideration of all the terms of the agreement the ownership
in the money and the paddy bought must be held to have vested in
the Broker and the advance must be regarded as a loan accompanied
by a promise to use it in a particular way.

Held BY HARTNOLL, OFFG. C. J.; (OTHER JUDGES DISSIDENTING)
that as the money was advanced for a specific purpose and in conse-
quence of confidence reposed in the appellant by the company and as
he expressly agreed to hold it in trust, the agreement must be held
to have created a trust and the mere provision that if the money or
paddy is stolen or lost otherwise or if the market value falls between
the time of the purchase and the time of supply to the company the
Broker is to bear the loss, does not seem to remove the arrangement
between the parties from one of entrustment.

Nga Po Ywet vs. King-Emperor 209

P—continued.

PAGE.

Penal Code—S. 405—Criminal Breach of Trust—A hirer of a sewing machine on a hire-purchase agreement selling the machine without making payments in full.

See Hire-Purchase agreement 222

Penal Code—S. 482 and 486—Can a corporate body be prosecuted criminally? Mens rea. Meaning of 'whoever' 'and any person who'—Merchandise—Act S. 7 to 11.

Where there is an ambiguity or the language of an act is not clear the cause or necessity of the law being made should be considered to ascertain the real meaning. Also every clause of a statute should be construed with reference to the contents and other clauses of the Act.

Held that Limited Companies are not excluded from the operations of s. 482 and 486 I.P.C. and they may prove their innocence either by showing that they acted without intent to defraud or by any other means.

Seena M. Haniff & Co. v. Liptons 116

Penal Code (Act XLV of 1860), Sec. 52, 499, Excep. 9—Defamation—Magistrate, allegation against, of corruption and conspiracy to save an accused under trial, by manipulating procedure—Magistrate's and Judge's public acts if above criticism—Press, if specially privileged in criticising such acts—Limits of legitimate comment—Libel, no plea of justification, yet truth of charges asserted by innuendo, propriety of—Defence of good faith—Matters relevant to the enquiry and proper to be placed before jury—Judge's right to state his own views, without withdrawing case from the jury—Charge to jury—Misdirection—Misdirection when sufficient for interference by Privy Council—Privy Council practice of interfering with criminal trials—Libel published under mistake—Duty of apologising on discovery of mistake—Bail, discretion as to granting.

No privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist; but, apart from statute law, his privilege is no other and no higher.

No privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment.

A, as District Magistrate having declined to commit one M for trial on a charge of having abducted and committed rape upon a Malay girl of about 11 years of age, the Appellant wrote an article in a newspaper charging A with being engaged with others in a corrupt plot to defeat justice in order to save M, with having bailed him out for a non-bailable offence and with having manœuvred his procedure to that end. M had himself admitted that, being informed that the child was suffering from gonorrhœa, he had taken her to his house and himself had personally examined her—although there was a hospital 8 miles away. A, in declining to commit M, had further stated that in his opinion M's conduct was pure and philanthropic.

Held—That this declaration by the Magistrate with which the enquiry before him concluded, laid the whole trial open to searching and severe observations, and no blame could be attached to these.

P—continued.

PAGE.

But it was not open to the Appellant to make against the Magistrate charges of corruption and conspiracy, which were admitted to be untrue, and were grossly libellous, and the Appellant could not justify them in a criminal proceeding for defamation, unless he was able to establish affirmatively that he believed them to be true and that on reasonable grounds, as provided in the ninth exception to sec. 499 of the Indian Penal Code.

That the conduct of M referred to above and of the Magistrate at the enquiry were relevant for a consideration of the question of accused's *bona fides* and were properly submitted to the jury in support of the defence.

That the Judicial Committee was not prepared to say that the granting of bail to M was an improper exercise of the Magistrate's discretion, but in any case it was a difficult and delicate point of law which could not have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel.

