

JUDGES OF THE CHIEF COURT

DURING

1903-1904.

CHIEF JUDGE.

THE HON'BLE SIR HERBERT THIRKELL WHITE, K.C.I.E., I.C.S. (on leave from 17th August 1903 to 10th September 1903).

PUISNE JUDGES.

THE HON'BLE MR. C. E. FOX, *Barrister-at-Law* (officiating Chief Judge from 17th August 1903 to 16th September 1903; on special duty from 4th January 1904 to 16th March 1904, and on leave from 17th March 1904 to 11th September 1904).

THE HON'BLE MR. W. E. BIGGE, M.A., *Barrister-at-Law* (on leave from 20th February 1903 to 3rd January 1904).

THE HON'BLE MR. A. R. BIRKS, B.A., I.C.S., *Barrister-at-Law* (on leave till 8th February 1903 and from 13th November 1904 to 11th December 1904).

THE HON'BLE MR. A. M. B. IRWIN, C.S.I., I.C.S. (officiating Judge till 8th February 1903 and from 13th November 1904 to 11th December 1904).

THE HON'BLE MR. C. W. CHITTY, B.A., *Barrister-at-Law* (officiating Judge from 20th February 1903 to 11th September 1904).

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LOWER BURMA RULINGS.

Before Mr. Justice Irwin.

RAMESH CHANDRA PAL v. NGA SAUNG.*

Mr. Kastgir—for appellant
(defendant).

Mr. Burjorjee on behalf of Messrs.
Chan Toon and Das—for res-
pondent (plaintiff).

Civil 2nd Appeal
No. 45 of 1902.
July 25th,
1902.

Mortgage—Sale—Procedure—Evidence Act, section 92.

Rules of evidence should be construed so as to give effect to the real intentions of the parties.

A case may not be started by offering direct oral evidence that an apparent sale was really a mortgage, but if it appears clearly from the conduct of the parties that they treated it as a mortgage, the Court will give effect to it as such, and thereupon will, if necessary, allow oral evidence of the original agreements.

Balkishen Das v. Legge, 4 C. W. N. 153, referred to; *Boksu Lakshman v. Govinda Kanji*, I. L. R. 4 Bom. 594, *Kashinath Dass v. Hurrihur Mookerjee*, I. L. R. 9 Cal. 898, *Mi Zainabi v. Cassim Ali*, P. J. L. B. 154, followed.

Respondent, who is a Chin, sold to appellant's father a plot of agricultural land for Rs. 80 by registered conveyance on 6th April 1897. On 3rd August 1901 he instituted the present suit to redeem the land for Rs. 80, alleging that before the conveyance was executed an oral agreement was made that the land should be redeemable within three years, that in March 1899 he sought to redeem the land from defendant's father, who asked to be allowed to work the land for one year more, and plaintiff agreed to postpone the redemption for one year. During that year defendant's father died, and defendant then refused redemption. Defendant did not deny the oral agreement, nor admit it, but pleaded that if there were such an agreement, it ought to have been stated in the deed. He also pleaded that five years had elapsed.

The Court of first instance framed only one issue, namely, whether there was an agreement for redemption. The finding was in the affirmative, and a decree for redemption was given, but the time within which the money should be paid was not specified. Defendant appealed to the District Court on the ground, *inter alia*, that the Lower Court was wrong in law in admitting evidence of an oral agreement. The Additional Judge entirely ignored this point, and confirmed the decree. In this Court the same point is again taken, and it is further urged that it is not proved that plaintiff-respondent tendered the redemption money within three years from the date of the mortgage.

On the point of law I have been referred to the ruling of the Privy Council in the case of *Balkishen Das v. Legge* (1) on the construction of section 92 of the Evidence Act. In that case two registered deeds were executed on one day, the first being an absolute sale of certain land and the second an agreement to re-convey the same land to the vendor if a specified sum were paid on a certain date. The question

* Overruled by *Maung Bin v. Ma Hlaing*, 3 L. B. R. 100.

(1) 4 C. W. N. 153.

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was whether the two deeds together constituted a mortgage or an out-and-out sale with a contract of repurchase. Oral evidence admitted for the purpose of the parties was rejected by their Lordships. I do not think that ruling affects the present case, for the evidence was adduced for the purpose of explaining the agreement to redeem, whereas here the question is whether the agreement to redeem should be admitted at all because it is not in writing. But the judgment seems to be applicable to this case in another way. It was based largely on two Bengal Regulations, passed in 1798 and 1806, respectively, one of which afforded a protection against fraud and injustice in cases of conditional sales, and the other applied the English doctrine of an equity of redemption to such deeds. Their Lordships found in the agreement for repurchase a reference to the former Regulation, and on that ground they seem to have held that the latter Regulation applied also. For this reason, and because the amount stipulated for redemption included another debt which had not previously been charged on the land, they held that the deeds constituted a mortgage, and they allowed redemption in 1894, although the deed expressly declared that the vendor should not be competent to repurchase the land after 1st March 1876. This is a strong illustration of the cardinal principle that the duty of the Courts is to give effect to the real intention of the parties, and in construing rules of evidence it should be remembered that they were enacted not to defeat, but to assist in attaining, that object.

There are several decisions of the Indian Courts on section 92. Previous rulings were examined at great length in *Baksu Lakshman v. Govinda Kanji* (1), where it was held that "a Court will not allow a rule, or even a statute, which was introduced to suppress fraud, to be the most effectual promotion and encouragement of fraud," and the following words of Lord Justice Turner, in *Lincoln v. Wright*, were quoted, "If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud." The general conclusion was that "a party who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such an agreement; but if it appear clearly and unmistakably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not a sale; and thereupon, if it be necessary, to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original agreement." This ruling was followed in *Kashi Nath Dass v. Hurrihur Mookerjee* (2), where the history of previous rulings, both before and after the enactment of the Evidence Act, was briefly reviewed.

Applying this doctrine to the present case, five witnesses deposed that when the three years had nearly expired defendant's father admitted the agreement for redemption and asked for a year's grace.

(1) (1880) I. L. R. 4 Bom. 594. | (2) (1883) I. L. R. 9 Cal. 898.

The Judge believed their evidence ; in fact it has not been seriously impeached. The Appellate Judge concurred in the general finding, without special mention of this point. I hold therefore that the transaction was clearly and unmistakably treated by defendant's father as a mortgage, and the Court was right in admitting direct parol evidence of the original agreement.

Strictly speaking, an issue ought to have been fixed on the question whether the time for redemption was extended to four years at the request of defendant's father, but this fact was stated so clearly in the plaint and not denied in the written statement, that I think appellant was not in any way prejudiced by the finding being arrived at without a formal issue.

On the pleadings and grounds of appeal the case must be returned to the lower appellate Court to try the issue, Did plaintiff tender the stipulated sum for redemption within four years from the date of the sale? The parties must be given an opportunity of adducing evidence on this point. The records to be resubmitted within six weeks.

Before Mr. Justice Irwin.

MA HNIN HMWE AND TWO OTHERS v. MAUNG PO AUNG.

For appellants—Messrs. *Agabeg* and *Maung Kin*. | For respondent—Mr. *Hla Baw*.
Mutation of names in revenue register of holdings—Suit for declaratory decree—
Consequential relief.

A suit for mutation of names in a revenue register does not lie in a Civil Court. A comprehensive prayer "for such further or other relief as the nature of the case may require," commonly contained in plaints, covers only relief consequential on the main relief prayed for, and cannot cover relief of a totally different nature as a substitute for the relief prayed for.

Maung Ba v. Maung Mo, 1 L. B. R. 124, followed.

The suit is for mutation of names in the revenue register of holdings. An objection is made for the first time at the hearing of the appeal that the Civil Court has no jurisdiction to try such a case. It is not too late to make such objection. If the point were not raised by the parties it would have to be raised by the Court. It is based on the ruling in *Maung Ba v. Maung Mo* (1).

Respondent relies first on the prayer in the plaint for such further or other relief as the nature of the case may require, and urges that plaintiff should have a declaratory decree. This is the very same argument that was used in the case quoted except that it is not clear from the report whether the prayer in the plaint was the same. But it seems to me that if this contention were allowed to prevail there would be nothing to prevent any suit being converted into one of a different nature. I agree with the learned advocate for the appellant that a comprehensive prayer of this kind, which is very common in plaints, covers only relief consequential on the main relief prayed for, and cannot cover relief of a totally different nature as a substitute for the relief prayed for.

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NGA SAUNG.

Civil Regular
Appeal No. 79 of
1901.
June 15th,
1902.

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 v.
 MAUNG PO AUNG.

It is then argued that a suit of this nature is cognizable by a Civil Court because provision is made for the court-fee in such a suit in Article 17 (ii), Schedule II, Court Fees Act. This is a tolerably large deduction. The Court Fees Act deals with court-fees, not with the jurisdictions of Courts. Taking it at its best, the clause quoted merely suggests that in some part of British India suits of this nature are probably cognizable by Civil Courts. The registers of names of proprietors of revenue-paying estates may be records of title established by law as such, which the revenue registers in Burma certainly are not. Moreover, the schedules are appendages to section 6 of the Act, and it is quite clear that they prescribe fees for Revenue Courts and public offices as well as for Civil Courts. From the mere fact of a plaint in a particular kind of suit being mentioned in the schedule it does not follow that the plaint is cognizable by a Civil Court.

The decree of the Lower Court is reversed, and the suit dismissed with costs in both Courts.

Civil Reference
 No. 7 of
 1902.
 August
 6th.

Before Mr. Justice Thirkell White, Chief Judge, and Mr. Justice Fox.

MAUNG SHWE LIN v. MA LE.

Messrs. Burn and Burn—for appellant. | Mr. Jordan—for respondent.

Mutation of names in a Revenue Register—Declaration of title—Amendment of plaint—High Court, Power and discretion of, in second appeal.

The High Court has power on second appeal to allow in its discretion the addition to a plaint of a prayer for a declaration of the plaintiff's right to the property involved, although in such plaint mutation of names in a revenue register is all that has been asked for, and it has also power in its discretion to make a declaration of the plaintiff's right in or to the land without an amendment of the plaint.

Maung Ba v. Maung Mo, 1 L.B.R. 124 and *Ma Hnin Hmwe and others v. Maung Po Aung*, 2 L.B.R. 3, followed in part. *Raja Rup Singh v. Rani Baisni*, 1 L.R. 7 All. 1, *Eshen Chunder Singh v. Shama Churn Butto*, 11 Moore's I. A. 7, *Myiapore Iyasawmy Vyapoory Moodliar v. Yeo Kay*, 1 L. R. 14. Cal. 501, *Kasinath Dass v. Sadasio Patnaik*, 1 L. R. 20 Cal. 805; *Saral Chand Mitter v. Sreemutty Mohun Bibi*, 2 C. W. N., 201; *Bai Shri Majirajba v. Maganlal Bha Ishankar*, 1 L. R. 19 Bom. 303, *Lingammal v. Chinna Venkatammal*, 1 L. R. 6 Mad. 239, *Shyam Chand Koondoo v. Land Mortgage Bank of India*, 1 L. R. 9 Cal. 695, *Narasamma v. Suryanarayana*, 1 L. R. 12 Mad. 481, *Seshamma v. Chennappa*, 1 L. R. 20 Mad. 467, *Mohammed Zahoor Ali Khan v. Mussamat Thakooraanee Rutta Koer*, 11 Moore's I. A. 468, *Sri Mahant Govind Rao v. Sita Ram Kesho*, 1 L. R. 21 All. 53, *Gunga Narain Gupta v. Tiluckram Chowdhry*, 1 L. R. 15 Cal. 533, *Rajah Peary Mohan Mukherjee v. Narendra Krishna Mukerjee*, 5 C. W. N. 273, *Sukhdeo Prasad v. Lachman Singh*, 1 L. R. 24 All. 456, followed.

The following reference was made to the Bench by Mr. Justice Irwin:—

This is a suit for mutation of names in Revenue Register IX. No objection to the jurisdiction of the Civil Court was taken either here or in the Courts below, but I was obliged to notice the point, as it was held by Mr. Justice Fox, in *Maung Ba v. Maung Mo* (1), that no right of suit for such relief exists, and this ruling has been followed by me in Civil Regular Appeal No. 79 of 1901, *Ma Hnin Hmwe and others v. Maung Po Aung* (2). No reasons have been put forward

(1) 1 L. B. R. 124.

(2) *Vide* page 3, *supra*.

for overruling those decisions, but there are a few more remarks to be made on the question. In appeal 79 the suit was for mutation of names in Supplementary Survey Register No. I, the annual assessment roll. In the present case the prayer in the plaint is to have plaintiff's name re-entered in Register IX. Register IX is a mere note book in which reports of changes are entered and signed by the persons concerned, and the object of this register is to enable the thugyi to make alterations correctly in Register I.

Register I is prescribed by Rule 83, which has the force of law. The preparation of it is a legal duty which the thugyi can be compelled to perform. If a suit for mutation of a name in that register lies at all, I think it is obvious that either the thugyi or his superior officer, the Collector, ought to be a defendant. But the register is prescribed by law not as a record of rights over land but merely for the purpose of collecting land revenue. Entries in it may be of some use as evidence of title, but they are not proof of title. A person whose title to land is challenged has to sue in a Civil Court to establish it. If he succeeds and gets a decree, the entry in Register I will follow as a matter of course, but not even then as a matter of right. Much less can he sue to have his name entered in the register without establishing his title.

Register IX is not prescribed by law at all: it is only kept under departmental directions. It is true that some of the entries which, under departmental directions, are to be made in Register IX are entries of reports which owners of grants and leases are required by law (Rule 7) to make to the thugyi, but whether the purchaser of a grant has a right to compel the vendor by civil suit to report the sale to the thugyi is a question which I am not required now to decide, because it is not alleged that the land in question is held under grant or lease.

The learned advocate for the respondent abandoned the position that a suit for mutation of names would lie, but urged that the suit should be taken as a suit for declaration of title. This point was taken in Appeal No. 79, and on this point also I followed Mr. Justice Fox's ruling and decided against the plaintiff. But on reconsideration I have some doubt as to the correctness of that ruling, and still more doubt whether it should be followed in the present case. I have read three rulings of the Privy Council which have some bearing on the point. In *Raja Rup Singh v. Rani Baisni* (1) their Lordships said that "in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was dealt with by the lower Courts."

In *Eshen Chunder Singh v. Shama Churn Bhutto* (2) in which case the plaint set up a contract whereas the decision of the High Court proceeded on an equity resulting from the relation of principal and agent, Lord Westbury pointed out "the absolute necessity that the determinations in a cause should be founded on a case either to be found in the pleadings or involved in or consistent with the case thereby made."

(1) (1885) I.L.R. 7 All. 1, at page 11.

(2) 11 Moore's I.A. 7.

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This was quoted in *Mylapore Iyasawmy Vyapoory Moodliar v. Yeo Kay* (1). The Calcutta High Court in *Kasinath Dass v. Sadasiv Patnaik* (2) held that an alteration in relief does not alter the character of the suit; and in *Saral Chand Mitter v. Sreemutty Mohun Bibi* (3) when it was found that the defendant was a minor when he executed a mortgage, allowed a suit on a mortgage to be altered to one for money paid on a fraudulent representation by the minor.

In the present case the pleadings are concerned chiefly with the question of a sale; the sole issue framed was whether the land had been sold to plaintiff; and the lower appellate Court actually gave a decree declaring that plaintiff was the owner of the land in suit. Plaintiff is admittedly in possession. Trying the present case by the tests set forth in the rulings I have quoted, all those rulings seem to favour the contention that this suit should be treated as a suit for a declaratory decree.

I therefore refer to a Bench, under section 11, Lower Burma Courts Act, the question, Can a suit for mutation of names in a land revenue register be treated in second appeal as a suit for a declaration of title to land?

The opinion of the Bench was as follows:—

Fox, J.—Legislative provisions which appear to have some bearing on the question referred are the following extracts from the Code of Civil Procedure—

“Section 50.—The plaint must contain the following particulars:—

* * * *

“(e) A demand of the relief which the plaintiff claims” and

“Section 43.—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; * * *. If a plaintiff omit to sue in respect of, or intentionally relinquish any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.”

“A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies: but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.”

These provisions must, however, be read with the following extract:—

“Section 53.—The plaint may, at the discretion of the Court—

* * * *

“(c) at any time before judgment, be amended by the Court upon such terms as to the payment of costs as the Court thinks fit:”

(1) (1887) I. L. R. 14 Cal. 801. 1 (2) (1893) I. L. R. 20 Cal. 805.
 (3) 2 C. W.N. 201.

"Provided that a plaint shall not be amended either by the party to whom it is returned for amendment or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character."

The last provisions quoted apply *prima facie* to an Original Court dealing with a suit. In *Bai Shri Majirajba v. Maganlal Bha Ishankar* (1) a Bench of the Bombay High Court appears to have doubted whether an amendment of the plaint could be allowed by an appellate Court, but there is authority in other High Courts for such course being adopted. In *Lingammal v. Chinna Venkatammal* (2) a Bench of the Madras High Court upon a first appeal holding that a suit was bad for misjoinder of parties, directed that the plaint should be returned to the plaintiffs for amendment, resting its decision on the ground that when causes of action are misjoined, and the Court of first instance enters on the merits on the erroneous view that there is no misjoinder, the appellate Court should dispose of the suit in the mode in which the lower Court ought to have disposed of it, if it had held, as it ought to have held, that there was a misjoinder.

In *Shyam Chand Koondoo v. The Land Mortgage Bank of India* (3) a Bench of the Calcutta High Court upon a second appeal allowed the plaintiff Bank to amend its plaint and sent back the case to the Court of first instance for trial *de novo* on the amended plaint. This was a case in which the High Court held that the plaintiff Bank had misconceived its cause of action, but as equity was on its side, the Bench allowed it an opportunity to apply to the Court for amendment of the plaint, and subsequently allowed an application made with such object.

In *Narasimma v. Suryanarayana* (4) before the Madras High Court on second appeal, the plaintiff's claim in the suit was to enforce acceptance of a potta and execution of another document by the defendant in respect of a holding in a village.

Inasmuch as the duty of accepting the potta and giving the document was one imposed by statute, and there was a special remedy for enforcing the duty prescribed by the statute, it was doubted whether the suit was maintainable. The plaint contained no prayer for a declaratory decree, but upon the view which the Bench took of the case, it directed the lower appellate Court to amend the plaint by the insertion of a prayer for declaration of the plaintiff's right, and to re-hear the appeal.

In *Seshamma v. Chennappa* (5) a Bench of the Madras High Court upon a second appeal held that the suit had been brought in the name of persons who had no right of suit. As, however, no objection on this ground had been taken in the Court of first instance, it was held that the suit ought not to have been dismissed without giving the plaintiffs an opportunity to amend, and accordingly it allowed an amendment of the plaint in the form of substituting a minor as plaintiff with one of the original plaintiffs as his next friend.

Their Lordships of the Privy Council in *Mohummud Zahoor-Ali Khan v. Mussumat Thakooranee Rutta Koer* (6) allowed an

(1) (1895) I. L. R. 19 Bom. 303.

(2) (1883) I. L. R. 6 Mad. 239.

(3) (1883) I. L. R. 9 Cal. 695.

(4) (1889) I. L. R. 12 Mad. 481.

(5) (1897) I. L. R. 20 Mad. 467.

(6) (1867) 11 Moore's I. A. 468.

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amendment of the plaint even upon an appeal to Her late Majesty in Council. Their Lordships held that the plaintiff's suit had been misconceived and made the following observations :—

"They have felt some doubt whether inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the appellant (plaintiff) to bring a new suit against Rutta Koer upon this bond, treating it as a mere money bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitations, that in the circumstances of this case such a defence would be inequitable and that the respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit ; they have come to the conclusion that the fairer course is to do what the Judge of first instance might, under the Code of Civil Procedure, have done at an earlier stage of the case, namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a bond."

The above cases afford authority for holding that upon a second appeal a High Court may in its discretion allow an amendment of the plaint in the suit, but such amendment could not of course infringe the following proviso in section 53 of the Code of Civil Procedure—

"Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character."

As stated in *Kasinath Dass v. Sadasiv Ratnaik* (1) "an alteration in the relief asked does not alter the character of a suit," or at least it does not necessarily do so, and probably the addition to a plaint asking for mutation of names in a revenue register of a prayer asking for declaration of the plaintiff's right to the property involved in the suit would not infringe the above rule.

The Privy Council case already referred to, and the following cases, may be of some assistance in considering when the discretion to allow an amendment should be exercised. It will be observed that in *Mohammed Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (2) their Lordships allowed the amendment upon the special ground that in the circumstances of that case, it would be inequitable that the defendant should have the opportunity of setting up limitation in defence to a fresh suit, which would be the only course open to the plaintiff if the appeal were dismissed. In the same case they observed :—

"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so to allow every question fairly arising on a case made by the pleadings to be raised and discussed in suit, yet this liberality must have some limit."

In *Sri Mahant Govind Rao v. Sita Ram Kesho* (3) the plaintiffs sued for the recovery of possession of the whole of certain property on the ground that it was the absolute self-acquired property of their ancestor Kesho Rao and had devolved upon them : the defendant Atma Ram claimed the property by right of his being the adopted

(1) (1893) I. L. R. 20 Cal. 805.

(2) (1867) 11 Moore's I. A. 468.

(3) (1899) I. L. R. 21 All. 53.

son of an elder brother of Kesho Rao ; the High Court considered that Kesho Rao had had only a life interest in the property, and that on his death the plaintiffs and Atma Ram had succeeded to the estate in equal moieties. The Chief Justice of the Allahabad High Court in the course of his judgment said :—

“ I would allow this appeal with costs and dismiss the suit with costs in all Courts with this exception, that in order, if possible, to prevent further litigation between these parties, I would make a declaration, but without costs, that the defendant Atma Ram is entitled to a moiety only of the *gursarai* estates, and that the plaintiffs *inter se* are entitled to the other moiety. *It is true that no such declaration was asked for in the plaint, and that, as a general rule, according to the decisions of their Lordships of the Privy Council which have been cited to us, a relief a right to which is not disclosed in the plaint, and which is not asked for in the plaint, should not be granted.*”

In the judgment of their Lordships of the Privy Council they say :—

“ Their Lordships quite agree with the High Court that a relief not founded on the pleadings should not be granted. But in this case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues ; they have been fully put in evidence ; and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule.”

In this case again the decision, so far as it gave the plaintiffs a relief they had not asked for, proceeded upon the special circumstances of the case.

In *Gunga Narain Gupta v. Tiluckram Chowdhry* (1) in which the plaint was held to be defective, their Lordships of the Privy Council pointed out that in such case the proper course for a Court to take (in case an amendment is not allowed) is to reject the plaint under section 53 of the Code of Civil Procedure, leaving the plaintiff to present a fresh plaint.

Subject to the foregoing remarks and questions I would answer the question referred as follows :—

This Court has power, in a case before it on second appeal, to allow in its discretion the addition to a plaint of a prayer for a declaration of the plaintiff's right to the property involved, although in such plaint mutation of names in a revenue register is all that has been asked for, and it also has power in its discretion to make a declaration of the plaintiff's right in or to the land even without an amendment of the plaint.

Thirkell White, C. J.—I concur in the answer proposed by my learned colleague to be returned to this reference. There is abundant weight of authority for both branches of the answer. To the cases which have been cited may be added the ruling of the High Court at Calcutta in *Rajah Peary Mohan Mukherjee v. Narendra Krishna Mukerjee* (2) ; and that of the High Court at Allahabad in *Sukhdeo Prasad v. Lachman Singh* (3), both of which furnish support to the position which we have taken.

(1) (1888) I L. R. 15 Cal. 533. | (2) (1900) 5 C. W. N. 273.
(3) (1902) I. L. R. 24 All. 456.

1902.

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v.
MA LE.

Criminal Reference No. 6 of 1902.
November 14th,
1902.

Before Mr. Justice Thirkell White, Chief Judge, Mr. Justice Fox,
and Mr. Justice Irwin.

NGA LUN MAUNG v. KING-EMPEROR.

Messrs. Eddis, Connell and Lentaigne | The Government Advocate—for the
— for the appellant. | Crown.

Joinder of charges—Code of Criminal Procedure, sections 233, 234, 235, 236.

Per curiam.—Misjoinder (*i.e.* illegal joinder) of charges invalidates a trial, and is not curable under section 537, Code of Criminal Procedure. The joinder at one trial of charges of forgery and criminal misappropriation committed in the course of one transaction, with another forgery or another criminal misappropriation committed in the course of another transaction is illegal, because there is no section of the Code of Criminal Procedure under which the forgery in the one case could be joined with the misappropriation in the other case.

Per Irwin, J.—If three or more charges are such that every combination of two of them is justified by some section of the Code, the joinder is legal.

Per Fox, J.—No joinder is legal unless every combination of two of the charges is justified by one and the same section of the Code.

Queen-Empress v. Mulua, (1892) I. L. R. 14 All. 502, referred to.

Subrahmania Ayyar v. King-Emperor (1902) I. L. R. 25 Mad. 61, followed.

The following reference was made to the Full Bench by Thirkell White, Chief Judge:—

The first point to be considered in this case is whether the trial is invalidated by the fact that six charges were framed against the appellant and tried at the same trial, as is urged, in contravention of section 233, Code of Criminal Procedure.

The charges framed by the Committing Magistrate were (1) a charge of forgery, under section 467, Code of Criminal Procedure, alleged to have been committed on or about 8th April 1902; (2) a charge of forgery under the same section alleged to have been committed on or about 28th May 1902. The Additional Sessions Judge added to each of the above an alternative charge under section 474, Indian Penal Code. Later he added two additional charges, both under section 403, Indian Penal Code, (1) of misappropriation on April 8th, 1902; and (2) of misappropriation on 28th May 1902.

No objection has been taken to the joinder of two charges under section 467, Indian Penal Code, which is plainly justified by section 234, Code of Criminal Procedure. Nor do I think that the addition of alternative charges on the same facts under section 236, Code of Criminal Procedure, is considered illegal. The objection taken is to the joinder of the additional charges under section 403, Indian Penal Code. Put in its extreme form, it is urged that the first charge under section 467, Indian Penal Code, cannot be joined with the second charge under section 403, the joinder not being authorized by sections 234, 235, or 236, Code of Criminal Procedure. No doubt, if these were the only two charges, they could not be joined. None of the sections cited above can apply. The learned Additional Sessions Judge has cited section 236, Criminal Procedure Code, as justifying the addition of the charges under section 403, Indian Penal Code. But this seems to be incorrect. The position is not that it is doubtful

whether the accused on each occasion committed forgery or criminal misappropriation. What was alleged was that on each occasion he committed forgery or the offence of possessing a forged document, and in the same transaction also committed criminal misappropriation. The provision, if any, which justifies the joinder of the charges under section 403, Indian Penal Code, is section 235, sub-section (1), of the Code of Criminal Procedure.

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I think it is a tenable position that, the joinder of the two charges under section 467, Indian Penal Code, being allowed by section 234, Code of Criminal Procedure, and the joinder of the charges under section 403 with those under section 467, Indian Penal Code, being allowed by section 235, sub-section (1), Code of Criminal Procedure, these charges may all be tried together. The limit of the number of charges imposed by section 234, Criminal Procedure Code, does not apply. It may be held that, reading section 234 and section 235, Code of Criminal Procedure, together, the joinder of charges effected in the present case is legal.

The question seems to be one of very considerable difficulty, and I think it is desirable to obtain a final decision of it. I therefore refer to a Full Bench the following questions:—

In the case under appeal is the trial invalidated owing to the joinder of six charges under sections 467, 474, and 403, Indian Penal Code, respectively?

The opinion of the Bench was as follows:—

Irwin, J.—The question for decision is whether the trial is invalidated by the joinder of the following six charges:—

- | | |
|---------------------------|---|
| (1) One under section 467 | } relating to one transaction on
8th May. |
| (2) One under section 474 | |
| (3) One under section 403 | |
| (4) One under section 467 | } relating to one transaction on
28th May. |
| (5) One under section 474 | |
| (6) One under section 403 | |

It may be convenient to follow the course taken by the learned advocate for appellant, and omit for the present consideration of the charges under section 474, because if the joinder of charges 1, 3, 4 and 6 be held to be legal, then *a fortiori* the joinder of the other two must be legal. In the contrary case, if one misjoinder be established, it will not be necessary to consider whether there was a second.

It is admitted on behalf of the Crown that if the joinder was illegal, it cannot be cured by section 537, Code of Criminal Procedure. This was decided by the Privy Council in *Subrahmania Ayyar v. King-Emperor* (1).

The argument addressed to us, as I understood it, was this. Section 233, which requires a separate trial for each charge, must be strictly applied unless the joinder can be justified under any one, but not more than one, of the four sections specified therein. Sections 234, 235 and 236 can operate singly but not cumulatively. (I am not sure whether the learned counsel referred to section 239.) When more

(1) (1902) I. L. R. 25 Mad, 61.

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than two charges are joined at one trial, every two of such charges must stand the test under one or other of these sections, without reference to any other of the charges. Thus in the present instance the forgery of the 8th May cannot stand in the same trial with the misappropriation of the 28th May and the facts that charges (1), and (3) could stand together, and that (3) and (6) could stand together, will not avail to make the joinder of (1) and (6) legal.

If the only charges were No. (1) and No. (6), it is quite obvious that they could not be tried together, and this constitutes the strength of the argument, for the addition of the other charges, which form connecting links, could not possibly simplify the trial; rather the reverse, and the object of section 233 is to use the words of the Lord Chancellor in the judgment quoted above, to prevent "the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to Judges and accused."

The High Court of in Allahabad, *Queen-Empress v. Mulua* (1), held that the joinder of robbery on one occasion with robbery and murder on another occasion was not illegal, but a mere curable error. It is not very clear to my mind whether the learned Judges meant that sections 234 and 235 operated cumulatively to make the joinder legal or not. Their decision might have been different if the case had been heard after the decision of the Privy Council I have referred to.

If in the present case charges (1), (2), and (3) had been tried at one trial and charges (4), (5) and (6) at another, I do not think any objection could have been taken. Charges (1) and (2) would have been joined under section 236, charges (1) and (3) under section 235 (1) and charges (2) and (3) under section 235 (1). Here every possible combination of two charges stands the test of one section of the Code or another.

In the absence of any authority, and the language of the Code being, to my mind, ambiguous, I would say that this test is correct. If every possible combination of two charges is covered by some section of the Code the joinder is legal; if not, it is illegal. In the present case charges 1 and 6 are not covered by any section. I would therefore say that the trial is invalidated by the joinder. This interpretation would prevent the law being circumvented by the addition of fictitious charges. For instance, a charge of robbery on one occasion and rape on another might be joined by framing two charges of robbery and two of rape, though only two out of the four could be sustained on the evidence. This is the kind of joinder least likely to be contemplated by the Legislature.

The question referred is to my mind one of great difficulty. For the above reasons I would answer it in the affirmative.

Fox, J.—In my judgment the question referred should be answered in the affirmative. If there was a joinder of charges at the trial which was not authorized by the Code of Criminal Procedure, then under the ruling of their Lordships of the Privy Council in *Subrahmania Ayyar v. King-Emperor* (2) such misjoinder rendered the trial illegal, and the error cannot be considered as one which may be dealt with under

(1) (1892) I. L. R. 14 All. 502. | (2) (1902) I. L. R. 25 Mad. 61.

the provisions of section 537 of the Code. The general rule as to the trial of offences is stated in section 233: for every distinct offence there must be a separate charge, and every such charge must be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. The natural meaning of the words appears to me to be that unless authority can be found in any one of those sections for charging and trying in respect of more offences than one the general rule applies.

If the Legislature had contemplated otherwise, one would have expected appropriate words added to section 234 expressly including a combination of two or more of the cases referred to within the exception to the general rule. The noticeable limitations in section 234 seem to show that the Legislature could not have contemplated any combination of cases falling within two or more of the sections: under section 234 the offences charged must be offences which are punishable with the same amount of punishment under the same section of law and they must have been committed within a limited time.

Having regard to the policy of provisions as to charges under the British system of jurisprudence, which is, I take it, that an accused should have the definite offence of which he is accused plainly stated to him, and that he should not in any way be embarrassed in meeting and defending himself against such definite accusation, it seems not unreasonable to suppose that the Legislature in enacting section 234 of the Code was of opinion that an exception to the general rule permitting three offences to be charged and tried in one trial would not infringe the policy adopted provided that only three charges of offences punishable under the same section of an enactment were permitted. The accused no doubt may have to meet three different states of facts in one trial on charges joined under section 234, but if he has only three charges to meet, he is unlikely to be embarrassed and confused, and the tribunal which tries him is unlikely to be embarrassed and confused and when he and it have to look at only one section of the law, and to consider whether any or all of the acts charged comes or come within that section. Similarly it appears not unreasonable to suppose that in enacting section 235, the Legislature considered that its policy would not be infringed if possibly a large number of charges were permitted in one trial, so long as the trial was confined to one series of acts so connected together as to form the same transaction.

The cases contemplated in section 234 are those in which there may be a trial of three distinct and separate states of facts, but only one section of law to be considered; whilst those contemplated under section 235 are cases in which one state of facts, but possibly numerous sections of law, may have to be dealt with.

In each case there is no doubt a departure from the general rule as expressed in 233, but the limitations on the departure are in each case sufficient to guard against the policy of the rule being infringed, and against the mischief or abuse, against which the general rule is aimed, occurring.

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If, however, a combination of cases under section 234 and section 235 were permissible, then the door would be open to those very mischiefs and abuses, and the policy of the general rule would cease to have any effect, and the rule itself might just as well not have been stated.

The cases contemplated in section 236 seem to me to stand on the same footing as cases under section 235: when in a series of acts it is doubtful which of several offences the facts which can be proved will constitute, the accused may be called upon to defend himself in respect of such series of acts against possibly numerous charges, but the safeguard against confusion and embarrassment is the limitation of consideration to the one series of acts.

The same guarding of the policy of the general rule is in like manner provided for in section 239.

At the hearing of this reference learned counsel for the appellant questioned the legality of the joinder of the charges under section 474 of the Indian Penal Code as well as of those under section 403 with the charges under section 467 in respect of the two transactions. On my view of the meaning and effect of the sections under discussion, the joinder of the charges under section 474 even was not warranted. There should have been separate trials of each transaction on which, in each case, charges under section 467, section 474 and section 403 could have been combined under section 235 of the Code of Criminal Procedure.

Thirkell White, C. J.—I concur in the proposed answer to the reference, and have nothing to add to the reasons stated by my learned colleagues.

*Criminal
 Reference No. 7 of
 1902. November
 28th, 1902.*

*Before Mr. Justice Thirkell White, Chief Judge, Mr. Justice Fox,
 and Mr. Justice Irwin.*

KING-EMPEROR v. NGA PO SEIN *alias* NGA THA YWE.

The Government Advocate—for the Crown.

Whipping in addition to imprisonment—Previous conviction subsequent to commission of offence—Whipping Act, section 3.

A sentence of whipping in addition to imprisonment, for an offence committed before the previous conviction, is legal but it is not expedient.

Anonymous case, 5 Mad. H. C. R. App. xviii, followed.

Regina v. Surya, 3 Bom. H. C. R. Cr. Ca. 38; *Regina v. Kusa*, 7 Bom. H. C. R. Cr. Ca. 70; *Queen v. Udai Patnaik*, 4 B. L. R. A. Cr. 5, dissented from.

The following reference was made to the Full Bench by Mr. Justice Irwin:—

Under section 11, Lower Burma Courts Act, I refer to a Full Bench the question—

Is a sentence of whipping in addition to imprisonment lawful under section 3 of the Whipping Act, when the previous conviction was subsequent to the commission of the offence for which the prisoner is being tried?

The facts are that on 5th May 1902 Tha Ywe was convicted of theft, section 379, an offence which he had committed on 28th May

1901. He had been previously convicted on 12th January 1902, and on 20th January 1902, of two thefts, both under section 379, and for that reason he was (on 5th May 1902) sentenced to imprisonment and whipping, section 3 of the Whipping Act being quoted as authority for that double sentence.

If the sentence had been one under section 75 of the Penal Code, there could be no doubt that that section was improperly applied; but the wording of section 3 of the Whipping Act is not identical with that of section 75 of the Penal Code. It makes no mention of the time at which either offence is committed, and the only condition it makes is that one conviction shall be subsequent to another conviction for a like offence.

In *Regina v. Surya Bin Krishna Mandavkar* (1) three Judges of the Bombay High Court, in a very short judgment, held that the law did not authorize the infliction of whipping in addition to imprisonment unless the offence had been committed after a previous conviction. The language of the section was not discussed. The wording has not been altered by Act III of 1895. This decision was followed, for common sense reasons, but again without discussion of the words of the section, in *Regina v. Kusa* (2). The decision of Mr. Copleston, Judicial Commissioner, in *Queen-Empress v. Nga Po Shein* (3) is to the same effect, but it is based on two rulings of the Allahabad and Calcutta Courts, both of which were under section 75 of the Penal Code and made no reference to the Whipping Act.

It is obvious that the principle of section 75 is the correct one, and it is difficult to imagine that the Legislature could have intended that a previous conviction should operate to enhance the punishment for an offence committed before that previous conviction; but at the same time I doubt whether the plain words of section 3 of the Whipping Act can be construed otherwise.

The opinion of the Bench was as follows:—

Thirkell White, C. J.—Section 3 of the Whipping Act renders liable to the punishment of whipping any one who, having been previously convicted of an offence specified in section 2 of the Act, is again convicted of the same offence or an offence included in the same group of offences. The question is whether this provision means what the plain words signify, namely, that whipping may be awarded on a second conviction, without regard to the date of commission of the offence punished under the latter conviction, or whether it means that if a man is convicted of an offence and is afterwards guilty of the same or, to put it briefly, a similar offence, he is liable to the additional punishment of whipping. The former view was taken by the High Court at Madras in an anonymous case (4); the latter by the High Court at Bombay in *Regina v. Surya* (1) and *Regina v. Kusa* (2) and by the High Court at Calcutta in *Queen v. Udai Patnaik* (5). Mr. Mayne

(1) (1866) 3 Bom. H. C. R., Crown Cases, 38.
(2) (1870) 7 Bom. H. C. R., Crown Cases, 70.

(3) P. J., L. B., 479.
(4) (1870) 5 Mad. H. C. R., App. XVIII.
(5) (1869) 4 B. L. R. A. Cr. 5.

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in his commentary on the Indian Penal Code (1) is disposed to approve the construction adopted by the Bombay and Calcutta High Courts, but he does not explain the reason of the preference. The only reason for construing the section otherwise than in accordance with the simple meaning of the words is that this construction appears to contravene the principles of natural justice. It may also seem anomalous that, if there are two separate trials, a sentence could be passed at the second trial which could not be awarded if the two sentences were passed in the same trial. But perhaps this is not more anomalous than the rule by which sentences passed at one trial may run concurrently while if passed at separate trials they must run consecutively.

The section of the Whipping Act which we are considering was enacted after the enactment of the Indian Penal Code, and it is reasonable to suppose that the difference between the wording of this section and that of section 75, Indian Penal Code, was intentional. It is not necessary for us to speculate on the reasons for this difference; though reasons could no doubt, if necessary, be conceived. I think that we are bound to construe the words of the section in their ordinary natural sense; and I can find no warrant for assuming that any restriction not explicitly stated in the section itself is implied or intended. For my own part, I should abstain from applying the section if I were passing sentence in respect of an offence committed before the date of the previous conviction. But I cannot say that the application of the section in those circumstances is illegal.

I would therefore answer the reference in the affirmative.

Fox, J.—I concur with the learned Chief Judge in his opinion.

Irwin, J.—I concur.

Criminal Revision
No. 1647 of
1902.
December 5th,
1902.

Before Mr. Justice Thirkell White, Chief Judge.

KING-EMPEROR v. NGA BA LE.

Security-order—Power of Additional Sessions Judge—Criminal Procedure Code, section 123 (3).

An Additional Sessions Judge has no power to deal with a reference under section 123, sub-section (2), and pass orders under sub-section (3) of that section.

Queen-Empress v. Dayaram, (Ratanlal, page 830), followed.

The point which occurred to me in connection with this case is whether, in view of the wording of section 123, sub-section (2), of the Code of Criminal Procedure, an Additional Sessions Judge has power to pass orders under sub-section (3) of that section. And I have been assisted by the argument of the learned Assistant Government Advocate on the point.

Sub-section (2) certainly says explicitly that the accused shall be detained in prison pending the orders of the Sessions Judge. But sub-section (3) says: "Such Court * * * may pass such order * * * as it thinks fit." It is suggested that if the Sessions Court can pass an order, the Additional Sessions Judge can exercise the power of the Court; and that if the Legislature had intended to restrict the power

(1) Cr. Law of India, 2nd Ed., p. 29.

to the Sessions Judge it would have said in sub-section (3) "Such Court or Judge." Reference was also made to section 31 of the Code of Criminal Procedure, under which an Additional Sessions Judge may pass any sentence authorized by law.

The only ruling I have been able to find is that in *Queen-Empress v. Dayaram* (1), which was decided by a full Bench of the Bombay High Court. But that is a ruling which more than meets the case. It was under the Code of Criminal Procedure, 1882, in which the second paragraph of section 123 directed that the accused should be detained in prison pending the orders of the "Court of Session." Notwithstanding this general expression the learned Judges held that, having regard to the terms of section 193 of the Code whereby Additional and Joint Sessions Judges could try only cases which the Local Government directed them to try or which were made over to them for trial by the Sessions Judge, and to the terms of the Government orders under that section, a Joint Sessions Judge had no power to pass orders on a reference under section 123. The fact that in the Code of 1898 the Legislature has substituted the words "Sessions Judge" for the words "Court of Session" seems to make it clear that it was the intention to limit the power of dealing with references under section 123, Code of Criminal Procedure, to the Sessions Judge. There would be even stronger grounds under the present Code than under the Code of 1882 for the ruling above cited.

For these reasons I am of opinion that the Additional Sessions Judge had no power to deal with the reference under section 123, sub-section (2). I set aside his order and direct that the proceedings be laid before the Sessions Judge, who will pass such orders as he may think fit.

The Magistrate's order was wrong. He had no power to order the accused to be detained in jail for two years in rigorous imprisonment. He could only order his detention pending the orders of the Sessions Judge. He could not submit his order to the Sessions Judge for confirmation. He had to cause the proceedings to be laid before the Sessions Judge for orders. The Sessions Judge has to pass a separate order, and does not merely confirm or reverse the order of the Magistrate. These matters were pointed out long ago in *Queen-Empress v. Nga Saing Gyi* (2) and *Queen-Empress v. Shwe Gyaw Aung* (3).

Before Mr. Justice Thirkell White, Chief Judge.

KING-EMPEROR v. NGA PE.

The Government Advocate—for the Crown.

Part-heard trial—One Magistrate succeeding another—Procedure—Criminal Procedure Code, section 350.

When one Magistrate succeeds another Magistrate and acts under section 350, Code of Criminal Procedure, he must either take up the case at the point at which his predecessor ceased to exercise jurisdiction, or he may resummon the witnesses and recommence the inquiry or trial.

Where an accused demands that all the witnesses be resummoned and reheard, the second Magistrate must adopt the second alternative course and recommence

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December 5th,
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(1) Ratanlal's Unreported Criminal Cases, 830 (1895).

(2) P. J., L. B., 245. | (3) P. J., L. B., 381.

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the inquiry or trial. But when *all* the witnesses already examined are not recalled and reheard, then the second Magistrate takes up the case from the point at which his predecessor left it, and he is bound by his predecessor's acts up to that point.

This is a somewhat curious case. The accused, Nga Pe, was prosecuted for the theft of a bullock belonging to one Lu Gyi. The Magistrate who first dealt with the case and heard the evidence for the prosecution considered that there was a *prima facie* case and framed a charge against the accused. He was then succeeded by another Magistrate who eventually discharged the accused. This Magistrate was asked under section 350, Code of Criminal Procedure, to recall and re-examine the witnesses for the prosecution; but as a matter of fact the advocate for the accused did not require the re-examination of all the witnesses for the prosecution. In some cases he was content with cross-examining them. The learned Assistant Government Advocate who has appeared for the Crown argues that when a Magistrate succeeds another Magistrate and acts on the evidence recorded by his predecessor, he must take up the case at the point at which his predecessor ceased to exercise jurisdiction. In this case the point was immediately after the charge had been framed. It is argued that the second Magistrate, having elected to act on evidence partly recorded by his predecessor and partly recorded by himself, had no power to ignore the charge framed by his predecessor, but was bound to call upon the accused for his defence and to acquit or convict him.

Section 350, Code of Criminal Procedure, gives the second Magistrate an alternative. He can act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may resumon the witnesses and recommence the inquiry or trial. But it does not appear that he can do both. The accused may demand that the witnesses or any of them be resumon and reheard.

It seems to me that if the accused demands that the witnesses be resumon and reheard, he compels the second Magistrate to adopt the second alternative course and to recommence the enquiry or trial. The section contemplates that when the witnesses are resumon the enquiry or trial shall be recommenced. But this obviously refers to all the witnesses. When the second Magistrate resmons none or only some of the witnesses previously examined, and acts on evidence partly recorded by his predecessor and partly recorded by himself, he adopts the first alternative and does not recommence the enquiry or trial.

Where the second Magistrate does not recommence the enquiry or trial I think he is bound by the acts of his predecessor, and, if a charge has been framed, must proceed to call upon the accused for his defence and to acquit or convict him. I can find no provision which enables him to ignore the charge and discharge the accused.

If, on the other hand, he recommences the enquiry or trial, then all the previous proceedings, whether a charge has been framed or not, are treated as non-existent. In that case the second Magistrate has

full power to deal with the case and can discharge the accused or, if he thinks fit, frame a charge. In that case, he must, if he does not discharge the accused, frame a fresh charge. He cannot, after recommencing the enquiry or trial, act on the charge, if any, framed by his predecessor, or on any depositions or examination of the accused recorded by him.

The present case is somewhat complicated. In the first instance, when the second Magistrate commenced his proceedings, the accused by his advocate desired that the prosecution witnesses should be recalled and examined. On that demand being made the Magistrate should have recommended the enquiry or trial. But as the case proceeded the accused waived his right to have all the witnesses re-heard. Some of them were not re-examined but were merely presented for cross-examination. In passing his order of discharge the Magistrate acted on evidence partly recorded by his predecessor and partly recorded by himself. He therefore cannot be considered to have recommenced the enquiry, and he was bound by the acts of his predecessor. The order of discharge was in consequence irregular.

In view of the fact that the case has already been dealt with by two Magistrates and that the present Subdivisional Magistrate has already formed an opinion on the merits, I think the best plan will be to have an entirely new enquiry by a Magistrate who will bring a new mind to the case.

The order of discharge is set aside and it is ordered that there be a fresh enquiry or, if a charge is framed, trial by the Headquarters Magistrate of Bassein.

Before Mr. Justice Thirkell White, Chief Judge, and
Mr. Justice Fox.

NGA TA PU AND FIVE OTHERS V. KING-EMPEROR. *

The Government Advocate— for the Crown.

Finder of charges—Joint trial of accused—Theft and receiving or disposing of stolen property—Confession made to Magistrate, Evidence of—Indian Penal Code, sections 379, 411, 414—Criminal Procedure Code, sections 233, 239, 164—Evidence Act, section 91.

As proximity of time between two acts does not necessarily constitute them parts of the same transaction, so an appreciable interval of time between two acts otherwise connected does not prevent them from continuing to be parts of the same series of connected events.

While therefore it is legitimate to regard theft and the disposal of the proceeds ordinarily as parts of the same transaction, the propriety of trying the actual thief and the dishonest receiver in one trial should depend upon the circumstances of each case.

Section 164 of the Code of Criminal Procedure requires that a confession made to a Magistrate in the course of an investigation shall be recorded, and, if not recorded, no evidence of it can be received.

Queen-Empress v. Sakharani, Ratanlal 449; In re A. David, 6 C. L. R. Henderson, 245, followed. Bishnu Banwar v. The Empress, 1 C.W.N. 35, dissented from: Jai Narayan Rai v. Queen-Empress, 1 L. R. 17 Cal. 862, followed in part.

Thirkell White, C. J.—The first five appellants were charged with and have been convicted under section 395, Indian Penal Code, of

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Nos. 451, 452,
453, 454,
455 and 456
of 1902.
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* Distinguished in *Nga We v. King-Emperor*, 2 L. B. R., 317.

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committing dacoity. The appellant, Thaing Pa Ywe, was charged with dacoity under section 395, Indian Penal Code, or in the alternative with being in possession of stolen property taken in a dacoity, under section 412, Indian Penal Code, or in the alternative with assisting in disposing of stolen property, under section 414, Indian Penal Code, and has been convicted of the offence and under the section last mentioned.

A preliminary objection has been taken on behalf of the appellant Shwe Ya that the whole trial is invalid on account of misjoinder of charges. It is said that the offence of receiving or disposing of stolen property cannot properly be tried together with the offence of theft (or in this case dacoity) though the stolen property in question was taken in the theft or dacoity. The joinder must be justified, if at all, by section 239 of the Code of Criminal Procedure which authorises the joint trial of persons accused of the same offence or of different offences committed in the same transaction. In a recent case *Ba Thein and others v. The Crown* (1) I had occasion to examine this point and I may extract the following remarks from that judgment:—

“In *Bishnu Banwar v. The Empress* (2) it was distinctly held that a person charged with receiving stolen property could not be tried together with persons charged with the theft of the property. The learned Judges held that the offence of dishonestly receiving stolen property from a person who had stolen that property could not be regarded as an offence committed in the same transaction as the theft itself unless it was in a case where, simultaneously with the offence of theft, the offence of receiving was committed.”

“I feel difficulty in holding that the offences of theft of property and of dishonestly disposing of the same property are not offences committed in the same transaction within the meaning of section 239 of the Code of Criminal Procedure. And if it is held that they are offences committed in the same transaction, then there has been no misjoinder and the rulings last cited will have no application. A thief, as a rule, steals property in order to dispose of it for his own gain. It would seldom be worth any one's while to steal for the mere sake of stealing and to keep the property taken in the theft without converting it into cash or some useful equivalent. Of course, there are many cases in which property might be stolen for use without conversion. But I think the commonest case is that in which property is stolen for the purpose of being disposed of for cash or some other equivalent. In that case, it seems to be a reasonable and natural view that the theft and disposal are parts of the same transaction. Without the disposal, the transaction begun by the theft would be incomplete. I think that this is a natural interpretation of the term ‘transaction’ and one which would be consistent with the meaning of that term as ordinarily used. In section 235, sub-section (1) of the Code, reference is made to a ‘series of acts so connected together as to form the same transaction,’ and the illustrations to that sub-section furnish instances of acts forming the same transaction. Thus, if a man entices away another man's wife, with intent to commit adultery with her, and then

(1) C.A. 417 of 1902 (unreported). |

(2) 1 C. W. N., 35.

commits adultery, the enticing and the adultery are a series of acts so connected as to form the same transaction [illustration (c)]. Another similar case is given in illustration (e). It has been suggested that there should be a very close sequence in point of time between the theft and the disposal, if these are to be considered part of the same transaction. It is possible that if there were a very long interval between the theft and the disposal it might be held that the two acts did not form one transaction. But I do not think it is necessary to show that the theft and disposal occurred within a few hours or even a few days of each other. In my opinion, in a case like that now before me, the theft and the disposal of the stolen property may well be regarded as the same transaction. I respectfully dissent from the view taken in the case of *Bishnu Banwar v. The Empress* (1) above cited; and I hold that the accused in this case were legally tried together under section 239, Code of Criminal Procedure."

I adhere to the view taken in the above case. It seems to me that ordinarily theft and the disposal of the proceeds would be parts of the same transaction; though there may be cases in which it can be shown that they should not be so regarded. Such cases would constitute the exception and not the rule. As proximity of time between two acts does not necessarily constitute them parts of the same transaction, so an appreciable interval of time between two acts otherwise connected does not prevent them from continuing to be parts of the same series of connected events. In the case of the *Queen-Empress v. Sakharum* (2), in which two people were charged, one with theft and the other with receiving, and tried in the same trial, the question of misjoinder was not even considered.

In the present case, the dacoity was committed on 17th May 1902, and the stolen property is said to have been found in the house of the 6th appellant, Thaing Pa Ywe, on the 29th of the same month. I think that, in these circumstances, there is no reason to regard the receiving or disposal by this appellant, if proved, as other than part of the same transaction with the dacoity. I am therefore of opinion that there has been no misjoinder and that the trial was valid.

* * * * *

Pa Pan was recognised by the Myoðk's clerk, Maung San O, and by his nephew San Pe, and that is the only direct evidence against him. He made a confession which was recorded by the Myoðk on 24th May 1902; and the Myoðk, Maung Pe, was allowed to testify that he made a similar confession which was not recorded on the 19th May. I think that if, as seems probable, this confession was made in the course of an investigation, it cannot be admissible unless recorded in the manner prescribed by section 164, Code of Criminal Procedure. When closely examined that section seems to require a confession made to a Magistrate in the course of an investigation to be recorded in a particular manner. It is therefore matter required by law to be reduced to the form of a document and section 91 of the Evidence Act applies. This is the view taken by the Calcutta High Court in *Fai Narayan Rai v.*

(1) 1 C. W. N., 35.

(2) Ratanlal's Unreported Cases, 449.

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The Queen-Empress (1); and though that ruling has been doubted in later cases, there has been no dissent from the dictum on the point now under reference.

* * * * *
 Fox, J.—I agree with the learned Chief Judge in thinking that the trial in this case was not illegal by reason of misjoinder of persons and charges in one trial.

There were very slender, if any, grounds for charging the sixth accused, Thaing Pa Ywe, with having taken part in the dacoity, but even on the view that there was no justification for a charge against him under section 395 of the Indian Penal Code, I do not think that trial of him on charges under section 412 and section 414 of the Indian Penal Code in respect of property taken in the dacoity in the same trial in which the other accused were charged with and tried for having taken part in the dacoity was contrary to law.

Under section 239 of the Code of Criminal Procedure, it is lawful to try at one trial all persons who are alleged to have committed all or any offences alleged to have been committed in the same transaction. I take it that these last words are used in the same sense as the words "in one series of acts so connected together as to form the same transaction" employed in sub-section (1) of section 235.

It appears to me to be legitimate, at least in some cases, of which the present is one, to regard the acts attending the actual theft or dishonest taking of property from its owner, and the acts attending the dishonest disposal of that property with a view to keeping such owner out of such property, as a series of acts forming one transaction.

The act of the dishonest receiver, retainer, concealer or disposer of stolen property which he knows to have been stolen has the same object as that of the actual thief, namely, depriving the owner of his property, and in a large number of cases, e.g., those in which habitual receivers employ thieves to steal, it is part of the pre-arranged plan of action that the property obtained by thefts shall be taken to and disposed of by the habitual receiver. In my opinion the ruling in *Bishnu Banwar v. The Queen-Empress* (2) that a person charged with receiving stolen property could not be tried together with persons charged with the theft of the property, is not well founded.

In the case of *In the matter of A. David* (3) another Bench of the Calcutta High Court pronounced the trial of an accused charged with dishonestly receiving property together with an accused charged with having committed criminal breach of trust of the property as perfectly legal. There is no fundamental distinction differentiating such a case from that of trial of the thief and of the receiver of the stolen property in one trial.

At the same time I would say that the propriety of trying the actual thief and the dishonest receiver in one trial should depend upon the circumstances of each case.

In some cases the evidence of the actual theft and the evidence of the acts constituting the dishonest receipt may be so distinct that, in

(1) (1890) I.L.R. 17 Cal., 862. | (2) 1 C. W. N., 35.
 (3) (1880) 6 C. L. R. (Henderson's) 245.

order to carry out the spirit of the general rule set out in section 233 of the Code of Criminal Procedure, there should be separate trials in order that each accused may have distinct consideration by the Court of evidence of the particular acts alleged against him unencumbered by evidence of acts with which it is not alleged he had any connection.

I think that the accused Thaing Pa Ywe should have been tried separately because, even on the case for the prosecution as submitted to the Sessions Court, there was not sufficient ground for belief that he had actually taken part in the dacoity, and his alleged connection with the stolen property was based upon conduct on his part under definite circumstances subsequent to the actual dacoity which had very small connection with it. I cannot hold, however, that the joint trial was absolutely illegal.

On the evidence, and on the merits of the cases against the accused severally, I agree with the views of the learned Chief Judge and with his conclusions as to the manner in which their appeals should be disposed of.

I also agree with him in holding that section 164 of the Code of Criminal Procedure requires that a confession made to a Magistrate in the course of an investigation shall be recorded, and that if not recorded no evidence of it can be received. I do not understand that the ruling in *Jai Narayan Rai v. The Queen-Empress* (1) to this effect has been doubted. The Honourable Judges' decisions on other matters in the case have been doubted, but those matters do not arise in this case.

Before Mr. Justice Thirkell White, Chief Judge, and
Mr. Justice Fox.

KING-EMPEROR v. NGA TO.*

Joinder of charges—Indian Penal Code, sections 379, 215—Code of Criminal Procedure, section 235 (1).

The accused, for a gratification, brought and returned stolen cattle two days after the theft.

Held,—that joinder of charges and separate convictions under sections 379, 215, were legal and proper.

The Crown v. Nga Shein, 1 L. B.-R. 203, dissented from.

Thirkell White, C.J.—The complainant had two buffaloes stolen from the possession of his son. On receipt of a certain sum of money the accused, Nga To, brought and returned the stolen buffaloes two days after the theft. On these facts, the accused has been convicted of theft, and of taking a gratification for the return of stolen property; and has been sentenced to rigorous imprisonment for eighteen months on the former, and to rigorous imprisonment for six months on the latter, conviction.

It will be seen that the case is distinguishable from that of *The Crown v. Nga Shein* (2) inasmuch as the stolen property was proved to have been actually in the possession of the accused soon after the theft. The presumption that he was the thief therefore arose and

* Overruled in part by *Twet Pe v. King-Emperor*, 4 L. B. R. 199.

(1) (1890) 1 L. R. 17 Cal., 862. | (2) 1 L. B. R., 203.

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the conviction under section 379, Indian Penal Code, was justified apart from the receipt of the gratification. The case is one of the kind contemplated in the above ruling, in which separate convictions are legal and proper.

But in that ruling, it is said that in such cases there should be separate trials because the two offences cannot be said to have formed part of the same transaction. If this view is correct, then there has been misjoinder of charges and both convictions must be quashed. But, with all respect, I venture to differ from the learned Judge whose dictum has been cited. It seems to me that when a man steals cattle for the express purpose of obtaining money for their restoration, a very common form of crime in this Province, and when soon after the theft he accomplishes the purpose of the theft and obtains the money for the sake of which he committed it, the theft and the receipt of the gratification may naturally and rightly be regarded as parts of the same transaction. In such a case, where much of the evidence would have to be reiterated if there were separate trials, it seems to me that separation of the charges is not required by law and would be practically inconvenient. The considerations which apply in such a case are similar to those discussed in the recent case of *Ta Pu v. The Crown* (1) and I think the reasoning and principles set forth in that case are applicable to the present circumstances. I would therefore hold that offences under section 379 and section 215, Indian Penal Code, committed in respect of the same property, and not necessarily separate transactions and that it is not necessarily illegal to try charges under those sections in the same trial.

In that view, the trial in the present case seems to me to have been legal and proper and I would not interfere with the convictions and sentences.

Fox, J.—I concur.

Civil First Appeal Before Mr. Justice Thirkell White, Chief Judge, and Mr. Justice
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MOULVIE ROWNAC ALLY v. THE BURMA RAILWAYS
 COMPANY, LIMITED.

Res judicata, Plea of—Jurisdiction of Court passing former judgment, enquiring into.

A Court in which the plea of *res judicata* is urged can inquire into the jurisdiction of the Court which passed the former judgment so far as to see whether that judgment is, on the facts on record, not void on the ground of want of jurisdiction.

Gunnesh Pattro v. Ram Nidhee Koondoo, (1874) 22 W. R. 361, *Gokul Mandar v. Pudmanund Singh*, 6 C.W.N., 825 followed.

The judgment of the Court was delivered by

Irwin, J.—In this case, the plaintiff-appellant sued to recover sums amounting to Rs. 18,000 on account of work done for the defendant Company. The plaint was presented in the District Court of Mandalay, and on 13th August 1901 it was returned on the ground that the Court had no jurisdiction to try the case. On 26th August 1901, the Company

(1) *Vide* page 19, *supra*.

filed a suit for a decree declaring the amount, if any, due to the present appellant from the said Company. This suit was heard and determined by the Court of the Adviser of the Sawbwa of Hsipaw, judgment being delivered on 12th October 1901. On 20th November 1901, the appellant presented in this Court on the Original Side the plaint which had been returned by the Mandalay District Court. The suit was dismissed on the ground that it was *res judicata* by operation of the judgment and decree in the Court of the Adviser.

Against this decision, the present appeal is preferred. Of the grounds of appeal, only part of the second and the fourth seem to us to be of any importance. The first ground refers vaguely to the doctrine of *lis pendens* and section 12 of the Code of Civil Procedure. These were matters to be urged before the Court of the Adviser, not in this Court. We are not considering the propriety of the Adviser's order which distinctly ruled against this contention. If that order was wrong, it could have been corrected by a Court to which that of the Adviser is subordinate. Clearly we have no power to deal with that matter.

As to the second ground, in so far as it relates to the nature of the decree as a declaratory decree, we do not think it requires much notice. There is nothing in section 13 of the Code of Civil Procedure which precludes a declaratory decree from operating as *res judicata*. As regards the objection that the decree was passed *ex-parte*, we think that learned judge on the Original Side has given good reasons for holding that the case was not heard *ex-parte*. This point has been fully considered by the learned Judge with reference to the finality of the Adviser's decree. We concur in his finding on this point.

As regards the third ground, it is sufficient to say that it has not been held that the suit in this Court was barred by limitation.

The grounds of appeal which do seem to require serious consideration are those which urge (1) generally that the Adviser's decree was made without jurisdiction; and (2) that the Adviser had no jurisdiction to try a suit of over Rs. 10,000 in value. The memorandum of appeal is very badly drawn. We take it that the former of these objections means that the Court of the Adviser had no jurisdiction to try the suit on which the defendants rely; and the latter that the Court of the Adviser is not a Court of jurisdiction competent to try the present suit.

In respect of the question whether, when the plea of *res judicata* is raised, the Court has power to consider the competence of the Court in which the former suit was tried to try that suit, the authorities are now decisive. In Mr. Hukm Chand's edition of the Code of Civil Procedure, this point is thus referred to (1) :—

“The competency of jurisdiction in regard to the former suit is not expressly mentioned but assumed, and that jurisdiction must exist in every respect. This is a natural result of the principle that a judgment of a Court not competent is void. The Court in which the plea of *res judicata* may be urged can, therefore, enquire into the jurisdiction

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of the Court which passed the former judgment, so far as to see whether that judgment is, on the facts on record, not void on the ground of want of jurisdiction."

The authority cited is *Gunnesh Pattro v. Ram Nidhee Koondoo* (1), in which Markby, J., said:—

"Although one Court cannot set aside the proceedings of another Court for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of jurisdiction and one of the parties relies on, or seeks to protect himself by, the proceedings of another Court, then in that way, the jurisdiction of the Court whose proceedings are pleaded in protection may be inquired into."

The same proposition is supported, mainly by reference to American cases, in Mr. Hukm Chand's *Treatise on the Law of Res Judicata* (2). But by a recent ruling of the Privy Council (*Gokul Mandar v. Pudmanund Singh*) (3) the question seems to be concluded by ultimate authority. In that case, their Lordships said:—

"It is not necessary for their Lordships to decide whether the decision of the Revenue Officer can be pleaded as *res judicata* on the issue as to Gokul Mandar's status. They will only observe in reference to the arguments addressed to them that under section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised."

These words seem to lay down explicitly the rule that the Court which passed the decree relied on as *res judicata* must have had jurisdiction to try and decide the particular matter in issue. It is necessary therefore for us to ascertain, in the manner agreed to by the learned Counsel who argued the appeal, whether the Court of the Adviser had jurisdiction or was competent to try the former suit.

This question was discussed at the hearing of this appeal. We were referred by Mr. Buckland to the *Shan States Civil Justice Order, 1900*, which was published in Political Department Notification No. 3, dated the 16th May 1900 (4). Hsipaw, it may be premised, is one of the Northern Shan States (Political Department Notification No. 10, dated the 11th July 1895) (5). In Hsipaw it appears that there is an officer called an Adviser to the Sawbwa; and under Political Department Notification No. 6, dated the 18th February 1897, (6) and Rule 3, sub-rule (2), of the Civil Justice Order, it may be taken that the Officer is an Assistant Superintendent within the meaning of the Order. Under Rule 17, clauses (a) and (b), the Superintendent may admit any plaint which would ordinarily be presented in the Court of the Chief, and may refer it to the Assistant Superintendent for disposal.

(1) (1874) 22 W. R. 361.
 (2) Pages 397—9.
 (3) 6 C. W. N. 825.

(4) Shan States Manual, page 18.
 (5) *Ibid*, page 4.
 (6) *Ibid*, page 18.

The first question which arises, then, is whether the suit is one which the Chief of the State has jurisdiction to try; for his jurisdiction is the basis of that of the Superintendent and of the Assistant Superintendent. The jurisdiction of the Chief is set out in Rule 5, namely: "Civil Suits of value exceeding Rs. 100 shall be instituted in the Court of the Chief of the State in which the defendant resides or carries on business." This provision of the local law differs materially from section 17, Civil Procedure Code, as it contains no mention of the cause of action arising within the State.

In the plaint in the Adviser's Court the defendant is described as residing in Mandalay. The fact of his having worked as a contractor in Hsipaw State in 1897 and 1898 obviously does not bring him within the definition of "carrying on business" in the State in 1901. Thus it would seem that the Chief, and therefore the Adviser also, was not competent to try the suit, the decree in which is pleaded as *res judicata*.

We therefore reverse the decree of the Original Side of this Court, and direct that the suit be readmitted. Costs will follow the final result.

Before Mr. Justice Thirkell White, Chief Judge, Mr. Justice Fox, Criminal Revision
and Mr. Justice Irwin.

KING-EMPEROR v. NGA PYU DI AND TWO OTHERS.

Dismissal of complaint or discharge of accused, Power of Magistrate to re-open case after— Code of Criminal Procedure, section 403 (explanation).

The discharge of an accused or the dismissal of a complaint is no bar to the institution of fresh proceedings otherwise than under section 437, Code of Criminal Procedure.

Mir Ahmed Hossein v. Mahomed Askari, I. L. R. 29 Cal., 726; *Queen-Empress v. Nga O Bôk*, F. J., L. B., 169, and others followed.

Nilvatan Sen v. Jogesh Chundra Bhattacharjee, I. L. R. 23 Cal., 983; *Queen-Empress v. Adamkhan*, I. L. R. 22 All., 106; *Queen-Empress v. Nga Po Nyein*, (1895) 1 U. B. R. 48; and others; dissented from.

Empress v. Donnelly, I. L. R. 2 Cal. 405; *Opoorba Kumar Sett v. Sreemutty Probod Kumary Dassi*, (1893) 1 C. W. N. 49; and others; referred to.

The following reference was made to the Full Bench by Mr. Justice Irwin:—

Irwin, J.—On 31st July 1902 Ma Pwa presented to Mr. Stevenson, first class Magistrate, Pegu, a complaint in which she stated that she had bought a holding of paddy land at a judicial sale and rented it to Ko Maung, and that the accused had ploughed it without her leave or consent. She prayed the Magistrate to try the accused under section 447. She further stated in paragraph 2 of her petition that she had already complained to the Kawa Myoôk, who had dismissed the complaint under section 203, Code of Criminal Procedure, under a general order of the Deputy Commissioner. A copy of the Myoôk's order is

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appended. It was passed after duly examining the complainant. It is dated 21st July 1902, and is in these terms, "The Deputy Commissioner's judicial order No. 540, dated 13th February 1902, strictly directs that cases of criminal trespass under section 447 are not to be entertained or tried on the criminal side, but should be transferred to the Civil or the Revenue side. The present complaint being under section 447 I cannot entertain it. It is dismissed under section 203, Code of Criminal Procedure."

Mr. Stevenson referred the second complaint to the Kawa Myoök for disposal, pointing out that the Deputy Commissioner's order does not preclude a Magistrate from entertaining a complaint under section 447 when the land rightfully belongs to the complainant. He concluded with the words "Please entertain the complaint under section 447."

The Myoök then tried the case, convicted all the accused, and fined 1st accused Rs. 100. He appealed, and the Additional Sessions Judge reversed the conviction and sentence, without going into the merits, solely on the ground that as the first complaint was dismissed under section 203 no fresh complaint on the same facts could be entertained except the order dismissing the complaint had been set aside by competent authority. This order is based on the rulings in *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (1) and *Komal Chandra Pal v. Gour Chand Audhikari* (2). The learned Judge wrote, "This was an irregularity which does not seem to be covered by section 537, Code of Criminal Procedure." The convictions of the other two accused have not been set aside. Their sentences are not appealable.

Of the two rulings which the Additional Sessions Judge quoted, the second merely follows the first without any discussion. The first ruling is by Mr. Justice Banerjee, who considered the question as by no means free from difficulty. It was concurred in by Mr. Justice O'Kinealy in these words, "So far as I can ascertain it has been the constant practice of this Court, since the introduction of the Code, to prevent new proceedings when the first complaint has been disposed of by an order under section 203 until that order is set aside. I am content to follow that practice without further discussion."

It seems to me very doubtful whether this practice is in accordance with the law.

The first ground of Mr. Justice Banerjee's finding is this, "When the Code therefore distinctly lays down a procedure for having an order dismissing a complaint under section 203 or discharging an accused person set aside, and a further inquiry directed, it seems to me reasonable to conclude that the Legislature intends that an order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided."

On this, the first question which occurs to me is "Does the Code provide at all for having an order dismissing a complaint set aside?" There is no mention of any such thing in sections 436 and 437, in marked contrast to the words of section 423, which deals with appeals from convictions and acquittals. Sections 436 and 437 seem to imply that

(1) (1896) I. L. R. 23 Cal. 983.

| (2) (1897) I. L. R. 24 Cal. 286.

the order of dismissal is not to be set aside, and this seems to harmonize exactly with section 403. While an acquittal remains in force the person acquitted is not liable to be tried again, but (under the explanation) a person against whom a complaint has been made may be prosecuted again, though the order dismissing the complaint remains intact.

There is another point to be considered in connection with this argument. The explanation to section 403 covers cases in which proceedings are stopped by a Magistrate under sections 203, 204 (3), 209, 249, and 253, or by the High Court under section 273. A High Court cannot revise its own orders under Chapter XXXII, and, moreover, section 273 is expressly excluded from the operation of section 439. I cannot find in the Code any provision for either the High Court or the Court of Session or the District Magistrate directing the revival of a prosecution which has been stopped under section 273. What meaning then can we gather from the explanation to section 403 except that a subordinate Magistrate, competent to try or commit for trial, can, without order of any superior authority, entertain a fresh complaint of an offence a charge of which has been marked by the High Court as unsustainable? If this be so, is it reasonable to hold that a Magistrate cannot entertain a complaint merely because a previous complaint of the same facts has been dismissed, by himself or by another Magistrate, on a preliminary point and for reasons which are obviously wrong?

The next difficulty which occurred to Mr. Justice Banerjee is that the entertainment of the second complaint involves the examination of the correctness of the previous order, a thing which the Magistrate has no authority to do, as his Court is not a Court of appeal or revision.

But does not the greater part of this difficulty disappear if, as I have suggested above, the law does not contemplate the setting aside of an order of dismissal under any circumstances? The existence of the previous order would then merely operate to suggest to the Magistrate a preliminary inquiry under section 202, just as the fact that the police had reported an information of a cognizable offence to be false would operate. If the consequences of a particular interpretation of the law are to be considered at all, my experience leads me to the conclusion that a Magistrate is ten times more likely to fall into the error of issuing process without good cause on an original complaint than to do so on a second complaint after the first has been dismissed either by himself or by another Magistrate. In *Nilratan Sen's* case the ruling in *Queen-Empress v. Puran* (1) was considered and Mr. Justice Banerjee neither approved of nor dissented from it, but declined to follow it because the facts were different, namely, the two complaints were entertained by the same Magistrate and the objection was taken after conviction.

In the latter point it is on all fours with the present case.

In *Puran's* case, Mr. Justice Brodhurst held that the Magistrate who had dismissed the first complaint did not act contrary to any provision of law by ordering a further inquiry when he received the second petition.

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(1) (1887) I. L. R. 9 All. 85.

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There is another aspect of the ruling in *Nilratan's* case to be considered. It was held that the original order of dismissal was an improper one, but that the proceedings on the second complaint were irregular and invalid merely because the order dismissing the previous complaint had not been set aside. From this would it not follow *a fortiori* that even the discovery of new evidence would not justify the Magistrate in entertaining a fresh complaint without the order of a superior Court? Is not this an extreme position to take up, and incongruous with the fact that under section 403 (3) no order of superior authority is required to prosecute for murder a person who has already been convicted of grievous hurt for the same act? The High Court of Allahabad in *Queen-Empress v. Adam Khan* (1) considered the three rulings mentioned above, and, holding that the case of *Puran* does not conflict with the two Calcutta rulings, followed the latter and set aside the second proceedings on the ground that, when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot reopen the same matter on a complaint made to it. This was apparently done before the second proceedings had been completed.

The case of *Queen-Empress v. Dolegobind Dass* (2) differs considerably from the present one. It was a case of second prosecution of a cognizable case by the police on fresh evidence, after the accused had been discharged by a different Bench of Magistrates, and it was in the Presidency Town of Calcutta. But the remarks of the learned Chief Justice are very pertinent to the present case. He quotes from Mr. Justice Banerjee in the case of *Nilratan Sen*, "There is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed," and proceeds, "I agree in that. If, then, there be no express provision in the Code, what is there to warrant us in implying or in effect introducing into the Code a provision of such serious import, a provision which, in certain cases, would render section 252 of the Code almost nugatory? In the absence of any other provision in the Code to justify such an implication

* * * * *

I can appreciate no sound ground for the Court so acting; were it to do so it would go perilously near to legislating, instead of confining itself to construing the Acts of the Legislature." Further on he questions the "constant practice of this Court" which was the basis of Mr. Justice O'Kinealy's judgment in *Nilratan's* case. Again, "It is fallacious to treat the second hearing as an appeal from the decision on the first hearing and to say that there is no provision in the Code for such an appeal. This argument overlooks the fact that the Magistrate is bound to hear the case under section 252, unless the Code precludes him from doing so until the previous order of discharge has been set aside. But * * * the Code does not do that either expressly or by necessary implication. Again, the learned Judges distinguish the case of *Opoorba Kumar Sett v. Sreemutty Probod Kumary Dass* (3) on the ground that there the order for the

(1) (1900) I. L. R. 22 All. 106.

(2) (1901) I. L. R. 28 Cal. 211.

(3) (1893) I. C.W.N. 49.

issue of fresh process was made by the same Magistrate who had discharged the accused. But what difference can that make if the real principle be that no fresh process can be issued unless and until the previous order of discharge has been set aside by the High Court? Finally, "No Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by another Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice."

If these remarks of the learned Chief Justice be correct, they seem to completely demolish the basis of the decision in *Nilratan Sen's* case. They apply as much to Mufassal Magistrates as to Presidency Magistrates.

I have one more remark to make. If the distinction drawn in *Adam Khan's* and other cases is correct, are the proceedings of the Magistrate who entertains the second complaint illegal, even if he is kept in ignorance of the fact that a previous complaint has been dismissed? It seems equally absurd to make the legality of his acts depend on his knowledge, or to say that his acts were illegal though he had no knowledge of the facts which rendered them illegal.

In the present case the original order of dismissal was made on grounds that are obviously untenable. The merits of the case were not considered at all. On appeal also the merits were not considered.

I refer to a Full Bench the question—

Is the order of the Court of Session reversing the conviction in accordance with law?

The opinion of the Bench was as follows:—

Irwin, J.—The facts of this case are set out in my order of reference. The material points are these. A complaint was dismissed by the Kawa Township Magistrate for reasons which are manifestly wrong in law. A fresh complaint of the same facts was presented to Mr. Stevenson, first class Magistrate at the headquarters of the district, who sent it for disposal to the same Kawa Township Magistrate, pointing out that the previous complaint had been dismissed under a misconception of the law. The Kawa Magistrate tried and convicted the accused, who appealed to the Court of Session, and that Court reversed the conviction on the ground that the dismissal of the first complaint debarred the Magistrate from taking cognizance of the second. The question for decision is whether that order of the Court of Session is in accordance with law.

The opinion which the learned Assistant Government Advocate submitted, with some diffidence, is that when a Magistrate in taking cognizance of a complaint substantially reviews the order of dismissal of a previous complaint he acts without jurisdiction, and I presume he implied, though I think he did not expressly say, that the order of the Court of Session reversing the conviction was therefore right.

I am unable to accept this view of the law. The doubts which I expressed in the order of reference as to the correctness of the order of the Court of Session have not been in any degree removed by the arguments addressed to us. On the contrary, I am confirmed in the

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opinion that that order is wrong, by the judgment in *Queen-Empress v. Nga O Bök* (1) which I had not noticed at the time when I made the reference. That ruling is based partly on a decision of a Bench of the Calcutta High Court refusing to interfere with a conviction in a case where the second proceedings had been instituted by an order which was found to be *ultra vires*, on the ground that the Magistrate who tried the case had jurisdiction to revive the prosecution without the orders of any superior authority. This decision supports the two propositions that (a) Mr. Stevenson's action in taking cognizance of the offence, and the Myoök's action in trying it, were legal, and (b) even if Mr. Stevenson's order referring the case to the Myoök were *ultra vires* the Court of Session ought not to have reversed the conviction on that ground.

I think the only grounds suggested for Mr. Giles' opinion were (i) the existence of sections 436 and 437, Code of Criminal Procedure, gives rise to the inference that those two sections provide the only way of over-riding an order of dismissal, but the inference is not overwhelmingly strong (I think these were his words), and (ii) if that inference is not correct a complainant may institute proceedings successively in several different Courts of co-ordinate jurisdiction, and it is even conceivable that a complaint, after being dismissed by a District Magistrate, may be entertained by a junior Magistrate subordinate to him.

To take the latter point first, I admit that such proceedings would be unseemly if the second complaint were entertained without good cause, but I have in the order of reference shown that there is no reason for apprehending any such unseemly proceedings. Mr. Aston expressed an opinion very much to the same effect at page 173 of the ruling above quoted.

But even if such a consequence were likely to ensue from a particular interpretation of the law, it would seem to be a matter of little moment in comparison to the consequences that would ensue from the contrary interpretation in the present case. To make my meaning clear I must digress a little. Under section 423, Code of Criminal Procedure, the Additional Sessions Judge when reversing the conviction ought to have either acquitted the appellant or discharged him or ordered him to be retried. He did none of the three. As the merits of the case were not considered, the order should probably be treated as an order of discharge. If it was so, and is held to be a proper order, it may be necessary for this Court to direct a new trial because the order dismissing the original complaint was obviously wrong. This, to my mind, would go near to bringing the law into contempt by too close adherence to technical points, as there is no suggestion that the trial was not properly conducted. If, however, it should be held that the Additional Sessions Judge's order is equivalent to an acquittal, we cannot, while upholding that acquittal, order a new trial, and it would seem that even an appeal by Government could not succeed in face of the finding of this Bench. The accused therefore would get off scot free while the question of his guilt or innocence is not considered at all.

(1) P. J., L. B., 169.

I have discussed this point at some length because it seemed to weigh with one of my learned colleagues, but at the same time I think it can in any circumstances have little weight in comparison with the direct question of construction of the words of the Code.

The argument that because sections 436 and 437 provide a means of reviving a prosecution, therefore a prosecution cannot be revived in any other way, is dealt with by Mr. Aston in the case of *O Bôk* at pages 171 and 172. To my mind these sections merely provide a direct mode of correcting mistakes in cases in which there is no reason to suppose that a second complaint will be accepted by a Magistrate and I cannot discover that they in any way override the provisions of the Code which deal directly with the procedure of Magistrates and with *res judicata*. The learned Assistant Government Advocate expressly repudiated the theory that the powers of Presidency Magistrates are different from those of other Magistrates in respect of revivals of prosecutions, and I entirely agree with him there, because I do not think that sections 436 and 437 affect the powers of Magistrates at all. There has not been suggested any solution of the difficulty noticed in my order of reference respecting the revival of a prosecution which has been stayed by the High Court under section 273. I concur with the learned Chief Justice of Bengal in thinking that it is fallacious to treat the second hearing as an appeal from the decision on the first hearing. The idea that a Magistrate who habitually entertains complaints cannot be trusted to deal properly with the second complaint is one for which I can find no foundation in my experience. The danger is all the other way, and that is the reason why sections 436 and 437 are found so useful as they are.

Section 190 enacts that certain Magistrates "may" take cognizance of any offence on receiving a complaint. I do not suppose that any person would contend that this leaves it open to the Magistrate to take cognizance or not just as he likes. He must take cognizance of offence on complaints duly presented to him, unless there be some legal reason debarring him from doing so. And having taken cognizance he must proceed under section 192 or section 200 and so forth. I cannot find in sections 436 and 437, or any other part of the Code, any such restriction either express or implied.

For these reasons I am of opinion that Mr. Stevenson's action in taking cognizance of the complaint was correct, and that the order of the Court of Session was wrong.

Thirkell White, C. J.—The question referred by our learned colleague has been a subject of much discussion and there are many decisions of various effect in the Indian High Courts.

The earliest cases are those under the Code of Criminal Procedure of 1861.

The first case is that of the *Queen-Empress v. Tilko Goala* (1) in which it was held that the discharge of a person accused of an offence triable by the Court of Session was no bar to his apprehension and production before a Magistrate with a view to commitment. The Magis-

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trate, it was said, might proceed of his own motion, and his authority to do so was quite independent of an order from the Court of Session, under section 435 of the Code of Criminal Procedure, which applied to cases where the Magistrate had not thought fit to commit. This ruling bears directly on the point under reference. For, though the Code of 1861 gave no general power to the Sessions Court or District Magistrate to order further enquiry into the case of accused persons who had been discharged, yet section 435 of that Code did enable the Sessions Court and District Magistrate to order the commitment of persons discharged by Magistrates in certain cases and to direct enquiry into certain complaints which had been dismissed without enquiry.

This case was followed in the case of *Ramjoy Mazoomdar* (1) in which Markby, J., observed—

“I think that that case proceeds upon a right principle, namely, that the mere discharge of a person upon a preliminary enquiry before a Magistrate in no way affects the legality of fresh proceedings against him, whether those proceedings be taken at the instance of a private prosecutor or they be taken under section 68 at the instance of the Magistrate himself.”

In neither of these cases is there any reference to the production of fresh evidence against the accused.

In *Fint Sahoo v. Bheekon Roy* (2), it was held that a Magistrate, after he had discharged the accused, had power, if circumstances appeared to require it, to take up the case again and to re-try the accused. In this case there was further evidence at the second enquiry.

In the case *Ramdass Sadhoo v. Anund Chunder Roy* (3), it was held that a police officer acted illegally in re-arresting an accused person who had been discharged when there was no fresh material for the prosecution of the charge. This does not directly touch the question under reference; but in principle it seems to be a departure from the previous rulings.

The next cases are those under the Code of 1872. That Code provided that a discharge was not equivalent to an acquittal and did not bar the revival of a prosecution for the same offence (section 195 and section 215) and that the dismissal of a complaint should not prevent subsequent proceedings (section 147). It also enabled the High Court, the Court of Session, or the Magistrate of the District to order enquiry into complaints dismissed; but not, explicitly, into the case of accused persons who had been discharged.

In *Hari Singh v. Danish Mahomed* (4) where the accused had been discharged, it was held that the Magistrate of the District had power on a fresh complaint to take cognizance of the offence and to refer the case to a subordinate Magistrate.

In this case there was further evidence procurable which was not before the Court when the order of discharge was given. *Kistoram Mohara v. Anis* (5) is to the same effect.

(1) (1870) 14 W. R. 65.

(2) (1872) 18 W. R. Cr. 39.

(3) (1873) 19 W. R. Cr. 27.

(4) (1873) 20 W. R. Cr. 46.

(5) (1873) 20 W. R. Cr. 47.

In the case of *Mohesh Mistree* (1), the decision seems to have proceeded on a somewhat different principle. The District Magistrate directed a Joint Magistrate to proceed afresh with a case in which the accused had been discharged. It was held that as the District Magistrate was proceeding under the revisional section (295) he could act only under section 296, Code of Criminal Procedure, and report the case for the orders of the High Court. No previous cases were cited. This decision is not an authority for the position that the District Magistrate could not have entertained a fresh complaint on the same fact or on the production of further evidence.

In the *Empress v. Donnelly* (2), the distinction was for the first time drawn between the case in which it was sought to revive a prosecution on the ground that the discharge was illegal or improper, and that in which fresh evidence was forthcoming. In the former case it was held that the matter must be brought before the High Court; in the latter case the Magistrate could proceed without any reference to the High Court. The distinction drawn in this case was observed in the cases of *Empress v. Hary Doyal Karmokar* (3) and *Dijahur Dutt* (4).

All these cases are in the Calcutta High Court.

In *Imperatrix v. Gowdapa* (5), the High Court at Bombay followed the ruling in *Mohesh Mistree's* case (1), and the decision does not go further than in that case.

In two anonymous cases of 1878 (6), the High Court of Madras held that when a complaint had been dismissed another Magistrate of competent jurisdiction could not, without the order of a Superior Court, receive a complaint of the same facts against the same person.

But in the case of *Munniappa Maistri* (7), the same High Court held that a prosecution could be revived after a discharge if fresh evidence was forthcoming. In the *Queen-Empress v. Budhya* (8), the Bombay High Court took the same view, following the case of *Empress v. Donnelly* (2).

The next cases are under the Code of Criminal Procedure of 1882. For the purposes of the question under reference, the main changes made in this Code were the addition of an explanation to section 403 to the effect that the dismissal of a complaint, the discharge of the accused, and the like, were not acquittals for the purposes of that section; the omission of the specific rule that a discharge does not bar the revival of a prosecution for the same offence; and the enactment of section 437 in wider terms than the corresponding section (298) of the Code of 1872. No material alteration in these matters was made by the Code of 1898.

In the *Queen-Empress v. Krishna* (9), the Bombay High Court held in very general terms that a discharge did not prevent the acceptance by another Magistrate of a complaint on the same facts.

(1) (1876) I. L. R. 1 Cal. 282.

(2) (1877) I. L. R. 2 Cal. 405.

(3) (1879) I. L. R. 4 Cal. 16.

(4) (1879) I. L. R. 4 Cal. 647.

(5) (1878) I. L. R. 2 Bom. 534.

(6) (1878) Weir, 874-875.

(7) (1881) Weir, 1038.

(8) (1880) Ratanlal, 145.

(9) (1884) Ratanlal, 209.

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In the *Queen-Empress v. Puran* (1), the High Court at Allahabad held that a Magistrate who had dismissed a complaint was competent to take up a second complaint of the same facts. No reasons were assigned for this opinion; and no cases were specifically cited.

In *Fowahir Singh v. Queen-Empress* (2), the Chief Court of the Punjab held that after a Magistrate had discharged an accused person he could not revive the proceedings on a fresh complaint. The learned Judge observed:—

“It is a necessary inference from the terms of section 437, read with its context, that a Magistrate is not competent to ignore his own order of discharge, and re-open an enquiry into the case of an accused person whom he has discharged.”

In the *Queen-Empress v. Po Nyein* (3), the Judicial Commissioner of Upper Burma held that a Subdivisional Magistrate had no power to take up a case in which an accused person had been discharged. The decision was based on the ground that only a District Magistrate was empowered to hold a further enquiry under section 437, Code of Criminal Procedure, without the orders of a Superior Court. The necessary inference was that a Subordinate Magistrate had not that power.

But in the *Queen-Empress v. O Bók* (4), decided by the Judicial Commissioner of Lower Burma, the contrary view was held.

The case of *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (5) is, in principle, closely analogous to the case under reference. The first complaint was dismissed because the Magistrate thought the case was of a civil nature. A fresh complaint was entertained by another Magistrate. The Court held that the second Magistrate had no power to take up this complaint. The reason of the decision seems to be stated as follows:—

“When the Code therefore distinctly lays down a procedure for having an order dismissing a complaint under section 203 or discharging an accused person set aside and a further enquiry directed, it seems to me reasonable to conclude that the Legislature intends that an order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided.”

The only precedent cited was the *Queen-Empress v. Puran* (1), which the Court distinguished and declined to follow.

This case was followed in *Komal Chandra Pal v. Gour Chand Audhikari* (6), though the facts were not identical. And these two cases were followed in *Inderjit Singh v. Thakur Singh* (7).

In *Simbhoo Ram Lall v. Kari Hazari* (8), it was held that after a Magistrate had dismissed a complaint he could not re-open proceedings of his own motion or set aside his order of dismissal. No cases were cited. And this case differs from others in the fact that there

(1) (1887) I.L.R. 9 All., 85.

(2) (1894) P.R. No. 33.

(3) (1895) 1 U.B.R. 48.

(4) P.J., L.B., 169.

(5) (1896) I.L.R. 23 Cal. 983.

(6) (1897) I.L.R. 24 Cal. 286.

(7) (1897) 2 C.W.N. 290.

(8) (1899) 3 C.W.N. 760.

was no fresh complaint and the Magistrate did purport to set aside his own order of dismissal.

The decision in *Nilratan Sen's* case (1) was followed by the Allahabad High Court in *Queen-Empress v. Adam Khan* (2), in which it was decided that when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers could not re-open the same matter on a complaint made to it. The case of *Puran* (3) was distinguished.

A small but important group of recent cases in the Calcutta High Court refers to the powers of Presidency Magistrates. Though instructive in reference to the matter under consideration, they are not precisely apposite as the position of Presidency Magistrates differs in some respects from that of other Magistrates. The cases are *Opoorba Kumar Sett v. Sreemutty Probod Kumary Dassi* (4); *Grish Chunder Roy v. Dwarka Dass Agarwallah* (5); *Queen-Empress v. Dolegobind Dass* (6); and *Dwarka Nath Mondul v. Beni Madhab Banerjee* (7).

Finally, so far as the Calcutta High Court is concerned, the question under reference has been settled by a Full Bench in the recent case of *Mir Ahmad Hossein v. Mahomed Askari* (8) in which it was held that, in a warrant case, a Magistrate having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence without an order for further enquiry under section 437 of the Code of Criminal Procedure. In the words of the learned Chief Justice of Bengal, section 437, which is an enabling section, does not, by implication, take away the jurisdiction which is vested in the Magistrate in a case of this class to hear the complaint again.

It will be seen that widely divergent views have been taken in the last 30 years on the question under reference. But even apart from the very weighty authority of the Full Bench case last cited, it seems to me that the balance inclines towards the reply proposed by Irwin, J. In such a conflict of opinion, it is necessary to state the grounds on which I concur in that reply.

The general rule as to cognizance of offences by Magistrates is contained in section 190, sub-section (1), of the Code of Criminal Procedure. Except as otherwise provided, any Magistrate duly empowered may take cognizance of any offence on complaint, police report, information, or his own knowledge or suspicion. One of the provisions which limit the power conferred by section 190 is section 403 of the Code, which prohibits the trial for an offence of persons once tried and acquitted or convicted of the same offence. This provision is clearly not superfluous; and we must presume that, but for this section, the fact of a previous conviction or acquittal would not prevent a Magistrate from taking cognizance of an offence. The explanation attached to this section declares that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of this section. There

(1) (1896) I.L.R. 23 Cal. 983.

(2) (1899) I.L.R. 22 All. 106.

(3) (1887) I.L.R. 9 All. 85.

(4) (1893) 1 C.W.N. 49.

(5) (1897) I.L.R. 24 Cal. 528.

(6) (1901) I.L.R. 28 Cal. 211.

(7) (1901) I.L.R. 28 Cal. 652.

(8) (1902) I.L.R. 29 Cal. 726.