That the fact that every officer, judicial or administrative, except one, had agreed with the conclusion to which the Magistrate had arrived, and that an investigation in the department of a Lieutenant-Governor of great experience had, to the Appellant's knowledge, resulted in exonerating the Magistrate from blame, and the attitude of the Appellant who neither defended the articles as true nor gave any assistance on the subject of what were the actual things upon which he founded his own beliefs and what steps, if any, he took to investigate the truth of the charges before giving them publicity, were also matters for consideration by the jury.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will be the subjects of separate analysis, but in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the jury's province. In the region of fact, the Privy Council will not interfere, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

Where, in answer to a charge of defamation, the accused did not plead justification, but nevertheless the truth of the libels continued throughout the trial to be urged by way of repeated *innuendo*, the Judge was justified in stating his own view of the facts, in order to counteract the improper use which was being made of the procedure, provided he did not withdraw the case on facts from the jury.

When during the trial the accused was apprised from materials placed before the Court that certain serious charges against the complainant were quite without foundation, he should have at once acknowledged his mistake and should not have adhered to the libel.

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by Statute, is undoubted. But there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. Before they will

interfere, it must be established demonstrably that justice itself in its very foundation has been subverted, and that it is therefore a matter of grave Imperial concern that by way of an appeal to the King it be restored to its rightful position in that particular part of the Empire.

The practice of the Committee in respect of criminal trials is to this effect: It is not guided by its own doubts of the Appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused, as has placed him outside the pale of regular law, or within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.

Channing Arnold v. King-Emperor 167

Penal Code—S. 500—Defamation—no defence that accused never intended to defame—Nature of proof required—Damages.

See Defamation 155

Phongyi—His powers of transfer of monastery dedicated to him personally.

See Suit 27

Pleader—Application for enrolment—Concealment of conviction—Misconduct—Dismissal.

A Pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is liable to be dismissed.

In the matter of a Second-grade Pleader 304

Possession within 12 years of suit—Limitation Act—Act. 142—Undisturbed possession—Discontinuance of possession.

In a suit for ejectment of a trespasser from certain land allowed to remain fallow for many years by the owner, the Defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation.

Held that the suit was governed by Art. 142 of the 1st Schedule of the Limitation Act and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit.

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person.

Nga Po and 1 v. Nga So Pe 255

Power of Attorney—Construction—Can an agent appointed to carry on the business of a money lending partnership sue for the dissolution of the partnership?—Amendment of plaint—Formal defect—Civil Procedure Code—Order 6, Rule 14.

A power enabling the agent to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by

	PAGE.
P —continued.	
requiring the principal himself to sign the plaint since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal.	
P. L. K. v. R. M. A. R.	282
Powers of attorney —to be strictly construed—Necessary incidents of such powers—Burden of proving transaction was within agent's authority.	
See Agent	126
Practice —Special leave to appeal—Criminal proceedings.	
Leave to appeal from conviction and sentence on the grounds of alleged irregular conduct of the proceedings, misdirection of the Jury, and misreception of evidence refused, the case not coming within the principle laid down in <i>In re Abraham Mallory Dillet</i> .	
George Staunton Clifford v. Emperor	37
Press —Limits of legitimate comment applicable equally to the Press as to the members of the public.	
See Penal Code	6
Charge to Jury —Must be read as a whole.	
See Penal Code	167
Principal and Agent —Suit by principal against his agent for neglect or misconduct—Limitation Act, Art. 89 and 90 of Sch. II—Starting of limitation—From the time the misconduct of agent became known to principal.—Is such knowledge to be presumed before getting books of account—Recognised agent—his power.	
In a suit by a principal against his agent for damages for misconduct and neglect, knowledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the Agent.	
Where after the termination of an agency, the agent first handed over the books of account to a Panchayat from whom the Principal secured them after some time.	
Held that the period of limitation under Art. 90, Sch. II of the Limitation Act for principal's suit against agent for his misconduct would run from the day on which he got the books of account from the Panchayat.	
An agent authorised to enter appearance in suits can sign the amendment plaint when once the suit has been instituted with the approval of the plaintiff.	
P. R. N. v. P. M. R. M.	199
Privy Council —its interference in Criminal cases limited to cases where there has been interference with the elementary rights of an accused or where a complete misdescription of the whole bearing of the evidence has occurred.	
See Penal Code	167
Provincial Insolvency Act III of 1907 S. 46 (2) and (3) —Appeal from orders of the District Court—Whether an appeal lies against order dismissing applicant's petition for adjudication as an insolvent for abuse of process comes under any of the sections enumerated in clause 2 of S. 46.	
Where the applicant's petition for adjudication as an insolvent was dismissed on the grounds of fraud and abuse of the process of the Court.	