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is therefore nothing in the Code which explicitly prohibits a Magistrate from taking cognizance under section 190 of an offence in respect of which a complaint has already been dismissed or an accused has been discharged. It has been said, in some of the reported cases, that the omission in the Code of 1882 (an omission repeated in the Code of 1898) of the words (a discharge) "does not bar the revival of a prosecution for the same offence," indicates that the Legislature intended to make a change in the law and to enact that, until set aside, a discharge should bar the revival of a prosecution. I do not think this is the correct inference. To my mind, the words were omitted because they would have been clearly superfluous.

Then, it is said, section 437 of the Code provides means whereby further enquiry into the case of an accused person who has been discharged or into a complaint dismissed can be ordered. The necessary implication is that such further enquiry cannot be held except as provided by that section. In some of the reported cases, it is even said that the order of discharge or dismissal must be set aside. But there is no provision in the Code for setting aside an order of discharge or dismissal. And the reason is that such an order does not operate as an acquittal and that its existence is no bar to further proceedings. Even when there is no fresh complaint, report, or information, it is not necessary for the order of discharge or dismissal to be set aside before further enquiry can be ordered.

It seems to me that section 437 of the Code of Criminal Procedure relates only to the special case for which it provides. The District Magistrate who acts under its terms must do so on examining a record; and when he himself makes further enquiry he does so not in exercise of any of the powers conferred by section 190. He is not taking cognizance of an offence under any of the clauses of that section. And but for the enabling provisions of section 437, it might and probably would be held that he could not make, still less order, further enquiry because none of the conditions prescribed by section 190 were present. This consideration avoids the difficulty felt by the learned Judicial Commissioner in the case of *Po Nyein* (1). For, in acting under section 437, the District Magistrate is exercising a power which no other Magistrate can exercise of his own motion. And in entertaining a fresh complaint a subordinate Magistrate is not making further enquiry on examination of a record. He is exercising a power conferred by law which there is no provision of the law to hinder. These views are, I think, in accordance with those expressed in the considered judgments of the majority of the learned Judges of the Calcutta High Court and in accord with the principles on which their decision is based.

To hold that notwithstanding the terms of section 403, Code of Criminal Procedure, an order of dismissal or discharge, till set aside, is a bar to a fresh prosecution, would be, in my opinion, to make a law which does not find a place in the Code. As a matter of principle, I can find no warrant for the distinction sought to be drawn in some of

(1) (1895) 1 U. B. R. 48.

the reported cases between a fresh prosecution because a discharge is illegal or improper and a fresh prosecution because further evidence is forthcoming. In neither case, as it seems to me, is it necessary for the second Magistrate to revise or consider the legality or propriety of the order of discharge or dismissal. Nor does it seem to me that the question is at all affected by the consideration whether the renewed prosecution is dealt with by the same or by a different Magistrate. If the order of discharge or dismissal is not a bar to a fresh prosecution, it is immaterial whether further evidence is available, or whether the same or a different Magistrate deals with the case.

If this view of the law is correct, it does not seem to me that the possible inconvenience of allowing an unlimited number of complaints to be filed on the same facts and against the same accused can have any weight. If this inconvenience arises in practice, it is for the Legislature, not for the Courts, to correct it. This point did not escape the notice of the learned Judges who decided the case of *Dwarka Nath Mondul v. Beni Madhab Banerjee* (1).

The following remarks by Prinsep, J., are relevant:—

"The argument which seems to have been freely used to support this point of view is that the accused might be constantly brought before the Courts to hear the evidence on which two opinions may be formed by different Courts and thus be put to considerable inconvenience and harassment. In the exercise of such a power, as well as in the exercise of many other powers, if a reasonable discretion is not exercised, an injustice to the parties may be done. That is a matter which may be set right by a superior Court. It is certainly not a matter which to me seems to require that the exercise of powers which the law confers on a Judicial Officer should be curtailed generally, and in all cases. This argument, moreover, would not apply to a case in which the complaint has been summarily dismissed under section 203 or dismissed on default to pay process-fees; section 204 (3), and such cases are also within the terms of section 437."

For the reasons which I have endeavoured to indicate above, I am of opinion that the discharge of an accused or the dismissal of complaint does not prevent the institution of fresh proceedings otherwise than under section 437, Code of Criminal Procedure. I would therefore concur with Mr. Justice Irwin in answering the question proposed in the negative.

Fox, J.—The question referred being "Is the order of the Court of Session reversing the conviction in accordance with law?" I concur in thinking that it was not in accordance with law, for the reason that the discharge of an accused or the dismissal of a complaint does not prevent the institution of fresh proceedings otherwise than under section 437 of the Code of Criminal Procedure.

The final order was passed by—

Thirkell White, C.J.—The Full Bench having ruled that the order of the Court of Session reversing the conviction was not in accordance with law, the order of the Sessions Court of Pegu in Criminal Appeal No. 1004 of 1902 is hereby reversed and it is ordered that the said Court readmit the appeal and dispose of it on its merits.

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(1) (1901) I. L. R. 28 Cal. 652.

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Revision No. 2074
of 1902.
January 13th,
1903.

Before Mr. Justice Irwin.

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Security proceedings—Distinction between sections 109 and 110—Sureties, their character and class to be specified in order—Criminal Procedure Code, sections 109, 110, 112 and 118.

No person ought to be proceeded against under both sections 109 and 110 of the Code of Criminal Procedure in the same proceeding.

When action is taken under section 110 the question of having ostensible means of subsistence should be excluded from the preliminary order and treated as irrelevant.

The character and class of sureties should be specified both in the preliminary order under section 112 and in the order under section 118, Code of Criminal Procedure.

Before any person is accepted as a surety for good behaviour the Magistrate should satisfy himself that that person is of good character, is able to pay the penalty in the bond and lives in a place where he is likely to be able to exercise some supervision over the conduct of the suspect.

A bond taken on a day subsequent to the day fixed for commencement of security must be limited to the period, counted from the day fixed, in the order under section 118.

In my opinion no person ought to be proceeded against under both sections 109 and 110 at the same trial, and when action is taken under section 110 the question of having ostensible means of subsistence should be excluded from the preliminary order and treated as irrelevant, because proof that the defendant has ample means of subsistence is no answer to a charge under section 110. It is well known that some of the most notorious receivers of stolen property are rich men. When action is taken under section 110 if any mention be made of means of subsistence the defendant is likely to be misled into making a futile defence though he may possibly have a good defence on the merits.

In the present case the order requiring security and sentencing the defendant to imprisonment in default was passed on 4th September 1902. The bond was signed on 23rd October and the prisoner released the same day, but the diary contains no note of any proceedings subsequent to 4th September. There is on the record an application of three persons offering to be sureties, and on the back of the application the Magistrate recorded an examination of one of the proposed sureties on oath, about his property. Below this the Magistrate wrote "Accepted". There is nothing to show that the Magistrate made any inquiry about the character of any of the proposed sureties, nor about the means possessed by two of them. The third he accepted on his own statement of his means. It is possible that the three were known personally to the Magistrate, but if so, he ought to have recorded the fact.

Before any person is accepted as a surety for good behaviour the Magistrate should satisfy himself that that person is of good character, is able to pay the penalty in the bond, and lives in a place where he is likely to be able to exercise some supervision over the conduct of the suspect. This is why the Code provides that the character and class of sureties should be specified in the preliminary order under section

112, a provision which the Magistrate overlooked in the present case. It is obvious that the character and class of sureties should be specified in the order under section 118 also. "Respectable house-holders" would be a suitable definition of character and class. The bond as it stands does not specify the date from which the year is to commence. Taking it in its ordinary and natural sense it would be interpreted as a bond for one year from the date of execution, namely, 23rd October 1902. But the term for which the suspect was ordered to give security is one year commencing on the 4th September 1902. The bond should be amended accordingly, and the signatures of the suspect and his sureties should be obtained to the amendment, after explaining it to them.

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Before Mr. Justice Fox and Mr. Justice Irwin.

M. E. MOOTALA AND CO. v. POONASAWMY.

Plaint, Signing and Verification of—Civil Procedure Code, ss. 36, 37 (c), 51.

Civil Reference
No. 14 of
1902.
February 2nd,
1903.

While a plaint may be verified by any person proved to the satisfaction of the Court to be acquainted with the facts, a plaint which has not been signed by the plaintiff himself or by an agent authorized by a power-of-attorney, either expressly or impliedly, to sign a plaint on behalf of plaintiff must be rejected by the Court before which it is presented.

Roy Dhunput Singh Bahadoor v. Fhoomuk Khawas, 3 C.L.R. 579; and Kastolino v. Rustomji, I.L.R. 4 Bom. 468, distinguished.

Irwin, J.—The question referred to us is "Can persons carrying on business for and in the names of parties not resident within the local limits of the jurisdiction of the Court, sign and verify a plaint on behalf of those parties without being expressly authorized to do so?"

I think there is no difficulty about the verification. The plaint may be verified by any person proved to the satisfaction of the Court to be acquainted with the facts. Such person need not be a recognized agent at all. He may be a stranger to the suit. When the suit relates to a business which has been carried on for a considerable time on behalf of the plaintiff by the person verifying, the Court would probably have no difficulty in holding that he is acquainted with the facts of the case.

The plaint must be signed by the plaintiff and his pleader, but in certain circumstances a person duly authorized in this behalf by the plaintiff may sign in place of the plaintiff (section 51). The question is whether this special provision of the law is overridden by the general provision in section 36, under which any act required by law to be done by a party may (except when otherwise expressly provided) be done by a recognized agent under clause (c) of section 37. In my opinion it is not overridden. In the first place, the contrary construction would involve holding that the plaint might, under section 36, be signed by the pleader in place of the plaintiff, whereas section 51 enacts that it must be signed by both plaintiff and his pleader. To hold that the pleader may sign for his client as well as for himself would entirely stultify this provision.

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Secondly, the words "except when otherwise expressly provided by any law" seem to leave no room for supposing that section 51 is governed by section 36. The difficulty experienced by the learned Judge of the Small Cause Court seems to have been caused chiefly by reading section 37 (c) alone, whereas it should only be read as a definition of one of the classes of the persons who are empowered by section 36 to act, and it is therefore subject to the exception expressly introduced into section 36. This difficulty was, of course, increased by finding that the existing practice of the Court was not fully in accordance with section 51.

The special provision in section 51 relating to signing seems to be a most salutary one. There is no reason why any act in a suit should not be done by a recognized agent as defined in clause (c), when once the suit has been instituted with the approval of the plaintiff, but it would be, in my opinion, very bad law to subject a principal to the risk of being involved in litigation without his knowledge at the instance of an agent whom he has appointed merely for the purpose of carrying on a business and has not expressly authorized to institute suits.

My answer to the reference therefore is that the persons described in the reference cannot sign plaints without being specially authorized to do so, but they can verify plaints if they are proved to the satisfaction of the Court to be acquainted with the facts of the case.

I think the learned Judge in making the reference ought to have recorded his own opinion more distinctly than he has done. It is not clear whether the first sentence of the second paragraph of the reference is to be taken as his final opinion or not, because it is qualified by doubts expressed in later sentences. Under section 617 it is incumbent on the referring Judge to record his own opinion.

Fox, J.—I concur in the answer to the reference proposed by my learned colleague. The terms of section 51 of the Code of Civil Procedure as to who may verify a plaint leave no room for doubt.

The terms of the proviso as to who may sign a plaint on behalf of a plaintiff may give rise to question in particular cases.

The corresponding section of the Code of 1877 did not contain the proviso, and was somewhat different in terms. In *Roy Dhunput Singh Bahadoor v. Jhoomuk Khawas* (1) it was held that the positive requirement of section 51 of the Code of 1877 as to subscription of the plaint by the plaintiff was governed by section 36 of the Code which provided, as section 36 of the present Code does, that "any appearance, application, or act in or to any Court required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent, or by a pleader appointed to act on his behalf."

Section 51 of the Code of 1877 was, however, amended by sections 1 and 2 of the Act XII of 1879 to the form in which section 51 of the present Code stands, and owing to such amendment I think it must be held that the special provisions in the proviso override the general provisions of section 36 of the Code.

(1) (1879) 3 C. L. R. 579.

In *H. Kastolino v. Rustomji* (1) a Full Bench of the Bombay High Court held that a plaint signed by an agent who held a general power of attorney containing (*inter alia*) powers to sue and to defend suits, but not containing a special power to sign a plaint, was properly signed within the proviso to section 51 of the Code of 1877 as amended. That ruling, however, does not afford authority for holding that a plaint may be signed by any of the recognized agents mentioned in section 37 of the Code. The ground of the decision is not stated in the judgment, but it may be that it was thought that an agent authorized expressly to sue had implied authority to do all things necessary for the purpose of suing, and that amongst such things was the signing of a plaint.

In the case under reference the person who has signed the plaint describes himself as the duly constituted Manager at Rangoon of the plaintiffs who carry on business here in a firm name, but who were at Surat when the plaint was presented. The suit is for rent of a room in a house.

Even if the letting of houses is part of the business of the plaintiffs, and the manager is by virtue of clause (c) of section 37 of the Code a recognized agent, he cannot merely on that ground be held to be impliedly authorized to institute suits on the plaintiffs' behalf for rent and to sign plaints presented in their names. 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.

Before Mr. Justice Irwin.

KING-EMPEROR v. MAUNG CHO AND OTHERS.

Search by District Superintendent of Police in common gaming house—Procedure—Gambling Act, sections 6 (3), 6 (4), 14—Criminal Procedure Code, sections 496, 14 (4)—Magistrate reviewing his own sentence—Criminal Procedure Code, sections 369, 438.

A District Superintendent of Police making a search on his own initiative under section 6 (1) of the Gambling Act should comply with the provisions of section 6 (4) in the same way as if he were making the search under a warrant, and has no authority to release the accused on bail except as provided for by section 6 (4). The presumption under section 7 does not arise unless the search has been conducted in the manner required by section 6 (3).

When a Subordinate Magistrate finds that he has passed an illegal sentence, his proper course is to submit the record to the District Magistrate for action under section 438, Criminal Procedure Code.

Mr. Wooldridge, District Superintendent of Police, recorded information and grounds of belief that the house of Maung Cho was used as a common gaming house. This document is dated 20th October 1902, but the Magistrate has noted on the back that Mr. Wooldridge explained that it was misdated 20th instead of 19th. There is no reason to suppose that it was not written on 19th.

It appears from a report, dated 27th October, which the District Superintendent of Police submitted to the District Magistrate, that

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on the same day the information was received (20th in the report) the District Superintendent of Police entered Maung Cho's house under section 6 of the Gambling Act, with five military policemen and some Burmans. He arrested 10 persons downstairs and shut in some 32 upstairs. He seized money, cards, and counters. In the report he asked for the orders of the District Magistrate, who wrote on the report "A prosecution should be instituted: a bad case of gambling." This is dated 28th October, and was sent to the Magistrate with a vernacular report of the raid and the property seized. The Magistrate received it and took cognizance of the case on 6th November.

There are bailbonds on the record which show that the accused were released on bail on 19th October. Some of the bonds are for appearance before the Subdivisional Magistrate on 20th October. In some of the bonds the date for appearance is left blank.

Mr. Wooldridge altogether ignored the provisions of clause (4) of section 6 of the Gambling Act. It is true that that clause relates expressly to cases in which a police officer acts under a warrant, but there is, so far as I know, no other law to which a District Superintendent of Police can look for guidance in case he acts himself instead of issuing a warrant. Pyapôn is the headquarters of a subdivision, and the District Superintendent of Police had no authority to release the prisoners on bail if the Subdivisional Magistrate was in the station. Mr. Wooldridge is a special Magistrate, but he could not act under section 496, because his magisterial powers are strictly limited by section 14 (4) to acts necessary for "..... apprehending and detaining offenders in order to their being brought before a Magistrate." His action in delaying the institution of a prosecution in order to obtain the orders of the District Magistrate was illegal, and the District Magistrate's order was superfluous, for he had no authority to direct the police to refrain from following the procedure laid down in section 6 (4).

The report submitted to the District Magistrate was not in any sense a report under section 6 (4). It was an executive report. It ought not to have been placed on the record.

The Magistrate tried the case summarily, but he evidently felt that it was not a suitable case for summary procedure, as he recorded the depositions at length, in the manner prescribed in sections 356 and 360, Criminal Procedure Code. Therefore the case ought to have been tried regularly. The effect of the summary procedure was to deprive Po Cho of the right of appeal.

The Magistrate neglected to record the charge and the finding in the spaces provided for that purpose. The entry of an Act and section is not a compliance with section 263 (f), Criminal Procedure Code. Moreover, when some of the accused are charged with one offence, and others with a different offence, the offence with which each person is charged should be clearly specified.

Even the body of the judgment does not show which of the offences specified in section 12 Po Cho was convicted of.

It is urged on behalf of the accused that the provisions of section 6, clause (3), were not complied with, because the elders were not called

to witness the search until after the house had been entered and the arrests made. I do not think it is possible to separate the sub-clauses of clause (1) of section 6 and consider the search as distinct from the entry and arrest, for the purposes of section 103 (1), Criminal Procedure Code. The object of the law is to ensure that false evidence is not fabricated, and this object could be entirely defeated if it were open to the police to raid the house first, and defer calling elders until after they had made the entry and arrests.

The provisions of section 6 not having been complied with, no presumption arises under section 7. It is necessary to look at the evidence to see whether the conviction can be sustained. Mr. Wooldridge says there were about 200 persons in the house. He saw cards and counters, and men gambling at different *waings*. Po Cho was sitting downstairs at a table with a box, into which people threw money as Mr. Wooldridge entered. Some money was found scattered on the floor, and some was thrown to some women sitting in a corner, and some conveyed out of the house in other ways. There can be no possible doubt that extensive gambling was carried on in the house.

Mr. Wooldridge's orderly Aung Bu went to the house in plain clothes and says he saw Po Cho take commission from the gamblers. Mun Sa, a detective, gives similar evidence. If this is true Po Cho used the house as a common gaming house. I can see no reason for disbelieving the direct evidence. Everything points to its truth. It is impossible to believe that Po Cho would let such a large concourse of persons gamble in his house if he did not bring them there to derive profit from the gambling himself, for he knew well that he ran a considerable risk by allowing them to gamble in his house.

I therefore see no reason to interfere with the conviction of Po Cho.

The trial of all the other accused was illegal from beginning to end because no complaint, report or information was made to the Magistrate within seven days of the commission of the offence (section 14, Gambling Act). I therefore reverse all the convictions under section 11 and direct that the fines paid be refunded.

The sentences in default were illegal, as the Magistrate himself noted on the 8th December. He, however, committed another illegality in telegraphing to the Jail to release the prisoners. He has no authority to revise his own order. He ought to have submitted the record to the District Magistrate for action under section 438, Criminal Procedure Code.

I think it necessary to draw the attention of the District Magistrate to Mr. Wooldridge's note, dated 18th October 1902, namely, "I will send a cryer round to proclaim all gambling in houses must stop, and stakes in booths to be limited to one rupee." The inference seems to be that gambling within certain limits, both in houses and booths, had been expressly permitted by the District Superintendent of Police. Neither he nor any officer has authority to give such permission. Gambling is not illegal except in a common gaming house or in a public place. Where it is illegal, no Magistrate or officer of Government has any dispensing power to permit it. If the booths were

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neither common gaming houses nor public places the order limiting stakes was futile, as it could not be enforced. If they were either common gaming houses or public places the order indirectly connived at a breach of the law, and was therefore a most improper one to issue.

Before Mr. Justice Thirkell White, Chief Judge, Mr. Justice Fox,
and Mr. Justice Irwin.

MAUNG SAN HLA v. MA ÒN BWIN.

Messrs. Agabeg and Maung Kin—for the respondent.

Maintenance—wife refusing to live with husband—father's obligation to maintain children—Criminal Procedure Code, section 488.

The obligation to maintain a child unable to maintain itself is a statutory obligation, and the father is not released from it by the fact that the mother refuses to live with him.

Maung Kin v. Ma Hnin Yi, S. J. L. B. 114; *Lal Das v. Nekunjo Bhaishiani*, I. L. R. 4 Cal. ; 374; *Kariyadan Pokkar v. Kayat Beeran Kutti*, I. L. R. 19 Mad. 461; *Ma Gyi v. Maung Pe*, I L. B. R. 126; *Ma Hnin Byu v. Maung Myat Pu*, 8 Bur. L. R. 96, referred to.

Irwin, J.—The proposition on which the applicant bases his objection to the Magistrate's order directing him to pay for the support of his children is stated in these words: "When a wife chooses to live separate from her husband she is not entitled to claim from him maintenance for the children," and the foundation of this proposition is the ruling of the Special Court in the case of *Maung Kin v. Ma Hnin Yi* (1).

That was a Civil Second Appeal, and I do not question its correctness, but I think it can afford no assistance in deciding the present case, because it proceeded on different grounds. The Code of Criminal Procedure was not in point and was not considered. The present order is under section 488 of that Code. To say that because a claim cannot be made good in a Civil Court, therefore it cannot be made good under section 488 in a Criminal Court, or *vice versa*, is a proposition to which I cannot assent.

The only part of section 488 which lends any colour to the applicant's theory is the proviso following sub-section (3), but it has not been put forward in support of his case. In *Lal Das v. Nekunjo Bhaishiani* (2) and in *Kariyadan Pokkar v. Kayat Beeran Kutti* (3) it was held that the refusal of a mother to surrender an illegitimate child is no ground for refusing an allowance for maintenance. We have not been referred to any ruling on this point as regards legitimate children. It does not appear from the record, nor from the present application, that the applicant ever offered to receive the children and maintain them without their mother. In this Court he has said that he is ready to do so. When the case was heard by the Magistrate last July one child was four years old, the other four months. It is not reasonable to ask the mother to surrender such young children, and the Magistrate's order would be justified under the proviso above mentioned if that proviso applies at all to the case of children, which is extremely doubtful.

(1) S. J. L. B. 114. | (2) (1879) I. L. R. 4 Cal. 374.
(3) (1896) I. L. R. 19 Mad. 461.

We have been referred to the cases of *Ma Gyi v. Maung Pe* (1) and *Ma Hnin Byu v. Maung Myat Pu* (2), as well as the Madras case above cited. None of these three are on all fours with the present case, but they all support the principle that the statutory obligation imposed by section 488 is distinct from any ground on which a suit for maintenance would lie in a Civil Court.

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Applicant has urged before us, though not in his application, that he is too poor to pay the amount ordered. He is a clerk in the employment of Bowyer Sowden and Company. He admitted to the Magistrate that his salary, including commission, amounts to Rs. 35 to Rs. 40 per month only, while Ma Òn Bwin alleged that his salary was Rs. 45, and he earned about Rs. 40 commission besides. As he did not explicitly object to the amount of the award in his application I do not think we should assume that his income is less than the amount stated by the respondent, and if that be so Rs. 15 does not seem to be an excessive amount for the maintenance of two small children.

I would dismiss the application.

Thirkell White, C.J.—I concur.

Fox, J.—I concur.

Before Mr. Justice Thirkell White, Chief Judge, and
Mr. Justice Fox.

Civil First Appeal
No. 68 of 1902.
December
18th.

COOVERJEE LADHA AND ONE v. SULEMAN ISMAIL AND Co.

Messrs. *Bagram and Metha*—for plaintiff. | Messrs. *Burjorjee and Dantra*—for respondent.

Jurisdiction of Civil Courts in suits against absent foreigners—Civil Procedure Code, sections 17, 89, 90, Chapter XXVIII.

The Code of Civil Procedure makes provision for suits against foreigners not resident in British India, and a Court is bound to entertain such a suit if the cause of action has arisen within the local limits of its jurisdiction.

English and Indian law distinguished, and effect of decree in such a suit discussed.

Rambhat v. Shankar Baswant, I. L. R. 25 Bom. 528;

Moazzim Hossein Khan v. Raphael Robinson, I. L. R. 28 Cal. 641;

Whaley v. Busfield, L. R. 32 Ch. D. 123;

followed.

Kussim Mamoojee v. Isuf Mahomed Sulliman, I. L. R. 29 Cal. 509;

Gurdyal Singh v. Raja of Faridkot, I. L. R. 22 Cal. 222;

Dacey's Conflict of Laws;

Story's Conflict of Laws;

referred to.

Fox, J.—The suit out of which this appeal arises was filed in this Court in its original jurisdiction which extends over the Rangoon Town district. It was brought by a firm of persons, described as rice shippers and commission agents trading in Rangoon, against a firm trading at Cochin. From the petition for issue of a summons it is

(1) I L. B. R. 126.

(2) (1902) 8 Bur. L. R. 96.

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evident that the Cochin referred to is the Native State of Cochin, or a town of that name in that State.

I will reserve allusions to the defects in the plaint, because the suit was treated by the learned Judge on the Original Side as a properly constituted one, in which the members of the defendant firm had appeared, under protest to the jurisdiction, and arguments before him and before this Bench have proceeded on that basis.

The circumstances set out in the plaint as constituting the plaintiff's cause of action are substantially as follows :

The defendant firm by telegrams sent from Cochin to the plaintiff's firm in Rangoon requested the plaintiffs to buy for them in Rangoon certain quantities of rice and paddy, to have the paddy bought for them milled, and to ship to Cochin the rice bought and obtained by milling the paddy for delivery to the defendant's firm there. The plaintiffs accordingly bought rice and paddy in Rangoon, milled the paddy there, made two shipments of rice to Cochin, and drew bills of exchange on the defendant's firm payable in Cochin against the shipments. The bill against one shipment was dishonoured, and the plaintiffs had that shipment sold at Cochin. The amount realised did not cover the amount of the bill against that particular cargo, and in respect of such cargo the plaintiffs claimed the difference between the two amounts. They further claimed in respect of some rice which they had bought for the defendant firm in Rangoon, and had sold there in consequence of the defendant firm's refusal to accept it. The rest of the amount claimed was on account of charges and expenses in connection with the two transactions.

A written statement purporting to be that of the defendants, whoever they may be, was filed by an advocate: it is signed in the name of the defendant firm, and is verified by Esmail Essa, who describes himself as the managing partner in Cochin of the firm of Suleman Ismail and Co., who conducted the transactions which form the subject of the suit.

In it exception is taken to the jurisdiction of this Court, and it is stated that the defendants are not British subjects, and that they do not reside or carry on trade in British India, and that they are subjects of the State of Cochin or of that of Travancore, and are domiciled and trade in those States.

Subject to this protest, they set out the facts on which they rely in their defence. No issue was raised or sought to be raised on the facts on which the protest to the jurisdiction was based, and it may be taken that the plaintiffs admit such facts. There is also no dispute as to the States of Cochin and Travancore not being parts of British India. The question of the jurisdiction of the Court to entertain and proceed with the suit was argued before the learned Judge as a preliminary question before going into the merits. He came to the conclusion that the Court had no jurisdiction by reason of the defendants being foreigners residing outside of British India and dismissed the suit on that ground.

The plaintiffs have appealed on the ground that the learned Judge erred in law in dismissing the suit on the above ground: the advocate for the defendant firm has supported the decree not only on the ground that the Court had no jurisdiction to entertain the suit, but also on the ground that even if it had jurisdiction against non-resident foreigners under any circumstances, the cause of action did not arise within the jurisdiction of the Court, a point on which the learned Judge decided in favour of the plaintiffs.

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It will be convenient to deal with this last point first. In my judgment the cause of action relied on by the plaintiffs did arise in Rangoon: they sued upon a contract of agency under which they were to perform the work to be done under such agency in Rangoon, and even if it is open to question whether the contract was made in Rangoon on the acceptance of the defendant firm's orders there, the case is amply met by clause (ii) of Explanation III to section 17 of the Code of Civil Procedure.

The question whether the Court had jurisdiction to entertain a suit against non-resident foreigners, even although the cause of action arose within the limits of the Court's jurisdiction, is a more difficult one.

The learned Judge based his decision mainly upon the judgment of their Lordships of the Privy Council in the case of *Gurdial Singh v. Raja of Faridkot* (1), and no doubt on first consideration, the basis of their Lordships' decision, and their remarks generally upon the source and extent of the jurisdiction of Courts, would appear to be of general applicability.

The case, however, was that of a suit upon a judgment of a foreign Court, and special considerations, not pertinent in a case such as the present one, arise in such a suit. They may be found commented on at length in Chapter XVI of Mr. Dicey's *Treatise on the Conflict of Laws*.

Since the decision in the *Faridkot* case a Bench of the Bombay High Court has considered the question which arises in the present case, and decided in *Rambhat v. Shanker Baswant* (2), which was not quoted to the learned Judge on the Original Side, that British Indian Courts have jurisdiction to entertain suits against foreigners residing out of British India, when the plaintiff's cause of action arises within their jurisdiction.

The arguments on which the decision of the learned Judges was based do not appear to be wholly convincing. In view of the enunciation of the law as to jurisdiction of Courts by their Lordships of the Privy Council in the *Faridkot* case, and of other statements of the extent of the powers of sovereignty by other Judges and commentators I have given as much consideration as I can to elucidating the question whether the decision of the learned Judges of the Bombay High Court is justified in law.

(1) (1894) I. L. R. 22 Cal. 222. | (2) (1901) I. L. R. 25 B. N. 528.

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Amongst other statements I allude to the following extract from Story's Conflict of Laws:—

"Section 539. No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions."

And the following extract from Lord Justice Cotton's judgment in *Whaley v. Busfield* (1):—

"Service out of the jurisdiction is an interference with the ordinary course of law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute a Court has no power to exercise jurisdiction over any one beyond its limits."

Undoubtedly, however, the Superior Courts in England exercise jurisdiction in certain cases even over foreigners not within their jurisdiction.

The illustrations commencing on page 249 of Dicey's Conflict of Laws refer to many cases in which such jurisdiction has been exercised in personal actions such as the present case is.

The foundation of such jurisdiction is statutory. Mr. Dicey in a note at page 370 of the above mentioned work says:—

"The jurisdiction of the Superior Courts of Common Law and of Equity depended substantially upon the King's writ being served upon the defendant. A writ could always be served on any defendant who was in England: and if some special cases be set aside in which the Court of Chancery allowed a writ of subpoena out of England, a writ could not be served on any defendant who was out of England. Hence the presence of a defendant in England was in effect the basis of the jurisdiction exerciseable by our Courts. It has only been in quite recent times that under statutory authority the service of a writ of summons out of England has been allowed, and the jurisdiction of the English Court's in actions *in personam* has been extended to defendants who are out of England."

The statutory authority under which such jurisdiction over absent foreign defendants is exercised is now, for the most part, that given by Order XI under the Judicature Acts. Rule 1 of that order enacts that "service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge whenever"—then follow several cases of which the only one which might be applicable to the present case if it had been instituted in an English Court is clause (e), which says: "Whenever the action is founded on any breach, or alleged breach within the jurisdiction, of any contract wherever made, which according to the terms thereof ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

It may be noted here that the exercise of jurisdiction when the defendant is not in England is by the terms of the order made discretionary. Mr. Dicey, at page 239 of this work, says:—

"When the defendant is in England the jurisdiction of the Court is not discretionary; the plaintiff has a right to demand that if it exists it shall be exercised. When the defendant is not in England, the jurisdiction of the Court is to a certain extent discretionary, for the Court may, if it see fit, in general decline to allow service or even the issue of the writ, and thus decline jurisdiction."

(1) (1886) L. R. 32 Ch. D. 123.

The case of *Moazzim Hossein Khan v. Raphael Robinson* (1) affords an instance of an English Court having entertained a suit against persons who were not at the time of suit within its jurisdiction, and having passed judgment against them by virtue of the authority conferred by the above clause of Order XI. It is also instructive as showing the manner in which the judgment of a Court outside of British India should be treated if sued upon in a Court in British India. The recent case of *Kassim Mamoojee v. Isuf Mahomet Sulliman* (2) also shows that a suit upon a foreign judgment must be dealt with according to the principles enunciated by their Lordships of the Privy Council in the *Faridkot* case. The first case, however, shows that a Superior Court in England exercised jurisdiction over non-residents within its jurisdiction by virtue of the authority given to it by domestic legislation, notwithstanding that it must have known that its judgment, if sued upon in a foreign Court, might be treated and rightly treated as a mere nullity according to the principles of international law. This, however, did not deter it from entertaining the suit. Similarly in the second case the Colonial Court entertained a suit against an absent defendant, and gave a decree which no doubt would have been enforced against the defendant if he had come within the jurisdiction of the Court, or against his property if he had property within that jurisdiction. It may be deduced from these cases and from the cases referred to in Mr. Dicey's work at pages 249, and 250 that Courts act on the authority given them by domestic legislation to exercise jurisdiction over absent foreigners, notwithstanding the fact that their judgments are liable to be treated as mere nullities by any foreign Court in which they happen to be sued upon.

If they exercise such jurisdiction and pass decrees against absent foreigners, it follows as a matter of course that such decrees would be and are held binding by the Courts of the territories in which they are given, and that they would be executed by such Courts against the property of the defendants in such territories, and against their persons if they happened to come within such territories.

These same Courts, however, when called upon to act upon judgments of foreign Courts deal with suits upon them according to the principles of international law. In any suit in a British Indian Court upon the judgment of a foreign Court there can be no question that the British Indian Court must follow the ruling of their Lordships of the Privy Council in the *Faridkot* case, but that ruling is only applicable to suits on foreign judgments, and in other suits British Indian Court must follow and act on the authority given them by the British Indian Legislature. The Code of Civil Procedure undoubtedly contemplates that the Courts to which it is applicable may entertain suits against absent foreigners. Chapter XXVIII makes provision for suits even against foreign Sovereigns, Princes, and Ruling Chiefs. Service of summonses out of British India is provided for by section 89 and section 90 of the Code, and every Court is empowered by section 17

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(1) (1901) I. L. R. 28 Cal. 641. | (2) (1902) I. L. R. 29 Cal. 509.

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to entertain a suit if the cause of action has arisen within the local limits of its jurisdiction. This power is not in any way restricted or confined to British subjects or to persons resident in British India.

Such being the case, and the exercise of jurisdiction over absent foreigners not being made discretionary as it is in England, I think that this Court is bound in the present case to exercise the power which domestic legislation has given it, notwithstanding that in a foreign Court any decree it may pass against the defendants may be regarded as a nullity.

I would therefore reverse the decree made by the learned Judge on the Original Side.

I find difficulty, however, as regards following the ordinary course, and directing a remand of the case under section 562 of the Code of Civil Procedure.

The plaint does not conform with either clause (b) or clause (c) of section 50 of the Code. The place of residence of plaintiffs is not given: this may be a matter of importance to foreign defendants if they should succeed in obtaining the dismissal of the suit on the merits.

A still more important defect is that no name of any defendant is entered, nor is any place of residence of any defendant given. There is as yet no provision in the Code permitting a suit to be instituted against persons in the style under which they trade together in partnership. No doubt some one has appeared to defend the suit, but there is nothing before the Court to show that that person is fully authorized to represent all the members of the defendant firm, or that all of the members of it have received notice of the suit, and that none of them have any wish to defend it on other grounds than those set forth in the written statement filed.

In my judgment the plaint should have been returned for amendment under clause (b) of section 53 of the Code before any summons was issued.

The fact that the plaintiffs were not aware of the names of the members of the defendant's firm was not sufficient reason for admitting a plaint which did not conform with essential requirements of the Code. It was for the plaintiffs to find out the names of the partners in the firm or the persons against whom they sought a decree before instituting their suit.

The Court cannot in any case give a decree against unknown persons constituting a firm.

I think the proper course to adopt is to direct that the plaint be returned for amendment under section 53 of the Code.

In view of my decision being in favour of the jurisdiction of the Court to entertain a suit by the plaintiff on their cause of action on a properly framed plaint, but being against the possibility of proceeding on the plaint as at present framed I would direct that each party bear their own costs of the hearings up to the present.

Thirekkl Whit, C.J.—I concur.

NGA WAN YE v. KING-EMPEROR.

Previous conviction, Proof of—Code of Criminal Procedure, section 511.

The filing of a certificate as the kind required by section 511 (b) of the Code of Criminal Procedure is not by itself proof of a previous conviction. The accused should be asked to plead to the previous conviction, and if necessary, evidence should be taken under the last clause of section 511.

Queen-Empress v. Nga Po Thei, 1 L. B. R. 8, referred to.

This appeal was admitted by Mr. Justice Irwin on the ground that the sentence passed was too severe as the previous convictions for offences coming under Chapter XVII were neither proved nor admitted. On the facts I think the accused was rightly convicted. At page 23 of the record there is the jail certificate of previous convictions which sets out six previous convictions, three of these were applicable under section 75 and the others not.

The accused was not asked to plead to his previous convictions. His plea was "not guilty" to the whole charge, in which the six convictions, three of them irrelevant, were set out. The certificate in question being signed by Jail Superintendent comes under clause (b) of section 511, Criminal Procedure Code, but it is clear from the concluding words of the section that unless the accused admits the correctness of the particulars set out in the certificate evidence of his identity with the person referred to in the certificate must be recorded.

In *Queen-Empress v. Nga Po Thei* (1) the late Chief Judge held that an accused person could not be asked questions concerning a previous conviction of which there was no evidence. In that case an extract from the village crime register was filed which does not meet the requirements of section 511, Criminal Procedure Code. Had the accused been asked to plead to the convictions set out in the certificate he might have admitted their correctness, in which case I think the evidence contemplated in the last clause of that section would not be necessary.

As the case stands I must hold that there is no proof of the previous conviction and the question remains whether the case should be sent back for proper proof. I am of opinion that in this case as the accused's leg was broken and he is related to the complainant, a sufficient sentence can be passed as if it were a first offence.

The conviction will be altered to one under section 457 alone and the sentence reduced to one year's rigorous imprisonment.

Before Mr. Justice Birks.

KING-EMPEROR v. NGA SHWE TUN.

Security—Indian Penal Code, section 506—Code of Criminal Procedure, sections 106, 123 (5).

The provisions of section 106, Code of Criminal Procedure, can only be applied in cases where a substantive sentence has been passed on conviction of one of the offences specified in the section.

Imprisonment in default of giving security under section 106 must be simple.

(1) 1 L. B. R. 8.

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Sureties are jointly and severally liable, and the bond should be expressed accordingly.

Crown v. Maung Naing, 1 L.B.R. 79, referred to.

Birks, J.—The accused, Shwe Tun, in this case was first tried by the District Magistrate of Northern Arakan under section 506, Penal Code. This offence is triable under the provisions of Chapter XXII of the Criminal Procedure Code, under section 260, clause (j). The District Magistrate passed a sentence of 18 months' rigorous imprisonment, which was illegal under clause 2 of section 262. On appeal to the Sessions Judge the conviction was set aside and a retrial ordered, the Sessions Judge remarking "it would seem to be a good plan to order accused to give security to keep the peace, in passing sentence upon him." In the second trial the District Magistrate convicted the accused under section 506, but passed no sentence upon him. He directed "that the said Shwe Tun do execute a bond for Rs. 50, and two sureties for a sum of Rs. 50 each, to keep the peace for one year, or in default one year's rigorous imprisonment under section 506, Indian Penal Code." There are several irregularities in this order. In the first place, section 106, Criminal Procedure Code, provides "that such Court may at the time of passing sentence on such person order him to execute a bond." It is clear from this that the Court must not only record a conviction but pass some "sentence" before the provisions of section 106, Criminal Procedure Code, become applicable. In the second place, the imprisonment to be awarded in default of furnishing the bond is prescribed in section 106, Criminal Procedure Code, and not in section 506, Penal Code. Section 106, Criminal Procedure, must also be read with clause 5 of section 123, Criminal Procedure Code, which states that "imprisonment for failure to give security for keeping the peace shall be simple." In the third place, the order appears to make each surety severally liable for the sum of Rs. 50. As pointed out in the *Crown v. Maung Naing* (1), the sureties are jointly and severally liable for the amount in which their principal is bound down. The order should read: "That the said Shwe Tun do execute a bond to keep the peace for one year with two sureties in the sum of Rs. 50, or in default do suffer one year's simple imprisonment." I concur with the Sessions Judge in thinking that this was a case in which a bond to keep the peace was desirable. It will, however, be necessary to call on the accused to show cause why some substantive sentence under section 506, Penal Code, should not be passed to legalize this order and this will now be done.

Civil
Miscellaneous
Appeal No. 108
of 1902.
March 10th,
1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.

MA SEIN HLA v. MAUNC SEIN HNAN.

Messrs. Eddis, Connell and Lentaing—for the appellant.

Buddhist Law—Inheritance—Illegitimate step-son.

¶ In the absence of legitimate children or step-children, a step-son though illegitimate may inherit from a step-mother to the exclusion of collateral heirs.

Maung Pyu v. Ma Chit, 2 U. B. R. (1892—96) 141; *Ka Yin O. v. Ma Gyi*, S. J. L. B. 15; *Ma Gun Bon v. Po Kywe*, 2 U. B. R. (1897—1901), 1; referred to.

Thirkell White, C. J.—The facts of this case are not now in dispute. Maung Po Hlut and Ma Min Tun were husband and wife. While this relationship existed, Po Hlut left his house and went to live with his mother. In his mother's house he contracted an intimacy with one Ma Thu Za, widow of his elder brother; but was never lawfully married to her. The result of this intimacy was the birth of the respondent, Sein Hnan, who was the illegitimate son of Po Hlut. After his birth, Po Hlut returned to his wife Ma Min Tun. Sein Hnan was acknowledged as his son and lived with Po Hlut and Ma Min Tun. Po Hlut died about eight years ago, leaving his widow Ma Min Tun, and a daughter born of Ma Min Tun in lawful wedlock. This daughter died some six years ago.

On the death of Ma Min Tun, Sein Hnan claimed to administer to her estate as her step-son. This claim was opposed by Ma Sein Hla, the present appellant, Ma Min Tun's first cousin.

The question is whether Sein Hnan has any right to inherit the whole or any part of the estate of the deceased Ma Min Tun. If he has no such right, he is not entitled to the letters of administration granted by the District Judge.

Illegitimate children are ordinarily excluded from the inheritance of their parents. This is the ordinary rule as laid down in many texts of the *Dhammathats* and rulings of the Courts. One case in which the question of the exclusion of illegitimate children has been discussed is that of *Maung Pyu v. Ma Chit* (1). But there is authority for the position that in the absence of legitimate children, illegitimate children are entitled to inherit. This was held in the case of *Ka Yin O v. Ma Gyi* (2). The ruling in that case does not seem ever to have questioned; and the rule laid down was cited with approval in the case of *Maung Pyu v. Ma Chit* (1) above cited.

Again, there is good authority for holding that step-children inherit from their step-parents to the exclusion of collateral heirs. This question was very fully discussed, in the light of all available authorities, in *Ma Gun Bon v. Po Kywe* (3), in which the right of step-children was affirmed. I have not discovered any ruling to the contrary, nor have I found any authority in the *Dhammathats* to indicate that this decision is not well-founded.

If therefore Po Hlut had died leaving no legitimate offspring, I think there is no doubt that the respondent, Sein Hnan, would have been entitled to share with Ma Min Tun in the inheritance of his estate. But it has been found that, on Po Hlut's death, he left not only a widow but also a legitimate daughter. This daughter excluded Sein Hnan entirely from the inheritance. On Po Hlut's death, his estate vested in Ma Min Tun and their daughter, Ma Shun We. This being so, the question arises whether Ma Shun We's death made any difference

(1) 2 U. B. R. (1892—96), *Buddhist Law—Inheritance*, p. 141. | (2) S. J. L. B. 15.
(3) 2 U. B. R. (1897—1901), *Buddhist Law—Inheritance*, p. 1.

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to Sein Hnan's position. It can hardly be contended that Sein Hnan succeeded to Ma Shun We's vested rights as her heir. There is so far, as I am aware, no authority for such an opinion. In the absence of heirs, Ma Shun We's rights disappeared and the estate remained absolutely in Ma Min Tun. But a step-son, as such, has a right of inheritance on the death of his step-parent. On the death of Ma Min Tun, the only direct descendant of either herself or her husband was Sein Hnan. Does the fact that he is illegitimate deprive him of the right to inherit which he would certainly have had if he was legitimate? I am disposed to think, not without some hesitation, that, on the principles laid down in the rulings which has been cited, Sein Hnan is entitled to be regarded as the step-son of Ma Min Tun, even though illegitimate, and to inherit as such. The principles seems to be that in the absence of legitimate children illegitimate children inherit to the exclusion of collaterals; and that step-children also exclude collaterals. Combining these two principles, I think that Sein Hnan's position on Ma Min Tun's death is the point for consideration and not his position on the death of Po Hlut. When Ma Min Tun died, the only person in direct descent from herself or her late husband was Sein Hnan; and in the absence of legitimate children or step-children, I think he was entitled to inherit her estate as a step-son.

In this view, I would dismiss this appeal with costs.

Fox, J.—I concur.

Special Civil
 Second Appeal
 No. 124 of
 1902.
 March 16th,
 1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
 Mr. Justice Fox.

MAUNG YA GYAW v. MA NGWÉ.

Limitation—Burden of proof—Limitation Act, Schedule 2, Articles 142 and 144—
 Settlement records and maps, Value of, as evidence—Separate ownership of land
 and of trees on land.

Settlement records and maps may properly be judicially received in evidence as
 correct at the time when they were made, unless there is evidence to the contrary.

Ownership of land, and ownership of property on the same land, are legally
 distinguishable.

Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi, I. L. R. 16 Cal. 473; *Faki Abdulla v. Babaji Gungaji*, I. L. R. 14 Bom. 458; *Mohesh Chunder Sen v. Fuggut Chunder Sen*, I. L. R. 5 Cal. 212; *Syam Lal Sahu v. Luchman Chowdhry*, I. L. R. 15 Cal. 353; and *Maharaja Jagadindra Nath Roy Bahadoor v. The Secretary of State for India*, 7 C. W. N. 193, referred to.

Fox, J.—The plaintiffs sued for possession of a small piece of land which they alleged to be part of holding No. 332 of 1899-1900 in Kado *kwinn*. They claimed the holding by virtue of ownership conveyed to them by Ma Kataw, who had bought it in 1896 from her mother Ma Bi, and who alleged that her mother and father had owned the land comprised in the holding for 40 or 50 years.

The plaintiffs alleged that the defendant was in possession of the small piece of land in dispute as a trespasser, but the plaint contains no statement as to when they or their predecessors in title had been dispossessed.

In view of the important questions which arise as to limitation, especially in suits for possession of land, Courts should insist that every plaint complies with clause (d) of section 50 of the Code, and contains a statement of when the cause of action arose. Insistence on strict compliance with all the provisions of that section tends to avoid confusion in the later stages of a suit.

The answer of the defendant to the suit was that the land sued for did not belong to the plaintiffs, but belonged to her, the defendant, and that it had been in her and her predecessor's possession for the past 50 years. On the pleadings it is impossible to say whether the suit was governed by Article 142 or by Article 144 of the first division of the second schedule to the Limitation Act. If the plaintiffs claimed on the ground that they and their predecessors had been in possession but had been dispossessed or had discontinued possession, the period from which limitation ran was the date of dispossession or discontinuance, and the burden was on the plaintiffs to show that they or their predecessors in title had been in possession within 12 years from the date of suit according to the ruling of their Lordships of the Privy Council in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1): whereas if the plaintiffs did not base their claim upon the fact of themselves or their predecessors in title ever having been in possession, but rested their claim upon title only, they would, according to the decision in *Faki Abdulla v. Babaji Gungaji* (2), be entitled to succeed, unless the defendant showed that she had held the land adversely for 12 years.

The Judge who settled the issues apparently treated the suit as falling under Article 144: the first issue was, "Had Ma Ngwè (the defendant) been in adverse possession 12 years or more when this suit was filed?" This appears to imply that he considered that the burden was on the defendant to prove the adverse possession. Turning, however, to the oral evidence, Ma Katakaw (the chief witness for the plaintiffs) says that her parents first, and she afterwards, owned the land comprised in the holding, and had been in possession of it for very many years up to about the year 1898, when the defendant suddenly put up a house on the piece of the holding now in dispute, and since then the defendant has been in possession. This shows that the case is really one of dispossession, and that it falls under Article 142 of the second schedule of the Limitation Act; and the ruling of their Lordships of the Privy Council in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1) applies. The plaintiffs then had to show title and possession by themselves or their predecessors within 12 years of the date of institution of the suit, which was the 15th October 1901.

If I did not think that the plaintiffs had offered evidence of title and of such possession sufficient (in the absence of any rebutting evidence) to justify a decree in their favour, I would be inclined to think that the proper course to adopt would be to frame a fresh issue, and

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(1) (1889) I. L. R. 16 Cal. 472. | (2) (1890) I. L. R. 14 Bom. 458.

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remand the case to the lower Courts for further evidence and decision since the first issue framed by the District Court was not calculated to raise the question on which the case must be decided, and the plaintiffs by reason of the wording of the issue may have been misled.

There is, however, evidence on the record which to my mind is sufficient to show their title and to satisfy the burden which was upon them to show possession of the land in dispute within the 12 years.

Ma Kataw said she had lived on the holding nearly all her life of 58 years. She says that her parents and latterly she herself owned it. She, however, admits that the defendant's parents bought from Maung Gale, who was a nephew of her father's, some trees on the land in dispute, and that those trees belonged to Maung Gale. She admits also that the defendant's parents used to collect the fruit of the trees for a large number of years. Those trees, however, are not still standing, and she says that after their disappearance, about six years previous to the suit, the defendant asked her leave to dry betel-nuts on the land in dispute, which leave was given. According to her no question as to the ownership of the land arose until after the disappearance of the trees, and the commencement of the drying of betel-nuts on the land. She alleges that the defendant first asserted a right to the land by building a house on it, and afterwards by planting a cocoanut tree on it about two years previous to the suit. Nothing turns upon the validity of the conveyances from Ma Bi to Ma Kataw and from the latter to the plaintiffs. In further proof of title a copy of entries in the settlement records was produced. The settlement was made, as stated by the Divisional Judge, in 1892-93, and as the result of the operations then conducted, the holding (then numbered No. 269) was entered as having been in Ma Bi and her husband Maung Hmôn's possession for 55 years. Further, a copy of the settlement map was produced, and this showed the holding as bounded by a road on the south, and the triangular strip in dispute in this case as included within it.

Upon these documents the Divisional Judge remarks that section 28 of the Burma Land and Revenue Act lays down that no person shall be deemed to have acquired any right to any land merely on the ground that a settlement of such land has been made on his application, and therefore in his opinion not much reliance could be placed upon the settlement map. In my judgment the Divisional Judge did not fully appreciate the weight which should be given to settlement maps.

As I understand the operations conducted during the "settlement" of a district, they are not confined to making a settlement of the land-revenue to be paid by holders of land with the Government.

The officers conducting the operations are appointed either "Demarcation Officers" or "Boundary Officers" under the Burma Boundaries Act, and they proceed, under that Act, to ascertain and determine the boundaries of every holding, and for this purpose the notices provided for by the Act are issued to all persons concerned.

In the course of their enquiries the officers necessarily enquire into who is in possession of particular lands, and length of possession is

recorded. If there is any dispute as to boundaries, the Boundary Officer fixes the boundary, and his decision, subject to the appeal allowed by the Act, is conclusive under section 17 of the Act.

The boundaries so fixed are, I understand, those entered in the settlement map.

Therefore in the present case it must be conclusively taken that the triangular strip in dispute is a part of the holding, the boundaries of which were finally determined by the Boundary Officer in 1892-93.

A settlement or survey map is important in other respects.

A number of cases collected in the notes to section 30 of Ameer Ali and Woodroffe's Commentary on the Indian Evidence Act show that even in provinces where Government surveys have been conducted without legislative authority, weight is given to the maps prepared on survey by Government officers both as evidence of possession and as evidence of title. The evidence afforded by them as regards either possession or title is not conclusive, but as evidence of possession at a particular time, a survey has been said to be cogent evidence, *see Mohesh Chunder Sen v. Juggut Chunder Sen* (1), and in *Syam Lal Sahu v. Luchman Chowdhry* (2) it was held that "a survey map is evidence of possession at a particular time, the time at which the survey was made." In the same case the learned Judges said: "We are not prepared to say that in no case can the evidence of survey maps be sufficient evidence of title. Each case must be decided on its own merits."

In the very recent case of *Maharaja Jagadindra Nath Roy Bahadur v. The Secretary of State for India in Council* (3), their Lordships of the Privy Council say:—

"Maps and surveys made in India are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made."

In this province, where survey maps are prepared under legislative authority, it appears to me that in the absence of evidence proving the contrary it should be taken that the persons entered as holders were in possession of the land included within the boundaries of a holding shown on the map at the time of the settlement, and also that being in possession it must be presumed under section 100 of the Evidence Act that a person entered as holder was the owner of the holding at the time. In the present case there was no evidence at all on behalf of the defendant, consequently in my judgment the plaintiffs by the evidence which they put forward satisfied the burden which was on them under the ruling of their Lordships of the Privy Council previously referred to, both as regards title and possession of their predecessors in title within 12 years of the institution of the suit. Their title was strengthened by the production of a certificate of landholdership issued to Ma Kataw in 1898. This no doubt was not conclusive as to title, because it was made less than five years previous to the suit, but

(1) (1880) I. L. R. 5 Cal. 212.

(2) (1888) I. L. R. 15 Cal. 353.

(3) (1902) 7 C. W. N. 193.

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here again I think it must be presumed until the contrary is proved that such certificate represented actual facts ascertained after due enquiry.

There remain to be considered the admissions made by Ma Kataw as to the defendant's predecessors having owned trees on the disputed piece of land for many years, although they did not own the land. There is nothing opposed to law in the ownership of things on land not being in the owner of the land itself.

Proof of a custom to uphold such separate ownership is not required by any provision of law. I take it that such separate ownership would in most cases arise from grant or license from the owner of the land. The Divisional Judge appears to me to have misapprehended the basis on which the District Judge bases his decision as to separate ownership in the present case. As I understand the latter's judgment, he based his decision on Ma Kataw's evidence, and as a reason for believing her on this point he referred to there being evidence of similar instances of separation of ownership in the locality. He uses the word "custom" no doubt, but I do not understand that he rested his decision on the point upon a custom have been proved.

In my judgment the decree of the District Court was correct. I would reverse the decree of the Divisional Court and restore that of the District Court, and order the defendant to pay the plaintiff's costs throughout in all Courts.

Thirkell White, C. J.—I concur.

Criminal Revision
 No. 306 of
 1903.
 March 23rd.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr. Justice Fox and Mr. Justice Birks.

KING-EMPEROR v. NGA THU DAW AND FOUR OTHERS.

Gambling Act, sections 3 (a), 5, 10—Village headman arresting gamblers—Coin as instrument of gaming.

A village headman is not empowered to arrest people whom he finds gambling in a public place, nor can the police take cognizance of such a case on a headman's report.

Queen-Empress v. Shwe Te, S. J. L. B. 281; *Queen-Empress v. Po Nyun*, P. J. L. B. 547; *Crown v. Nga Po Hlaing*, 1 L. B. R. 65; referred to.

Coins found on the persons of gamblers are not necessarily instruments of gaming.

Illegality in making an arrest does not necessarily invalidate a trial.

Queen-Empress v. Nga Su, 1 U. B. R. (1897—01), 211; *Queen-Empress v. Taw Aung*, P. J. L. B. 369; referred to.

Thirkell White, C. J.—In this case, the accused were arrested by a village headman, who found them gaming in a public place. Section 5 of the Burma Gambling Act empowers a Police Officer to arrest persons whom he finds playing for money with any instrument of gaming in a public place. It does not seem to me that a village headman is a Police Officer. Under section 22 of the Lower Burma Village Act, the Local Government may confer on headmen any powers which may be exercised by Police Officers under any enactment in force in Lower Burma; and doubtless under this section the Local Government could confer on headmen the power of making arrests under section 5 of the Gambling Act. But this does not seem

to have been done. The rule which has been made by the Local Government (Judicial Department Notification No. 337, dated 26th November 1895) (1) empowers every headman to arrest any person liable to be arrested by a Police Officer in the circumstances mentioned in section 54 of the Code of Criminal Procedure. But that section does not authorize the arrest of persons who gamble in a public place. To this end, there is special provision in special circumstances in the Burma Gambling Act. I am therefore of opinion that the arrest of the accused in this case was illegal, and that the action of the Police in taking cognizance of the alleged offence on the headman's report was also illegal. The proper course for the headman to pursue was to note down the names of the gamblers and to prefer a complaint to the Magistrate.

On the persons of two of the accused were found coins to the value of Rs. 27-2-3. These coins were not used for the purpose of gaming, for the game was a game with cards. As the arrest was illegal, it follows that the seizure of the money was illegal and the order of confiscation was also illegal. For in the case of a conviction under section 10, clause (a), of the Gambling Act, it is only instruments of gaming seized under section 5 that can be destroyed or forfeited. As these coins were illegally seized by the headman and not by a Police Officer under section 5, the order of forfeiture was illegal.

But even if the arrest had been duly made under section 5 of the Gambling Act, it seems to me that the seizure of the money on the persons of the gamblers would not have been justified. The District Magistrate has cited the case of *Queen-Empress v. Shwe Te* (2) in support of that view. But that ruling was under the old Gaming Act and probably does not apply. The ruling which does apply is that of the Judicial Commissioner in *Queen-Empress v. Po Nyun* (3) in which it was said: "Coins are now instruments of gaming under section 3, sub-section (a), and under section 15 (2) they can be seized and forfeited even in prosecutions under section 10 (a)."

I do not think this ruling means that coins are in all circumstances "instruments of gaming" and liable to confiscation. It seems to me that the meaning of the definition in section 3, sub-section (3), clause (a), of the Gambling Act, is that coins are instruments of gaming when they are actually used for the purpose of gaming. Thus in the common game of pitch and toss, coins are instruments of gaming; and so would they be if they were used as counters; and probably if they were actually staked on a roulette table. But to hold that every coin in any circumstances is an instrument of gaming and that any one who carries a rupee in his pocket is carrying an instrument of gaming seems to me to involve an absurdity. One result of such a conclusion would be that if a house were entered under the provisions of section 6 of the Gambling Act and if any money was found in the house or on the person of any one in the house, though no other instrument of gaming was found, the Magistrate would be bound to draw the presumption described in section 7, and to throw on the accused the burden of

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(1) Lower Burma Village Manual, 32. | (2) S. J. L. B. 281.

(3) P. J. L. B. 547.

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proving that the house was not a common gaming house. In my opinion, coins are not necessarily instruments of gaming but may be so in certain conditions. And I think that coins found in the possession of a person arrested under section 5 of the Gambling Act are not liable to seizure and forfeiture unless there is evidence to show that they were used or intended to be used for the purpose of gaming.

I would therefore set aside the order of confiscation or forfeiture and direct the return of the forfeited money to the persons in whose possession it was found.

The fact that the arrest was illegal does not seem to me to invalidate the trial. The accused have their remedy for the illegal arrest. But having the accused before him the Magistrate's procedure in trying them was not incorrect. This view has been taken in Upper Burma in *Queen-Empress v. Nga Su* (1) and there is an analogous ruling in Lower Burma in *Queen-Empress v. Taw Aung* (2). The accused admitted the commission of the offence and have been, I think, rightly convicted. The fines appear to me to be excessive. I would reduce them to Rs. 5 on each of the accused and direct the refund of the excess.

As the headman behaved in an unlawful manner I do not think that he should be rewarded. I would therefore set aside the order granting him a reward. In any case, the reward was excessive.

Birks, J.—I concur with the learned Chief Judge in holding that the village headman is not a Police Officer within the meaning of section 5 of the Burma Gambling Act. There is a further authority for this view in a decision of a Bench of this Court, in *Crown v. Nga Po Hlaing* (3). It was there pointed out that "the Government appears intentionally to have avoided calling the *Ywathugyi* or village headman appointed under the Act of 1889 a Police Officer," and Mr. Hosking's opinion (4), that a confession made to a *Ywathugyi* was inadmissible, was overruled. I also concur with the learned Chief Judge in holding that money found on the persons of gamblers is not liable to seizure merely because "coins" are defined in section 3 (3) (a) as instruments of gaming. In the case of *Queen-Empress v. Nga Po Nyun* it would appear that the few coins confiscated, six annas in all, were used as stakes; at least they were so described by the District Magistrate of Thongwa. I certainly never intended to hold that in all cases the money found on the persons of gamblers is liable to confiscation. I think that sums actually staked on a mat or roulette table would come within the definition of instruments of gaming as the coins would then be appropriated to the specific purpose of gaming. If persons choose to stake the actual coins, when counters would do as well, they cannot be surprised if coins used in this way are considered as instruments of gaming and liable to confiscation as the counters certainly would be. With these few remarks I concur in the judgment of the learned Chief Judge and in the orders proposed.

Fox, J.—I concur in the views of my learned colleagues and in the orders proposed.

(1) 1 U. B. R. (1897-01) 211
 (3) 1 L. B. R. 65.

(2) P. J. L. B. 369.
 (4) P. J. L. B. 22.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.

Criminal Appeal
No. 70 of 1903.
March 23rd.

Ref: to L. 14R716, (1937) K384
HAMID v. KING-EMPEROR.

The Government Advocate—for the Crown.

Murder—Stabbing in vital part—Intention—Indian Penal Code, section 300 (3)—
Sentence of death—Practice.

The accused inflicted a stab with a sharp-pointed weapon, which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum.

Held, that such acts fall *prima facie* within the third clause of section 300, Indian Penal Code.

Ma Ni v. Queen-Empress, S. J. L. B. 300, partly dissented from.

Nga Po Aung v. Queen-Empress, S. J. L. B. 459, referred to.

The judgment in *Crown v. Nga Tha Sin*, 1 L. B. R. 216, must not be understood as fettering Sessions Judges in the reasonable exercise of the discretion vested in them by law in awarding the capital sentence.

Fox, J.—Upon the facts there cannot, in my opinion, be the least doubt that the appellant caused the death of Ma Be. She gave the name of "Hamid" as the name of the man who had struck her immediately after she was struck. The accused was the Hamid with whom she was acquainted, and whom she had seen previously on the day of the occurrence. To one witness she subsequently gave the name of the father of the Hamid she referred to, and to another she gave the name of his sister.

The evidence given by the witnesses for the defence to prove an *alibi* carries no weight.

The Additional Sessions Judge had some hesitation in convicting the accused of murder, and doubted whether a death sentence should be passed.

There need not have been any such hesitation or doubt.

The accused inflicted a stab with a sharp-pointed weapon, which entered the upper part of the deceased's stomach, causing rupture of the peritoneum and of the stomach.

Common knowledge and experience tell us that any cut into the peritoneum and stomach is sufficient, in the ordinary course of nature, to cause death unless done by a skilful surgeon under safeguards discovered during comparatively recent years. The fact that persons have, under medical treatment, or even without medical treatment, recovered from wounds in the stomach affords no ground for holding that a stab in the stomach is not sufficient in the ordinary course of nature to cause death.

Of the cases referred to by the Additional Sessions Judge I should be prepared to dissent from the ruling in *Mi Ni v. Queen-Empress* (1) in so far as it was held that the act of a person who stabs another with a knife in such a manner that the knife penetrates the cavity of the chest of the person stabbed, does not fall within the first three clauses of section 300 of the Indian Penal Code.

It appears to me that such an act and any act of stabbing into what are ordinarily considered to be vital parts of the body *prima facie* fall within the third clause of the section.

(1) S. J. L. B. 300.

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The intention with which such an act is done must be gathered from the act itself, and if a person strikes another in a vital part with a cutting instrument, it must be held that the striker's intention was to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. Illustration (c) to the section bears out this view. The fourth clause of the section contemplates a different class of cases, an illustration of which is given in illustration (d).

In my opinion the accused was rightly convicted of murder, and there can be no doubt that a death sentence is called for. The Additional Sessions Judge's doubt appears to be founded on the decision in *Nga Po Aung v. Queen-Empress* (1), in which it was held that where an accused was convicted of murder only by reason of his case coming under clause 4 of section 300 of the Indian Penal Code, a sentence of death is not called for. As it appears to me that the present case falls under the third clause of the section, I do not think it necessary to discuss the correctness of that decision.

The Additional Sessions Judge passed sentence of death because he read the recent decision of this Court in the *Crown v. Nga Tha Sin* as indicating that Judges of Sessions Courts should not exercise free discretion in passing or refraining from passing a sentence of death in cases in which its propriety appears to them doubtful.

This interpretation of the ruling is not warranted by anything in the judgments of any of the Judges composing the Bench.

It is true that attention was drawn to the fact that on a conviction for murder a sentence of death is the normal sentence contemplated by the Legislature, and to justify a lesser sentence, there must be extenuating circumstances in the case, and Mr. Justice Irwin said that when a Sessions Judge has any doubt whether a sentence of death should be passed or not, he should pass sentence of death. This, however, must be read with what follows in his judgment, and the learned Judge's remarks do not go the length that the Additional Sessions Judge seems to consider they do.

I do not think there are any extenuating circumstances whatever in the present case, and accordingly I would dismiss the appeal and confirm the death sentence upon the appellant.

Thirkell White, C. J.—I concur in the judgment of my learned colleague and have only a few remarks to make on the judgment in the cases of *Tha Sin* (2), to which reference has been made. The main point in that ruling is that, when an accused person is convicted of murder, it is the duty of the Court to pass sentence of death unless there are reasons for not doing so. The extreme sentence, it was said, was the normal sentence; the mitigated sentence the exception. At the same time, advantage was taken of the opportunity to point out that absence of premeditation was not necessarily by itself a sufficient reason for not passing sentence of death.

While concurring in the judgment of the Bench, Irwin, J., observed that it was a natural corollary that, if a Sessions Judge is in doubt as to whether a sentence of death or one of transportation should be passed,

he should pass sentence of death. It was not suggested that, if a Sessions Judge considered that there were good reasons for not passing sentence of death, he should not exercise the discretion vested in him by law. It was only in cases in which the Judge might be in doubt which sentence to pass that the passing of the extreme sentence was pointed out as a necessary consequence of the Full Bench Ruling. In the exercise of its discretion, the Sessions Court is bound to be guided by the decisions of the Superior Courts as to the circumstances which may reasonably be taken into consideration. But there was no intention of fettering the free exercise of that discretion within judicial limits.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Fox and Mr. Justice Birks.

KING-EMPEROR v. BA HAN.

Criminal Procedure Code, section 562—Interpretation of.

In order to enable a Court to exercise the power conferred by section 562 of the Code of Criminal Procedure, it is not necessary that the offender should be young, that the offence should be trivial, and that there should be extenuating circumstances. The mention of these conditions and of the character and antecedents of the offender merely indicates generally considerations with regard to which the discretion of the Court should be exercised in dealing with first offenders who are convicted of any of the offences specified in the section.

Queen-Empress v. Nga Po Hman, 1 L. B. R. 41, overruled.

Queen-Empress v. Nga San Chein, 1 U. B. R. (1897—01), 137, dissented from.

The following reference was made to the Full Bench by Sir Herbert Thirkell White, K.C.I.E., Chief Judge:—

Thirkell White, C. J.—The accused Ba Han has been convicted of theft of a watch and chain and has been sentenced to receive 30 lashes.

On the whole I fail to see that there is any sufficient reason for interference in this case on the merits. The case is not one in which an appeal is allowed, and on the facts I should not interfere unless I was satisfied that the evidence had not been properly considered or that the finding was otherwise unreasonable or perverse.

It is further urged that the sentence is excessive and that the accused should have been dealt with under section 562, Code of Criminal Procedure, as a first offender. The difficulty I find in applying that section to the present case is that, in the ruling in the case of the *Queen-Empress v. Po Hman* (1) it has been laid down that the Court must give regard to all the points specified in the section and that, in order that a case may be dealt with under the section, the offender must be young and the offence must be one of a trivial nature. A similar view was taken in Upper Burma in the case of the *Queen-Empress v. San Chein* (2). In view of the wording of the section, I am not entirely satisfied as to the correctness of these rulings. It seems to me open to argument whether it is necessary that all the

(1) 1 L. B. R. 41.

(2) 1 U. B. R. (1897—01), 137.

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conditions recited in the section should exist before the offender can be released on probation of good conduct.

I therefore refer to a Full Bench, under section 11 of the Lower Burma Courts Act, the following question of law :—

Must all the specified conditions, namely, the youth of the offender, the trivial nature of the offence, and extenuating circumstances under which the offence was committed, co-exist in order to give a Court power under section 562, Code of Criminal Procedure, to release an offender on probation of good conduct ?

The opinion of the Bench was as follows :—

Thirkell White, C.J.—The question for decision in this case is whether, in order that section 562 of the Code of Criminal Procedure may be applied, it is necessary that the offender should be young, that the offence should be of a trivial nature, and that there should be extenuating circumstances. That this is the meaning of the section has been held in the cases cited in the order of the reference. We have been assisted in the consideration of the question by the arguments of the learned Counsel who have appeared for the Crown and for the accused respectively.

The view suggested by the learned Assistant Government Advocate is that, in order to give a Court jurisdiction to release an offender under section 562, Code of Criminal Procedure, there must co-exist two conditions precedent; there must be no previous conviction proved and the offence must be one of those specified in the section. If those conditions are fulfilled, the Court has jurisdiction, in the exercise of its discretion, to act under the section. But in exercising its discretion, the Court must have regard to the points specified in the section, namely, to the youth, character, and antecedents of the offender to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed. It is argued that the intention of the Legislature is not to make it essential that the offender must be young, that the offence must be trivial, and that there must be extenuating circumstances, but merely to indicate the lines on which the discretion of the Court should be exercised.

In my opinion this is the correct view and I think that the opinion which I expressed in a former case is incorrect. As was pointed out in argument, it would be difficult, if not impossible, to construe the section as applying merely to youthful offenders, because there is no definition of "youth." It can hardly be held that the section applies only to youthful offenders as defined for instance in the Reformatory Schools Act, or to juvenile offenders as defined in the Whipping Act. In the former case, there is already sufficient provision for release without sentence in section 31 of the Reformatory Schools Act. But if the section does not apply exclusively to youthful offenders of these classes, what is the limit of age for the purpose of the section? Again, regard must be had to the character and antecedents of the accused. But these terms seem to be applicable rather to persons of mature years than to youths. The heading of the part in which the section occurs indicates that the limitations suggested do not apply. The heading is

"First Offenders." Whereas, if the intention of the legislature had been that only youthful offenders, convicted of trivial offences under extenuating circumstances, should be released on probation, it is probable that the intention would have been expressed in the heading. It is also pointed out that the section closely follows the wording of section 1, sub-section (1) of the Probation of First Offenders Act, 1887 (50 and 51, Vict., Chapter 25); and that the preamble of that Statute declares that "it is expedient to make provision for cases where the reformation of persons convicted of first offences may, by reason of the offender's youth, or the trivial nature of the offence, be brought about without imprisonment." If a reference to this Statute is a lawful aid to the interpretation of the section under consideration, the wording of this preamble seems to afford strong support for the liberal construction for which both the Crown and the accused contend. It is also clear that if the earlier rulings are to be followed, the section is likely to be of little practical utility.

The only point which can be urged against the proposed construction is that the conjunction "and" is used instead of "or." But apart from the fact that there are many cases in which "and" and "or" have been regarded as interchangeable looking at the wording of the section and taking the view that the passage under discussion is merely directory, I do not think that even a literal construction of the text necessitates the more limited interpretation of the earlier rulings.

I would therefore answer the question referred in the negative.

Fox, J.—I concur.

Birks, J.—I concur.

The final order was passed by—

Thirkell White, C.J.—The Full Bench reply to the reference in this case having placed a liberal interpretation on section 562, Code of Criminal Procedure, I think that the case is one to which that section may properly be applied. The accused is a young schoolboy, though the offence cannot be regarded as trivial.

I reverse the order of whipping and direct that the accused Ba Han be released on his entering into a bond, with two sureties, in the sum of Rs. 50, for one year, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Fox and Mr. Justice Birks.*

P. SAMUEL v. ANNAH NATHANIEL *alias* AVARENJI AND ONE.

Marriage, Dissolution of—Indian Divorce Act, section 17 (1st clause)—Section 12—Section 14.

An application for confirmation of a decree for dissolution of marriage is not necessary in order to enable the High Court to take action under section 17, Indian Divorce Act.

A decree for dissolution of marriage cannot be passed without enquiry into, and evidence to prove the facts alleged by the petitioner.

Simmonds v. Simmonds and another, Civil Reference No. 2 of 1890; *Powell v. Powell and another*, Civil Reference No. 2 of 1898; *Culley v. Culley*, I. L. R. 10 All. 559, and *Bai Kanku v. Shiva Toya*, I. L. R. 17 Bom. 624, referred to.

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*Civil Reference
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Thirkell White, C.J.—This case comes before the Court for confirmation, under section 17 of the Indian Divorce Act, of the decree for the dissolution of a marriage made by the Judge of the Divisional Court of Minbu exercising the jurisdiction of a District Judge under that Act.

There has been no appearance on behalf of the petitioner, but an application purporting to be from him has been submitted through the District Judge praying that the decree may be confirmed. The procedure of the Courts under the Divorce Act, as provided by section 45, is regulated by the Code of Civil Procedure. In view of the provisions of section 36 of that Code, this application must be made by the party in person, his recognised agent, or his pleader. I do not think therefore that we can accept or act on this application which cannot be said to have been duly made.

The first question, therefore, is whether this Court can or should confirm the decree for dissolution in the absence of an application to that end. There does not seem to be any precedent to show what has been the practice of this Court in this matter. In the late Special Court, two cases have been shown in which, apparently, the practice was divergent. In *Simmonds v. Simmonds, and Sheen* (1), which was a reference by the Recorder of Rangoon under section 17 of the Divorce Act, it was ordered that, as no one appeared to have the decree *nisi* made absolute, the petition should be dismissed. In *Powell v. Powell and Mathers* (2), which was a reference by the District Judge of Meiktila, although there is nothing to show that any appearance or application was made, the decree *nisi* was confirmed.

These cases are precisely similar, as the Recorder of Rangoon was a District Judge under the Divorce Act, and not a High Court. With all respect to the learned Judges of the Special Court, it must be observed that the procedure adopted in the earlier of the two cases cited above appears to be that of a High Court dealing with its own decree *nisi* under section 16 of the Act. It may also be observed that, in strict nomenclature, it is a decree passed by the High Court which is a decree *nisi* requiring to be made absolute. A decree for dissolution made by a District Judge is not described in the Divorce Act as a decree *nisi*; and it requires to be confirmed by the High Court, not to be made absolute.

Now there is no doubt that, in respect of a decree *nisi* made by a High Court, it is the practice for the petitioner to move to have the decree made absolute; and if he fails to do so within a reasonable time, section 16 of the Divorce Act empowers the High Court to dismiss the suit. Probably the effect of this section is that there must be an application before the decree can be made absolute.

As regards the decree of a District Judge, there is nothing in section 17 of the Divorce Act, corresponding with the last paragraph of section 16, requiring any application to be made, or declaring the result of a failure to make application within a reasonable time. In the case of *Culley v. Culley* (3), however, it was held by a Bench of three

(1) Civil Reference No. 2 of 1890. | (2) Civil Reference No. 2 of 1898.
 (3) (1888) I. L. R. 10 All. 559.

Judges of the High Court at Allahabad that, when the petitioner and respondent joined in an application that the decree of a District Judge should not be confirmed, the High Court should desist from confirming the decree. It was not necessary for the determination of that somewhat exceptional case to decide whether the Court had power to confirm a decree of a District Judge without any application for confirmation being made. But the opinion that such an application was necessary under section 17 of the Divorce Act was indicated in the judgment of Edge, C.J., in which Brodhurst, J., concurred. This opinion seems to have been based mainly on the ground that if an application was necessary in the case of a decree of a High Court, *a fortiori* it must be necessary in the case of a decree of a District Judge.

It seems to me very doubtful whether an application is necessary under section 17 of the Divorce Act. If it had been the intention that the same procedure should be observed in cases under that section as in cases under section 16, it is likely that the Legislature would have enacted in section 17 a provision similar to that in the last paragraph of section 16. The fact that such a provision does not exist seems to indicate that an application for confirmation is not necessary and that the High Court can deal with the decree of a District Judge on the materials on the record, or after such further enquiry or additional evidence as it may require. It is quite possible that the distinction in this respect between section 16 and section 17 may be due to some such considerations as these. When a suit for dissolution of marriage has been tried in the High Court, the application for making absolute a decree *nisi* is a mere continuation of proceedings already taken in the same Court and in practice no inconvenience is likely to be caused to the petitioner in requiring him to make the application or cause it to be made. But in the case of a suit tried in a District Court, possibly at a long distance from the seat of the High Court, it may be a distinct hardship to a petitioner to have to put in a formal application before the High Court. Again, in the case of a decree *nisi*, unless there is opposition, the High Court makes the decree absolute as a matter of course on application. In the case of a decree of a District Judge, the High Court reviews the proceedings and passes orders on the merits. There is therefore no particular object in having a formal application before it. I would therefore hold, in accordance with what seems to have been the more recent practice of the late Special Court, that an application for confirmation is not necessary in order to enable this Court to dispose of cases under section 17 of the Divorce Act. There is nothing in this position to prevent the Court from acting as the Court acted in *Culley v. Culley* (1) and abstaining from confirming a decree when there is an application from the petitioner praying that the decree may not be confirmed.

As regards the merits of this case, I concur in the opinion of Mr. Justice Fox, whose judgment I have had the opportunity of reading, that the case should be remanded to the District Court for further enquiry. The result of the further enquiry and the additional evidence

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recorded should be certified to this Court in accordance with the provisions of section 17 of the Divorce Act.

Fox, J.—I agree in thinking that no application by the petitioner for divorce is required in order to enable this Court to consider whether the decree of the District Court should be confirmed.

The decree in this case cannot, in my opinion, be confirmed upon the District Court's record as it stands, because no evidence has been taken in the case. Section 14 of the Indian Divorce Act enacts that "in case the Court is satisfied *on the evidence* that the case of the petitioner has been proved, * * * the Court shall pronounce a decree," &c. In *Bai Kanku v. Shiva Toya* (1), a Full Bench of the Bombay High Court pointed out in a case similar to the present that it was impossible to confirm the decree of the District Court without violating the principles applied by the Courts to protect the bond of marriage.

The procedure in matrimonial suits under the Indian Divorce Act differs in some respects from procedure in other suits. Section 12 of the Act casts a duty upon the Court itself to inquire into the facts alleged in the petition, and into whether there has been collusion, or connivance, or condonation, and into any counter-charge against the petitioner. The proviso to section 14 also indicates matters which should be the subject of inquiry if there is any reason to think that they arise in the case.

In my opinion the case should be sent back to the District Court for further enquiry and evidence.

Birks, J.—I concur.

Criminal Revision
 No. 230 of 1903.
 April 1st,
 1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

NAGORE MEERA v. THE RANGOON MUNICIPALITY.

Mr. T. A. Bland—for the appellant.

Burma Municipal Act, 1898, sections 133 (1), 160—Construction of terms.

The accused, who used a house as a depôt for the storage of deal boxes, was convicted under section 160 of the Burma Municipal Act for storing wood without registration or license as required by section 133 (1) of the Act.

Held,—that the word "wood" as used in section 133 includes wood in the form of boxes, and is not to be restricted to the sense of "firewood" or wood in an unmanufactured state.

The accused, Nagore Meera, was convicted under section 105 read with section 180 of the Burma Municipal Act of disobeying a lawful direction given by the Municipal Committee of Rangoon under section 105 of the Act in respect of the stacking of deal-wood boxes within a prohibited area. The Honorary Magistrates who tried the case found that the accused's house was stacked with deal-wood boxes, in fact that it was a sort of depôt. On appeal the District Magistrate altered the conviction to one under section 160 of the Municipal Act for using the house as a depôt for wood without license or registration under section 133 of the Act. This application for revision is based

on the ground that the keeping of a stock of deal-wood boxes does not amount to the using of a place as a depôt for trade in wood and is therefore not within the scope of section 133.

Under the head of dangerous trades, section 133 of the Municipal Act prohibits the using of any place within the Municipality as, among other uses, a yard or depôt for trade in hay, straw, thatching grass, wood or coal, or other dangerously inflammable material, except under certain specified conditions of registration or license.

In support of the application, it is argued that in the section under reference "wood" means "firewood," and that the word "depôt" has a distinct meaning and would not apply to the place in question which is said to be a small shop. Reference has also been made to the doctrine of *ejusdem generis* and, as I understand, it is suggested that the word "wood" as used in the section must be interpreted in relation to the other words with which it is associated therein.

It seems to me, on the facts as found by the Magistrates, that a place where deal-wood boxes are stacked for the purpose of trade is a depôt for trade in such boxes. I do not know what other meaning can be assigned to the word, in this sense, than that of a place for deposit. The only question of any difficulty seems to be whether the word "wood" means wood in bulk in a raw or unmanufactured state or whether it includes also articles made of wood. I cannot accept the suggestion that it means specifically firewood. If that had been the intention, it would have been simple to use that word. The section must be interpreted and the word "wood" construed so as to give effect to what seems to be the intention of the Legislature. If the section is construed literally, the offence of which the accused has been convicted appears to be established. For the storage of deal-wood boxes certainly involves the storage of the material of which they are constructed, that is, of wood, even though other materials, such as tin-linings and nails, are also used in their manufacture. Is there any reason to suppose that the Legislature intended to limit the use of the word to "wood" in its natural state and to exclude wood made up into wooden articles? What the Legislature intended to provide against was the storage of dangerously inflammable materials, save under conditions to be imposed by the Municipal Committee; and it was careful to specify wood as one species of dangerously inflammable material. It can hardly be held that the conversion of deal-wood into the shape of boxes renders it less inflammable. A pile of deal-wood boxes, it may reasonably be said, would burn as readily as a stack of firewood or a pile of deal-wood planks. It seems to me that there are insuperable difficulties in the way of holding that any special kind or class of wood, or wood in any particular shape or form, was within the danger against which it was intended to guard. I think that the section is intended to prohibit the storage for trade purposes of wood in an inflammable condition; and that it is immaterial whether it is in a manufactured or unmanufactured shape.

In my opinion the view taken by the District Magistrate is correct and this conviction ought to be sustained. I therefore dismiss this application.

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Criminal Reference
No. 3 of
1903.
April 5th.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr. Justice Fox and Mr. Justice Birks.

KING-EMPEROR v. NGA PO THIN. *Ref: 6th in*

The Government Advocate—for the appellant. *11 L.B.R. 52*

“Committal to prison” in default of giving security—Section 123, Code of Criminal Procedure—“Sentence of imprisonment”—Sections 396 and 397.

The word “sentence” in section 396 or section 397, Code of Criminal Procedure, does not include an order of committal or detention under section 123, Code of Criminal Procedure.

Queen-Empress v. Diwan Chand, (1895) P. R. Cr. No. 14; *Queen-Empress v. Tulshya Bahiru*, (1898) Ratanlal, p. 970; *Queen-Empress v. Shwe Byo*, S. J. L. B. 364; followed. *Queen-Empress v. Nga Kyon*, 1 L. B. R. 14, referred to. *Queen-Empress v. Pandu Khandu*, (1898) Ratanlal, p. 774, dissented from.

The following reference was made to the Full Bench by Sir Herbert Thirkell White, K.C.I.E., Chief Judge:—

Thirkell White, C. J.—The accused, Po Thin, was called upon to furnish security for his good behaviour, under section 118, Code of Criminal Procedure. The order is said to be dated 29th August 1902. On 17th September 1902, he was convicted of escaping from lawful custody and sentenced under section 225B, Indian Penal Code, to suffer rigorous imprisonment for four months. The Magistrate ordered, but did not enter on the warrant, that this sentence should commence “at the expiration of the other.”

The case has been brought to the notice of this Court at the instance of the Local Government because it is doubted whether the Magistrate’s order postponing the sentence is one which can legally be passed; and it is further suggested that, if the sentence under section 225B, Indian Penal Code, must take effect from the date on which it was passed, it should be enhanced.

I have been much assisted by the argument of the learned Assistant Government Advocate, who argued the case on behalf of the Crown.

Section 397 of the Code of Criminal Procedure directs that when a person already-undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced. The question for decision is whether imprisonment for failing to give security is a sentence of imprisonment within the meaning of this section.

The Chief Court of the Punjab in *Queen-Empress v. Diwan Chand* (1) held that imprisonment in default of giving security is not included in the expression “sentenced to imprisonment.”

There are two rulings of the Bombay High Court which are not published in the Indian Law Reports, but which have some bearing on the point. In *Queen-Empress v. Pandu Khandu* (2), the facts are somewhat obscure; but apparently one of the questions before the Court was on what date a sentence of imprisonment for escaping from

(1) (1895) P. R. Cr. No. 14. | (2) (1895) Ratanlal, p. 774.

custody should take effect in the case of an accused person who had been adjudged imprisonment in default of furnishing security under section 123, Code of Criminal Procedure. The pertinent remarks in the order of the Court are as follows :—

“The sentence passed for the escape is, under section 396, legal so far as the original sentence is concerned. It is also legal so far as the order sentencing to rigorous imprisonment under section 123 is concerned if that order is one to which the word ‘sentence’ as used in section 396 may be applied, and there appears to be no authority or reason for excluding this order or not calling it a sentence. The contrary view of the Sessions Judge would occasion the inconvenience of our having to hold that the present is a *casus omissus* from the Code.”

In the later case of *Queen-Empress v. Tulshya Bahiru* (1) in which one of the Judges who passed the order had also been a member of the Court which passed the order in the case cited above, the accused was ordered to furnish security for good behaviour and in default was directed to suffer rigorous imprisonment for six months. While undergoing imprisonment he was sentenced to rigorous imprisonment for two months under section 224, Indian Penal Code. The imprisonment was ordered to commence after the accused had furnished the security required of him or after he had undergone the rigorous imprisonment awarded under section 123 of the Code of Criminal Procedure. The Sessions Judge referred the case to the High Court, being of opinion that the word “sentence” in section 397 of the Code of Criminal Procedure did not include an award of imprisonment under section 123. The order of the Court was as follows:—

“This is a case not expressly provided for by the Code, but we think that the Sessions Judge is right, and that a sentence for a substantive offence must commence at once and cannot be postponed to take effect at the expiration of the sentence of imprisonment which the convicted person was at the date of the conviction undergoing in default of giving security for good behaviour.”

In the case of the *Queen-Empress v. Shwe Byo* (2), it was held that the imprisonment ordered in default of security was not a punishment for an offence; and that a Magistrate was not justified in postponing the commencement of the sentence of imprisonment for a substantive offence until the term of imprisonment awarded under section 123, Code of Criminal Procedure, had expired.

In the case of the *Queen-Empress v. Nga Kyon* (3), a somewhat different point was dealt with. But there are remarks by the learned Chief Judge which bear upon the point under consideration. He observed that section 397 of the Code of Criminal Procedure would not warrant the postponement of a sentence for a substantive offence to the close of the term of imprisonment suffered under section 123 of the Code of Criminal Procedure because the latter is not a *sentence* of imprisonment within the meaning of section 397.

The weight of authority seems to incline to the opinion stated by the Judicial Commissioner and the late Chief Judge of this Court. But in view of the arguments of the learned Assistant Government

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(1) (1898) Ratanlal, p. 970. | (2) S. J. L. B. 364.

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Advocate and of the earlier of the two Bombay cases which I have cited, I do not think that the point is free from difficulty.

I therefore refer to a Full Bench the following question :

Does the word " sentence " in section 396 or section 397, Code of Criminal Procedure, include an order of committal or detention under section 123, Code of Criminal Procedure ?

The opinion of the Bench was as follows :—

Thirkell White, C.J.—The weight of authority, as indicated in the order of reference, inclines to the conclusion that an order adjudging imprisonment in default of security under section 123 of the Code of Criminal Procedure is not a sentence within the meaning of section 397, Code of Criminal Procedure. There is, however, the authority of the earlier of the two Bombay cases cited which seems to be to the contrary.

I am disposed to think that that view is correct. The word " sentence " is nowhere defined in the Code of Criminal Procedure. And it seems to me that an order for the committal or detention of a person in default of furnishing security, under section 123 of the Code, may well be regarded as a sentence of imprisonment for the purpose of section 396 and section 397, Code of Criminal Procedure. There can be no doubt that detention in rigorous imprisonment is punishment and not merely a temporary seclusion for preventive purposes. And I think the same may be held, though with somewhat less force, in respect of simple imprisonment. I do not think that the question is affected by the consideration that the imprisonment can be terminated at any time if the prisoner furnishes security. The same consideration would apply to imprisonment in default of payment of a fine. Nor does it seem to me that the rule laid down by section 120, sub-section (1), of the Code of Criminal Procedure would be unnecessary, if it were held that an order adjudging imprisonment under section 123 was a sentence. That sub-section relates to the period for which security is required whether security is furnished or not. But for this sub-section, it might happen that the period, or part of the period, for which security is required would be spent in jail. As a matter of fact, the sub-section was obviously intended for the most part to meet cases in which security to keep the peace is demanded on conviction. It would seldom be necessary to place on security for good behaviour a person under sentence of imprisonment.

Unless it is held that a person imprisoned under section 123, Code of Criminal Procedure, is undergoing a sentence of imprisonment, it must be held that the case is one not provided for in the Code. If the contrary is held, no inconvenience or doubt can arise. Moreover, if a person imprisoned in default of furnishing security escapes or tries to escape from jail, he is punishable under section 225B, Indian Penal Code. The maximum term of imprisonment under that section is six months. If therefore it is held that imprisonment under that section in a case where the accused is undergoing imprisonment under section 123, Code of Criminal Procedure, must begin from the date of sentence, it is obvious that a person from whom security is demanded for a year

and who is imprisoned in default could escape or try to escape at any time during the first six months of that period without being liable to any additional punishment. He cannot be punished departmentally as escaping from prison is not a prison offence. This can hardly be the intention of the Legislature.

In my opinion, the Magistrate's order in this case was correct and I would answer the reference in the affirmative.

Fox, J.—The matter raised in the question referred has been left in doubt by the Legislature. I incline to the opinion that a committal order under section 123 of the Criminal Procedure Code is not a "sentence" as contemplated in section 396 and section 397 of the Code.

The provisions of Chapter VIII of the Code have for their object the "Prevention of Offences": it is no doubt anomalous that in order to prevent a person offending, he may be subjected to punishment of the same nature as that which he might have to undergo if he had actually offended, but the methods which may be adopted to ensure good behaviour or the keeping of the peace do not affect the main object of the provisions.

I agree with Mr. Meres in thinking that if a prisoner detained in prison for failure to give security is convicted of an offence and is sentenced to imprisonment, the object of the proceedings against him for security has been attained, for the danger to the public arising from the risk of his being at large without security cannot arise so long as he is detained in prison for an offence (1).

The peculiar wording in section 123 authorizing an order for imprisonment must have been designedly adopted: it differs markedly from the wording of sub-section (2) of section 367, in which provision is made for a sentence of punishment upon a conviction being stated in a judgment upon a trial.

In my opinion the ordinary meaning of the word "sentence" when used in connection with criminal proceedings is that part of the judgment or order which states the award of punishment on an offender found guilty of an offence, and I think that following the ordinary rule of construction the word must be taken to be used in that sense in section 396 and section 397 of the Code of Criminal Procedure. To read it in any other sense requires, in my opinion, specific authority from the Legislature.

I would answer the question referred in the negative.

Birks, J.—I concur in the view expressed by Mr. Justice Fox that a committal order under section 123 of the Criminal Procedure Code is not a sentence as contemplated in section 396 and section 397 of the Code. The learned Chief Judge in his order of reference admits that the weight of authority is in favour of this view.

It seems curious that the word "sentence" was not defined when the General Clauses Act (X of 1897) was passed. In the Century Dictionary a sentence in law is defined as follows: "A definitive judgment pronounced by a Court or Judge upon a *criminal*; a judicial

(1) *Queen-Empress v. Nga Shwe Byo*, S. J. L. B. 364.

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"decision publicly and officially declared in a *criminal prosecution*.
"In technical language sentence is used only for the declaration of
"judgment *against one convicted of a crime* or in maritime causes."
In Wharton's Law Lexicon it is defined as "a definitive judgment pronounced in a cause of criminal proceeding. The sentence of a Court may be dispensed with in two ways: by the *pardon of the Crown*: and by a *finding of insanity* under 27 and 28, Vict., C. 29."

The words used in section 124, "imprisoned for failing to give security under this chapter," seem to have been designedly used and the general powers given to the District Magistrate to release persons so imprisoned when it can be done without hazard to the community seem inconsistent with the idea of this detention in jail being regarded as a sentence of imprisonment. In the case of detention in a reformatory school under section 8 of Act VIII of 1897, where the detention is *instead of undergoing the sentence* the powers of release are reserved to the Local Government under section 14, and it is the Local Government which exercises the King's prerogative of pardon under Chapter XXIX of the Criminal Procedure Code.