Held that such an order could not be made under any of the sections enumerated in S. 46 (2) and no appeal can be laid against it except with the leave of the District Court or the High Court.

R. M. Ramanathan Pillay v. M. L. V. E. R. M. Firm ... 53

Probate and Administration Act.—Act V of 1881—Sec. 23, 41 and 150—Indian Succession Act s. 331 and 332—Hindu.

Where the intestate professed the Hindu religion, though he was of a mixed parentage.

Held that letters of administration should issue under the Probate and Administration Act of 1881 and not under the Indian Succession Act.

Though under S. 23 of the Probate and Administration Act letters of administration should ordinarily be issued only to an heir or heirs S. 41 allows exceptions to be made in special cases. Where the intestate made a large settlement and appointed his wife and daughter to be its trustees and not his eldest son and where the other heirs desire that their mother and sister rather than their eldest brother should administer the estate the Court held that letters were rightly granted to the wife and daughter of the deceased rather than to the eldest son.

Maung Chit Maung v. Ma Yiat and 1 ... 133

Probate and Letters of administration—Nett value of estate less than Rs. 1000—No Courtfee chargeable.

See Court Fees Act ... 275

Probate and Administration Act.—S. 90 Cl. 4—Person interested in the property—Are creditors interested in property?

Held that a creditor has no interest in the immovable property of his deceased debtor unless he has charge on that property. He has no *locus standi* to come and object to a grant of probate or letters unless he objects to the grant on the ground that the will is set up in fraud of the creditors.

Ma E Me and 1 v. Ma. E. ... 245

Proclamation of Sale—Particulars of—value and capacity of a mill are material facts for proclamation—stay of sale—Civil Procedure Code G. XXI, Rule 66—Section 47, Civil Procedure Code.

Where the judgment creditor had purchased property at an auction sale which was subsequently set aside and the judgment-debtor in the next sale proclamation claimed a set off from the judgment creditor for the mesne profits of the property.

Held that this matter should be dealt with in execution proceedings and not by a separate suit.

In the sale proclamation as the parties did not agree as to the valuation and capacity of two rice mills the Court inserted the respective figures of both parties. *Held* that as far as valuation was concerned this amounted to a material irregularity.

Maung Maung v. Wightman & Co., and others ... 64

P—continued.

PAGE.

Promissory note payable to bearer on demand—Section 26 Indian Paper Currency Act 1910.

A promissory note payable to any person or order does not, by indorsement in blank, become "a promissory note payable to bearer on demand" within the meaning of section 26 of the Indian Paper Currency Act 1910; and is not invalid therefor.

Sana Emansaib v. Moona Ena Mahommed and 6 ... 95

Pronote on an unstamped paper—Whether admissible—Is there independent cause of action?

Where the plaintiff sued for money lent but it was proved that at the time of the transaction defendant executed a pronote which was written on an unstamped paper,

Held that the said unstamped document could not be admitted in evidence or acted on, on account of its being insufficiently stamped and plaintiff can succeed only if he can show that he has a cause of action independently of the document.

Held further that in the case the promissory note was the contract and section 91 of the Evidence Act debarred the production of any other evidence but the writing itself.

Bally Singh v. Bhugwan Doss Kalwar ... 95

Purchaser—when put on inquiry by part of purchased property being in the possession of person other than vendor—constructive notice of latter's title.

See Notice ... 69

R

Railways Act X of 1890—Sec. 101—Effect of breach of rules framed under the Act—Cases of actual danger distinguished from disobediences involving risk of danger.

A Railway servant cannot be convicted under Section 101 of the Indian Railways Act, 1890, unless he has, by his disregard of the rules, *actually* endangered the safety of some person. It is not sufficient that his act *might* have endangered the safety of some person.

Where the disobedience of a rule is merely *likely or calculated* to endanger the safety of any person the intention of the legislature was apparently to leave it to the railway authorities to deal departmentally with disobediences involving risk of danger without entailing actual danger.

Nge Ba Lin v. King-Emperor ... 101

Rateable distribution—Civil P. C.—S. 73.

See Illegality ... 277

Rateable distribution—S. 73 of Civil P. C.—Meaning of 'same character' of judgment—debtor.