The particular case of a person imprisoned for failure to give security escaping from jail was doubtless overlooked, but "conspiring to escape" is also a jail offence: *see* section 45 of Act IX of 1894: and is punishable under section 46. Even if this were not the case I concur with Mr. Justice Fox in thinking that it rests with the Legislature to supply the omission. I would therefore answer the question referred to us in the negative.

Criminal Revision Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
No. 309 of 1903. Mr. Justice Birks.
May 14th,
1903.

NGA PO NYUN v. KING-EMPEROR.

Messrs. Thin & Pennell—for applicant.

Security proceedings—Powers of Sessions Judge under section 123, Code of Criminal Procedure—Object of security sections of the Code.

A Sessions Judge to whom a case is referred under section 123 (2), Code of Criminal Procedure, may, under section (3), impose conditions regarding the character of the sureties who may be accepted. But such conditions must be reasonable and capable of fulfilment.

In such a case, the Sessions Judge should himself pass orders regarding the acceptance of sureties tendered, and cannot subsequently cancel an order accepting a surety. Section 122 also considered.

The primary object of Chapter VIII of the Code is that persons of ill-repute should be put on security, not that they should be imprisoned as a punishment or safeguard.

Harilal Buch, I. L. R. 22 Bom. 949; *Ram Lal Acharjia*, I. C. W. N. 394; *Fhojha Singh*, I. L. R. 24 Cal. 155; *King-Emperor v. Nga Po Thin*, *vide* p. 72 *supra*, referred to.

Thirkell White, C.J.—(On 11th August 1902, the Subdivisional Magistrate passed orders requiring Po Nyun to furnish security in the sum of Rs. 500, for three years, with four sureties. On 26th August 1902, the Sessions Judge to whom the proceedings were submitted passed orders requiring the accused to furnish security in the sum of

Rs. 200, with two sureties, for three years. He directed that the sureties should be local men of good reputation and standing who were in a position to control and influence Po Nyun.

On 20th August 1902, four men, Shwe U, Maung Ke^z, U Bya and Po An, were tendered as sureties. The Subdivisional Magistrate directed an enquiry by the Township Magistrate. The Township Magistrate reported that the sureties were of sufficient substance and that they professed themselves able to take care of Po Nyun. The Subdivisional Magistrate required a further report. It was then reported that the sureties would not, in the Township Magistrate's opinion, be able to look after Po Nyun. The Magistrate said that Po Nyun lived in Shwe U's house; and that the other three men mentioned were relatives of his wife. He recommended that these sureties should not be accepted. On 26th September 1902, the Subdivisional Magistrate declined to accept the proposed sureties on the ground that they were under the influence of Po Nyun.

On 27th October 1902, the accused's wife petitioned the Sessions Judge, and on 6th November the Sessions Judge directed the release of Po Nyun if his father-in-law, one Lu Nge, consented to join as surety. This was in accordance with the view of the Township Magistrate. But when Lu Nge offered to stand as a surety, the District Magistrate, whose standing in the matter is not apparent, directed that the order of the Sessions Judge should be suspended as Lu Nge was an habitual gambler and not a proper person to be a surety. On 29th November 1902 the Sessions Judge passed a fresh order. He cancelled his order of 6th November, and directed the District Magistrate himself to enquire and report on the eligibility of the four men who had been proposed as sureties. On 10th December 1902, after enquiry, the District Magistrate reported that the sureties were men of sufficient means, but that it was doubtful whether they fulfilled the condition as to control and influence. He considered it difficult to understand why any one should wish to become security for such a man as Po Nyun, except under the influence of fear or recompense. On this report, on 22nd December 1902, the Sessions Judge held that the sureties were not fit and proper persons and he declined to interfere with the order of the lower Court rejecting them.

It is objected, in the first place, that the order of the Sessions Judge, imposing conditions as to the character of the sureties, was illegal. Under section 118 of the Code of Criminal Procedure, no person can be ordered to give security of a nature different from that specified in the order under section 112. And in that order, in this case, there is no mention of the character of the persons to be required as sureties. The wording of section 123, sub-section (3), is, however, very wide. It authorizes the Sessions Judge to pass such order as he thinks fit, provided that the period of imprisonment in default of security does not exceed three years. It seems, therefore, that the Sessions Judge has a very wide discretion and that he is not even bound by the term for which security has been demanded by the Magistrate. I am not prepared to say that the Sessions Judge exceeded his powers in

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prescribing the qualifications of the sureties. But the conditions imposed must be reasonable and such as are capable of being fulfilled. Now the direction that the sureties should be local men of good reputation and standing is a reasonable order. But, if the rest of the direction means that only such persons may be accepted if they can show that they are in a position to control the accused and influence him for good, then I think that this is not a reasonable condition and that it is too vague to be capable of fulfilment. If it is meant that local men of good reputation and standing must be produced because such men will be in a position to control Po Nyun and influence him for good, then the addition to the order is innocuous. It is very difficult for any one to say whether one person is in a position to control and influence another. And the reasons given for thinking that the persons tendered as sureties do not fulfil the condition laid down by the Sessions Judge are not at all satisfactory. One Magistrate distrusts them because they are related to the accused's wife; another records what other people have heard the sureties say, and apparently would not accept any sureties for so dangerous a man as the accused.

Again, it is objected that the Sessions Judge should himself have passed orders on the tender of sureties, and this seems to be the intention of sub-section (4) of section 123 of the Code of Criminal Procedure. For it is to the Court which passed the order that a reference has to be made in the case of the tender of security to the jail authorities. It is inconvenient that this should be so; for this provision must involve delay in the release of prisoners ordered to furnish security. But the law seems to be beyond doubt. The Sessions Judge's practice has not been consistent. In some cases, he passed an order of his own, as he was bound to do. In his final order, he refers to interference with the order of the Lower Court. But he was not sitting as a Court of Appeal but as a Court of original jurisdiction in this matter.

It is further objected that the Sessions Judge was bound by his order of 6th November 1902, and could not cancel it or decline to accept Lu Nge as a surety. I think that this position should be affirmed. There would be an end of all finality if Courts were at liberty to cancel and reverse their own orders. And the allowance of such liberty is at variance with the spirit of the Code of Criminal Procedure and its judicial interpretation. Having passed the order of 6th November 1902, the Sessions Judge had no power to vary it and was bound to accept Lu Nge as one of the sureties. I am bound to say, at the same time, that I think Lu Nge was somewhat hastily accepted. He may be a man of means; but a man who is, one may almost say, constantly being convicted of illegal gambling, can hardly be regarded as a man of good reputation. Even a man who is known as a gambler, pure and simple, suffers somewhat in repute. And the depreciation of character is the more grave when he is shown to be a frequenter or promoter of common-gaming houses and illegal assemblies for gambling.

One more point may be mentioned. It is pointed out by the learned counsel for the applicant, whose temperate and exhaustive argument was of much assistance to the Court, that under section 122 of the

Code of Criminal Procedure it is only a Magistrate who has power to refuse to accept a surety on the ground that he is an unfit person. In view of the limited terms of section 122, it is suggested that the Sessions Judge has not the power conferred by that section and that he must accept sureties of the kind specified in his order, so long as they are possessed of sufficient means. I doubt whether this position can be sustained. I think that the Sessions Judge must be held to have a general power of accepting or rejecting sureties for good cause shown, provided that the power is exercised with due and judicial care and discretion. This seems to be implied in sub-section (4) of section 123. But even if the Sessions Judge has not the power of rejection for the cause stated in section 122, he must be held to have the power of rejection on the ground that the persons tendered as sureties are not of sufficient substance or that they do not fulfil the conditions prescribed in his order.

I have no doubt that all the officers who have taken part in this case have been actuated solely by regard for the public interest as conceived by them. But I cannot help thinking that there has been a tendency to strain the law for the purpose of rendering it difficult for the accused to furnish security. I think the local officers regard Po Nyun as a person whom it is safer to keep in prison than to release on security. This may be so in this individual case. But the law must not be strained in order to secure even a public advantage. It is better that one dangerous man should be at large, than that a precedent should be established which would jeopardise the liberties of an indefinite number of citizens. And it cannot be too often repeated that the object of Chapter VIII of the Code of Criminal Procedure is that persons of ill-repute should be placed on security as a preventive against possible hazard to the community, not that they should be imprisoned as a punishment, or as a safe-guard. Imprisonment in default of security should be the exception, not the ordinary consequence of an order under that Chapter. In my opinion, Po Nyun has not had a fair opportunity of furnishing security and he is entitled to that opportunity.

I would set aside so much of the order of the Sessions Judge, dated the 26th August 1902, as directs that the sureties should be persons who are in a position to control Po Nyun and to influence him for good. I would also set aside all the subsequent orders of the Sessions Judge in the case and direct him to reconsider the application made by Po Nyun and the four persons tendered by him as sureties on 19th August 1902. Two of these persons should be accepted as sureties, if they are local men of good reputation and standing and possessed of sufficient means to cover the amount of the security, namely, Rs. 200. They should not be rejected because they are related to the accused or his wife, or because they have business relations with his father-in-law, or except on some definite, tangible ground that they are unfit persons to be sureties. A mere opinion of a Magistrate that they cannot be fit persons because no one would stand security for such a dangerous person as the accused, unless he were influenced by fear or the

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hope of gain, should not be regarded as a good reason for refusing to accept a person tendered as a surety.

The Sessions Judge should now proceed to dispose of the case in accordance with these instructions.

Birks, J.—I concur with the learned Chief Judge in thinking that the Sessions Judge had no power to cancel his order of the 6th November. The order of that date appears to be a final order in the "nature of a judgment" as defined in *Harilal Buch* (1) and therefore section 369, Criminal Procedure Code, will apply. There is also a ruling, *Ram Lal Acharjia* (2), which says that a Magistrate, after a surety has been accepted, has no power subsequently to cancel the security bond, though he may be of opinion that such surety is an unfit person. This was a decision by Ghose and Gordon, J. J. In the Bombay case, section 369 was held to apply to an order made as to the disposal of property seized by the police.

With regard to the omission of the words "Sessions Judge" in section 122 I hardly think we are justified in holding that this omission is due to a mistake in drafting as urged by Mr. Pennell. The enquiry into the fitness of sureties, whether as to mere pecuniary means or general character is under the present Code ordinarily delegated by the Sessions Judge to a Magistrate. Under the Code of 1882 it was held that the Sessions Judge could not remand a case under section 123 for further enquiry, but such evidence as he required he had to take himself; vide *Fhojha Singh* (3). I do not think therefore that a Sessions Judge is debarred by the provisions of section 122 from acting on the recommendation of the Magistrate under this section, nor is he compelled to accept a surety reported by the Magistrate to be unfit merely because the final orders have to be passed by himself.

There is no doubt that as a Court of Revision we are empowered to make the order proposed by the learned Chief Judge. I concur in that order and in the remarks made as to the real object of the preventive sections of the Code. These considerations were present to my mind in a recent case (4), where I held that the detention of a person against whom an order of security is made is not a "sentence of imprisonment."

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
 Mr. Justice Fox.

EBRAHIM v. KING-EMPEROR.

Criminal Revision
 No. 305 of 1903.
 April 6th.

Transfer of cases—Code of Criminal Procedure, sections 192, 110—District Magistrate ordering further enquiry into case of person discharged under section 119, Code of Criminal Procedure—Meaning of terms "accused" and "accused person"—Code of Criminal Procedure, Chapter VIII, section 437.

The District Magistrate, after calling on the accused under section 110 of the Code of Criminal Procedure, to show cause why they should not enter into bonds to be of good behaviour, transferred the case for inquiry to the Subdivisional Magistrate.

(1) (1898), I. L. R. 22 Bom. 949.
 (2) I. C. W. N. 394.

(3) (1897), I. L. R. 24 Cal. 155.
 (4) *Vide p. 72 supra.*

The Subdivisional Magistrate discharged the accused, whereupon the District Magistrate called for the records and ordered further inquiry.

Held,—after discussion of the meaning of the terms “accused” and “accused person,” that the District Magistrate’s action in each case was legal.

Satish Chandra Panday v. Rajendra Narain Bagchi, I. L. R. 22 Cal. 898; *Sarat Chunder Roy v. Bepin Chandra Roy*, I. L. R. 29 Cal. 389; *Buroda Kant Roy v. Korimuddin Moonshee*, 4. C. L. R. 452; *Queen-Empress v. Mona Puna* I. L. R. 16 Bom. 661; *Fhoja Singh v. Queen-Empress*, I. L. R. 23 Cal. 493; *Queen-Empress v. Mutasaddi Lal* I. L. R. 21 All. 107; *King-Emperor v. Fyazuddin*, I. L. R. 24 All. 148; and *Srinath Roy v. Ainaddi Halder*, I. L. R. 24 Cal. 395; referred to.

Gudar Singh, I. L. R. 19 All. 291; *Imam Mondal*, I. L. R. 27 Cal. 662, dissented from.

Fox, J.—The case has been referred to this Court by the Sessions Judge.

Upon receipt of information the District Magistrate issued an order, under section 112 of the Code of Criminal Procedure, to the respondents to show cause why they should not enter into a bond for their good behaviour for the term of a year. The substance of the information set out in the order was that the respondents were habitual receivers of stolen property.

On the ground of pressure of work, the District Magistrate transferred the inquiry from himself to the Subdivisional Magistrate. The latter inquired into the cases separately, and discharged each of the respondents. The District Magistrate called for the records and ordered further inquiry into the cases.

The first question which arises is whether the District Magistrate had power to transfer the inquiry, under section 117, from himself to the Subdivisional Magistrate. Regarding the provisions of Chapter VIII of the Code only, it would appear as if the intention of the Legislature was that the Magistrate who has received and acted on information should himself inquire into the truth of it. The wording of Chapter XII would, when read alone, also seem to imply that the Magistrate who has acted under section 145 should personally conduct the subsequent proceedings. In the matter of *Gudar Singh* (1), it was held that where a Magistrate had acted within the meaning of section 117, no transfer of the case from the Court of such Magistrate could be made. In *Satish Chandra Panday v. Rajendra Narain Bagchi* (2), however, it was held that the general power of a District Magistrate to transfer is not taken away or cut down by anything in section 145.

In *Sarat Ghunder Roy v. Bepin Chandra Roy* (3), it was not even contended that the transfer by a District Magistrate of proceedings taken under section 107, from one Magistrate to another was illegal. The matter is not free from difficulty, because in the present case the transfer of the inquiry from himself to the Subdivisional Magistrate must be authorized, if it can be at all, under the provisions of section 192.

(1) (1897) I. L. R. 19 All. 291.

(2) (1895) I. L. R. 22 Cal. 898. | (3) (1902) I. L. R. 29 Cal. 389.

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That section authorises the transfer of any case of which a District Magistrate or Subdivisional Magistrate has taken cognizance. It is in a group of sections headed "Conditions requisite for Initiation of Proceedings," and the first section of the group—section 190—refers only to Magistrates taking cognizance of *offences*.

When a Magistrate acts under section 110, the initiation of proceedings arises under the provisions of that section, and section 190 has no application.

Looking at the position of section 192, it might appear that the power of transfer given by it was only intended to apply to cases taken cognizance of under section 190. I do not think, however, that this necessarily follows, and in the cases in the Calcutta High Court above quoted there is authority for holding that it does not.

I would hold that the District Magistrate's order transferring the inquiry to the Subdivisional Magistrate was not illegal.

The next question which arises is whether the District Magistrate's order for further inquiry was within his powers. Section 437 of the Code is the only section which enables a District Magistrate to order further inquiry, and the power is confined to inquiry into a complaint which has been dismissed, and into the case of any accused person who has been discharged. The respondents in this case were "discharged" under section 119, but the question remains whether they were "accused" persons.

In the case of *Queen-Empress v. Iman Mondal* (1) the learned Judges held that proceedings under section 110 of the Code of Criminal Procedure cannot be regarded as on a complaint, nor can they be regarded as a case in which an accused person has been discharged because the terms "accused person" and "discharge" in section 437 clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Chapter XIX of the Code. Consequently they held that further inquiry could not be ordered into the case of a person against whom proceedings under section 110 of the Code of Criminal Procedure had been taken and who had been discharged.

There have, however, been various rulings as to the meaning of the terms "accused person" which were not adverted to by the learned Judges.

Three High Courts have adopted the following as a definition of the terms, namely, "a person over whom a Magistrate or other Court is exercising jurisdiction." If such is the correct meaning of the words in one section of the Code, *primâ facie* it is the meaning in other sections. There does not appear to me to be any strong reason for holding that in section 437 they must mean something else.

Taking the words in their natural meaning, a person against whom information has been given that he is of one or more of the descriptions given in section 110 of the Code of Criminal Procedure, has been

(1) (1900) I. L. R. 27 Cal. 662.

"accused" of being such, and so of being a wrongdoer although no specific offence is charged against him.

In my opinion the terms of section 437 of the Code are sufficiently wide to enable a District Magistrate to order further enquiry into the case of a person discharged under section 119 of the Code, and there is no sufficient ground for holding that they apply, in the case of a discharge, only to a discharge from a charge of an offence. On the merits of the present case, I agree with the Sessions Judge in thinking that the District Magistrate's strictures on the Subdivisional Magistrate's procedure were uncalled for, and that further inquiry into the case was not necessary. I would therefore set aside the District Magistrate's order.

Thirkell White, C. J.—I concur in the opinion that the District Magistrate's order transferring the enquiry to the Subdivisional Magistrate was not illegal; and I have nothing to add to the examination of cases and statement of reasons on that point contained in the judgment of my learned colleague.

As regards the second point, whether the District Magistrate had power to order further enquiry under section 437, Code of Criminal Procedure, the question is whether a person against whom proceedings are instituted under Chapter VIII of the Code is an accused person within the meaning of that section. On this point there is some divergence of authority. In the case of *Buroda Kant Roy v. Korimuddi Moonshee* (1) the High Court of Calcutta held that a person brought before a Magistrate for the purpose of being called upon to give security to keep the peace was in substance "accused" of being likely to commit a breach of the peace.

In *Queen-Empress v. Mona Puna* (2), the High Court of Bombay in a weighty judgment held that, for the purpose of section 342, Code of Criminal Procedure, "the accused" meant a person over whom the Magistrate or other Court was exercising jurisdiction.

In *Fhoja Singh v. Queen-Empress* (3), the High Court at Calcutta adopted this definition of "accused" for the purposes of section 340, Code of Criminal Procedure. And both these rulings were cited by the High Court of Allahabad in *Queen-Empress v. Mutasaddi Lal* (4) as authorities for applying the same interpretation to the term "accused person" in section 437, Code of Criminal Procedure. More recently the same High Court in *King-Emperor v. Fyaz-uddin* (5) has intimated adherence to this view notwithstanding the ruling to the contrary to be cited below.

The only cases in which it has been distinctly held that section 437, Code of Criminal Procedure, refers exclusively to persons accused of offences are, *Srinath Roy v. Ainaddi Halder* (6) and *Queen-Empress v. Iman Mondal* (7) both in the Calcutta High Court. The former case is not a direct authority on the point under reference,

(1) (1879) 4 C. L. R. 452.

(2) (1892) I. L. R. 16 Bom., 661.

(3) (1896) I. L. R. 23 Cal. 493.

(4) (1899) I. L. R. 21 All. 107.

(5) (1902) I. L. R. 24 All. 148.

(6) (1897) I. L. R. 24 Cal. 395.

(7) (1900) I. L. R. 27 Cal. 662.

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as it concerns the meaning of the word "complaint" The latter ruling is directly to the point. But it may respectfully be observed that the previous rulings of the Calcutta, Bombay and Allahabad High Courts as to the meaning of the term "accused" or "accused person" were not mentioned, and that no reasons are assigned for the opinion expressed by the learned judges. The relevant part of the judgment is merely that "the terms 'accused person' and 'discharge' in section 437 clearly refer to a person accused of an offence within the terms of Chapter XIX of the Code of Criminal Procedure."

It seems to me that the weight of authority is very much in favour of the view that in section 437, Code of Criminal Procedure, the term "accused person" should be held to mean a person over whom a Criminal Court is exercising jurisdiction. There are also reasons which seem to me worthy of consideration why this view should be adopted. Presumably a word should be interpreted in the same sense when used in different parts of the same enactment. If therefore in section 437, "accused person" means a person accused of an offence, and if it does not include a person against whom proceedings are instituted under Chapter VIII of the Code of Criminal Procedure, then it seems to follow that such a person is not a "person accused" within the meaning of section 340 and cannot claim as of right to be defended by a pleader, and that he is not protected by section 342, sub-section (4), from being required to support his statements by oath. Again, in section 488 of the Code, a person against whom proceedings for maintenance are instituted is called "the accused." Yet clearly he is not accused of an offence. The reference to such a person as "the accused" seems to be a recognition of the correctness of the interpretation assigned in the rulings first cited, that an accused person is a person over whom a Criminal Court is exercising jurisdiction.

No doubt there is a difficulty in accepting this view. For in Chapter VIII of the Code of Criminal Procedure the word "accused" is not used and may seem to have been avoided deliberately. But on the whole the difficulties of holding the contrary view seem to be more serious. The use of the word "discharge" in section 119 obviates another difficulty which might have been experienced.

I therefore concur also in holding that a District Magistrate has power to order further enquiry under section 437, Code of Criminal Procedure, into the case of a person discharged by a subordinate Magistrate under section 119.

As regards the merits of the case, the District Magistrate has overlooked the order in the Subdivisional Magistrate's case No. 35 of 1902, discharging Be Bya. As clearly appears from the final order, Criminal Miscellaneous Case No. 32 of 1902 was concerned solely with Ba Saw, Be Bya being examined as a witness for the defence. I agree that the District Magistrate's strictures are not justified and that the order directing further enquiry should be set aside. It does not appear that the accused had an opportunity of showing cause why further enquiry should not be ordered. It is ordinarily right that such an opportunity should be afforded.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.*

MA THET v. MA SAN ON.*

Messrs. *Lewis and Giles*—for appellant.

*Buddhist Law—Marriage and Divorce—Inheritance—Rights of child of wife
who has left her husband—Form of suits for share of inheritance.*

Under Buddhist Law, a divorce may be effected by the voluntary departure of the wife from the husband for a period of one year. If such departure is without good and sufficient reason, the wife loses all claim on the joint estate.

The right of a child of the defaulting wife to inherit her father's estate depends on the special circumstances of the case.

A suit for a share of an inheritance should ordinarily contain a prayer for the taking of accounts and for administration of the estate and all interested parties should be joined.

Mi Thaik v. Mi Tu, S. J. L. B. 184; *Ma Pon v. Po Chan*, U. B. R. (1897-98) 55, and *Chan Toon*, L. C. Vol. II, p. 220 referred to.

Fox, J.—The plaintiff, who is the daughter of Maung Tha Ya, by Ma Shwe Min, one of five wives Maung Tha Ya had during his life, sued the defendant, who is his widow and the administratrix of his estate, for Rs. 1,250, which she alleged to be a one-eighth share of that estate, to which she was entitled as the child of a former marriage.

The defendant resisted the claim on the ground that before Maung Tha Ya's marriage with herself, he and Ma Shwe Min had been divorced, and on such divorce the plaintiff had been given to her mother with certain property.

Both the lower Courts have held that on the separation of Maung Tha Ya and Ma Shwe Min, there was no division of property: this appears to have been the chief reason for their also holding that there had been no divorce. This latter conclusion is an inference made from the facts found, and such inference is open to question upon second appeal. The first and second grounds of appeal are to the effect that the findings of fact did not justify the conclusion that Ma Shwe Min had not been divorced, and that on them it should be held that there had been a divorce.

The facts found by the original Court were—

- (1) That Maung Tha Ya and Ma Shwe Min lived together as man and wife for about 10 years.
- (2) That they then quarrelled, and Ma Shwe Min left the house where they lived together, taking with her the plaintiff, who was then a child of about 10 years of age. There was no division of property between the husband and wife, although Maung Tha Ya was fairly well off at the time.
- (3) That thereafter Ma Shwe Min lived in houses of various relations until she died about two years after the separation; during that time she made no attempt to obtain maintenance from him, and (presumably) he provided nothing towards her support.

Pro tanto overruled by *Thein Pe v. U Pet*, 3 L.B.R. 175.

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- (4) That Maung Tha Ya married the defendant about a year after the separation.
- (5) That after Ma Shwe Min's death, the plaintiff lived in the house of an aunt, but when she was between 12 and 15 years of age, Maung Tha Ya received her back into his house, and she lived with him and the defendant for 10 years or more until she was about 26 years of age. During that time she was treated by Maung Tha Ya as a daughter.
- (6) That she then left her father's house, and was for some time in a semi-insane condition.
- (7) That when she left the house Maung Tha Ya caused enquiries to be made about her, and when she was found, he assented to her living with an aunt, and offered to pay for her support, and visited her where she was living.
- (8) That in less than a year from the time she left his house the plaintiff married without his consent, and during the six years which followed before her father's death he took no notice of her, and never recognized her husband.
- (9) That she was present at his funeral.

The only ground taken on appeal to the Divisional Court was that the District Court had erred in holding that the plaintiff's mother had not been divorced from Maung Tha Ya, and that therefore she was entitled to a share in his estate. The Divisional Judge does not deal with all the findings of fact by the District Judge, but I do not understand that he differed from any of them, consequently the case may be treated as if there were concurrent findings of fact as above set out.

Upon those findings it appears to me that the Courts were justified in drawing the inference that there had been no divorce by mutual consent at the time of the separation. The marriage tie, however, may be dissolved in other ways than by mutual consent at the time of separation. The District Judge dealt with the question whether it had been dissolved in consequence of desertion of Ma Shwe Min by her husband, and held that as the period of three years had not elapsed subsequent to the separation and before her death, no divorce had been brought about in that way.

This method does not seem to have any application to the case.

There is another method in which a divorce may come about, and that is expressed in the following extract from section 17 of Book V of the Manukye:—

“ If the wife, not having affection for the husband, shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again. If * * * the wife has left the house, and within one year the husband shall take another wife, of the property of both, what was brought at marriage, and that which belongs to both, having counted one, two, and weighed by ticals, let all the property be demanded and taken from the person who failed in his or her duty as husband or wife, by the

other who has become the lord of it; and if (the person in fault) comes to the house of the other (the person not in fault), may turn (the other), out but not accuse each other of taking a paramour, or seducing husband or wife."

The finding of fact seems to me to bring the case within the above statement of the law, and I am inclined to think that the proper inference to be drawn from those facts was that the marriage tie between Maung Tha Ya and Ma Shwe Min was dissolved on the expiry of a year from the date on which she left his house.

No question of division of property arises in such a case. Even if Maung Tha Ya wished for the separation or was not opposed to it, Ma Shwe Min was the one who separated herself from him, and by so doing she forfeited all right to share in the joint property.

It appears to be the spirit of Burmese Buddhist Law that the spouse who separates or wishes to separate from the other without good and sufficient cause must give up all claim to the joint property—compare Manukye Book XII, section 3.

There remains, however, the question whether, upon a divorce brought about in the way I have referred to, a child taken by the mother loses all right to share in the inheritance of the father's estate. The leading authorities favouring the view that children who upon a divorce go and live with one parent are not entitled subsequently to share in the inheritance of the other parent are (in Lower Burma) *Mi Thaik v. Mi Tu* (1) and (in Upper Burma) *Ma Pon v. Po Chan* (2). In each of those cases, however, there had been a divorce by mutual consent, and there had been a division of property. There had also been a complete severance of the children who went with the mother from connection with the father, and discontinuance of filial relations towards him. In *Maung Pe v. Ma Myitta* (3), the learned Judicial Commissioner said that he would hesitate to press the rule against a child of tender years, who has had no opportunity of exercising reasonable choice, and in that case, although there had been a division of property on the divorce, the child who was taken by her mother was held entitled to share in her father's estate.

The present case appears to me to be even stronger than that case in favour of the view that it does not follow as a necessary consequence that a child taken by one parent upon a divorce loses all right to inheritance in the estate of the other parent.

The plaintiff in this case was only ten years of age when her mother took her away with her; there was no division of property on the separation of the parents; and filial relationship between the plaintiff and her father was resumed and continued for many years after the separation. I would hold then that notwithstanding that the marriage tie between her mother and father may have been dissolved, the plaintiff had a right to share in her father's inheritance when he died.

The fourth ground of appeal is to the effect that even if Ma Shwe Min was not divorced the plaintiff was not entitled to any share in the estate of her father, but this ground has not been pressed.

(1) S. J. L. B. 184. | (2) 2-U. B. R. (1897-01), 116.

(3) Chan Toon L. C. Vol. II, p. 220.

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The fifth ground is that the learned Judge should not have decreed Rs. 1,250, or the full amount of the one-eighth share claimed, to the plaintiff, but should before making the decree have ordered an enquiry into the value of the estate which had come to the hands of the defendant as administratrix, and as to the heirs of the deceased, and as to what amounts such heirs were respectively entitled to.

This ground appears to me to be a good ground, and on the authorities it may, I think, legitimately be considered on second appeal, although it was not taken in the lower Appellate Court.

Even if the plaintiff was solely entitled to the one-eighth share in the estate which goes to a child or is divisible amongst children of a former marriage, the value of the estate come to the hands of the defendant had not been definitely ascertained, and in order to ascertain how much the plaintiff was entitled to, the taking of an account was almost necessarily involved. The valuation of an estate upon an application for letters of administration affords no exact criterion of what the share of each person entitled to share in the estate will eventually amount to. Such valuation is a valuation of the property which the applicant expects will come to his hands. Some of the property may never be realized, or perhaps more may come to the administrator's hands. The sharers are entitled to share in what actually does come to his hands. Consequently in a suit by a sharer for his or her share in an estate the taking of an account is almost necessarily involved, and in such a suit there should ordinarily be a prayer asking for an account and for the due administration of the estate under the orders of the Court, as contemplated by section 213 of the Code of Civil Procedure. Form 130 of the 4th schedule indicates the accounts and inquiries which should be ordered and made in such a suit under a preliminary order, and the Forms in No. 131 indicate the shapes in which a final decree should be made.

In such a suit and under a preliminary order the whole estate can be ascertained and each sharer's rights determined finally and so that further litigation regarding matters connected with the estate may be avoided. Section 42 of the Code provides that every suit shall be framed with this latter object.

In the present case not only was the amount of the estate not definitely ascertained, but it was indicated in the pleadings that there were other children of Maung Tha Ya's marriages who might possibly make claims to share in the one-eighth share which the plaintiff claimed.

I think the decree of the original Court should be set aside, and in lieu thereof there should be a preliminary order as follows:—

1. It is declared that the plaintiff as a daughter of Maung Tha Ya by a marriage previous to his marriage with the defendant is entitled to share in the estate left by him.

2. It is ordered that the following accounts and enquiries be taken and made; that is to say:—

(1) An inquiry as to who were and are the heirs at law of the deceased Maung Tha Ya entitled to share in his estate.

- (2) An inquiry as to what share in the deceased's estate each heir was and is entitled to.
- (3) An account of the funeral expenses paid out of his estate.
- (4) An account of the moveable property of the deceased come to the hands of the defendant or to the hands of any other person by her order or for her use.
- (5) An account of the moveable property of the deceased still outstanding and unrecovered.
- (6) An account of what immoveable property the deceased was seized of at the time of his death.
- (7) An inquiry what were the incumbrances (if any,) affecting the immoveable property of the deceased or any part thereof at the time of his death.
- (8) An account so far as possible of what is due to the several incumbrancers.
- (9) An account of what was and is due to the creditors of the deceased.

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3. And it is further ordered that for the purposes of the inquiries and accounts hereinbefore directed advertisement shall be made or public notice shall otherwise be issued calling on creditors and all persons claiming to be interested in the estate to come in, and prove their respective debts and claims on or before the 1st day of July 1903 and that special notice be issued to the persons named in the pleadings to come in and prove their claims (if any).

4. And it is further ordered that this suit be adjourned until the 1st day of July 1903 for consideration of the claims which may be put forward and of the inquiries and accounts ordered to be made and taken.

5. And it is further ordered that the defendant do from time to time pay into Court such sums as may be requisite for carrying out any matters or things necessary for the due administration of the deceased's estate by the Court.

I would allow this appeal and modify the decree of the original Court accordingly. The costs of both the plaintiff and the defendant throughout the proceedings should, I think, come out of the estate.

Thirkell White, C. J.—I concur.

*Before Mr. Justice Thirkell White, Chief Judge, and
Mr. Justice Fox.*

LEE LOKE SHAIN v. LIM TIE MUN.

Messrs. Eddis, Connell and Lentaigne—
for appellant.

Messrs. Lewis and Giles—
for respondent.

Civil First Appeal
No. 3 of
1903.
April
6th.

Temporary injunction—Property wrongfully sold in execution of decree—Application of section 492, Code of Civil Procedure.

In deciding an application for a temporary injunction under section 492, on the ground that property is about to be wrongfully sold in execution of a decree, the Court may have regard to probability, convenience, and expediency, as indicated by the *prima facie* merits of the applicant's case.

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Kirpa Dayal v. Rani Kishori I. L. R. 10 All. 80; *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R. 92 Cal. 459, followed.

Thirkell White, C. J.—In this case, the respondent, Lim Tie Mun, attached a house known as No. 48, Latter Street, in execution of a decree against one Moy Htone Shoke. The petitioner, Lee Loke Shain, who is Moy Htone Shoke's son-in-law, obtained the removal of the attachment on the ground that the house was his. Lim Tie Mun then instituted a suit and obtained a declaration that the house was liable to attachment in execution of the decree against Moy Htone Shoke. Against this decree an appeal is pending and in the meantime the petitioner asks for an injunction restraining the respondent from proceeding to the execution of the decree against Moy Htone Shoke. The application is too broadly stated; what is really sought is an injunction restraining the respondent from bringing the house in question to sale in execution of the decree against Moy Htone Shoke pending the disposal of the appeal, to which the petitioner and respondent are parties. Section 492 of the Code of Civil Procedure provides among other matters that if it is proved that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree, the Court may grant a temporary injunction staying and preventing the sale. The only question seems to be whether the house in question in this case can be said to be in danger of being wrongfully sold. In opposition to the application it has been urged that the policy of the Code of Civil Procedure is that execution should not be stayed merely because an appeal has been filed (section 545). But, on the other hand, the last paragraph of section 546 shows that the law is specially careful as to the sale of immoveable property. In the cases in the Calcutta High Court which were cited to us in argument (*Brojendra Kumar Rai Chowdhuri v. Rup Lall Doss*) (1) and in a later case in the same High Court (*Amir Dulhin v. Administrator-General of Bengal*) (2), the circumstances in which an injunction might properly be granted under section 492, Code of Civil Procedure, were not considered. But in the case of *Kirpa Dayal v. Rani Kishori* (3) in the Allahabad High Court, the ruling is apposite. In that case Straight, J., took into consideration the word "wrongfully," which forms the difficulty in the application of the section, and on the ground that the sale of the property might involve complications and further litigation, while the grant of an injunction till after the decision of the appeal would result in no practical harm to any one, he granted an injunction restraining the sale. In principle that case does not seem to be distinguishable from the present case and the facts were similar. I think this authority may well be followed and that the injunction asked for should be granted. The inconvenience of having had the property sold should the petitioner succeed in his appeal is greater than would be the inconvenience caused by the delay in effecting the sale should the appeal be unsuccessful. I think also that the property may reasonably be said to be in danger of being wrongfully

(1) (1886) I. L. R. 12 Cal. 515. | (2) (1896) I. L. R. 23 Cal. 351.
(3) (1888) I. L. R. 10 All. 80.

sold when, if the appeal succeeds, the sale would have been wrongful though not illegal.

Fox, J.—I concur. I would only add that to justify the issue of a temporary injunction, it is sufficient if the applicant shows that he has a fair question to raise in the suit or on the appeal, and that the property should be preserved *in statu quo*, see *Chandidat Jha v. Padmanand Singh ahadur* (1). The appellant in this case claimed the property under a registered deed of sale, and was in possession of it.

Upon the face of the judgment there is no indication that the case is one in which the defendant-appellant cannot have any good ground for appealing.

In view of this and of the difficulties which must almost inevitably arise if the property is sold pending the appeal, and if afterwards the original decree is reversed, I would grant an injunction restraining the respondent (plaintiff) from bringing the property to sale in execution of his decree against Moy Htone Shoke pending the final decision of this appeal.

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Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.

Civil First Appeal
No. 71 of 1902.
April 6th,
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DEVCHAND KHATOO AND OTHERS v. BIRJEE COOMAREE.

Mr. Lentaigne—for appellants. | *Mr. Cowasjee*—for respondent.
Witness failing to attend in obedience to summons—Adjournment of case—
Acceptance of goods—Indian Contract Act, ss. 113, 118.

If one of the witnesses called by a party fails to attend in obedience to the summons the Court is not bound to adjourn the hearing in order that the presence of the witness be may secured and his evidence taken.

“Acceptance” distinguished from “receipt” of goods, Indian Contract Act, section 118.

Vyraven Chetty v. Oung Zay, C. R. 51 of 1890; *Mitchell Reid & Co., v. Buldeo Doss Khettry*, I. L. R. 15 Cal. 1; *Heilbutt v. Hickson* L. R. 7 C. P. 438; and *Addison on Contracts*, 10th edition, 519, referred to.

Fox, J.—Admittedly the defendants sold to the plaintiff 1,340 bags of ready milled “Usual Straits quality” rice milled by Messrs. Gillanders, Arbuthnot and Company. The contract was expressed by filling in some words and figures on a printed form of contract intended to be used for contracts for sale of rice *to be* milled. The printed conditions on the form, which are applicable to such latter contracts only, were not struck out, and even the weight of bags printed on the form was left unaltered, when it is evident that the parties contemplated bags of less weight.

So far as the contract goes there is nothing to indicate that the goods were ascertained at the date on which the contract was made. For all that appears the defendants may have had at the time a larger number of bags of Messrs. Gillanders Arbuthnot’s milling.

Three days after the contract the defendants presented their bill for the rice and the amount was paid. The bill contained a reference to

(1) (1895) I. L. R. 22 Cal. 459.

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the contract under which Messrs. Gillanders, Arbuthnot and Company, had milled certain rice, and to the delivery order which they had given for it, and on payment of the bill this delivery order was handed over to the plaintiff's manager.

Although one of the plaintiff's native witnesses says he went to take delivery in September, it is clear that the plaintiff's employees did not go to the mill to take delivery until the 11th October or shortly before it. This was about three weeks after the delivery order had been handed over. In the process of removing the rice one of the bags burst, and on seeing the contents the man taking delivery reported to the plaintiff's firm, and after further inspection the plaintiff's advocates were instructed to write to the defendants calling upon them to remove and take back such rice as was not of the quality contracted for.

They also gave notice that the plaintiff firm intended to have the rice surveyed. The rice was surveyed, and the result was that the surveyors pronounced the rice to be not of "Usual Straits quality white rice." The plaintiff sued for recovery of the price which had been paid: during the course of the suit the plaintiff's manager was appointed receiver, and as such sold the rice in February of the following year.

The learned Judge on the Original Side gave the plaintiff a decree for the price which had been paid and interest, less the amount received by the plaintiff's manager on the resale.

The chief grounds of appeal contest the plaintiff's right to sue for the return of the price, and it has been urged that if there was any breach of warranty the plaintiff's remedy was a suit for damages or compensation for such breach.

In the original Court some misunderstanding and confusion appears to have arisen in consequence of both parties having made reference to a sample which had been shown to the plaintiff's manager before the contract was made.

On the hearing of the appeal neither has contended that the sample had any material bearing on the case.

What was contracted for was "Usual Straits quality rice" and even if the contract had been a sale by sample, which it is now admitted it was not, the plaintiff was entitled to rice falling under the denomination contracted for, and under section 113 of the Contract Act there was an implied warranty on the part of the defendants that they would deliver rice of that denomination.

The evidence is overwhelming that the rice which the plaintiff received under the delivery order was not, and would not pass as "Usual Straits quality white rice." One of the grounds of appeal however is that the Judge erred in not allowing the defendants a postponement to obtain the evidence of the manager of Messrs. Gillanders, Arbuthnot and Company's mill, whom they had subpoenaed. What happened was that the defendants on the 19th May took out a summons to serve amongst others "the mill manager of Messrs. Gillanders, Arbuthnot and Company," to appear on the 21st May to give evidence

and to bring with him books showing the quality of rice milled under the firm's contract referred to in the defendant's bill against the plaintiff, and other books referring to another contract. The summons was served on Mr. Percy W. Woolley on the 20th May. The case was partly heard on the 21st May, and was adjourned until the following day. On that day the examination of such of the defendant's witnesses as were present was finished by 10 minutes to noon, and the Judge asked the counsel to close the defendant's case. However as some more witnesses came straggling in they were examined. At 12-40 P.M. the mill-manager had not appeared, and the defendant's case was closed. On the record it does not appear that any adjournment or postponement was asked for, but in his judgment the learned Judge says that he was told that an important witness was on his way from Messrs. Gillanders, Arbuthnot and Company's mill, but no reasonable excuse was given or even suggested for his absence, so he declined to wait for him.

The contention that the learned Judge was wrong in the course he took is a somewhat bold one. It may be unfortunate for parties to suits if the persons whom they take out summonses for to give evidence do not attend the Court in obedience to the summonses, just as it may be unfortunate for a party if a person who can give material evidence in his favour dies, or goes away to some place where a summons cannot be served upon him, but if a Court recognized such misfortunes as good ground in all cases for adjourning the hearing of a case once begun, the business of the Courts could not be got through.

In the present case the defendant's counsel did not apply for a warrant for the arrest of Mr. Woolley, and it may be taken that he at any rate acquiesced in the justice of the learned Judge's action in requiring the case to be proceeded with. It may be well to remind persons summoned to Courts to give evidence that if they do not attend in obedience to the summons, or if after having attended, they depart without the Judge's leave, they may be held liable to imprisonment extending to six months, and to fine extending to Rs. 1,000 and to attachment of their property.

There is in my opinion no good ground for remanding the case in order that the evidence of Mr. Woolley may be taken.

In regard to the legal grounds advanced on behalf of the appellants, I have already said that the rice was not, in my opinion, "ascertained" rice at the time of the contract, consequently the plaintiff had a right, if the rice offered was not of the description contracted for, to refuse to accept the rice, and this was done by the advocate's letter of the 11th October. It was argued, however, that, on the view that section 118 of the Contract Act applied to the case, the plaintiff's firm had kept the rice an unreasonable time before intimating rejection of the rice. This was based on another argument to the effect that handing over of the delivery order with the defendant's bill constituted in law delivery of the property itself to the plaintiff. The delivery order is not before the Court, and consequently the Court is not in a position to say what the exact effect of the delivery order in

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question may have been. If it was in the same form as that usually adopted by millers in Rangoon; the ruling in *S.R. M. M. Vyraven Chetty v. Oung Zay* (1), is an authority for holding that the mere handing over of such a delivery order does not constitute delivery of the goods referred to in it.

The plaintiff's agents no doubt took delivery of the rice in October, for the full number of bags contracted for appears to have been received on the cargo boat which was sent for it, but if they did not "accept" the goods, they had the right to reject them. In *Mitchell Ried & Co. v. Buldeo Doss Khettry* (2), the learned Judges say:—

"To us it seems clear that whether the property in the goods has passed to him (the buyer) or not he is entitled to reject the goods if they are not in accordance with the description in the contract, if that description forms, as it does here, an actual part of the conditions of the contract and not something collateral to it. Even by the law of England, the question of the right to reject does not necessarily always depend upon the question whether the property has passed or not. In this country it appears to us that the intention of the Legislature was to make the two things wholly independent of one another. It appears to us that, under the law in this country, a man is not bound, unless he has altered his position by some conduct of his own, to accept and pay for goods which are not in accordance with the description he bargained for."

Mr. Addison, in his treatise on the Law of Contracts (3), states the law thus:—

"In cases of executory contracts when there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty; but, even after they had been delivered by the vendor, he may reject them after discovering the defect and, if he has paid for them, he may recover back the price."

Heilbutt v. Hickson (4) is a notable case in which a purchaser's right to reject goods after delivery and to recover the price he had paid and the expenses he had been put to, was upheld.

I take it that the word "accept" in section 118 of the Contract Act is used in the same sense accorded to it in English Law, which is equivalent to its ordinary sense. The learned author of Blackburn on Sales says:—

"In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous or assigning no reasons at all, it is clear that he does not accept the goods; and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts."

"The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an

(1) C.R. No. 51 of 1890 of the Recorder's Court, Rangoon.

(2) (1888). I. L. R. 15 Cal. 1.

(3) Addison on Contracts, 10th edition, p. 519.

(4) (1872), L. R. 7 C.P. 438.

acceptance, but it is not the same thing: indeed the receipt by the buyer may be, and often is, for the express purpose of saying whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order."

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Counsel for the appellants has urged that the plaintiff's agent waited an unreasonable time before raising objection to the rice and so deprived them of any right to reject it they may have had, but it does not appear that the defendants ever called upon the plaintiff to take delivery of or to remove the rice, and there is no evidence that the delay in sending to remove it was unreasonable.

Counsel also urged that by the 17th clause in the contract the plaintiff was precluded from making any claim based upon difference of quality or otherwise after delivery; but that clause is only applicable to a sale of rice to be milled, and learned counsel has not cited any authority which supports his argument that the words "ex-hopper" should be now struck out of the clause in order to make the clause applicable to the present contract. In my judgment the appeal fails on all the grounds taken and should be dismissed with costs.

Thirkell White, C. J.—I concur.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge and Mr. Justice Fox. overruled in 1939 R.L.

FONE LAN v. MA GYEE AND OTHERS.

Messrs. VanSomeren and Fagan—for appellant.

Inheritance—Estate of Chinese Buddhist dying in Burma—Law applicable.
In a suit for a share in the estate of a Chinese subject professing the Buddhist faith who dies in Burma after having acquired a domicile there, the plaintiff must show that he is entitled to share under the customary law applicable to Chinese Buddhists.

Section 13, Burma Laws Act, 1898, discussed.
Hong Ku v. Ma Thin, S. J. L. B. 185; *Ma Tin v. Doop Raj Barna*, Chan Toon, L. C. Vol. I. p. 370; *Pirthee Singh v. Mussamat Sheo Soonduree*, 8 W. R. 261; *Surendra Nath Roy v. Hiramani Barmani*, 1 Ben. L. R. (P. C.) 26; *Ma Sa Yi v. Ma Me Gale*, 7 Agabeg's Reports, 295, and *Ma Mein Gale v. Ma Kin*; referred to.

Fox, J.—In her amended plaint, the plaintiff sued for a declaration of her right to share in the inheritance of one Ah Choung, a Chinese subject, who died in Rangoon in the year 1899.

Her claim was based on the allegation that she was the adopted daughter of Ah Choung and his wife Ma Gyee the 1st defendant.

It was admitted that the latter was entitled to share in the inheritance, but the claims of the other defendants were disputed. The 2nd defendant is admitted by the 1st, 3rd and 4th defendants to be the natural son of Ah Choung; the 3rd, 4th and 5th defendants are admitted by the 1st and 2nd defendants to have been adopted by him and the 1st defendant, but in the case of the 5th defendant (a female minor), the other defendants do not admit that she is entitled to any share in the estate. The defendants, except the 5th defendant, also say that

mentioned in 1940 R 685

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there is another sharer in the estate, namely, a widow of the deceased living in China, who is not a party to the suit. The case was heard first on two issues, namely:—

- (1) Was Ah Choung permanently domiciled in Burma at the time of his death?
- (2) What law is applicable to the case?

The learned Judge decided that Ah Choung was domiciled in Burma at the time of his death, and that the law applicable to the succession to the property he left was the Chinese Buddhist Law.

Upon appeal neither party has questioned the ruling upon the 1st issue: the plaintiff appellant, however, contends that the ruling on the 2nd issue was erroneous. It is argued in the first place that there is no such thing as Chinese Buddhist Law regarding succession or inheritance. So far as appears from anything available to the Court, the contention appears to be correct. Various witnesses have spoken to customs in China regarding succession, but none of them connect such customs with religious belief, nor have any books or commentaries been referred to which enjoin rules as to succession and inheritance upon Chinese who profess the Buddhist faith. It is further argued for the appellant that it having been admitted that the deceased was a Buddhist domiciled in Burma, the law which must be applied to the succession and inheritance to his estate in Burma is the Buddhist Law prevailing in Burma, for that (1) the deceased having been a Buddhist, section 331 of the Indian Succession Act precludes that Act being applied to the case, and (2) the parties to the suit being Buddhists, section 13 of the Burma Laws Act, 1888, compels the Court to apply the laws contained in the Dhammathats followed and recognized by the Burmese, the laws contained therein being the only laws on the subject of succession and inheritance which can be said to be "Buddhist Law." The first proposition is no doubt correct: the second is open to doubt.

In the latter part of his judgment in *Hong Ku and another v. Ma Tin* (1), Mr. Jardine comments on a provision in the then Statutory Law of British India similar to the provision in section 13 of the Burma Laws Act. He says he knows of no authority for the proposition that the Dhammathat or even the general body of Buddhist Law is an exclusive *lex loci*, and, later on, he expresses doubt whether it is obligatory on our Courts here to apply the Burmese Buddhist Law to Buddhists from Ceylon or China, and he remarks that the subject teems with difficulties.

For the appellant the decision in *Ma Tin v. Doop Raj Barna* (2) is relied on. One of the questions to be determined in that case was whether the appellant was the widow of a so-called Hindoo-Buddhist native of Chittagong who had come to Burma, and who, the appellant alleged, had married her. It was held that there had been no proper trial of the matter, but in the course of his judgment the Judicial Commissioner, Mr. Burgess, made the following observations:—

(1) S. J. L. B. 135.

(2) Chan Toon, L. C. Vol. I, p. 370.

"*Prima facie*, as a Buddhist, deceased would come under the Buddhist Law of the country at large, and the burthen of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance."

If by the words "country at large" be meant "the province of Burma," I venture to doubt the proposition.

In the case of Hindus and Mahommedans the Courts of India in questions of marriage, succession and inheritance administer the personal law applicable to the parties. On such matters there is no such thing as a general Hindu Law or a general Mahommedan Law applicable universally to every Hindu or Mahommedan. There are different schools of law, and different commentaries by which Hindus and Mahommedans are governed, and there are also customary laws often divergent from the laws laid down in commentaries.

Further, decisions of their Lordships of the Privy Council and of the High Courts in India have on some matters settled what the law applicable to parties is.

The law of the commentaries, the customary law, and the law as laid down by decisions make up what is known as the Hindu and Mahommedan Laws.

In India as in this province, each individual of the Hindu or Mahommedan faiths is accorded the personal law applicable to him in matters of marriage, succession or inheritance. There is a presumption that a Hindu family is ordinarily governed by the law prevailing in the country of its origin, and not by the law of its habitat for the time being, see *Pirthee Singh v. Mussamut Sheo Soonduree* (1) and *Surendra Nath Roy v. Hiramani Barmani* (2).

In regard to Mahommedans of the Sunni sect the Hanifeea Code is applied, whilst in the case of Mahommedans of the Shia sect, the Imameera Code is followed.

Customary law when proved is applied to both Hindus and Mahommedans—as, for instance in the case of Jain tribes and Khoja Mahommedans, and the cases in which special family customs have been proved and adopted.

On consideration of what the Hindu and Mahommedan Laws are composed of, I take it that when in section 13 of the Burma Laws Act, 1898, the Legislature uses the words "Mahommedan Law" and "Hindu Law," it means the laws applicable to such Mahommedan and Hindu parties whencesoever such laws may be derived. No doubt provision has been expressly made in the section for the validity of customs opposed to what is referred to as Hindu and Mahommedan Laws, as if customary law formed no part of such laws, but if customary law is in fact a part of Hindu and Mahommedan Law, tautology or an inexact method of expressing the intention of the Legislature cannot make it otherwise. If the terms "Hindu Law" and "Mahommedan Law" in section 13 of the Act must be read as above, I think the terms "Buddhist Law" in the section must be read in the same way, namely, as meaning the law of succession, inheritance, marriage, &c., applicable to the Buddhist parties in the case.

(1) (1867) 8 W. R. 261.

| (2) (1868) 1 Ben. L. R. (P.C.) 26.

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What is the law of succession and inheritance applicable to a Chinese Buddhist? As far as the evidence in this case goes it is customary law wholly unconnected with the Buddhist faith.

Ah Choung appears to have retained and followed Chinese customs of living and worship. Is there anything which compels the Court to apply to his family the rules of the Dhammathats, which are, as far as I am aware, only followed by Burmese Buddhists; who form but a small proportion of the professors of Buddhism throughout the world? In my opinion there is not. The Legislature has designedly refrained from bringing Buddhists under the rule of English law under which succession to the moveable property of a person is governed by the law of the country in which he had his domicile at the time of his death.

The personal law is left to all who are exempted from the operation of the Indian Succession Act.

The law of the Dhammathats is not the outcome of the teaching of the Buddha that the Burmese reverence: it is rather of Hindu origin. It would be incongruous to apply to Buddhists who do not apparently even reverence the same Buddha, laws which are not connected with the Buddhist religion and are accepted only locally.

On the other hand it would be in accordance with the principle of the decisions of the Courts of India to accord to the oriental whose estate is in question the rules of succession applicable to one of his class dying in his native country.

There does not appear to be any written law on the subject of succession in China, therefore the law applicable would be the customary law.

I would hold that it was for the plaintiff to prove that by the customary law applicable to Chinese Buddhists she was an adopted daughter of Ah Choung, and as such entitled to a share in his estate.

His she has failed to do. If, however, the contention for the appellant is correct, and the matter must be decided according to the Buddhist law prevalent in Burma, I think the plaintiff's claim must also fail.

The evidence falls short of proof that even according to Burmese ideas the plaintiff was adopted as a "Kittima" child or child adopted with a view to its sharing in the inheritance of the adopter.

In the first place there is no evidence of Ah Choung having taken part in asking for the child. Further, there is no evidence of his ever having held out or stated to any one that the plaintiff was intended by him to have a share of his property on his death. Judging from the views of the Chinese witnesses in regard to female children, it appears highly unlikely that a Chinaman would adopt a female child with a view to making her a sharer in the estate he might leave.

In *Ma Sa Yi v. Ma Me Gale* (1), the question of adoption amongst Burmese was dealt with. I adopted the views of Mr. Burgess, Judicial Commissioner, in *Ma Mein Gale v. Ma Kin* (2). I adhere to those views, and applying them to this case I think that the plaintiff must fail even if Burmese-Buddhist Law is applicable. I would dismiss the appeal with costs.

Thirkell White, C. J.—I concur.

(1) (1901) 7 Agabeg's Reports, 295.

(2) Chan Tson, L.C. Vol. I, p. 168.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.

MA PWA SHIN v. S. N. A. RAMEN CHETTY. *

Mr. Palit—for appellant (plaintiff). | Mr. Chan Toon—for respondent
(defendant).

Civil First Appeal
No. 98 of
1902.
May 4th,
1903.

*Contract containing a promise to do a certain thing within a specified time,
Construction of by Court—Indian Contract Act, section 55.*

In the case of a written contract of the kind described in section 55 of the Indian Contract Act, the question whether or not it was the intention of the parties that time should be of the essence of the contract must be determined from consideration of the terms of the written instrument and of surrounding circumstances. Oral evidence is not admissible to show the intention of the parties.

Hipwell v. Knight, 1 Y. and C. Ex. 401; *Seton v. Slade*, Tudor's L. C. in Equity, Vol. II, p. 468; *Reuter v. Sala*, L. R. 4 C. P. Div. 239; *Re Poole Fire Brick and Blue Clay & Co.*, 43 L. J. Ch. 447; *Balkishen Das v. Legge*, 1 L. R. 22 All. 149; *Patrick v. Milner*, 2 C. P. D. 342; Fry on Specific Performance, s. 1042; Story's Equity Jurisprudence, s. 776; referred to.

Fox, J.—The defendant-respondent obtained, in August 1900, an *ex-parte* decree against the plaintiff-appellant foreclosing her right to redeem certain paddy lands mortgaged to him by her husband. Under the decree the defendant obtained possession of the lands in February 1901. In July of the same year the plaintiff applied to have the *ex-parte* decree set aside. The application was not proceeded with because the parties on the 8th November 1901 entered into an agreement which the plaintiff seeks specific performance of in this suit.

The material parts of the agreement are as follows:—

"1. That the said S. N. A. Ramen Chetty agrees to hand over the 21 pieces of paddy land mortgaged to him by the said Maung Lu Gale and give up all claims thereto, and the said Ma Pwa Shin agrees to pay to the said S. N. A. Ramen Chetty the sum of Rs. 8,100 in consideration thereof.

2. That the said Ma Pwa Shin agrees to pay the said sum of Rs. 8,100 within 40 days of the date hereof.

3. That the said Ma Pwa Shin will not be entitled to the possession of the said paddy land till the whole of the sum mentioned above is paid."

The suit was filed on the 11th April 1902. In her plaint the plaintiff alleged that a tender of Rs. 8,100 had been made to the defendant on or about the 37th day after the 8th November, but that the defendant had from time to time put off returning the lands to her, and that he had ultimately refused to do so.

The Additional Judge of the District Court found on the evidence that no tender of the Rs. 8,100 had been made within the 40 days. There is no room for doubting the correctness of his decision on this question of fact.

Another issue, however, was raised, *viz.*: "Was it the intention of the parties that time should be of the essence of the contract?"

On this the Additional Judge says: "The plaintiff when examined admitted that she knew that she would not get the lands after the expiry of the 40 days if she did not pay the money within 40 days." In the Additional Judge's opinion this admission made an end of the matter. He says: "If she understood that the payment of Rs. 8,100

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was a condition precedent to the transfer of the lands, then time was of the essence of the contract, even though the document itself will bear another interpretation." This view is, in my opinion, erroneous. It was for the Court to construe the agreement by looking only at its terms. No oral evidence was admissible to explain it, or to show what either party intended. The Court had by the light of the terms of the document to say what *both* parties intended. If as a matter of fact the true construction of the document is that time was not intended by the parties to be of the essence of the contract, a mistake on the plaintiff's part as to her legal rights does not now debar her from asserting those rights.

The question in the case is whether the contract, being construed according to the rules laid down in the Evidence Act, the period of time mentioned in it for completion of the contract should be regarded as of the essence of it.

Section 55 of the Indian Contract Act, 1872, contains certain provisions as to the legal rights of parties to contracts when time is of the essence of the contract, and when it is not so; but neither in that section nor in any other legislative provision is any light thrown upon when time is to be regarded as of the essence of a contract, or when it is not to be so regarded. The doctrines connected with the subject emanate from the decisions of the English Courts of Equity, and it may be well to refer to those doctrines shortly.

When two people enter into a contract and stipulate that it shall be completed within a certain time, it may be said that completion within the time mentioned is a part of the contract, and that the parties contemplated that it should be completed within the time, and therefore if one party does not do what it lies upon him to do within the time, he has failed to perform or has broken the contract. The English Courts of Law regarded stipulations as to completion within a certain time in the above light. The Courts of Equity, however, regarded the question of time differently; for "discriminating between those formal terms of a contract, a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the contract, and applying to contracts the principles which governed the interference of those Courts in relation to mortgages, they held time to be *primâ facie* non-essential." (1)

The doctrine appears to have been at one time carried to extravagant lengths in favour of relief against breaches due to non-fulfilment within the time fixed in a contract (2). However in *Hipwell v. Knight* Baron Alderson states the result of the cases thus (3):—

"A Court of Equity is to be governed by this principle: it is to examine the contract not merely as a Court of Law does to ascertain what the parties have in terms expressed in the contract, but what is in truth the real intention of the parties, and to carry that into effect. In the case of a mortgage for instance, the Court, looking at the real contract, which is the pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees

(1) Fry on Specific Performance, section 1042.

(2) Story's Equity Jurisprudence, section 776. | (3) Y. and C. Ex. 401.

accordingly; taking it to be clear that the general intention should override the words of the particular stipulation. So, in the ordinary case of the purchase of an estate, and the fixing a particular day for the completing of the title, the Court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is only formal, and the stipulation means, in truth, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case."

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Mr. Tudor in his notes to the leading case of *Seton v. Slade* (1) says:—

"A Court of Equity has relieved against and enforced specific performance notwithstanding a failure to keep the dates assigned by the contract either for the completion, or for the steps towards completion, if it could do justice between the parties, and if there was nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant when it is said that in equity time is not of the essence of the contract; the steps towards the completion of the contract being the delivery and return of the abstract of title, objections and requisitions of the purchaser, payment of the deposit or purchase money and delivery of possession."

Contracts relating to land were those in which these doctrines of the Equity Courts were usually applied.

In *Reuter v. Sala* (2) Lord Justice Cotton points out that contracts of purchase of land fell amongst those in which, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition, and equity enforced such contracts although the time fixed therein had passed.

The contract which is the subject-matter of this suit does not differ in any material respects from a contract for the purchase of land.

There is nothing on the face of it to show that the parties contemplated that time should be of the essence of the contract. If there had been a stipulation that if the Rs. 8,100 was not paid within 40 days, the contract would be void, then the time would probably have to be regarded as an essential part of the contract—see *re Poole Fire Brick & Blue Clay Company* (3).

There is no such stipulation, however, and consequently the presumption, as stated by Lord Justice Cotton, should, in my judgment, be applied to the case.

It appears to me also that justice between the parties will be met by giving the plaintiff a decree for specific performance of the contract.

In Civil Regular Suit No. 5 of 1900 in the District Court the defendant claimed Rs. 6,950 as due upon the mortgage of the lands in suit. He asked that in default of payment of the above amount with subsequent interest, the right of redemption might be foreclosed or that the lands might be sold, and the debt discharged out of the proceeds of sale.

The mortgage deed contained no provision for possession of the lands being taken or given to the mortgagee. What was contemplated

(1) Tudor's Leading Cases in Equity, Vol. II., p. 468.
 (2) (1879) L. R. 4 C. P. Div. 239. | (3) (1874) 43 L. J. Ch. 446.

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upon the default of payment of the mortgage money was a sale of the property; yet the District Court gave the defendant a decree for possession. The result had been that under the *ex-parte* decree the defendant acquired for Rs. 6,950 plus 6 months' interest, property which he admits was worth Rs. 10,000 or Rs. 11,000.

There was not, in my opinion, such unreasonable delay on the plaintiff's part in filing the present suit as should disentitle her to the relief she claims.

The defendant would be entitled to compensation for any loss he sustained by reason of the contract not having been fulfilled within the 40 days, but he has not shown that he suffered any loss, and loss could scarcely have occurred for he has been all along in receipt of the rents and profits. I would reverse the decree of the District Court, and decree that if the plaintiff pays into the District Court on or before the 1st July next the sum of Rs. 8,100 less her taxed costs of the suit in the District Court and of the appeal in this Court, the defendant do give possession of the lands which are the subject-matter of the suit to the plaintiff, but if the plaintiff fails to pay the amount payable on or before the abovementioned date, then this appeal and the suit in the District Court should stand dismissed, and that the plaintiff do pay the defendant's taxed costs of the suit and of the appeal.

Thirkell White, C. J.—The sole question for decision in this case is whether it was the intention of the parties as embodied in the written instrument that time should be of the essence of the contract. For there can be no doubt that the plaintiff failed to prove that she tendered the purchase-money within the specified time. That the intention of the parties must be ascertained from the document itself, and that the oral evidence of their intention cannot be received, has been laid down clearly by their Lordships of the Privy Council in *Bal-kishen Das v. Legge* (1), in the following words:—

"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisoes. * * * The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

It is therefore for the Courts to ascertain from the written instrument, and from surrounding circumstances, what was the intention of the parties, or, as has been said, "what must be judicially assumed to have been their intention" (2).

The agreement is in English. It contains three terms, so far as this case is concerned:—(1) The defendant agreed to make over the land in suit to the plaintiff and the plaintiff agreed to pay Rs. 8,100.

(1) (1900) I. L. R. 22 All., 149.

(2) *Per Groves, J., in Partrick v. Milner*, (1877) 2 C. P. D. 342.

(2) The plaintiff agreed to pay the said sum within 40 days. (3) It was agreed that the land should not be made over till the whole of the said sum was paid. Construing these stipulations in accordance with the equitable doctrines which have been discussed in the judgment of my learned colleague, which I have had the advantage of reading, I think it may reasonably be held that the main, substantial object of the contract was the purchase and sale of the land for the sum specified; and that a date was named in order that the contract might be performed in a reasonable time. I think that this is the way in which, judging from the precedents which have been cited, the contract would be construed in English Courts. And there is nothing in the Statute Law of India to indicate that a different view should be taken by this Court. The contract does not specifically say that, if the purchase-money is not paid within the time specified, the agreement shall be void or the plaintiff shall have no right to insist on the purchase. Again, the two terms of the contract may be considered as independent. The defendant agreed to sell and the plaintiff agreed to buy, absolutely, without any reference to time. Next a clause was inserted whereby the plaintiff agreed to pay the purchase-money within forty days. For breach of this second condition, the defendant might be entitled to compensation; but the plaintiff might still insist on the performance of the first unqualified article of the contract. The case is somewhat analogous to that provided for in general terms by section 14 of the Specific Relief Act.

For these reasons, I concur in thinking that this appeal should be allowed, and in the order proposed by my learned colleague.

Before Mr. Justice Fox.

MAUNG BA KYWAN v. MA KYI KYEE.

Mr. Vakharia—for the applicant.

Messrs. Eddis, Conuell and Lentaigne
—for the respondent.

Promissory note bearing uncanceled stamp—Indian Stamp Act, sections 12, 35, 36, 61.

A promissory note bearing a stamp not cancelled as required by law is inadmissible in evidence under section 35 of the Indian Stamp Act. A Court which gives a decree on such a document acts contrary to law. Section 36 of the Act does not prevent a superior Court from correcting the illegality.

S. A. Ralli v. Cara Malli Fazal, (1890) I. L. R. 14 Bom. 102; and *Chenbasapa v. Lakshman Ramchandra*, (1894) I. L. R. 18 Bom. 369; referred to.

Fox, J.—The plaintiff sued upon a promissory note payable on demand. When produced in Court, the note bore an adhesive stamp of one anna, but the stamp had not been cancelled in any way. The Additional Judge, although he noticed this and ordered the note to be sent to the Collector, admitted the document in evidence and gave a decree upon it. Section 12 of the Indian Stamp Act, 1899, requires the person who affixes an adhesive stamp to any instrument to cancel such stamp so that it cannot be used again, and this must be done when affixing the stamp. It also provides that a document bearing

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an adhesive stamp which has not been so cancelled shall be deemed to be unstamped. Section 35 of the Act provides that no instrument chargeable with duty shall be admitted in evidence for any purpose, or shall be acted on, unless such instrument is duly stamped. Provision however is made for the admission in evidence of documents *other than instruments chargeable with a duty of one anna only, bills of exchange and promissory notes*, upon payment of the proper duty and a penalty. Unstamped receipts may also now be admitted in evidence on payment of a penalty.

The document sued upon being a promissory note and bearing an adhesive stamp, fell within the main provision of the section as it was not duly stamped, and none of the provisions in the proviso to the section applied to it. Consequently there was an express provision of law which prevented the document being admitted in evidence and acted upon, and the Additional Judge acted contrary to law in admitting it and giving a decree upon it. It is argued, however, that the Judge's illegal action cannot be interfered with because section 36 of the Act provides that where an instrument has been admitted in evidence such admission shall not, except as provided in section 61 of the Act, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Section 61 provides that when a Court makes an order admitting an instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty, an Appellate Court may take the order into consideration, and if it differs from the original Court's view it may determine the proper amount of duty, and may impound and send the document to the Collector with a view to the party chargeable being prosecuted, or the proper duty and penalty being levied.

Reading sections 35, 36 and 61 together it appears to me that section 36 applies to instruments which may be admitted in evidence under the provisoes to section 35, and to instruments which a Court holds to be not liable to duty, but the absolute provisions of the main part of section 35 are not affected by section 36, and that if a Court admits and acts on an unstamped document which cannot under any circumstances be admitted and acted upon, section 36 does not prevent a superior Court from dealing with the illegality.

The decisions in *S. A. Ralli v. Cara Malli Fazal* (1) and *Chenbasa v. Lakshman Ramchandra* (2) support this view.

The Additional Judge having acted contrary to law in giving a decree upon an unstamped promissory note, his decree is set aside, and the suit is dismissed.

Each party will bear his and her own costs of the suit and of this application.

(1) (1890) I. L. R. 14 Bom. 102. | (2) (1894) I. L. R. 18 Bom. 369.

Before Mr. Justice Birks.

MAUNG THA AUNG AND OTHERS v. MAUNG THA SHUN AND OTHERS.

Messrs. Jordan and Villa—for appellants (plaintiffs). | Maung Kyaw—for respondents (defendants).

*Arbitrators appointed without intervention of Court—disagreement—appeal from order of Court filing award—Code of Civil Procedure, sections 525, 526, 522.*Civil Second
Appeal No. 221 of
1902.
May 15th,
1903.

When parties have agreed to refer a matter to arbitrators appointed without the intervention of a Court, and the agreement makes no provision for difference of opinion, it must be presumed, in the absence of evidence to the contrary, that unanimity was intended.

Sections 526 and 522 do not operate to bar an appeal from an order filing such an award, when the objection is that by reason of want of unanimity the award is void.

Maung Kan v. Ma Hmwe Chon, (1892-1896) 2 U. B. R. 18; *Kali Prosanno Ghose v. Rajani Kant Chatterjee*, (1898) I. L. R. 25 Cal. 141; and *Ma Me Hmyin v. U Nanda Myisu*, 2 U. B. R. (1897-01), 5; followed.

Bindessuri v. Jankee, (1889) I. L. R. 16 Cal. 482, referred to.

Birks, J.—The five plaintiff-appellants in this case are the agents of *pôngyi* U Nya Na. The five respondents are the agents of another *pôngyi* U Pyin Nya. A suit was brought to file an award made without the intervention of the Court by two out of four arbitrators appointed by an agreement, dated the 29th September 1901. This agreement contains a stipulation that the four *pôngyis*, one from Ôkpo, two from Sadè, and one from Pandaung, should make an award, "or such of them as remain." It is admitted that the Pandaung *pôngyi* fell sick and could not come. The actual award is signed by the Ôkpo *Sayadaw* and the Sadè *Sayadaw*. Their actual signatures do not appear, but it purports to be signed by them. It seems to be admitted that *pôngyi* U Awbatha did not consent to the award, but it is argued that the words "or such of them as remain" in the agreement mean that the decision is to be in accordance with the opinion of the majority. No objection was taken in the Court of first instance that the award was incapable of execution.

The Court of first instance held that the award of the majority was binding and gave a decree in accordance with the award. On appeal the District Judge held on the authority of *Maung Kan v. Ma Hmwe Chon* (1) that the agreement did not specify that the opinion of the majority was to prevail, that all the arbitrators must agree, and dismissed the suit.

The first ground of appeal is that there is no appeal allowed by the Code against an order directing an award to be filed. In this case the Court of first instance has made out a decree; section 522 of the Code is relied on as showing that no appeal lies except in so far as the decree is in excess of or not in accordance with the award.

That section no doubt applies where the Court has made a reference to arbitration, but I think it is clear that where the contention all along has been that there is no valid award, an appeal lies, *vide Kali Prosanno Ghose v. Rajani Kant Chatterjee* (2). In that case

(1) (1892-96), 2 U. B. R. 18. | (2) (1898) I. L. R. 25 Cal. 141.

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one of the arbitrators was the retained pleader of the plaintiff; in the present case it is alleged that the three arbitrators should have been unanimous and it is admitted that they were not. Mr. Villa relies on *Bindessuri v. Jankee* (1), but in that case there was no dispute as to the powers of the arbitrators.

I hold, therefore, that an appeal lay to the District Judge. With regard to the third ground of appeal, I find that the decision in *Maung Kan's* case already cited was approved by the late Chief Judge of this Court, while Judicial Commissioner of Upper Burma in *Ma Me Hmyin v. U Nanda Myizu* (2). That case is very similar to the present; there were three arbitrators, and one refused to sign. The written submission to arbitration contained no provision for disagreement, but oral evidence was admitted in the Courts below to show that it was agreed that the decision of the majority should prevail. There is no evidence in the present case to show that the opinion of the majority was to prevail. U Awbatha, the *pôngyi*, who refused to sign the award, speaks of the *Ôkpo pôngyi* as the Umpire, but this probably means that he was the arbitrator who recorded the evidence. The ruling quoted by the lower Appellate Court seems applicable to the present case. The decree passed on the award is also vague and indefinite and does not state clearly the relief given.

I do not think it necessary to refer back for evidence as to whether there was a verbal agreement to abide by the decision of two out of three arbitrators.

The appeal is dismissed with costs.

Before Mr. Justice Birks.

NGA THA DUN AUNG v. KING-EMPEROR.

Messrs. *Agabeg* and *Maung Kin*—for the appellant.

Criminal Appeal
 No. 194 of
 1903.
 May 8th,
 1903.

Joint trial of accused—"Same transaction"—Code of Criminal Procedure, section 239.

The police sent up two accused, A and B, separately, A charged under section 324 with causing hurt to B, and B under section 326 with causing grievous hurt to A. The Magistrate inquired into the case against both accused jointly, and finding that the evidence against B was insufficient discharged him and examined him as a witness against A, who was convicted.

Held,—that since it was proper to take the evidence of A against B, as well as that of B against A, the different offences were not committed in the same transaction, and separate inquiries should have been held against each accused.

Queen-Empress v. Nga Aung Nyun, 1 L. B. R. 56; *Queen-Empress v. Chandra Bhinya*, I. L. R. 20 Cal. 537; *In the matter of David*, 5 C. L. R. 574; *Nga Aung Bwin v. Queen-Empress*, P. J. L. B. 536; referred to.

Birks, J.—The appellant has been convicted by the Eastern Sub-divisional Magistrate of Rangoon under section 324 of voluntarily causing hurt with a *da* to Maung Ba O on the 10th March 1903 and has been sentenced to 2 years' rigorous imprisonment, of which three months are to be in solitary confinement.

(1) (1889) I. L. R. 16 Cal. 482. | (2) 2 U. B. R. (1897-01), 5.

There are three grounds of appeal, but the first, that the conviction is against the weight of the evidence, has been abandoned. It is urged for the appellant that the sentence is too severe, as the evidence shows that Ba O struck the appellant three times with a cane on the back shortly before he was cut by the accused. There were as a matter of fact cross charges which were tried by the Magistrate together.

The record is somewhat misleading as the papers are not arranged in chronological order. I think it is clear from section 441 of Criminal Circulars that the depositions should be filed in chronological order as far as may be. The first witness in the case is shown on the record as Ba O, but he was not examined till the 8th April when he was discharged on the date of the first judgment and directed to be examined as a witness against the present appellant.

The record also does not show clearly which of the various witnesses for the prosecution were the witnesses of appellant or Ba O. They are all shown as witnesses for the prosecution and it would seem that up to the 8th, the two accused were tried jointly, the first six witnesses being those named by Ba O and the next three those named by appellant.

The two accused were sent up by the police on two separate final reports; the appellant being charged under section 324 and Maung Ba O under section 326; and these two reports were put up with two facing sheets Nos. 144 and 145. It appears from an order, dated the 14th March, in the diary of case No. 145 that the Magistrate held that the two charges arose out of the same transaction and ordered the two cases to be tried together. In his order of the 8th April discharging Ba O he speaks of the action of the police in sending up separate charges as quite improper.

The Magistrate has taken a mistaken view of the meaning of section 239, Criminal Procedure Code. If the two accused had been charged under section 160, Penal Code, they could doubtless have been tried together for by fighting together they would both have disturbed the public peace.

It has frequently been held by the Courts in India that the members of the two opposing factions in a riot cannot be tried together, see also *Queen-Empress v. Nga Aung Nyun* (1). The Calcutta High Court has held in *Queen-Empress v. Chandra Bhinya and others* (2) that a fight between two parties cannot properly be described as being the same transaction. In the matter of *David* (3) it was held improper to examine one prisoner as a witness against another in the same trial. In that case two accused were tried jointly, one for criminal breach of trust and one for receiving stolen property. In *Nga Aung Bwin v. Queen-Empress* (4) I held that one accused could not be admitted as approver in the course of the same trial.

In the present case each of the two accused tried jointly was a necessary witness against the other. The Magistrate seems to have

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(1) 1 L. B. R. 56.

(2) (1893) 1 L. R. 20 Cal. 537.

(3) 5 C. L. R. 574.

(4) P. J. L. B. 536.

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felt the difficulty and met it by discharging the accused, against whom there was least evidence, and putting him in as a witness against the other. He then goes on to say that there is only one witness, Nga Thet, who proves that the injuries received by the appellant were caused by Ba O and he merely proves that appellant charged Ba O with cutting him. The appellant was as much a necessary witness against Ba O as Ba O was against him.

According to the medical evidence grievous hurt was caused in both cases, for Ba O had a "box lid fracture of the skull" and Tha Dun Aung had a cut through the lower end of the collar bone. I think some further enquiry should be made as to the charge against Ba O.

The conviction of Tha Dun Aung is quashed and a fresh trial ordered on a charge under section 326, Penal Code, by the District Magistrate, who will, if necessary, take further action against Nga Ba O, who has been discharged. An undertrial warrant will issue for the detention of appellant pending his retrial.

Before Mr. Justice Fox.

MAUNG SAN NYEIN v. MAUNG TUN U AND TWO OTHERS.

Mr. Villa--for appellant (plaintiff). | Messrs. Chan Toon and Wilkins--for respondents (defendants).

Mortgagee with right of pre-emption—Suit by third party for specific performance of contract to sell—Specific Relief Act, section 27 (b).

A condition in or at the time of a mortgage that the mortgagee shall have a right of pre-emption if the mortgagor wishes to sell the property, is valid, if nothing fraudulent, oppressive, or unfair appears in the agreement. If the mortgagee obtains a conveyance of the property before a third party who has contracted with the mortgagor for the purchase of it, the third party cannot enforce the contract against the mortgagee even although the latter knew of the mortgagor's agreement to sell to such party.

FISHER ON MORTGAGES, 4th Edition, section 1152; *Haris Paik v. Jahuruddi Gazi* 2 C. W. N. 575; *Bimal Fati v. Biranja Kuar*, (1900) I. L. R. 22, All. 238; referred to.

The facts are that on the 16th January 1900 the 1st defendant made an usufructuary mortgage of the land which is the subject-matter of the suit, in favour of the 2nd and 3rd defendants, and agreed at the same time that before a sale of it to others they should have a right of pre-emption.

On the 14th November 1901 the 1st defendant agreed to sell the land to the plaintiff without having first offered it to the 2nd and 3rd defendants. The 2nd and 3rd defendants then called on the 1st defendant to sell and convey the land to them in pursuance of his original contract. By a registered deed, dated the 14th February 1902, the 1st defendant sold and conveyed the land to the 2nd and 3rd defendants, for the price at which the plaintiff had agreed to buy. Previous to this the plaintiff had tendered the balance of the purchase money to the 1st defendant.

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The plaintiff's suit was in reality for specific performance of the contract to sell the land to him, and he sought to enforce that contract against the 2nd and 3rd defendants. This latter could only be done if the case was covered by clause (b) of section 27 of the Specific Relief Act.

The conveyance to the 2nd and 3rd defendants was subsequent to the contract to sell to the plaintiff, and when they took that conveyance they undoubtedly knew of the 1st defendant's contract to sell to the plaintiff. They, however, relied upon having a right to purchase in priority to others under the original contract with them.

A learned author, Mr. Fisher, has questioned whether under English law a stipulation giving the mortgagee a right of pre-emption in case the mortgagor wished to sell the property should be upheld in a Court of Equity, but in one edition of his work on the Law of Mortgages (1) he says that the Court will not object to such a stipulation, but the mortgagee is liable to be deprived of the benefit of it by oppressive and fraudulent conduct.

In *Haris Paik v. Jahuruddi Gazi* (2) it was argued that such a stipulation was against public policy, but the Court held that it was valid.

In *Bimal Jati v. Biranja Kuar* (3) such a stipulation, with an addition, which practically fixed at the time of mortgage the price to be paid if the property were sold, was upheld as valid after full discussion. This decision admits that if in any case a stipulation for pre-emption could be shown to be fraudulent, oppressive or unfair, it would not be upheld.

Adopting the above rulings as correct statements of the law of India, I hold that the 1st defendant's agreement giving the 2nd and 3rd defendants a right of pre-emption was valid, and created a right in their favour to acquire the property in preference to others if the 1st defendant wanted to sell it.

It cannot be held that there was anything fraudulent, oppressive or unfair about the agreement in this case, because it did not stipulate for any such condition as that the 2nd and 3rd defendants should have a right to buy at a lower price than others offered, or for anything giving them an undue advantage.

The conveyance to the 2nd and 3rd defendants, being in pursuance of a right to purchase created prior to the plaintiff's right to purchase, must prevail upon the principle of the maxim *qui prior est tempore potior est jure*.

This appeal is dismissed as against the 2nd and 3rd defendants, but the lower Appellate Court should have decreed the return by the 1st defendant of the earnest-money paid by the plaintiff. The decree of the lower Appellate Court will be varied in this respect, and there will be a decree against the 1st defendant ordering him to pay the plaintiff Rs. 10 without costs.

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(1) Fisher on Mortgages, 4th edition, section 1150.

(2) (1897-98) 2 C.W.N., 575. | (3) (1900) I.L.R. 22 All., 238.

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Appeal No. 112 of
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Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Birks.

MAUNG PO MIN v. U SHWE LÜ & ANOTHER.

Mr. Palit—for appellant (plaintiff). | Messrs. Agabeg and Kin—for respondents
(defendants).

Buddhist Law—Inheritance—Suit by eldest son for one-fourth share—Limitation Act.

The Burmese Law of Inheritance, where it conflicts with the Limitation Act, cannot be enforced in the Courts.

Article 123 of Schedule 2 of the Limitation Act applies to a suit by an eldest son for one-fourth share of the estate of his father and mother, on the mother's death. In such a case, limitation begins to run from the date of the mother's death.

Mi Paing v. Mi Tu, S.J.L.B. 51; *Ma Min Ku v. Tha Nyun*, 2 U.B.R., (1892—96) p. 9; *Aung Ge v. Ma Hla Win*, P.J.L.B. 415; *Ma Nyein Aung v. Ma So*, P.J.L.B. 530; *Anleathan v. Mi Tha Ta U*, P.J.L.B. 625; *Ma On v. Shwe Oh*, S.J.L.B. 378; *Seik Kaung v. Po Nyein*, 1 L.B.R. 23; referred to.

The plaintiff-appellant, Po Min, sued the defendants-respondents, his father and step-mother, for his share, one-fourth, of the estate of his father and mother, Ma Yin, on Ma Yin's death.

The suit has been dismissed on the preliminary point of limitation. The learned Additional Judge of the District Court did not apply the Limitation Act, but the Burmese Buddhist Law, and came to the conclusion that the suit was time-barred thereunder. In coming to this conclusion the Additional Judge probably overlooked the Special Court ruling in *Mi Paing v. Mi Tu* (1) in which it was clearly held that the Burmese Law of Inheritance, where it conflicts with the Limitation Act, cannot be enforced in our Courts. This ruling is binding unless or until it is overruled by this Court. A similar rule obtains in Upper Burma, as stated in *Ma Min Ku v. Tha Nyun* (2). This principle has been consistently followed both in Upper Burma and in Lower Burma and can hardly now be open to question. It has been but faintly contested in this appeal.

On the finding that the Limitation Act must be applied, we have heard argument as to the Article which should be applied. We think there is abundant authority for holding that Article 123 of the Second Schedule is the appropriate Article. In *Aung Ge v. Ma Hla Win* (3), the learned Judicial Commissioner (Mr. Hosking) held that Article 123 applied to claims to a share in the inheritance of deceased parents. The same view was taken by the Special Court in *Ma Nyein Aung v. Ma So* (4) and by the Judicial Commissioner in *Anleathan v. Mi Tha Ta U* (5). We see no reason to dissent from these conclusions and we decide that Article 123 of the Second Schedule of the Limitation Act governs the period of limitation in this suit.

As regards the date from which limitation should begin to run, we think that the ruling of the Special Court in *Ma On v. Shwe Oh* (6) should be followed; and that subject to any exception on account

(1) S. J. L. B. 51.

(2) 2 U. B. R. (1892—96) p. 9.

(3) P. J. L. B. 415.

(4) P. J. L. B. 530.

(5) P. J. L. B. 625.

(6) S. J. L. B. 378.

of the minority of the plaintiff, the date should be that of the mother's death. Some doubt on this point was expressed in *Seik Kaung v. Po Nyein* (1); but the decision of the Special Court cited above was not overruled.

We do not find on the record sufficient materials to enable us to decide whether this suit is barred by the operation of article 123 of the second schedule of the Limitation Act. Some attempt must be made to fix approximately at least the dates according to the English calendar. This has not been done. We reverse the decree of the lower Court and remand the suit for a fresh decision on the merits or on the ground of limitation, subject to the remarks made above. If necessary, the Court should allow the parties to produce further evidence, or to re-examine witnesses, for the purpose of fixing the relevant dates. Costs will follow the final result.

Before Mr. Justice Birks.

SOOBARAMONY PILLAY CHETTY v. MAUNG PO LU.

Messrs. Eddis, Connell and Lentaigne
—for appellant (plaintiff).

Messrs. VanSomeren, McDonnell and
Fagan—for respondent (defendant).

Damages for malicious prosecution—Suit for.

A conviction by a criminal Court even though afterwards reversed on appeal is evidence that the complainant had reasonable and probable cause for prosecuting the accused; and when there has been such a conviction a suit for damages for malicious prosecution will not lie, save in very exceptional circumstances.

Kazie Koibutollah v. Motee Peshakur, 13 W.R., 276; *Parimi v. Bellamkonda*, 3 Mad. H.C., 238; *Reynolds v. Kennedy*, 1 Wilson, 232; *Fadubar Singh v. Sheo Saran Singh*, I.L.R. 21 All., 26; referred to.

The plaintiff-appellant in this case is a Chetty and he sued for Rs. 2,000 damages for a malicious prosecution under section 406, Penal Code. The defendant is Maung Po Lu, who was the 2nd defendant in Civil Regular No. 4 of 1901 of the Subdivisional Court of Wakè-ma. The plaintiff claims Rs. 1,000 as actual expenses incurred by him and Rs. 1,000 damages for distress of mind and loss of credit. The defendant pleaded justification and denied malice; he put in a petition saying that as a public servant he was unable to get leave to appear and asked that the framing of issues might be postponed till 2nd October.

Issues were framed by consent of the advocates on the 28th September. The plaintiff's witnesses were examined on the 4th December. It is not quite clear from the record whether the defendant ever appeared in person. He might apparently have come in October and claimed to be examined, but there is nothing on the record to show that he ever appeared or applied for further postponement in order to give evidence. The case was therefore decided on the evidence of the plaintiff and his 5 witnesses alone.

The facts of the case are fully set out in the judgment of the Court of first instance. The Court held that the defendant had made up a false story that the Chetty had come to his house and asked for the *naggats* in order to sell them to Tun E, and after obtaining possession

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of them had fraudulently retained them as security for Rs. 700 advanced by him to Ma Hlaing for funeral expenses. The evidence on the record is unchallenged and shows that as a matter of fact the defendant himself brought the *naggats* to the Chetty to retain as security instead of a pair of bangles for this sum of Rs. 700. The Court of first instance held that the defendant had acted maliciously and gave the plaintiff a decree as prayed.

This decision was reversed on appeal by the Judge of the Divisional Court, who found that though plaintiff might have brought a false charge it was not proved that he had done so; that the burden of proof was on the plaintiff to show that the defendant was actuated by malice and that his proceedings were without reasonable and probable cause.

The learned Judge of the Divisional Court held that the defendant's story was as probable as the plaintiff's as he was shown to be interested, and had charge of the keys of the box, while the Chetty's conduct seems to have shown that he took sides with Ma Hlaing.

I concur with the Court of first instance in thinking that it was very unlikely that the plaintiff would commit a criminal breach of trust as alleged by the defendant, but the fact that he has been convicted in itself seems to show that the defendant had reasonable and probable cause for the prosecution. This was held very strongly by Jackson and Phear, JJ, in *Kazee Koibutoollah v. Motee Peshakur* (1). In that case the accused was convicted by the Deputy Magistrate of theft and sentenced to 6 months' imprisonment. This conviction was reversed on appeal, but was held to show that the defendant had fair cause to impute the crime to the plaintiff. A similar decision was given by the Madras High Court in *Parimi v. Bellamkonda* (2). In that case the Judges, Bittleston, Acting C.J., and Ellis, J., remarked:—

"We do not know of any instance of a suit of this kind being successfully maintained after a conviction of the plaintiff by the sentence of one competent tribunal. In the case of *Reynolds v. Kennedy* (3) an attempt was made but it failed."

There is nothing in the present case which shows that the qualification applies which the Court added to the above remarks, as to the defendant, when instituting the prosecution, having information available to the plaintiff which he held back from Court. It was simply a case of one of two stories, one of which has been believed by a Magistrate and has resulted in conviction. This Madras ruling was followed by the Allahabad High Court in *Fadubar Singh v. Sheo Saran Singh* (4). In that case it was noted that the Appellate Court in reversing the conviction did not find that the complaint was utterly false. A similar remark applies to Mr. Buchanan's judgment on the criminal appeal, for he observes:—

"The story of the manner in which the *naggats* found their way into Ma Hlaing's possession is quite as probable as the story for the prosecution."

Neither of these cases appear to have been over-ruled and I think they are fatal to this appeal. The appeal is dismissed with costs.

(1) (1884) 13 W.R., 276.

(2) (1868) 3 Mad. H.C., 238.

(3) 1 Wilson, 232.

(4) (1899) I. L.R. 21 All., 26.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief
Judge, and Mr. Justice Fox.*

AGA MAHMOOD v. EDWARD PELTZER AND OTHERS.

Mr. Giles—for appellant. | Mr. Connell—for respondents.

Trade-marks—limitation.

The period of limitation in a suit for an injunction to restrain from the infringement of a trade-mark is prescribed by Article 120 of Schedule II of the Indian Limitation Act.

A fresh right to sue accrues in respect of each infringement, until the trade-mark has become *publici juris*.

Fullwood v. Fullwood, L. R. 9 Ch. Div., 176; *Kanakasabai v. Muttu*, I. L. R., 13 Mad. 445, referred to.

Fox, J.—The plaintiffs sued the defendant for infringement of a trade-mark. Three reliefs were claimed, namely, (1) an account of the cloths bearing the mark complained of which the defendant's firm had imported into Burma, (2) damages, and (3) an injunction restraining the defendant from importing, selling and exposing or offering for sale cloths bearing the mark.

The learned Judge on the Original side found that the mark which the defendant had used was an infringement of the plaintiffs' trade-mark, and that the plaintiffs had not lost their right to their mark by delay and acquiescence. He gave a decree for an injunction as prayed, but there is no decree for either an account of profits or for damages. We have been informed by counsel for the plaintiffs that the claims for these reliefs were not pressed. The defendant has appealed on the grounds that (1) the suit was barred by limitation, and (2) that, even if not so barred, the plaintiffs had lost their right by delay and acquiescence, and were not under the circumstances of the case entitled to a decree for an injunction. The other grounds of appeal relate to this second ground.

At the hearing learned counsel for the defendant wished to argue whether the mark used by the defendant constituted an infringement of the plaintiffs' mark, but as this ground was not included in the memorandum of appeal, we declined to hear him upon it.

He admitted that unless he substantiated that the suit was barred by limitation, he could not succeed on the ground of the plaintiffs' delay and acquiescence. On this argument the matter resolves itself into the question whether the suit was barred by limitation. Article 40 of the 1st division of the 2nd schedule of the Limitation Act was relied on. That article applies to suits "for compensation for infringing copyright or any other exclusive privilege." The limitation for such a suit is three years from the date of the infringement.

In the present case the first delivery into the Rangoon market of goods bearing the infringing mark was on the 27th August 1895, and the suit was filed on the 18th September 1901. The plaintiffs were informed in November 1896, that the defendant's then firm were using a mark which, in the opinion of their informants, was an infringement of their mark, but they did not actually see the infringing mark until September 1900, and then they themselves, not being acquainted

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with the conditions of the Eastern markets, failed to understand how the defendant's mark could be considered to be an infringement of their mark. Eventually, however, a suit on their behalf was filed on the date above mentioned.