See Civil Procedure Code ... 67

Receiver's claim for rent paid in advance to the owner—Transfer of Property Act—S. 59—such advance payment a condition precedent of letting the premises.

Where the owner of certain mortgaged premises let them to the applicant after receiving 5 month's rent in advance as a condition precedent of such letting and where a receiver of these premises appointed subsequently sued for the same rent,

	PAGE.
R—continued.	
<i>Held</i> the lessee having paid the rent in advance only as a part of his entering into the contract of hiring the premises, could not be compelled to pay it over again to the receiver.	
Toon Chan vs. P. C. Sen	139
Rent paid in advance—when can it deemed rent and when can it be deemed as mere advance—Condition of paying in advance part of the contract of renting the premises.—Effect.	
See Receiver's claim	139
Res judicata—a point objected to in appeal but not finally decided, the appeal being disposed of on another point cannot be said to be <i>res judicata</i> .	
See Civil Procedure Code	249
Rights in a natural stream of owners of lands through which it flows.—Damming it up—reasonable use of flowing water without diminishing the quantity or impairing the quality.	
A riparian proprietor may take from a flowing stream as much water as he really requires for ordinary purposes such as for drinking, washing and so on even though he may seriously diminish the quantity available for the proprietors below him but for purposes of irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case.	
Where it was found that the Defendant appellant took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the Plaintiff Respondent's land.	
<i>Held</i> the user was illegal, unless he had acquired any right of such use by prescription.	
Uga Pi and r vs. Nga Kyan Tha	282
Riparian proprietor—his right to a flowing stream—illegal user.	
See Rights	282
Rules framed under S. 101 of the India Railways Act—Effect of breach of such rules—Cases of actual danger distinguished from disobedience involving risk of danger.	
See Railways Act	101
S	
Sale without any registered conveyance—creates a charge to the extent of amount advanced.	
See Burden of Proof	86
Scheme of Trust framed by a Court—Provision for future modification—Fresh suit necessary when no provision made for amending scheme.	
See Civil Procedure Code Section 539	298
Search—S. 103 of the Criminal Procedure Code—are ward Headmen competent witnesses?—Presumption under S. 7 of the Gambling Act arises only if search is properly conducted.	
<i>Held</i> by Ormond, Parlett and young JJ :—That ward headmen in towns other than Rangoon are not incompetent to witness a search under Section 103 of the Criminal Procedure Code merely because their duties require them to take measures for the prevention and discovery of crime.	

Held by Sir Henry Hartnoll Offg. Chief Judge and Robinson :—
That such ward headmen cannot be competent witnesses for searches under Section 103 as their duties are connected with the police, and as they look for credit or reward from work done for or in conjunction with the police and as the persons searched cannot have sufficient confidence in them.

Ti Ya and C v. K. E. 143

Slander—repetition of rumour—equally actionable—English law about slanderous words imputing unchastity to a woman—Slander of Woman Act now makes such imputations actionable per se.

Repetition of slanders heard from others is actionable unless privileged.

In a civil suit for damages for slander, the criminal law of defamation has no application. The suit must be decided according to justice, equity and good conscience.

Proof of the truth of the slander is a complete defence in a civil suit for damages.

Mi Ngwe Hmon v. Mi Pwa Su 253

Special Laws—Meaning thereof—Offence—Abetment of—S. 3, Whipping Act, 1909—S. 109 Penal Code.

Persons other than juvenile offenders convicted of *abetment* of theft (or of any other offence specified in section 3 of the Whipping Act 1909) cannot be punished with whipping under the provisions of that section.

Special laws are laws that create fresh offences *i. e.* make punishable certain things which are not already punishable under the general Penal Code *e. g.* Excise Opium, Cattle Trespass Acts, &c.

Po Han and 1 vs. King-Emperor 99

Specific performance—Contract to sell—Offer and acceptance—was there a completed contract?

Where a Broker inquired of the owner the lowest prices for his 3 houses and where the owner stated them and asked for a reply.

Held that the mere statement of the lowest price at which the Vendor would sell contains no implied contract to sell at that price to the persons making the inquiry.

Hardandas Paladroy v. Ram Mohm Bibi 136

Specific Relief Act—S. 9—Suit for possession under this Section not compulsory—Plaintiff may choose to bring suit for possession based on title.