So far as the suit claimed damages and an account of profits, article 40 would probably debar them from obtaining either damages or profits for any infringement which took place over three years previous to the date on which the suit was instituted, but the article does not apply to the claim for an injunction, unless the defendant's counsel's argument that the right to an injunction is co-extensive with and dependent on the right to obtain damages for infringement, is correct. Mr. Justice Fry's decision in *Fullwood v. Fullwood* (1), that mere lapse of time, short of the statutory period fixed for the limitation of actions, will not deprive a plaintiff in action for an infringement of a trade-mark of his right to an injunction, has been relied upon by both sides. Defendant's counsel urged that the infringement was in August 1895, and although the infringement was not known to the plaintiffs the right to compensation for it became barred in 1891 under article 40, and consequently under this decision the right to an injunction also became barred.

Under the circumstances now before us the suit may be treated as if the only claim made had been for an injunction. The question then is what provision is made in the Indian Limitation Act for such a suit.

Article 40 above referred to does not in express terms apply to such a suit; article 36 also applies only to a suit for compensation; the only other article which can apply is the general article 120, which provides for a suit for which no period of limitation is provided elsewhere in the schedule, the limitation being six years from the time when the right to sue accrues. The infringement of a trade-mark is a wrong, and I take it that a right to sue accrues to the person wronged for and in respect of every wrongful act committed until such act becomes, as it may do in some cases, no longer wrongful. For instance, if a person trespasses on my land I have a right to sue him for every act of trespass, until by reason of repeated trespasses accompanied by the conditions necessary to acquire an easement, the trespasser acquires a right of way over my land. So in the case of an infringement of a trade-mark I apprehend that the owner of the mark has a right to sue for every infringement of the mark until the mark becomes *publici juris*, that is to say, until the proprietor of it has in effect thrown open the use of it to the public by allowing his right to be so habitually infringed that the trade-mark no longer conveys to those who see it the impression that the goods to which it is attached are the manufacture of one manufacturer, or the goods of one person or firm who originally adopted the mark. It is not, and could not be contended in this case that the plaintiffs' mark had become *publici juris*. The defendant admits having imported cloths with the mark, which has been held to be an infringement of the plaintiffs'

(1) (1878) L. R. 9, Ch. Div., 176.

mark, in each year from 1897 up to 1902, so that on the view I take there can be no question as to the suit, so far as it was a suit for an injunction, not being barred by limitation.

It may be said that on this construction the proprietor of a trade-mark might delay for many years in bringing a suit for an injunction without any risk, and there might be great hardship on a defendant who *bona fide* went on selling goods bearing a mark which he considered not to be an infringement of any other mark.

I may point out that under section 52 of the Specific Relief Act preventive relief is to be granted by Indian Courts at their discretion, and in view of the fact that the Limitation Act makes no express provision for suits for an injunction, it is questionable whether the decision in *Fullwood v. Fullwood* above referred to should be followed.

The delay on the plaintiffs' part in taking action was no doubt long, but there is some explanation of it, although the explanation is not wholly satisfactory.

I am not prepared to disagree with the learned Judge in holding that the plaintiffs were not deprived of their right to an injunction by reason of delay in suing, and I would dismiss the appeal with costs.

Thirkell White, C. J.—I concur generally in the judgment which has just been delivered. The article of the 2nd schedule of the Limitation Act which applies is, I think, article 120, as was held by the High Court of Madras (not in a trade-mark case but in a suit for a perpetual injunction in another matter) in the case of *Kanakasabai v. Muttu* (1). I think also that a fresh right to sue accrues in respect of every act of infringement, in which case the suit is well within the prescribed period of limitation.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and Mr. Justice Birks.

NGA THET U v. KING-EMPEROR.

Examination of accused—calling on accused for his defence—Criminal Procedure Code, sections 289, 342.

The accused was convicted of murder and sentenced to death by the Sessions Court. The record did not show that he had been examined or called upon to enter on his defence.

Held,—that the omissions were not cured by section 537 of the Code of Criminal Procedure.

Po Sein v. The Crown, C. A. No. 214 of 1902; (unreported);

Queen-Empress v. Imam Ali Khan, I. L. R. 23 Cal. 252, referred to.

Thirkell White, C. J.—The appellant, Thet U, has been convicted of murder and has been sentenced to death.

Before considering the case on its merits, I think it necessary to deal with a question which arises concerning the validity of the proceedings. So far as can be ascertained from the record, it does

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(1) (1890) I. L. R. 13 Mad. 445.

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not appear that the accused was examined by the Sessions Court or that he was called upon to enter upon his defence. The diary shows that the opinion of the Assessors was recorded immediately after the close of the case for the prosecution.

As was held by a Bench of this Court in *Po Sein v. The Crown* (1), the terms of section 342, Criminal Procedure Code, are imperative and require the Court to question the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called upon for his defence, for the purpose of enabling him to explain any circumstances appearing in the evidence against him. "It is true," to cite the words of the judgment in the above-mentioned case, "that section 289 of the Code of Criminal Procedure refers to 'the examination (if any)' of the accused, as if it were optional with the Court to examine the accused or not." But the only explanation of this apparent inconsistency between section 289 and section 342, Code of Criminal Procedure, is that section 289 contemplates the case in which there are no circumstances for the accused to explain. That seems to be the only instance in which section 342 of the Code of Criminal Procedure would not require an accused to be questioned generally on the case." I believe this to be a correct statement of the law.

Again, under section 289, sub-section (4), of the Code of Criminal Procedure, if the Court considers that there is evidence that the accused committed the offence, the Court must call on the accused to enter on his defence. Obviously the record must show that this requirement of the law has been fulfilled; and the substance of the accused's defence should be recorded.

It remains for consideration whether these serious omissions to comply with the law are such as to invalidate the proceedings in this case. Section 537 of the Code of Criminal Procedure provides that no finding of a Court of competent jurisdiction shall be reversed or altered on appeal on account of any omission or irregularity in any proceedings during the trial, unless the omission or irregularity has in fact occasioned a failure of justice. In the *Queen-Empress v. Imam Ali Rhan* (2), it was held by the High Court at Calcutta that the omission to call upon the accused to enter on his defence was not cured by section 537 of the Code of Criminal Procedure. The words used by Banerji J. are as follows:

"The formality of calling upon an accused person to enter on his defence is not a mere formality, but is an essential part of a criminal trial, and when that has been wanting, it is difficult to say that the omission has not occasioned a failure of justice."

In that case, a re-trial was ordered, even though the accused had been examined by the Sessions Court in conformity with section 342 of the Code. This case is even stronger. For the accused was neither called upon for his defence nor examined to enable him to explain circumstances appearing in the evidence against him. His examination before the committing Magistrate was put in and read.

(1) C. A. No. 214 of 1902 (unreported). | (2) (1895) I. L. R. 23 Cal. 252.

But it is impossible to say what might have been the effect on the Judge's mind of statements made by the accused if he had been examined in the Sessions Court or if he had been called upon for his defence. It seems to me impossible to say that these omissions have not occasioned a failure of justice. It is the undoubted right of the accused to be heard; and unless this right is accorded to him it cannot be said that he has had a fair trial. In this case, so far as appears from the record, he was not heard at all, except when he pleaded to the charge.

I do not express an opinion on the point whether, if the accused was examined but not called upon for his defence, or if he was called on for his defence but not examined, it would be necessary to order a re-trial. That point may be considered when it arises.

Notwithstanding the serious delay and inconvenience which will be occasioned, I think that we have no option but to order a retrial in this case. It will be necessary that the trial should be held afresh and that the witnesses should be examined again.

I would reverse the conviction and sentence and order a new trial accordingly.

Birks, J.—I concur.

Before Mr. Justice Birks.

MAUNG HME BU AND ONE *v.* MAUNG SHWE HMYIN AND THREE OTHERS.

Messrs. *Burjorji* and *Dantra*—for
the appellants (plaintiffs).

Mr. *Palit*—for the respondents (de-
fendants).

Jurisdiction—case tried by Court of higher grade than that ordinarily having jurisdiction—Court in which appeal should be brought—Civil Procedure Code, sections 15, 25, 578—remand by Appellate Court for further evidence, sections 566, 569.

A suit of value less than Rs. 500 was, with consent of parties, transferred to the Subdivisional Court, which gave judgment for plaintiff. Appeal was made to the Divisional Court, which framed certain issues and directed the Township Court to take evidence and record findings on them. On the evidence so recorded, the successor of the former Judge of the Divisional Court dismissed the plaint.

Held, on second appeal, that the first appeal was rightly brought in the Divisional Court, and that the remand of the case to the Township Court, if irregular, was not such a material irregularity as to justify interference.

Pachaoni v. Ilahi Bakhsh, I. L. R. 4 All. 478; *Peary Lall v. Komal*, I. L. R. 6 Cal. 30; *Ledgard v. Bull*, I. L. R. 9 All. 191; *Matra Mondal v. Hari Mohun*, I. L. R. 17 Cal. 155; *Ram Narain v. Parmeswar*, I. L. R. 25 Cal. 39; *Velayudam v. Arunachala*, I. L. R. 13 Mad. 273; *Chandulal v. Awad*, I. L. R. 21 Bom. 351; referred to.

Birks, J.—The facts of this case are thus stated by Mr. *Burjorji* on behalf of petitioners. They filed a suit, No. 7 of 1901, on the 16th February 1901 in the Township Court of Minhla. This suit was dismissed for default on the 2nd of April 1901, after issues had been framed and one witness for plaintiffs examined. Application was then made to the Judge to restore the suit, and was refused in Miscellaneous Case No. 6 of 1901.

The plaintiffs then appealed to the District Court, which gave the 1st plaintiff leave to re-open the case in Civil Appeal No. 43 of 1901.

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On the 2nd of August 1901 the suit was transferred by consent to the Subdivisional Court of Minhla, and the case was re-opened and headed No. 2 of 1901 in that Court on the 1st of October. Both Nga Hme Bu and his wife, Ma Shwe Ein, appear as plaintiffs though the 1st plaintiff alone was allowed to re-open the suit. A decree was given in favour of Nga Hme Bu for Rs. 238-5-0, the amount sued for.

The defendants next applied to be declared insolvent under the provisions of Chapter XX of the Code. This application was dismissed. They then appealed to the Divisional Court against the decree of the Subdivisional Court, dated the 18th November 1901. This appeal was filed on the 13th of January 1902 and therefore beyond the period that would be allowed if the appeal had been preferred to the District Court from a Township Court.

The Judge of the Divisional Court, Mr. Todd-Naylor, heard the appeal and evidently suspected fraud of some kind for he examined the record-room lists and referred the case back to Maung Po Sein, who is described as the Township Magistrate of Thayetmyo, for evidence on three additional issues framed by him.

When the findings were returned the plaintiffs' suit was finally dismissed by Mr. Cholmeley, who had succeeded Mr. Todd-Naylor as Judge of the Divisional Court.

There are six grounds of revision, but they really amount to three—

- (1) That the Divisional Court had no jurisdiction to entertain the appeal as the suit having been instituted in the Township Court the appeal lay to the District Court notwithstanding the transfer to the Subdivisional Court.
- (2) That the Divisional Court erred in law in remanding the case to a different Court and exercised a jurisdiction not vested therein by law.
- (3) That the Divisional Court acted with material irregularity in reversing the decree of the original Court.

Mr. Burjorji contended on the 1st ground that the suit having been rightly filed in the first instance in the Township Court it remains a suit of that character even though it was transferred to the Subdivisional Court. He has cited the following authorities which I will examine in detail. The first is the case of *Pachaoni v. Ilahi Bakhsh* (1). In that case the Court in which the plaint was originally instituted had no jurisdiction as the cause of action did not arise within its local limits. The case was transferred by the District Judge from the Munsif of Cawnpore to the Subordinate Judge of Cawnpore. That officer held that he had only the powers of the Munsif and returned the plaint. This order was reversed on appeal to the District Judge. On further appeal to the High Court, Straight, J., held that the order of the Judge passed under section 25 of the Code could not cure any defect of jurisdiction in reference to the institution of the suit and directed him to rehear the appeal. In *Peary Lall v. Komal* (2), the land which formed the subject-matter of the suit had been transferred from one district to another before the appeal was made. The High Court held

(1) (1882) I. L. R. 4 All. 478.

|

(2) (1881) I. L. R. 6 Cal. 30.

that they could not transfer the hearing of the appeal to the Judge who would have had jurisdiction before that transfer was made. This decision was entirely approved by their Lordships of the Privy Council in the case of *Ledgard v. Bull* (1). In that case the Court which first entertained the plaint was not competent under section 22 of Act XV of 1895, and the case was withdrawn by the District Judge by consent of the parties to his own Court under section 25, Civil Procedure Code. Their Lordships observed:—

“When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process: although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision. On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.”

In the case of *Matra Mondal v. Hari Mohun* (2), a suit valued at over Rs. 1,000 was filed in the Court of a Subordinate Judge when as a matter of fact it should have been filed in the Munsif's Court. On the valuation found by the District Judge on appeal, costs were only allowed on the scale of the Munsif's Court. The High Court held that the Subordinate Judge was competent to try and that the words in section 578 ‘not affecting the jurisdiction of the Court’ meant ‘not affecting the competency of the Court to try.’

Mr. Burjorji has placed most reliance on the case of *Ram Narain v. Purmeswar* (3). In that case an appeal over Rs. 5,000 in value was wrongly filed in the District Judge's Court and was withdrawn by the High Court under section 25. When they came to hear the appeal the High Court found themselves debarred from doing so by the decision in *Ledgard v. Bull* above referred to. In the case of *Velayudam v. Arunachala* (4), the original suit should have been filed in the Munsif's Court but was, as a matter of fact, filed in the Subordinate Judge's Court. The District Judge was the appellate authority in whichever Court the suit was filed and it was urged that as the appellant did not demur to the jurisdiction of the lower Appellate Court, he must be held to have waived the right to raise the question of jurisdiction. The decree was set aside and the plaint was returned for presentation in the proper Court.

In *Chandulal v. Awad* (5), the sanction of the Governor-General was necessary to the institution of the suit and was not given till after the plaint had been filed; it was held the sanction was insufficient but that as the Court had inherent jurisdiction over the subject-matter the defendant had by his conduct waived the defect.

It may be noted that in all these cases the plaint was originally filed in the wrong Court and the general principle laid down is that where the original Court was not competent to try the suit as having

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(1) (1887) I. L. R. 9 All. 191.

(2) (1890) I. L. R. 17 Cal. 155.

(3) (1898) I. L. R. 25 Cal. 39.

(4) 1890) I. L. R. 13 Mad. 273.

(5) (1897) I. L. R. 21 Bom. 351.

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no inherent jurisdiction no subsequent transfers can confer jurisdiction, but when the Court has inherent jurisdiction but is debarred from trying the suit by the terms of section 15 of the Code of Civil Procedure this is an irregularity which can be cured under section 578 if the parties have not been prejudiced.

Now it is clear from the terms of section 25 of Act VI of 1900 that a Subdivisional Court has jurisdiction to hear and determine any suit or original proceeding not exceeding Rs. 3,000 in value. It has frequently been held as in the case of *Matra Mundal* above noted that section 15, Civil Procedure Code, refers to procedure only and does not deprive any Court of jurisdiction which it may otherwise possess.

There was not even any irregularity in transferring the case to the Subdivisional Court as the Judge of the Township Court had acted harshly in dismissing the suit *ex parte*. The question still remains as to whether the appeal lay to the District Court or Divisional Court. The only case of all those cited by Mr. Burjorji which seems to bear out his contention is 4 All., 478, but in that case the suit was originally brought in the wrong Court which had no territorial jurisdiction and the Subordinate Judge merely held that the order of transfer could not give him a jurisdiction of that kind when the plaint was filed in the wrong Court.

Mr. Burjorji relies also on clause 3 of section 25, Civil Procedure Code, as showing that the Court to which the case is transferred only exercises the powers which were exercised by the Court from which the transfer was made. I do not think this argument has much weight. It may well be that the Legislature did not wish to extend the right of appeal by this section when none existed before; but if it had been intended that the Court to which the case was transferred was in all cases to be treated as of the same character as the Court from which the case was transferred it would have been expressly provided. I think the appeal was correctly brought in the Divisional Court. On the other grounds I do not think that the action of the Divisional Court in remanding the case to another Judge for finding on certain issues is such a material irregularity as would justify me in interfering on revision. The lower Appellate Court held that the plaintiff's claim might be genuine but was evidently of opinion that the evidence in support of it was not sufficient and required more evidence. It may be that Mr. Todd-Naylor formed an erroneous opinion on this point but the final order dismissing the suit was not passed by him but by his successor. I find that Maung Po Sein was Additional Judge of the Township Court of Thayetmyo and he should have signed his proceedings in that capacity. No sufficient reason was given by the Judge of the Divisional Court for not referring the case back to the original Judge, but his action seems covered by section 569, Civil Procedure Code.

For these reasons this application is dismissed, but I will make no order as to costs.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

KING-EMPEROR *v.* NGA PO KYAW.

MR. McDonnell, ASSISTANT GOVERNMENT ADVOCATE, FOR THE CROWN.

*Criminal Revision
No. 631 of
1903.
June 17th,
1903.*

Reformatory Schools Act—procedure.

The District Magistrate, to whom proceedings were submitted under section 9 of the Reformatory Schools Act, transferred them to the Subdivisional Magistrate for disposal. The latter passed orders under section 9 of the Act.

Held,—that the action of the District Magistrate and Subdivisional Magistrate was illegal, and *ordered* that the order of the District Magistrate and Subdivisional Magistrate be set aside, and the case disposed of by the District Magistrate under section 9, sub-section (2), of the Reformatory Schools Act.

The Magistrate of the first class who tried this case, not being specially empowered by the Local Government under section 8 of the Reformatory Schools Act, and being of opinion that the accused was a proper person to be an inmate of a Reformatory School, rightly submitted his proceedings to the District Magistrate in accordance with section 9 of the Act. The District Magistrate, by his order of the 17th February 1903, transferred the case to the Subdivisional Magistrate for disposal. The Subdivisional Magistrate proceeded to deal with the case under section 9 of the Reformatory Schools Act, and sentenced the accused to rigorous imprisonment for two years, substituting for the sentence an order of detention for five years in a Reformatory School. The accused appealed and after a reference to the Subdivisional Magistrate the appeal was dismissed.

The learned Assistant Government Advocate, who appeared on behalf of the Crown, has not been able to support the legality of the procedure which has been adopted. It is only the District Magistrate who has power to pass orders under section 9 of the Reformatory Schools Act, though the present case is not the only one which has come to my notice in which this has been overlooked. The order passed by the Subdivisional Magistrate was made without jurisdiction. He is empowered under section 8, not under section 9, of the Act.

There is abundant authority for holding that section 16 of the Reformatory Schools Act does not prevent the exercise by this Court of its revisional powers in cases where orders have been passed without jurisdiction.

I set aside the order of the Sessions Court dismissing the appeal of the accused, the order of the Subdivisional Magistrate sentencing him and ordering him to be detained in a Reformatory School, and the order of the District Magistrate transferring the case to the Subdivisional Magistrate. The District Magistrate will now proceed to dispose of the case under section 9, sub-section (2), of the Reformatory Schools Act. His attention is invited to section 11, sub-section (1), of that Act.

Before Mr. Justice Fox.

RAMRICK DASS *v.* MOHAMED YACUBJI DUDAH.

Mr. Buckland—for applicant (plaintiff) | Mr. Lentaigne—for respondent.

Claim for use and occupation.

A claim for use and occupation only arises where it is shown that the occupation was by the permission or sufferance of the plaintiff.

Gibson v. Kirk, 1 Q. B. 850; *Hellier v. Sillcox*, 19 L. J. Q. B. 295; *Marquis of Camden v. Batterbury*, 5 C. B. N. S. 808; and *Churchward v. Ford*, 2 H. & N. 446; referred to.

The learned Judge in his judgment says that if the claim had been for compensation for use and occupation, it must have been decreed, at any rate in part.

The claim was in fact for use and occupation of the premises, and was not for rent, as stated by the learned Judge.

The plaintiff alleged that the defendant had occupied one room in the house by permission of the plaintiff and had agreed to pay a reasonable rent for the use of the premises. It is not explicitly stated that this agreement was an express agreement. In evidence the plaintiff sought to make out an express agreement to the above effect, but the learned Judge held it had not been made out.

If, however, the defendant occupied the premises by the permission or sufferance of the plaintiff, the latter would be entitled to rely on the contract or promise which the law implies that the defendant would pay a reasonable sum for such use and occupation—*Gibson v. Kirk* (1), *Hellier v. Sillcox* (2).

The implication however only arises where it is shown that the occupation was by the permission or sufferance of the plaintiff—*Marquis of Camden v. Batterbury* (3), and *Churchward v. Ford* (4).

In the present case the defendant denied that he occupied by the permission of the plaintiff.

The learned Judge has found both that there was no express agreement to pay rent and that no relationship of landlord and tenant existed. He does not appear to have considered the defendant's occupation upon what was alleged and traversed with regard to it in all aspects. The chief question to be determined was whether the defendant occupied the room from the 16th July to the 31st August by the permission and sufferance of the plaintiff.

It appeared that the defendant was the agent of a lady who had brought a suit against the plaintiff for specific performance of a contract by the deceased person whom the plaintiff represented, to buy the property in question. Specific performance was decreed, and the plaintiff paid the purchase money into Court.

His legal advisers then wrote to the lady's legal advisers asking that possession of the premises might be delivered and claiming the rents and profits as from the date of the order allowing the purchase

(1) (1841) 1 Q. B. 850 at p. 856.
(2) (1850) 19 L. J. Q. B. 295.

(3) (1859) 5 C. B. N. S. 808.
(4) (1858) 2 H. & N. 446.

money to be withdrawn from the Court. No answer to that letter was sent until nearly a month had elapsed.

The answer was written under the instructions of the defendant, and it is stated that he was prepared to make over the property, and also that he was occupying a portion of it and was prepared to remain in occupation at a reasonable rent. The answer to this letter was a notice to quit at the end of the current month.

Under the circumstances it appears to me that if there was no express agreement between the parties as from the 16th July there could be no ground for holding that the defendant occupied the premises by the permission or sufferance of the plaintiff from that date.

If the plaintiff was entitled to possession of the premises from the date on which he claimed to be entitled, the lady who sued him was responsible for not having given possession, and she was the only person he could look to for compensation for not fulfilling any obligation which lay upon her to give possession.

If the plaintiff did not receive full possession of the premises by reason of the defendant not removing until the end of August, it appears to me that she may be responsible in a suit for mesne profits for such act of her agent, but the defendant personally cannot be held responsible to the plaintiff under any implied tenancy for no such tenancy can be implied. The dismissal of the suit was, in my opinion, correct, although the reasons given for dismissing it were not wholly so.

This application is dismissed with costs—2 gold mohurs allowed as advocate's fee.

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JI DUDAH.

Before Mr. Justice Birks.
KING-EMPEROR v. NGA PO.

Whipping Act, section 5.

A sentence of whipping for attempt to commit theft, when the accused is not a juvenile offender, is illegal. *Criminal Revision*

Queen-Empress v. Nga Po Hlaing, S. J., L. B., 531 and *Queen-Empress v. Abdul Masjid*, S. J., L. B., 338, noticed.

No. 926 of
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The accused in this case is not a juvenile offender, being 28 years old. Under section 3 of Act V of 1900, juvenile offenders are liable to whipping for attempts to commit offences not punishable with death under the Penal Code or any other law. The District Magistrate was right in pointing out that the sentence in this particular case was illegal, but the rulings quoted by him, *Queen-Empress v. Nga Po Hlaing* (1) and *Queen-Empress v. Abdul Masjid* (2), must be read now subject to Act V of 1900. The sentence has been carried out. For formal purposes it is cancelled.

(1) S. J. L. B. 531. | (2) S. J. L. B. 338.

Before Mr. Justice Fox.

MA DUN v. MA PA U. *

Civil 2nd Appeal
No. 43 of 1903.
June 25th,
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MESSRS. Agabeg and Kin—for appellant | MR. Das—for respondent (plaintiff).
(defendant).

Suit for declaration of title—declaratory decree—Specific Relief Act, section 42, proviso.

Where a plaintiff, being able to sue for an injunction, omits to do so, the Court cannot grant a mere declaration of title.

A suit in respect of standing crops on land may be a "land suit" for the purposes of section 2 of the Lower Burma Courts Act.

The plaintiff alleged that she had let certain land to the defendants at an annual rental of 450 baskets of paddy, and on their promise that they would not part with any of the outturn of the land to others until they had handed over 450 baskets of the paddy obtained from it to her. She further alleged that the defendants threatened to reap the crop then standing on the land, and to dispose of the outturn to others so that she might not get it.

She asked for a mere declaration of her title to 450 baskets of paddy from the outturn of the crop on the land.

Both the lower Courts have given her a decree. In my judgment they erred in so doing.

The proviso to section 42 of the Specific Relief Act forbids the giving of a mere declaratory decree where the plaintiff being able to seek further relief omits to do so. It was open to the plaintiff in this case to sue for an injunction to restrain the defendants from commission of the alleged wrongful act which she said they threatened to commit, consequently further relief than a mere declaration of title was open to her. The decrees being against a positive rule of law must be set aside.

It was argued that there is no second appeal to this Court, as this is not a land suit, but was a suit cognizable by a Small Cause Court. As the suit was framed, it was, in my opinion, a land suit within the definition of the term "land suit" in section 2 of the Lower Burma Courts Act, because a right to and interest in the standing crop on the land was claimed.

The decrees of both the lower Courts are set aside, and the suit is dismissed with costs. The plaintiff must also pay the defendants' costs in the District Court and in this Court.

Before Mr. Justice Birks.

KING-EMPEROR v. ABDUL MAWZIT.

Burma Municipal Act—prosecutions.

Criminal Revision
No. 894 of 1903.
June 25th,
1903.

A prosecution under the Municipal Act cannot be instituted except by some person duly authorized under the Act.

The prosecution in this case does not seem to have been sanctioned either by the President or Vice-President under section 195 of Burma Municipal Act, III of 1898. There is nothing in the record to show that Mr. Wilson, the overseer, has been authorized personally and by writing to institute such complaints. He is not a person who can be authorized by virtue of his office. No Court can take cognizance of any offence

* Distinguished in *Kya Get v. Bu Nwè*, 4 L. B. R., 88.

punishable under the Burma Municipal Act except on the complaint of a person authorized by the Committee. The Magistrate was therefore wrong in transferring the case to the Honorary Magistrates.

I do not understand the accused to have admitted the charge. They admitted that an offence had been committed by some one under section 148 of the Act, but it was necessary for the prosecution to show that accused had permitted persons under their control to deposit rubbish and the accused's witnesses should have been examined. The conviction is set aside as the prosecution was not properly instituted and the fine will be refunded.

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Discussed in 1940 R 258.
Before Mr. Justice Birks.

KING-EMPEROR v. MA HLA BON AND ANOTHER.

Security to keep the peace—Code of Criminal Procedure, section 106.

An offence under section 294, Indian Penal Code, does not necessarily involve a "breach of the peace" for the purposes of section 106 of the Code of Criminal Procedure.

Crown v. Nga Wet Taung, 1 L.B.R., 262, referred to.

The two accused were convicted under section 294, Penal Code, with uttering obscene abuse in a public place. The charge should set out the words used so that a Court of Revision or Appeal can decide whether the offence really comes under section 294. Both the women were fined, but Mi Hla Bon, the aggressor, was ordered to give her personal bond under section 106, Criminal Procedure Code, for a period of three months in the sum of Rs. 25. I think the ruling in *Crown v. Nga Wet Taung* (1) will apply equally to a conviction under section 294. Obscene abuse does not necessarily involve a breach of the peace any more than abuse under section 504. The order directing a bond to be furnished is set aside and the bond will be cancelled.

Criminal Revision
No. 912 of
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July 1st,
1903.

Before Mr. Justice Fox and Mr. Justice Birks.

SHWE HLA U v. KING-EMPEROR.

Murder—blows on the head—intention—Indian Penal Code, section 300

The accused, in a scuffle, struck the deceased two blows on the head with a pint bottle of brandy. Deceased fell at the second blow, and remained unconscious till his death, thirteen hours afterwards.

Held,—after consideration of the question of intention in such cases, that the re-petition of the blow brought the case within the definition of murder in the third clause of section 300 of the Indian Penal Code.

Chevers' Medical Jurisprudence, and Taylor's Medical Jurisprudence, referred to.

Fox, J.—About 10 A.M., on the morning of the 1st April, four men, Mro Aung (the deceased), Shwe Hla U (the accused), Ba Me, and Pa Nyo were drinking in a liquor shop. The accused made some very insulting and obscene remarks about a sister of the deceased. A

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quarrel was averted by Ba Me, who, on the deceased wanting more drink, bought a pint bottle of brandy and gave it to the deceased to take home with him. The deceased left the liquor shop but turned back at once.

He then addressed some words to the accused about what the latter had said about his sister, and, according to Pa Nyo, the words used were provocative. The accused asked in reply if Mro Aung wanted to die. The latter said "I dare die if others dare." The accused then closed with Mro Aung, and during the course of the struggle between them the accused got possession of the pint bottle of brandy, and hit Mro Aung on the head with it twice. The bottle broke on the second blow. Mro Aung fell after receiving this blow. None of the witnesses speak to how he fell. When he was on the ground the accused struck him again with some iron instrument.

From the time he fell Mro Aung is not stated to have moved or to have spoken. He died about 11 P.M. on the same day. When his body was examined by the Civil Surgeon, it had two incised wounds on the head, one incised wound on the nape of the neck, and an abrasion over one of the eye-brows. Apparently none of these injuries had anything to do with the man's death. This was attributed by the Civil Surgeon to *concussion* of the brain. On the skull being opened, effusion of blood on both the right and left side of the brain was found and there was a lineal fracture of the base of the skull. No depression in the skull and no contused wounds on the surface of the head are spoken to. The fracture and internal effusion of blood could, in the opinion of the Civil Surgeon, have been caused by a blow with a bottle.

The deceased's death may be taken to have been caused by the accused's blows with the bottle.

The question arises what offence the accused committed.

The medical evidence is very meagre, and the case was one in which the Sessions Judge should have examined the Civil Surgeon. A recent Circular of this Court (section 440) has directed that medical witnesses should ordinarily be examined by the Sessions Court at the trial.

The Sessions Judge says that the accidental nature of the injury is negated by the evidence of the Civil Surgeon.

That does not appear to me to be a correct representation of the effect of the Civil Surgeon's evidence.

He simply said that the fracture and effusion could have been caused by a blow from a bottle.

I presume he would have said the same thing in regard to a blow with a clenched fist upon which death had ensued. Dr. Chevers mentions a case in which death was caused by a blow on the temple with the open hand, and another case in which death was caused by a blow on the temple with a light bamboo, six feet in length and weighing a pound and a half (1).

(1) Chevers' *Medical Jurisprudence* p. 339.

These no doubt were exceptional cases, but they go to show that death may *possibly* ensue upon blows on the head even when given with something which would probably not cause any serious injury to any other part of the body.

Dr. Taylor (1) says:—

“These injuries (*i.e.*, to the head), as it is well known, are capricious in their after-effects. The slightest contusion may be attended with fatal consequences, while fractures, accompanied by great depression of bone, and an absolute loss of substance of the brain, are sometimes followed by perfect recovery.”

He refers to a case in which a person received a blow on the head from a small stone and died in ten minutes.

In view of the insidious effects of injuries to the head on the one hand, and the sometimes marvellous immunity from serious results in spite of violent blows to it on the other, it appears to me desirable in all cases in which persons are charged with causing death by blows to the head to have as much evidence as possible throwing light upon the amount of violence which may have, or must have, been used to cause the injuries, and as to the existence or non-existence of any abnormal conditions of the deceased's skull.

The medical officer who has examined the corpse of the injured person will probably be in a position in most cases to give an opinion on these matters.

At the same time the act of the accused in such a case as this must be judged by the light of the common knowledge of mankind upon the dangers and results of striking a person on the head.

In the present case violence in the accused's blows may be presumed, under section 114 of the Evidence Act, from the facts of the quarrel, the struggle, the state of hot blood in which both the accused and the deceased were, and the result of the blows. The Sessions Judge was of opinion that when the accused struck the deceased with the bottle, he must be taken to have had the intention to cause bodily injury which he knew *was likely* to cause death, and on this he found the accused guilty of murder, presumably because he considered that the case fell within the third case mentioned in section 300 of the Indian Penal Code.

The finding does not exactly fall within the case covered by the clause, for that requires an intention to cause *bodily injury sufficient, in the ordinary course of nature, to cause death.*

Actual intention to kill the deceased can scarcely be attributed to the accused from the use of the words of bravado before the struggle began. His intention can only be gathered from his acts.

Death from a blow or blows on the head is probably, as a rule, associated by people unskilled in medical science only with the breaking of the skull. Ignorance of the actual causes which may bring about another's death in consequence of a blow cannot affect the question of the striker's knowledge and intention when striking the blow. If actual knowledge and experience do not do so, instirct at

(1) Taylor's *Medical Jurisprudence*, 1st edition, p. 519.

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least tells every man that to hit another human being any violent blow on the head *may possibly* result, or *is likely* to result, or *will probably* result, in serious injury to the person struck, but knowledge, belief or expectation of the amount of injury that may be caused must depend upon what is used in inflicting the blow, and the force with which the blow is delivered.

A man is presumed by law to intend the ordinary and natural as well as the necessary consequences of his acts.

As Mr. Mayne points out at page 425 of the 2nd edition of his work on "The Criminal Law of India," the question of intention is in the majority of cases merely the question of knowledge. If a result ordinarily occurs as a consequence of an act, a man must know that such result is a probable consequence of the act: if it results sometimes, and not rarely happens, he must know that it may be a likely consequence of the act; if it results sometimes, but rarely, he must know that it may be a possible result of the act.

The cases of a sword cut and a blow with a club, given in illustration (c) to section 300, which is the illustration meant for a case within the third case of murder given in the section, are simple and present no difficulty, because every man must know that in striking another man a violent blow with either a sword or a club, he will probably either kill him, or cause him injury from which he will probably die: either of such weapons is one which a man actually intending to kill another would use for his purpose as a matter of course, if one were at hand. In the present case, however, we have a case of blows dealt with a thing which would not ordinarily be chosen by any one who actually intended to cause another's death, or to cause bodily injury sufficient in the ordinary course of nature, to cause death.

If it is argued that because death has resulted from the blows, therefore the striker must have intended to cause injury sufficient in the ordinary course of nature to cause death, then a blow with any thing (*e.g.*, with a clenched fist), which has resulted in the assaulted person's death, must be held to bring the case within the third case of section 300.

But taking the case of a blow with the fist, it is well-known that human heads have oftener than not stood such blows dealt with the utmost vigour of the most powerful men without death ensuing.

It may be that every man dealing another a very violent blow on the head with his fist must be taken to know that the result of his blow *may be*, and even *is likely to be*, injury to the other sufficient to kill him, but unless it must be taken that ordinary knowledge, experience or instinct tells a man that such a result is an ordinary and therefore *a probable consequence* of so striking another man, the striker's act would not amount to a greater crime than culpable homicide, for at most it would be an act done with the knowledge that he was only *likely* to cause death, and an intention to cause more than he knew *was likely* could not be imputed to him, unless there was further evidence showing what his actual intention was.

Probably on the ground that blows on the head with fists only occasionally cause death or injury resulting in death, the acts of men who have caused death in prize and other fights in England have been held to be manslaughter and not murder.

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

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

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

In the case of a blow with a bottle full of liquid, there is no common experience or knowledge to tell a man what the probable result of a blow on the head with such a thing will be. In the case of a blow dealt by an ordinary person, death caused by a blow on a man's head with a bottle may possibly be a more probable result than it would be in consequence of a blow with a fist, but the blow of a trained prize-fighter's fist would possibly come upon his opponent's head with greater force than the blow of any ordinary person even striking with a bottle.

Although the blows in this case were given during the course of a drunken brawl, the acts of the accused have to be considered as if they were the acts of a thinking and reasoning man. Would such a man know, and must he be taken to know, that the *probable* result of striking another man on the head with an ordinary pint bottle full of liquid would be to cause that other's death, or injury sufficient in the ordinary course of nature to cause death?

Such a thing as a bottle would scarcely be chosen by a man who intended to cause death or such injury, because it would in all probability occur to him that the bottle might break, and that so his object might not be accomplished.

In the case of death caused by a single blow with a bottle it appears to me that it would scarcely be legitimate to impute to the striker more than that he must have known that he was *likely* to cause death, or injury sufficient in the ordinary course of nature to cause death, and his act would therefore be not more than culpable homicide not amounting to murder. In the present case, however, the accused struck a second blow. At the time he dealt that, he must be taken to have known that he was using a breakable but yet a hard thing which had withstood one violent blow on his opponent's head, and consequently there was reason for his believing that the bottle would probably withstand another. Every man must be

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taken to know that if he repeats violent blows with anything substantial and hard on another man's head, he will probably either kill the man, or cause him such injury as is sufficient in the ordinary course of nature to cause death. This repetition of the blow appears to me to take the present case beyond the limits of culpable homicide into those of murder:

For these reasons I think that the conviction of murder was justified, but I do not think in view of all the circumstances that confirmation of the death sentence is called for. I would sustain the conviction, but would reduce the sentence to one of transportation for life.

Some matters in the procedure of the Sessions Judge require comment. He, apparently of his own motion, admitted in evidence and caused to be filed on the record the statements made by two of the witnesses to the police. This was directly opposed to the explicit provisions of section 162 of the Code of Criminal Procedure.

The terms of the question which he put to the sixth witness Shwe Bwin were in any case unjustifiable. A Judge is not justified in practically threatening a witness with imprisonment, even although it does appear to him that such witness is withholding information.

If a witness for the prosecution who has given evidence before the Committing Magistrate appears to withhold part of such evidence before the Sessions Court, section 154 of the Evidence Act provides for the method in which he may be dealt with, and section 288 of the Code of Criminal Procedure provides for the record of the witness' evidence before the Committing Magistrate being treated as evidence in the Sessions Court.

Birks, J.—I concur.

Full Bench.

Civil Miscellaneous Application No. 36 of 1903. July 15th 1903.
 Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr. Justice Fox, Mr. Justice Birks and Mr. Justice Chitty.
 In the matter of a report concerning Mr. A. P. Pennell, Barrister-at-Law.
 Mr. VanSomeren—for the respondent.

Advocates—Legal Practitioners' Act, section 41.

An advocate is bound to use his judgment, experience and discretion in the presentation of his client's case and, whatever be his instructions, to exclude all topics and observations of which the case does not properly admit. An advocate cannot shelter himself behind his clients, when he allows himself to be made the medium of reckless imputations on a Court of Justice.

The publication of a libel on a Court of Justice is an aggravated misdemeanour.

Legal Practitioners' Act, section 41.

(1871) Bom. H. C. R., 146; *Sullivan v. Norton*, (1887) I. L. R., 10 Mad., 28; *In the matter of Mr. R. Cruise*, (1870) 14 W. R., 53; *R. v. Watson*, Roscoe's Crim. Evidence, 12th Ed., p. 597; *R. v. White*, Archbold's Crim. Pleading, 22nd Ed., p. 1040; *Gunesh Chunder Gangolly*, (1870) 13 W. R., 456; cited.

Mr. A. P. Pennell, Barrister-at-Law, an Advocate of this Court, has been called upon to show cause why he should not be dismissed or suspended—

- (1) for preparing and presenting to the District Magistrate of Rangoon a petition containing unfounded charges of misconduct against Maung San Pe, Subdivisional Magistrate; and
- (2) for preparing the said petition otherwise than in accordance with the instructions of the persons on whose behalf it was prepared, who made no imputations against the Magistrate.

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The petition out of which these proceedings arose was, it is admitted, drafted and written out by Mr. Pennell with his own hand. It is signed by five persons, who were accused in a criminal case, and by Mr. Pennell as their counsel. The substance of the petition was that the accused were under trial before the Subdivisional Magistrate; that the Magistrate was prolonging the case with a view to forcing them to come to a compromise; that he had framed a charge in order to frighten them into this course; and that he was not impartial. The petitioners therefore asked that the case might be withdrawn and tried by the District Magistrate to whom the petition was presented. The suggestion of the petition is that the Magistrate was actuated by improper motives in granting adjournments in the case.

The District Magistrate held a formal enquiry, in the course of which he examined the Subdivisional Magistrate, the petitioners, Mr. Jordan and Mr. Villa, who were in the case with Mr. Pennell, and he heard Mr. Pennell and Mr. de Glanville who was appearing for the prosecution in the Subdivisional Magistrate's Court. He came to the conclusion that there was no foundation for the imputations made against the Magistrate; he declined to withdraw the case; and he reported Mr. Pennell's conduct to this Court.

As regards the second head of the formal charge which we have framed, we accept without reserve Mr. Pennell's statement that the petition was prepared in accordance with instructions from his clients. Such parts of the petition regarding facts and the belief of his clients as purport to be the outcome of instructions, we accept as such. We do not require any affidavits in support of Mr. Pennell's assurance on that point.

But there are two paragraphs of the petition which do not purport to be statements of fact or belief but of advice given to the clients. These paragraphs are as follows:—

"11. Your petitioners are advised that the case against them has completely broken down, but that the Magistrate, after adjourning the case ostensibly to consider if he would proceed further with it, framed charges against your petitioners under sections 451 and 451-109 of the Indian Penal Code."

* * * * *

"14. That your petitioners are advised that the framing of the charge and especially the framing of it under sections which compel a sentence of imprisonment is a mere device of the Magistrate to frighten them into coming to terms with the opposite side, and that the Magistrate will not dare to convict on such evidence."

For this advice it has not been suggested that Mr. Pennell, who signed the petition as counsel for petitioners, is not wholly responsible. Taken with the rest of the petition, these paragraphs impute to the

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Magistrate that he had been acting partially and from improper motives. There does not appear to be the slightest foundation for this imputation. No attempt has been made to substantiate it; nor was it urged on behalf of Mr Pennell before us that there was any reasonable ground for imputing misconduct to the Magistrate. It is true that there was serious delay in the disposal of the case and we are not prepared to say that, with better management, some of this delay might not have been avoided. But there is nothing to show that the case was improperly delayed or that the Magistrate was not really occupied with Police cases which must have precedence.

The absurdity of the allegation that the Magistrate had framed a charge of a non-compoundable offence in order to frighten the accused into a compromise with the complainant in itself shows the recklessness of the imputation against the Magistrate.

We find then that Mr. Pennell has prepared a petition, embodying in part instructions received from clients and in part his advice to them, the whole of which constitutes a reckless and unfounded charge against a Magistrate. Even in respect of that part of the petition which was framed under instructions, we do not absolve Mr. Pennell from blame in allowing himself to be the channel of reckless and baseless insinuations. On this point we cite the weighty words of Blackburn, C.J. :—

"It belongs to every subject of this realm, in all Courts of Justice, to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegate; its nature and character is not altered by this delegation; it is still the same to be exercised in the same manner and for the same purpose, and subject to the same limitation and control, as it would if the party were pleading his own cause. *These considerations will at once show the fallacy of the argument that instructions to counsel are the test by which we should try whether or not the line of duty has been passed; no instructions can justify observations that are not warranted by facts proved, or which may, legally be proved; and it is the duty of counsel toward their clients to use their own judgment and experience and discretion; and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right when duly exercised and directed to its proper purposes, should not be fettered or impeded; for if it be an injury is sustained, not by the advocate, but by the client, and not by the client alone, but by the whole community, whose interests are inseparably connected with a right essential to the administration of justice.*" (1)

To these remarks we subscribe without reserve, and we adopt the principles which they lay down. Nothing is further from our desire than to control or discourage the strongest expression of a client's belief, the most forcible exposition of facts. But there must be some reason, or at least some probable reason, for the belief and some probable basis for the statement of fact. It is especially necessary in this country and when, as in the present case, the clients are ignorant people, unacquainted with the language in which their instructions are to be carried out, that counsel should exercise, as was said above, their judgment, experience.

(1) Cited by Westropp, C.J., (1871) Bom. H. C. R., 146.

and discretion in the presentation of their case. No Advocate can shelter himself behind his clients when he suffers himself to be made the medium of reckless and unreasonable charges and imputations against judicial officers. The grav. impropriety of Mr. Pennell's conduct consists in the utterance in a formal and considered document of such imputations and charges, which there has been no serious attempt to justify, no less than in the tendering of advice to his clients to the same effect. The case is distinguishable from that in which an advocate, in the course of pleading, carried away by the heat of argument exceeds the bounds of strict propriety. In such a case, more latitude has always been allowed. The cases of *Sullivan v. Norton* (1) and *In the matter of Mr. R. Cruise* (2) may be referred to in connection with this point.

The very grave nature of Mr. Pennell's misconduct may be illustrated by reference to the remarks of learned Judges on libels on the administration of justice. It has been said:—

“Where a person either by writing, by publication in print, or by any other means, caluminates the proceedings of a Court of Justice, the obvious tendency of such an act is to weaken the administration of justice, and consequently to sap the very foundations of the constitution itself.” (3)

Again:—

“It is said to be an aggravated misdemeanour to publish an invective against Judges and juries with a view to bring into suspicion and contempt the administration of justice.” (4)

The learned counsel who appeared in this court for Mr Pennell argued that as it was alleged that the preparation and presentation of the petition constituted the offence of defamation, the matter could not be dealt with by us until a criminal prosecution had been instituted and decided. The only case cited in which there appears to be some authority for this position is that of *Gunesh Chunder Gangolly* (5). That case is distinguishable from the present case, the facts being entirely different; and we do not regard it as an authority for the position adopted by the learned counsel.

Neither in this Court nor, so far as appears from the record, before the District Magistrate, has Mr. Pennell attempted to offer any apology for his wanton attack on the Subdivisional Magistrate.

We have now to consider the action which should be taken to mark our sense of the impropriety of Mr. Pennell's conduct. We do not think that so wanton an attack on a judicial officer can be passed over without a substantial penalty. We trust that the order which we shall pass will be regarded, not as a discouragement to the honest expression of opinion, within reasonable and legal limits, but as a warning against reckless, unfounded, and scandalous attacks on the administration of justice.