See Suit 10

Stamp Act—S. 2—Documents chargeable with stamp duty on execution—unsigned documents not chargeable—Admissible.

See unsigned documents 48

Statute—Interpretation when meaning not clear—Doubt in favour of subject.

See Court Fees Act 272

S—continued.

PAGE.

Stay of Criminal suit during pendency of a civil suit involving the same issues—Distinction between private prosecutions and those ordered or sanctioned by Government or Court Officers—Magistrate's Discretion.

Where an application for stay was made by the accused in a criminal case on the ground that the same issues were being tried in a Civil Suit before the District Judge,

Held that the Magistrate would exercise his discretion properly if he would adjourn the Criminal Proceedings until the decision of the Civil Suit.

Kalima Bibi vs. Macbul Ahmed 73

Suit between a layman and a monk—Jurisdiction of Civil Courts—Vinaya and Dhammathats—Their applicability to suits regarding gifts to Phongyis and subsequent transfers.

Though the subject-matter of a suit between a layman and a monk was admittedly once religious property, the Civil Courts had jurisdiction to try it.

Cases regarding gifts to Phongyis and their subsequent transfers should be decided according to texts of the Vinaya and not according to the Dhammathats which are hopelessly contradictory.

Held that a monk cannot, according to the Vinaya, give away to an individual, either monk or layman, a monastery dedicated to him personally.

Nga Po Thin vs. U Thi Hla 27

Suit for possession—whether under Section 9 of the Specific Relief Act or not—Inference from the fact that the suit was brought within 6 months—Also from the fact that the suit was for possession only and not declaration of title and does an appeal lie to the Divisional Court?

The sole question in this appeal was whether the suit was in fact brought under Section 9 of the Specific Relief Act. The Divisional Court held that it was, because (a) the plaintiff was entitled to bring such a suit, and (b) the suit was filed within 6 months of the dispossession.

In this Court the finding is supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title.

Held that the second paragraph of section 9 shows clearly that no one, though entitled to sue under that section, is bound to do so, but that he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section.

Held also that a person by seeking his remedy early does not thereby alter the nature of his suit.

Held further that there is no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

The plaintiff in the present case set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants, alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the court of first instance held that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession.

S—continued.

PAGE.

Held that both from the frame of the plaint and the course which the case took it was always intended to be a suit based upon title and never a suit under section 9 of the Specific Relief Act and that the plaintiff cannot be heard to assert the contrary and that, therefore, an appeal lay to the Divisional Court.

Maung Lu Maung and 6 vs. Maung Pu and 4 10

Sureties for appearance of judgment-debtor on the day the time for appeal expires—Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties—Responsibility of Sureties—Its extent.

D. M. Biswas was summarily arrested under Order XXI, Rule 2 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and cost the Judge ordered his release on his sureties furnishing security for his appearance on the 1st August 1909, the date when the period for appeal against the decree expired, failing with the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to jail. An appeal was duly preferred on the 27th July 1909 and dismissed on the 14th October 1909.

The bond which the sureties actually signed was for the due performance of such decree as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on the 1st August 1909.

Held that it was clearly not in accordance with the order of the Court.

Held that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on the 1st August 1909 should discharge the sureties and that it was then the Court's duty to rearrest the judgment-debtor and commit him to prison.

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between the 10th August 1909 and the 5th April 1911 (both inclusive).

Held that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that therefore the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability.

Chandi Charan Sen vs. Ramkumar Chakravarty 5

Surety's bond for appearance of judgment debtor not in accordance with Court's order—Construction.

See Sureties for appearance 5

T

Teji and Mundi Contracts—Double option—Does it differ from a single option so as to make it a wager.

See Wagering Contracts 54

	PAGE.
T —continued.	
Transfer of Property Act—Chap. VIII—Actionable claim—Assignment. See Contract	51
Transfer of Property Act (IV of 1882.) Section 53—Fraudulent transfer—Suit to avoid—Frame of suit—Intent must be to defraud creditors generally—One creditor securing payment of his debt—Volunteer—Difference in their liability—Proof required of each—Relationship—Presumption.	
A suit founded on Section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. An objection on this ground must be taken in the first court, but if not so taken, cannot avail in the Appeal Court.	
The intent, which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors generally. Therefore, a transfer, made with intent to defeat or delay any one particular creditor, cannot be avoided provided that there has been good consideration and the transaction is not a mere sham.	
A transfer with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor, proof of valuable consideration is ordinarily sufficient, but not so in the case of a volunteer who must prove not only valuable consideration but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer.	
Relationship alone between the transferor and the transferee is not sufficient to establish such aiding, but it is a circumstance giving rise to suspicion and one that must therefore, be very carefully considered.	
V. R. M. V. A. Chetty firm vs. Maung Po Sin	257
Trustee of Mosque—His election under a scheme framed by Court—Appeal from order deciding a question as to his election lies—Such order savouring of the nature of execution proceedings.	
See Civil Procedure Code S. 539	298
U	
Undue influence—S. 16 of the Contract Act—Test whether plaintiff used his dominating position to obtain an unfair advantage.	
See Contract Act	90
Unsigned documents—written on palm leaf whether inadmissible because unstamped—Indian Stamp Act—S. 2—Paper—definition thereof—Execution—Meaning of the Expression.	
<i>Held</i> that as 'execution' means 'signature' under section 2, Indian Stamp Act 1899, an instrument which becomes chargeable with stamp duty on being executed is not liable to duty until it is signed.	
<i>Held</i> further that such unsigned documents written on palm leaf may be admitted as completed documents in accordance with the universal custom in Upper Burma and the courts cannot refuse to admit them in evidence merely on the ground that they are unstamped.	
Maung Chet Po v. King Emperor	48

Upper Burma Civil Courts Regulation—S. 26—Use of special powers—of Attorney to evade the provision of law relating to the appointment of Pleaders and Advocates.

See Civil Procedure Code 206

V

Value—meaning thereof—meaning of nett value.

See Court fees Act 272

Venue of Suit—Plaintiff's option—Causes for transfer—Preponderance of convenience.

Though S. 20 of the Old Civil Procedure Code requiring that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so is dropped in the New Code, very strong reasons must be shown under the new as required in the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows.

A. T. K. P. L. vs. L. A. R.

W

Wagering Contracts—Teji and Mundi contracts explained—Practice and intention of the parties—Milling notices—Effect of delivering it—Double option—Does it differ from a single option so as to make it a wager?—Resources of the contracting parties.

A *teji* (rise in price) contract is a contract in which all the usual formalities of an ordinary contract are observed except that the seller only signs his (i. e. the seller's) note and gets an extra amount as consideration for his promise not to proffer delivery unless called upon. It is virtually the purchase of an option or right to call for delivery, the *teji* eater being bound to supply if called upon.

In a *mundi* (fall in price) contract the procedure is the same, a similar premium is paid to the *mundi* eater who signs a bought note but the other party signs no sold note merely purchasing an option to sell.

As to the question whether the *teji* contract in the present case was an honest contract or was void as a wager.

Held that the practice and intention of the parties were that the holder of the option should, if the market rose, call for and the other party (the *teji* eater) should give delivery of milling notices.

Held also that in the rice trade, the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice.

Held that the purchase of an option or right to call for shares is not necessarily a wagering contract and the test to be applied in such contracts is whether differences *only* are intended to be paid.

Held further that a double option is no more necessarily a gamble than a single option.

Held that a contract cannot be proved to be a wagering contract unless neither of the parties intended under any circumstances to give or take delivery

W—continued.

PAGE.

Held that the transactions in question were within the genuine commercial resources of the parties who were doing a large legitimate business and cannot therefore be classed as wagering contracts.

Dhunji Deosi vs. Pokermul Anandroy ... 54

Whipping Act, 1909—S. 3—Not applicable to persons other than juvenile offenders when convicted of abetment of offences mentioned in S. 3.

See Special Laws ... 99

Whipping Act (vi of 1864,) S. 5—Findings as to age final—Sentence of whipping inadequate but carried out—other punishment whether it can be awarded.

The finding of a Magistrate as to the age of the accused is final under S. 5, Explanation, of the Whipping Act.

Where the sentence of whipping has been carried out, no other punishment can be awarded, even if the sentence was inadequate.

King Emperor v. Po Ba ... 292