Our order is that Mr. A. P. Pennell be suspended from practice as an advocate for a period of three months from this date.

(1) (1887) I. L. R., 10 Mad., 28.

(2) (1870) 14 W. R., 53.

(3) *Per Buller, J., R. v. Watson*, cited (Roscoe's Crim. Evidence,

12th Ed., p. 597.)

(4) *R. v. White*, cited in (Arnold's Crim. Pleading, 22nd Ed., p. 1040.)

(5) (1870) 13 W. R., 456.

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IN THE MATTER OF
MR. A. P. PENNELL,
BARRISTER-AT-
LAW.

Special Civil and
Appeal
No. 27 of 1903.
July 23rd,
1903.

Before Mr. Justice Fox.

MAUNG THA ZAN AND ANOTHER v. U SAN WIN.

Mr. Thin—for Appellants (defendants). | Mr. Bland—for Respondent (plaintiff).

Rights-of-way—Indian Limitation Act, section 26.

Public rights-of-way, and private rights-of-way, are legally to be distinguished. The remedies for obstruction in either case are not the same.

A person to whose property the direct route is by a public path has a sufficient interest to enable him to bring a civil suit to have an obstruction to the path removed.

Chuni Lall v. Ram Kishen Sahu, (1888) I. L. R., 15 Cal., 460; *Dovaston v. Payne*, Smith's L. C., 10th Ed., Vol. II, p. 167; *Gardner v. Hodgson's Kingston Brewery Company*, (1903) 19 Times L. R., 458; *Anderson v. Fuggodumba Dabi*, (1880) 6 C. L. R., 282; *Abdul Miah v. Nasir Mahomed*, (1895) I. L. R., 22 Cal., 551; referred to.

The plaintiff and defendant are owners of garden lands lying to the east of a Government main road. The plaintiff's garden is further east than the defendant's; neither of them adjoins the main road.

The plaintiff sued to have a footpath through the defendant's garden, which the defendant had blocked shortly before the suit, opened out again.

He based his claim on the fact that he and many others had used such footpath for thirty years previous to its being blocked up, and this was clearly proved by the evidence. It was also clear that the footpath in question was the direct route to the plaintiff's garden.

There was another footpath about 150 feet to the north of the one in dispute, but this led by a circuitous route to the plaintiff's garden. The defendant in his evidence virtually admitted that the plaintiff had used the path in question for 30 years, but he denied that it was a public path.

The Township Court, notwithstanding overwhelming evidence to the effect that people in general had used the path for many years, held that the plaintiff had failed to prove that the public were in the habit of using it, and because there was another road by which the plaintiff could reach his garden, he dismissed the suit.

The Additional Judge of the District Court held that the plaintiff had acquired a right to use the path by prescription under section 26 of the Indian Limitation Act, that is to say, that he had acquired a private right-of-way over the defendant's land. He therefore reversed the Township Court's decree. He overlooked the fact that the plaintiff's claim was based on the allegation that he and many others had used the path for very many years, and the evidence for the plaintiff which was to that effect.

The distinction between public ways and private ways is important, because the remedies for obstruction to them are not the same.

As pointed out in the Full Bench case of *Chuni Lall v. Ram Kishen Sahu* (1), there are three distinct classes of rights-of-way and other similar rights. First there are private rights in the strict sense of the

(1) (1888) I. L. R., 15 Cal., 460.

term, vested in particular individuals or owners of the particular tenements, and such rights commonly have their origin in grant or prescription. Secondly there are rights belonging to certain classes of persons, certain portions of the public, such as freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term, which exist for the benefit of all the King's subjects; and the source of these is ordinarily dedication by the owner of the land over which the way is. Dedication to the public by such owner may be proved expressly or may be inferred from facts proved or may be presumed from user by the public without interruption or objection by the owner.

In the notes in Smith's Leading Cases to *Dovaston v. Payne* (1), the law applicable to the creation of a public way is thus stated:—

"Except where it is expressly created by statute, a highway derives its existence from a dedication to the public by the owner of the land of a right of passage over it. This dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right-of-way claimed. An open user as of right by the public raises a presumptive inference of dedication. No particular time is necessary for evidence of a dedication. Six years have been held time enough wherein to presume a dedication from user; four years too short a time; eighteen months again, sufficient where there had been an express intention to dedicate. All depends on the special circumstances of each case, and the duration of public user which limits the rights of the owner of the soil is not so important as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him and the intention thereby indicated."

The acquisition of a private right-of-way by prescription is in this province determinable by reference to section 26 of the Indian Limitation Act. To acquire such right there must have been a peaceable and open enjoyment of the way by the person who claims it as an easement and as of right without interruption, and for twenty years up to some date within two years of any suit brought to contest the claim. The words "as of right" have recently been authoritatively defined to mean—

"A right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean a user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought." [*Vide* The Lord Chancellor's Judgment in *Gardner v. Hodgson's Kingston Brewery Company* (2).]

In the case of a claim to use a way as a private way such user as above for twenty years must be shown, whereas in a claim to use a way as a public way on the ground of user by the public, proof of user for any particular period of time is not necessary; see *Anderson v. Juggodumba Dabi* (3).

A person who has acquired a private right-of-way may sue for the removal of any obstruction to it or for any interference with his right, but a course of decisions of the Indian High Courts have adopted the

(1) Smith's Leading Cases, 10th Edition, Vol. II, p. 167.

(2) (1903) 19 Times L. R., 458.

(3) (1880) 6 C. L. R., 282.

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English rule that no one can sue for the removal of an obstruction to a public way or for interference with it unless he can show that he has sustained or sustains special injury by reason of the obstruction or interference. See *Abdul Miah v. Nasir Mahommed* (1). A member of the public who has not sustained special injury is not without remedy, for he may give information to a Magistrate on which action may be taken under Chapter X of the Code of Criminal Procedure.

In the present case the plaintiff based his claim upon the footpath being a public way. He, in my opinion, proved that the footpath had been used by himself and others generally for a lengthened period without interruption by the owners of the land which now belongs to the defendant, consequently a dedication to the public of the land on which the footpath is as a right-of-way must be presumed, and it must be held to be a public way.

The question then is whether the plaintiff proved that he sustained more injury than the public generally by reason of the closure of the footpath.

He is the owner of a garden in the vicinity, and as long as the footpath in question was open he had a direct route from his garden to the main road. By reason of the closure of this footpath he has to take a circuitous route in order to get to and from his garden. It appears to me that this constitutes special injury beyond what members of the public generally sustain. I think therefore that the plaintiff was entitled to a decree in the form of an injunction ordering the defendant to remove the obstructions he placed barring passage along the footpath in dispute, and an injunction restraining the defendant from obstructing the footpath in future.

There will be a decree of this Court accordingly.

The defendant must pay the plaintiff's costs of this appeal.

Before Mr. Justice Birks.

MA PI v. KING-EMPEROR.

Messrs. Jordan and Villa—for Applicant.

Excise Act, section 51.

A *bona fide* custodian of liquor is not liable to be convicted of unlawful possession under section 51 of the Excise Act.

Emperor v. Gajadhar, (1903) I. L. R., 25 All., 262, referred to.

In this case the accused has been convicted under section 51 of the Excise Act, and sentenced to pay a fine of Rs. 200 or in default to suffer 21 days' rigorous imprisonment. In admitting the application the Chief Judge ordered the Magistrate to report whether the two cases of beer were unopened and he has now reported that they were so. The accused proved that these two cases had been left at her house by An Nga, a Chinese boatman, who had brought them for Gwe Ya who holds a license for the liquor shop at Kyaiktaw. It is clear that Ma Pi's possession of these two cases of beer was not on her

(1) (1895) I. L. R., 22 Cal., 551.

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own account but merely as custodian for Gwe Ya. There is one witness, Nga Po On, who says he bought a quart bottle of beer from Ma Pi's shop for Re. 1. If this witness was worthy of credit the accused might have been convicted under section 49, but this evidence is not relied on. The Dedayè licensee who instituted the prosecution had not heard that beer was sold by Ma Pi, she had merely heard that Gwe Ya's two cases of beer had been taken to Ma Pi's house and kept there.

Mr. Villa has cited the *Emperor v. Gajadhar* (1) as shewing that the accused as a custodian is not liable to be convicted of unlawful possession. In that case the conviction was under the Opium Act and the presumption arising under section 10 had to be rebutted. The ruling will apply with greater force to a conviction under section 51 of the Excise Act.

The conviction is set aside and the fine paid will be refunded.

Before Mr. Justice Birks.

KING-EMPEROR *v.* NGA PAN TIN ALIAS NGA KYWET.*

Code of Criminal Procedure, section 562.

A formal conviction must be recorded before a bond can be required under section 562 of the Code of Criminal Procedure.

A minor should not be required to give a bond personally under this section.

The accused is a boy of 16 years of age and was sent up by the police under section 381, Penal Code. He was charged by the Magistrate under section 380. He admitted taking Rs. 6-4-0 and a white jacket from the house of Maung Saung. He pleaded not guilty, by which no doubt he meant to say that he did not take dishonestly. The evidence of the 1st witness is that accused was formerly his servant at Rs. 4 a month wages, and I think the Magistrate was right in holding that it was not proved that he was in the position of a servant when he returned the second time. He has been ordered to give a bond under section 562, Criminal Procedure Code. The Magistrate should have recorded a formal conviction under section 380, for the section requires that there must be a conviction prior to the order for the bond. One of the conditions of the bond is that the accused is to appear and receive sentence when called upon. Section 563 provides for the apprehension of the accused if the Court is satisfied that the offender has failed to observe the conditions of his recognizance. The "case" referred to in clause 2 of that section is not the original "case" which led to the conviction under the appropriate section of the Penal Code, but the "case" as to whether a breach of the bond has been committed. The order should be "The Court finds Nga Pan Tin alias Nga Kywet guilty of the offence specified in the charge, namely, house theft, section 380, Penal Code, but in lieu of passing sentence the Court directs that he be released under section 562, Criminal Proce-

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(1) (1903) I.L.R., 25 All., 262.

*Overruled in part by *K-E. v. Mi Pyu*, 4 L.B.R., 12.

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Code, on his finding a surety in the sum of Rs. 50 that he will keep the peace and be of good behaviour for the period of one year from this date, and that if he fail to observe the conditions of the bond, that he will appear and receive sentence when called upon under section 380 of the Penal Code." In the present case, the accused being a minor, the provisions of section 118, clause 3, will apply, and the offender's signature to the bond is not required.

The order of the Subdivisional Magistrate will be amended accordingly.

Before Mr. Justice Birks.

Civil Revision
No. 49 of
1903.
August 3rd,
1903.

S. R. M. A. N. MUTHAPPA } v. { S. A. R. M. PALLATHAPPA
CHETTY } CHETTY.

Messrs. Eddis, Connell and Lentaigne—for Appellant (defendant).

Mr. Das—for Respondent (plaintiff).

Application for attachment and sale of property under mortgage decree—Common error of Courts—Claim to such property under section 278, Civil Procedure Code.

It is not necessary for the holder of a mortgage-decree to apply for the attachment and sale of the mortgaged property. The decree contains, or ought to contain, a direction for sale; and it only remains for the decree-holder to apply for the sale to be proclaimed. If he unnecessarily applies for an attachment, which is granted, a claim to the property cannot be brought under section 278.

Deefholts v. Peters, (1887) I.L.R., 14 Cal., 631; *Himatram v. Khushal* (1894) I.L.R., 18 Bom., 98; *Dayachand Nemchand v. Hemchand Dharamchand*, (1880) I.L.R., 4 Bom., 515; referred to.

This is a petition for revision by Muthappa Chetty to set aside an order of the Additional Judge of the Myaungmya District Court passed in Civil Miscellaneous Case No. 29 of 1902. The petitioner had obtained a mortgage decree directing the sale of certain property and had applied for execution by attachment and sale. The respondent intervened with success under section 278, Civil Procedure Code. The order in question reads as follows:—

"It is quite clear that at the time of the attachment in Civil Execution Case No. 8 of 1902, Ma Shwe Ya had interest in the four parcels of land attached and through her that Pallathappa had an interest. In Suit No. 10 of 1902 of this Court Muthappa voluntarily relinquished his rights as against Ma Shwe Ya and therefore such rights as she possessed cannot be attached by Muthappa. It would not be proper for me in a summary proceeding to determine what her share is or was. The parties must settle the matter by agreement or by regular suit. This application is therefore granted and the attachment on all four pieces of land removed. Both parties to pay their own costs in this application."

It is contended for the petitioner that this order is wrong as it really involves a cancellation of the order for sale to which Muthappa Chetty is entitled as he holds a mortgage decree. The error has arisen through the mistaken practice in the Mofussil of applying for execution of mortgage decrees by way of attachment and sale.

Mr. Lentaigne is right in this contention; he has cited the case of *Deefholts v. Peters* (1). Petheram, C.J., remarked in that case—

“We think that this rule must be discharged. The rule was obtained for the purpose of compelling the Subordinate Judge to enquire into a claim which had been made by a person claiming to be interested in a certain property which had been ordered to be sold under a mortgage decree, the mortgage being a mortgage of that very property, and the decree sought to be executed being a decree passed upon the mortgage bond, and directing the sale of the property.”

We think that proceedings by way of claim are not applicable to a case of this kind. Proceedings by way of claim are applicable only in cases of money decrees where property of the judgment-debtor has been attached; that is, where some property of the judgment-debtor is attached for the purpose of satisfying any general money claim. * * * In a case like this where the property has been dealt with in a solemn way by the decree of the Court, and has been declared liable to sale under the mortgage, that remedy would not be applicable. In cases like this the remedy is not by claim under section 278 but is either by regular suit to establish his right to the property, or by resistance to the purchaser, or the mortgagee, or other person who would be put in possession of the property.”

A similar view was taken by the High Court of Bombay in *Himatram v. Khushal* (2). In neither of those cases had there been an actual attachment of the property under the mortgage decree. Mr. Das for the respondent does not dispute the authority of these cases but says that as the petitioner applied for attachment he must take the consequences of his own action and that the Judge's order in this case does not say that the sale is to be cancelled. The order for sale was, however, stayed pending the hearing of the application and the result is that the petitioner is obliged to bring a regular suit. I do not think that the petitioner should be prejudiced by the mistaken action of the Mofussil Courts in requiring attachments where a mortgage decree is already issued. All that was necessary for the petitioner to do was to apply to have the property sold in execution of his decree.

In the case of *Dayachand Nemchand v. Hemchand Dharamchand* (3), Westropp, C.J., observed:

“It seems to be the inveterate practice of the Mofussil Courts of this Presidency to issue an attachment in enforcement of a decree establishing a mortgage, and directing a sale of the mortgaged premises in satisfaction of the mortgage. If the decree contain, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attachment would seem to be unnecessary, as well as expensive and dilatory. * * * The direction for sale in the decree is in itself sufficient authority for the sale. That direction is founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the execution clauses in the Code of Civil Procedure.”

For these reasons I think the order of the Additional Judge of the District Court must be set aside and the respondent Chetty relegated to his remedy by a regular suit. The order will be made accordingly. The petitioner will obtain his costs, which I fix at 3 gold mohurs.

(1) (1887) I.L.R., 14 Cal., 631. | (2) (1894) I.L.R., 18 Bom., 98.

(3) (1880) I.L.R., 4 Bom., 515.

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Before Mr. Justice Birks.

KING-EMPEROR v. NGA PO SAW.

Charge—Commitment—Wrong discharge of accused.

A Magistrate who has charged an accused with a view to committing him cannot discharge him without recording further evidence.

Where credible witnesses make statements which, if believed, would sustain a conviction, the Magistrate ought to convict.

Empress v. Namdev Satvaji, (1887) I.L.R., 11 Bom., 372, referred to.

The Magistrate, having framed a charge of murder against the accused under section 210, Criminal Procedure Code, must have considered that there was a *prima facie* case against him. The accused declined to call witnesses and his advocate reserved his defence. The Magistrate's order of discharge purports to be made under section 213 (2). That section gives a committing Magistrate power to cancel a charge when he has heard the witnesses for the defence. In the present case the Magistrate took no further evidence and his order cancelling the charge is *ultra vires*. I think on other grounds the accused should have been committed. The case rests on the credence to be given to the first witness Maung The. He identifies the accused and says it was not dark. The time of the assault is not very precisely given. It was some time between 5 and 7 P.M. but apparently shortly after 5. The first witness had some conversation with accused and seems to have described him to the Inspector as he was arrested by the description. This is clearly a case which should be tried by the Sessions Court. It was held in *Empress v. Namdev Satvaji* (1), that where credible witnesses make statements which, if believed, would sustain a conviction, the Magistrate ought to commit. In this case the Magistrate did commit and wrongly cancelled his order of commitment. The order of discharge will be set aside and the record will be returned to the Magistrate, who will re-arrest the accused and ascertain if he wishes now to put in a further list of witnesses before finally committing the case.

Distinguished in Ram: 569.
Full Bench—(Civil Reference.)

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr.
Justice Fox and Mr. Justice Birks.

MA SHWE GE v. MAUNG SHWE PAN.

Maung Kyaw—for Appellant (defendant). | Messrs. Agabeg and Kin—for Respondent (plaintiff).

Jurisdiction of Court—Suit of which it is not possible to estimate the value—Lower Burma Courts Act, section 25—Guardians and Wards Act, VIII of 1890—Civil Procedure Code, section 11.

Under section 25 of the Lower Burma Courts Act, VI of 1900, the Township Court has jurisdiction to hear and determine any suit of a value not exceeding Rs. 500. It is not possible to estimate the money value of a suit for the custody of a child. Such a suit cannot therefore be regarded as beyond the pecuniary juris-

(1) (1887) I.L.R., 11 Bom., 372.

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dition of a Township Court and will lie in that Court, except where it would have the effect of contesting an order made under section 25 of the Guardians and Wards Act.

The provision of a special remedy (as in section 25 of the Guardians and Wards Act) does not bar the jurisdiction of the Courts to entertain a regular suit.

Krishna v. Reade, (1886) I. L. R., 9 Mad., 31; *Sharifa v. Mune Khan*, (1901) I. L. R., 25 Bom., 574; *Mussamat Harasundari Baistabi v. Mussamat Jayadurga Baistabi*, (1870) 4 B. L. R., Appendix 36; *Kristo Chunder Acharjee v. Kashee Thakoranee*, (1875) 23 W. R., 340; *Ghasita v. Wazira*, (1897) 32 P. R. F. B. No. 10; *Ramjiwan Mal v. Chand Mal*, (1885) I. L. R., 7 All., 227; and *Kishori Mohun Roy Chowdhury v. Chander Nath Pal*, (1887) I. L. R., 14 Cal., 644; referred to.

The following reference was made to a Full Bench by Mr. Justice Birks:—

The plaintiff-respondent in this case, Maung Shwe Pan, is a Mahomedan and sued for the custody of his son who was over 7 years of age.

The plaint is stamped with a Rs. 10 stamp but contains a prayer for the delivery of the child by an order to the mother. The defence was that the plaintiff had refused to maintain his child and that defendant had to obtain an order from the District Magistrate's Court for maintenance 11 months ago. (It is also alleged that the object of the application is not to educate the child but to avoid paying the maintenance order, and that the child's grand-father, who is now educating the child, is better able to do so than the father.) The Courts below have both found that the father, being well-to-do, was entitled to the custody of his child as he was over 7 years of age, and gave the plaintiff a decree. I am in some doubt as to whether a suit of this kind for the custody of a child is maintainable in a Court subordinate to the District Court. Section 4 of the Guardians and Wards Act, VIII of 1890, provides that "The Court means the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian." Section 3 of the Act provides that "Nothing in this Act shall be considered to affect or in any way derogate from the jurisdiction or authority of any Court of Wards, or to take away any power possessed by any High Court established under the Statutes 24 and 25 Vict., Chapter 104." It may be that this clause shows that it was intended to take away jurisdiction from subordinate Courts.

In *Krishna v. Reade* (1), a Divisional Bench of the Madras High Court held "that Act IX of 1861 did not debar a District Munsiff's Court from entertaining a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant." In that case damages Rs. 100 were claimed and the boy was valued at Rs. 130. The Court held that Act IX of 1861 (Minors) was an enabling Act and did not deprive any Court of any jurisdiction or powers which it before possessed. Reference was made to a ruling of Mr. Justice Hobhouse, 4 B. L. R., App. 36, in which a contrary view was taken; I cannot trace this case as the pages are missing. In *Sharifa v. Mune Khan* (2), *Krishna v. Reade* was referred to. The Court there held that they were concluded by authority as Mr. Justice Bayley and Mr. Justice Candy had held in appeal from Order No. 5 of 1892 that such a suit would lie. Jenkins, C.J., intimated an opinion that the Guardians and

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Wards Act of 1890 required amendment so as to show that the procedure there indicated should be explicitly substituted for an ordinary suit. Chandavarkar, J., pointed out that the Punjab Chief Court had held in ruling No. 10 of the Punjab Records, page 97, that a father claiming custody of his children is, since the passing of Act VIII of 1890, debarred from proceeding by a regular suit, but must proceed by an application under that Act to a District Court.

I am inclined to think that the Punjab ruling gives the more correct view of the law, but as the matter is not free from doubt I will refer the following question for decision by a Bench of this Court under section 11 of the Lower Burma Courts Act, VI of 1900:—

Will a suit for the custody of his minor son brought by a Mahomedan father against a divorced wife lie in a Township Court when he has not obtained a declaration from a District Court under Act VIII of 1890 that he is the guardian of his children?

The opinion of the Bench was as follows:—

Thirkell White, C.J.—The question proposed is:—

Will a suit for custody of his minor son brought by a Mahomedan father against a divorced wife lie in a Township Court when he has not obtained a declaration from a District Court under Act VIII of 1890 that he is the guardian of his children?

In the first place, it may be pointed out that under section 19 of the Guardians and Wards Act, 1890, a Court cannot appoint or declare a guardian of the person of a minor, not being a European British subject, whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. It would seem therefore not to be within the competence of the District Court to declare or appoint a Mahomedan father to be the guardian of his minor children.

Guardians are either (1) Natural guardians; (2) Testamentary guardians; (3) Guardians appointed by a Civil Court or by a Court of Wards. Unless the Court considers the father of a minor to be an unfit person to be a guardian, no appointment can be made by the Court if the father is living. It seems therefore that the question is not affected by the consideration that the father has not obtained a declaration of guardianship from the District Court. It may be regarded as a question in more general terms whether a suit to obtain the custody of his minor son may be brought by a Mahomedan father in a Township Court.

The cases which have been cited in the order of reference or in the course of argument may first be examined. The earliest case is that of *Mussamat Harasundari Baistabi v. Mussamat Jayadurga Baistabi* (1), which was decided with reference to the provisions of Act IX of 1861. The High Court at Calcutta held that an application made by a relative in respect of the custody of a minor must be made to the principal Court of Civil jurisdiction in the district. The same view was taken in *Kristo Chunder Acharjee v. Kashee Thakooranee* (2).

On the other hand, in *Krishna v. Reade* (3), the High Court of Madras held that a District Munsiff's Court was competent to entertain

(1) (1870) 4 B. L. R., Appx. 36. | (2) (1875) W. R., 304
 (3) (1886) I.L.R., 9 Mad., 31.

a suit by a Hindu father to recover possession of his minor son. The learned Judges distinguished between a "suit" and an "application by petition," the latter only being provided for by section 1 of Act IX of 1861; and they held that that Act was merely an enabling enactment and did not deprive any Court of a jurisdiction previously vested in it.

These cases were considered by the Chief Court of the Punjab in *Ghasita v. Wazira* (1), with reference to the provisions of the Guardians and Wards Act, 1890; and it was held that a suit for the custody of a minor would not lie in a Court inferior to the District Court.

Finally in *Sharifa v. Mune Khan* (2), the High Court at Bombay held that a suit of this nature would lie in the Court of a Subordinate Judge. The reasons for the decision, which followed a previous ruling of the same Court, are not stated in detail.

The provisions of the Guardians and Wards Act, 1890, differ from those of Act IX of 1861. Section 1 of the latter Act enacts that "any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition to the District Court." This is a distinct provision for a procedure otherwise than by suit for determining the custody of a minor. The Act of 1890 is concerned more with the appointment and duties and rights of guardians and does not deal in so general a manner with the mere question of custody. There is no general provision enabling any person, or even a guardian, to make an application for the custody of a minor. The only section in which a somewhat analogous provision is made is section 25, which enables the Court, that is, the District Court, to make an order for his return, if a ward leaves or is removed from the custody of a guardian of his person. This order, as described in the section, and as referred to in section 47, clause (c), is for the return of the ward. It could not, apparently, be made in a case like the present where the person who claims to be the natural guardian has never had the custody of the minor.

But even in a case provided for by section 25 of the Guardians and Wards Act, I do not think that the mere provision by the Legislature of a summary mode of procedure can be held to bar the jurisdiction of the ordinary Civil Courts. I think that the view taken by the Madras and Bombay High Courts is correct. Section 11 of the Code of Civil Procedure declares that "the Courts shall" (subject to the other provisions of the Code) "have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." It has not been suggested in this case that the suit is not one of a civil nature, though that point was considered and decided in the Bombay case quoted above. The position that the provision of a special remedy does not bar the jurisdiction of the Courts to entertain a regular suit was affirmed in the cases of *Ramjiwan Mal v. Chand Mal* (3), and in *Kishori Mohun Roy Chowdhury v. Chunder Nath Pal* (4) in cir-

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(1) (1897) 32 P. R. F. B. No. 10. | (3) (1885) I.L.R., 7 All., 227.
(2) (1901) I.L.R., 25 Bom., 574. | (4) (1887) I.L.R., 14 Cal., 644.

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cumstances which may be regarded as somewhat analogous. There is no doubt a possible inconvenience in the adoption of this view. An order made under section 25 of the Guardians and Wards Act, 1890, cannot be contested by suit (section 48); and in the special circumstances provided for by section 25, there might be concurrently a suit in one Court and an application in another. But I think it is for the Legislature to remove this inconvenience, if it thinks fit to do so.

If there has been an order for the return of a ward to the custody of a guardian or an order refusing an application under section 25, then a suit which would have the effect of contesting such an order is clearly barred by section 48 of the Guardians and Wards Act, 1890. But unless or until there is such an order, it seems to me that the jurisdiction of the Civil Courts conferred by section 11 of the Code of Civil Procedure in respect of suits of this nature is not barred by any enactment.

Under section 25 of the Lower Burma Courts Act, subject to the provisions of the Code of Civil Procedure, the Provincial Small Cause Courts Act, and any other enactment for the time being in force, the Township Court has jurisdiction to hear and determine any suit of a value not exceeding Rs. 500. It is not possible to estimate the money value of a suit for the custody of a child. Such a suit cannot therefore be regarded as beyond the pecuniary jurisdiction of the Township Court.

I would therefore answer the reference by saying that, except where such a suit would have the effect of contesting an order made under section 25 of the Guardians and Wards Act, 1890, a suit by a Mahomedan father for the custody of a minor child will lie in the Township Court.

Costs of this reference should follow the final result.

Fox, J.—I concur.

Before Mr. Justice Birks.

MOHINDRA KUMER CHAKRAVATI v. KYAW ZA PRU.

Mr. Das—for appellant (plaintiff).

Messrs. Chan Toon and Christopher
 —for respondent (defendant).

Mahomedan Law—Power of widow to alienate estate—Rights of attaching creditor—widow with minor children—Guardianship of property.

A, a Mahomedan widow with minor children, who was sued by B for a debt due to him by her deceased husband, sold the estate remaining at her husband's death to C. B obtained a decree, and sought to attach the property.

Held,—that as a Mahomedan widow has power to alienate only her own share, *i.e.*, one-eighth of the estate remaining at her husband's death, B had the right to attach seven-eighths of the estate in C's hands.

A Mahomedan mother has no right to the guardianship of the property of her minor children unless she has been appointed by the Court.

Sircar, Mahomedan Law Lectures, 1873, pages 477, 478; Land Mortgage Bank, Limited v. Roy Luchmiput Singh, (1881) 8 Cal., L.R., 447; Land Mortgage Bank v. Bidyadhari Dasi, (1881) 7 Cal., L.R., 460; Syud Bazayet Hossein v. Dooli Chund, L.R., 5 I.A., 211; referred to.

The plaintiff-appellant in this case sues as the transferee of a decree obtained by one Ali Hoosain against the widow and minor

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children of Lal Mohamed for Rs. 319-8-0 in Small Cause suit No. 110 of the Subdivisional Court of Rathedaung. The original decree-holder had attached 15.61 acres in execution of his decree, but the attachment was removed at the instance of 1st defendant and the present respondent, who had purchased the whole estate from the widow of Lal Mahomed on the day the suit was filed. Ali Hoosain then sold his decree to the plaintiff who is now suing under section 283 to have 25.07 acres of land declared subject to his attachment.

The Court of first instance decreed the claim, holding that the widow, who had only a right to one-eighth of her deceased husband's estate, had no title to convey to the first defendant. It also held that the sale was illegal and inadmissible and gave a decree in full as prayed.

The lower Appellate Court quoted a number of rulings, the authority of which is not disputed, to the effect that a sale by a debtor owning property on the eve of attachment is not illegal and held that the first defendant was a *bonâ fide* purchaser for value and that the plaintiff's remedy was to attach the sale proceeds. The suit was therefore dismissed. It may be noted also that the lower Appellate Court held that the mother as guardian of her minor children could sell the estate on their account and so give a good title to the first defendant.

Mr. Das for the appellant quotes Mr. Sircar's Mahomedan Law Lectures as showing that a Mahomedan mother has no right to the guardianship of the property of her minor children unless she has been appointed by the Court. The passage reads as follows (1):—

"The guardianship of a minor for the management and preservation of his property devolves first on his or her father, then on the father's executor,—next on the paternal grandfather, then on his executor, then on the executors of such executors,—next on the ruling power or his representative, the Kazi or Judge. In default of a father, grandfather and their executors, as above, all of whom are termed near guardians, it rests in the Government, or its representative, to appoint a guardian of an infant's property."

A similar passage may be found in Ameer Ali's work on Mahomedan Law, Volume 2, page 473.

Mr. Chan Toon for the respondent has quoted two Calcutta cases, *Land Mortgage Bank, Limited v. Roy Luchmiput Singh* (2) and *Land Mortgage Bank v. Bidyadhari Dasi* (3). Both these cases follow the ruling of their Lordships of the Privy Council in *Syud Bazayet Hoossein v. Dooli Chund* (4). It was there held that a creditor of a deceased Mahomedan whether in respect of dower or otherwise cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage. There was, however, no question in the case decided by their Lordships that the son had only alienated what was his own share, for, while he was entitled to seven-eighths of the property, he only alienated half.

(1) Sircar, Mahomedan Law Lectures, 1873, pages 477, 478.
 (2) (1881) 8 Cal. L.R., 447. | (3) (1881) 7 Cal. L.R., 460. | (4) L.R., 5 I.A., 211.

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In the present case the widow is only entitled to one-eighth share and as she was not appointed by the Court she had no right to dispose of more than that amount.

It is of course possible that the purchaser Kyaw Za Pru was ignorant of these rules of Mahomedan Law, but this does not make him a *bona fide* purchaser for value. *Ignorantia legis neminem excusat*. He purchased through an agent and should have satisfied himself that the widow had a right to sell. Mr Das is unable to support the decree of the Court of first instance in its entirety as the widow had a right to sell her one-eighth share. The decree of the lower Appellate Court is reversed and the decree of the Court of first instance restored subject to the proviso that only seven-eighths of the 25.07 acres of land are liable to attachment. Costs will be allowed as usual.

Full Bench—(Revisional).

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Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
 Mr. Justice Fox and Mr. Justice Birks.

KING-EMPEROR v. NGA PO THIN AND FOUR OTHERS.

Mr. McDonnell, Assistant Government Advocate—for the Crown,

“Report of Police Officer”—sections 4 (1) (h) and 190 (1) (b), Criminal Procedure Code.

Per Curiam.—The words “Report of a Police Officer” and “Police Report” respectively in sections 4 (1) (h) and 190 (1) (b) of the Code of Criminal Procedure do not refer exclusively to reports under Chapter XIV of the Code. They refer to and include any report by a Police Officer whether in a cognizable or non-cognizable case; and it is not necessary for a Magistrate receiving such a report to treat the reporting officer as a complainant under section 200 of the Code.

Per Fox, J.—The term “Police Report” in section 190 (1) (b) includes even a verbal report by a Police Officer.

Per Birks, J.—The term “Police Report” in sections 4 and 190 includes any written information given by a Police Officer in the performance of his duty as a public servant and not in his capacity as a private individual.

Queen-Empress v. Ma Min Me, 1 U. B. R., (1892—1896), p. 28, dissented from. *Queen-Empress v. Nga Shwe Lin*, 1 L. B. R., 18; *Queen-Empress v. Nga Shwe E*, 1 L. B. R., 58; *Queen-Empress v. Nga Saw*, 1 L. B. R., 59; over-ruled. *Reg. v. Jafar Ali*, (1871) 8 B. H. C. R., Cr. Ca., 113; *Queen v. Surrendro Nath Roy*, (1870) 13 W. R. Cr., 27; *Reg. v. Lala Shambhu*, (1873) 10 B. H. C. R., Cr. Ca., 70; referred to.

Thirkell White, C.J.—The facts of the case are set out in the order of reference by the learned Sessions Judge. On the application of a Sergeant of Police, the Sergeant was examined as a complainant and summonses under sections 11 and 12 of the Gambling Act were issued on the accused. On the day fixed for the hearing the Sergeant, who was treated as the complainant, and the accused, failed to appear. The Magistrate thereupon passed an order discharging the accused under section 249 of the Code of Criminal Procedure. The reference to section 249 is obviously wrong; the Magistrate treated the case as one instituted upon complaint; and section 249 applies to cases instituted otherwise than upon complaint. Again, that

section does not enable the Magistrate to acquit or to discharge the accused but to stay proceedings. If, however, the case was rightly treated as instituted on complaint, and if the Sergeant was rightly regarded as the complainant, then under section 247 of the Code of Criminal Procedure the Magistrate had the power to acquit, not discharge, the accused.

But the point to which our attention was directed at the hearing of the reference was whether the Sergeant's application was rightly treated as a complaint. It has been held that an application of this kind is not a police report and that it must be regarded as a complaint. It will be necessary to examine the course of legislation and the authorities bearing on the point.

Section 66A of the Code of Criminal Procedure of 1861, which was inserted by Act VIII of 1869, enabled the Local Government to define what Magistrates shall entertain cases either on complaint preferred directly to themselves or on the report of a Police Officer.

Section 140 of the Code of 1872 enacted that process might be issued upon a report by the police under Chapter X (Powers of the police to investigate); or upon information or report by a police officer as to a non-cognizable offence; and declared that the last-mentioned information or report should be regarded as a complaint. Neither in the Code of 1861 nor in that of 1872 was the term "complaint" defined.

In the Code of 1882, for the first time, "complaint" was defined as "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence; but does not include the report of a police officer"; the definition being the same as that in the Code of 1898. At the same time, section 191 of the new Code was enacted in terms identical with those of section 190 of the present Code. In this section it is provided that certain Magistrates may take cognizance of offences, (a) upon receiving a complaint of the facts; (b) upon a police report of the facts; (c) upon information received from any person other than a police officer.

The authorities which bear upon the construction of the expressions "report of a police officer" and "police report" as used in the sections under consideration may now be examined. In *Reg. v. Jafar Ali* (1), it was held by the Bombay High Court that the report of a police officer under section 66A of the Code of Criminal Procedure, 1861, meant the final report drawn up under section 155 of the Code (which corresponds with section 173 of the Code of 1898) in cases in which the police might arrest without warrant. In the *Queen v. Surrendro Nath Roy* (2), the High Court of Calcutta enunciated, though not in specific terms, an opinion which seems to be consistent with the above ruling.

Under the Code of 1872 there is only one ruling, in the case of *Reg. v. Lala Shambhu* (3), wherein the High Court at Bombay held

(1) (1871) 8 B. H. C. R., Cr. Ca., 113. (2) (1870) 13 W. R. Cr. 27.

(3) (1873) 10 B. H. C. R., Cr. Ca., 70.

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that under the new Code, the view taken in *Jafar Ali's* case (1) was no longer operative.

Coming to the Codes of 1882 and 1898, which are for the purposes of this case identical, we find that, in the *Queen-Empress v. Ma Min Me* (2), the late learned Judicial Commissioner of Upper Burma (Mr. G. D. Burgess), citing the Calcutta case and the earlier Bombay case above mentioned, held that a police report or the report of a police officer in section 191 and section 4 of the Code of Criminal Procedure, 1882, respectively meant only the report of a police officer under Chapter XIV of the Code. The later Bombay ruling cited above does not seem to have been brought to the notice of the learned Judge.

In Lower Burma, there are three rulings to the same effect, all by my learned predecessor, in the cases of *Queen-Empress v. Nga Shwe Lin* (3), *Queen-Empress v. Nga Shwe E* (4), *Queen-Empress v. Nga Saw* (5). These are cases under the Code of 1898. I am unable to see that any reasons are assigned in these rulings in support of the proposition that "the expressions *police report* and *report of a police officer* as used in section 4 (1) (h) and section 190 (1) (b) of the Code refer to reports by police officers under Chapter XIV and more especially under section 173." The proposition seems to be treated as an axiom, not requiring, and perhaps not susceptible of, proof.

Some light may be obtained by consideration of other enactments in which information and reports by the police are mentioned. In section 24 of the Police Act, it is provided that any police officer may "lay any information before a Magistrate and * * * apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence." This information must be treated either as a complaint or as a police report, for a Magistrate cannot take cognizance of the offence disclosed by it under section 190, sub-section (1), clause (c), of the Code of Criminal Procedure. In the rulings cited above it has been held that it must be treated as a complaint. But in the absence of specific indication, it seems at least as reasonable to hold that it should be treated as a police report.

Again, there are references to reports by the police in the Burma Gambling Act, 1899. Under section 6, sub-section (1) of that Act, a police officer executing a warrant has to submit to the Magistrate who issued it, or to the nearest Magistrate empowered under clause (c) of sub-section (1) of section 190 of the Code of Criminal Procedure, a report of his proceedings. Is this report the report of a police officer or a police report? If not, how is the Magistrate to take cognizance of the offence on receipt of it? It can hardly be said that he has already taken cognizance of it before the issue of the warrant, even the names of the accused being then often unknown to him. But in any case, this could not be so held, if the warrant

(1) (1871) 8 B. H. C. R., Cr. Ca., 113. | (3) 1 L. B. R., 18.

(2) (1894) 1 U. B. R., (1892-96), p. 28. | (4) 1 L. B. R., 58.

(5) 1 L. B. R., 59.

happened to be issued not by a Magistrate but by a District Superintendent of Police. This report is certainly not a report under Chapter XIV of the Code of Criminal Procedure. And it can hardly be seriously contended that it should be treated as a complaint and the police officer submitting it examined as a complainant, when the accused, or some of them, are presumably already in custody. It seems inevitable, if the Magistrate is to proceed at all, that he must proceed under section 190, sub-section (1), clause (b), of the Code of Criminal Procedure and treat this report as a police report for the purpose of that clause.

Again, in section 14 of the same Act, there are references to a complaint, a report, and information. What is the report mentioned in this section, on which it is assumed that a Magistrate can take cognizance of an offence? Even if it is restricted to the report under section 6 of the Act, it is, as shown above, not a report under Chapter XIV of the Code of Criminal Procedure. If as seems probable it has a wider meaning, and includes also a report of a police officer otherwise than under section 6, it still cannot be a report under Chapter XIV of the Code, unless it is restricted to the case of a report of an offence under section 10 of the Gambling Act, which alone of offences under that Act is cognizable by the police. It is improbable that it has this restricted meaning.

It seems to me that the course adopted by the Legislature is as follows. In the Code of 1872, in order to remove doubts such as those raised by the decision of the Bombay High Court in *Jafar Ali's* case (1), section 140 specially provided for the case of a report by a police officer as to a non-cognizable case. This could not be a report under Chapter X of the Code and in fact was explicitly distinguished from it. The section also expressly declared that such a report should be regarded as a complaint. That was a clear rule and if the Code of 1872 was still in force the Upper Burma and Lower Burma Rulings would no doubt be correct. But ten years later, when enacting the Code of 1882, the Legislature deliberately departed from this policy. In section 4, clause (a), it specially declared that the report of a police officer was not a complaint. In section 191, it authorized Magistrates to take cognizance of offences upon a police report of the facts, abolishing the distinction made in the Code of 1872 between reports of cognizable and of non-cognizable offences. It also expressly excluded information received from a police officer from clause (c) of that section. It seems to me that the Legislature could hardly have indicated more clearly its intention to distinguish reports of police officers from complaints and from information given by private persons. With the words of section 140 of the Code of 1872 under consideration, it could hardly have failed to notice the necessity of declaring a police report in section 191 to be a report under Chapter XIV if that had been the intention. Moreover, if in the definition of "complaint," the words "report of a police officer" had been intended to apply only to a report of a police officer

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under Chapter XIV of the Code, the use and necessity of the limitation are not apparent. A complaint is made in view of the issue of process of some kind. This is clear from the terms of section 204 of the Codes of 1882 and 1898. But a report under Chapter XIV is seldom, if ever, made in view of the issue of process. For the police can without warrant arrest in cases which they are investigating under that chapter. Why then should they apply for process? It would not occur to any one that a report of a police officer under Chapter XIV could be regarded as a complaint. It might, especially in view of the rule in section 140, clause (b), of the Code of 1872, be held that a report of a police officer otherwise than under that chapter was a complaint. And it seems to me that it was to prevent such a construction that the words in question were added to the definition.

For these reasons, I venture very respectfully to differ from the learned Judges who have held that in section 4, sub-section (1), clause (h), and section 19, sub-section (1), clause (b), of the Code of Criminal Procedure, the expressions "report of a police officer" and "police report" respectively refer exclusively to reports under Chapter XIV of the Code. I have no doubt that these expressions refer to and include any report by a police officer, whether in a cognizable or non-cognizable case; and that it is not necessary for a Magistrate receiving such a report to treat the reporting officer as a complainant under section 200 of the Code.

At the same time, I would warn all Magistrates that process should not be issued on the report of a police officer lightly, as of course, or without due consideration. The Magistrate should consider whether the report discloses reasonable grounds for the issue of process and a reasonable probability that the offence has been committed. Unless the Magistrate is fully satisfied on these points, process should not be issued.

Fox, J.—I concur in holding that the term "police report" in section 190 (b) of the Code of Criminal Procedure is not confined to a report under Chapter XIV of the Code.

Prima facie the term includes any report made by a police officer as such. If the Legislature had intended that it should only apply to certain reports, it would surely have said so in unmistakable terms.

It can scarcely have intended that the term should be in any way restricted, for section 23 of the Police Act imposes upon the police not only the duties of preventing the commission of offences generally, but the collection and communication to a Magistrate of any intelligence affecting the public peace. The regulation by the Code of Criminal Procedure of the methods to be adopted in respect of classes of cases is matter of procedure only, and does not affect the duties imposed by the Police Act.

Communication to a Magistrate of intelligence in regard to crime or affecting the public peace necessarily involves making some sort of report. There is surely no good reason why a Magistrate should not take cognizance of an offence even upon the verbal report of a police officer that certain facts constituting an offence have occurred. The

term "police report" in clause (b) of section 190 of the Code includes, in my opinion, even a verbal report by a police officer.

Birks, J.—I understand that this case has been referred to a Full Bench with the object of reconsidering the rulings of the late Chief Judge in *Queen-Empress v. Nga Shwe Lin* (1), and in two other cases reported at pages 58 and 59 of the same rulings. In all these cases it is distinctly laid down that the words "report of a police officer" that occur in sections 4 (1) (h) and 190 (1) (b) of the Code refer to reports by police officers in Chapter XIV, and more especially under section 173, Criminal Procedure Code. Section 190, Criminal Procedure Code, provides three ways in which Magistrates, duly empowered, may take cognizance of offences, (a) upon complaint as defined in section 4 (1) (h), (b) upon a police report, and (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such an offence has been committed. This section seems to contemplate: *First*, complaints made under section 200 of the Criminal Procedure Code. In the case of private persons these complaints require a court-fee of annas 8; in the case of public servants, as defined in the Penal Code, Municipal and Railway servants, these complaints are exempted from court-fees under section 19 (xviii) of the Court-Fees Act. Where a complaint is made by a Court under section 195, Criminal Procedure Code, section 476 provides that such report shall be treated as a complaint. *Second*, reports of police officers. There is nothing in the section itself which shows that these reports are only those made under Chapter XIV, nor does the definition of complaint in section 4 (1) (h) specify any particular class of reports. *Third*, information received from persons other than police officers or upon the Magistrate's own knowledge or suspicion.

It may be noted that this power can only be conferred by the Local Government upon Magistrates of the 1st and 2nd class, while powers under clauses (a) and (b) can be conferred by the District Magistrate. The question as to whether police reports of non-cognizable offences can be treated as complaints seems really to turn on the definition of complaint in section 4 (1) (h).

This section is word for word identical with section 4 (a) of the Act of 1882

In the original bill as prepared the last 9 words "but does not include the report of a police officer" were wanting. These words were added, *vide* Statement of Objects and Reasons, page 782, Part III of *Burma Gazette* of 7th May 1881. The section as amended ran, "Complaint means the allegation made to a Magistrate with a view to institute proceedings under this Code, that some person, whether known or unknown, has committed an offence, but does not include the report of a police officer." These last words remain though the other words of the section have been slightly altered. The reasons given were "That the definition of a complaint has been amended so as to *exclude* the report of a police officer and information given to a police officer." I am aware that their Lordships of the Privy Council

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in *The Administrator-General of Bengal v. Prem Lall Mullick* (1) have condemned a reference to these objects and reasons, and I think it sufficient to base my opinion on the plain words of the section itself.

A police officer can hardly give information without making a report, and if he makes a report the Code declares that it is not a complaint which requires his examination on oath under section 200. Section 191 of Act X of 1882 is the same as section 190 of Act V of 1898. The exclusion of information given by a police officer in clause (c) of that section seems also to indicate what was meant by the definition in section 4.

The learned Assistant Government Advocate has cited *Regina v. Jafar Ali* (2). In that case it was held that the report of a police officer was the formal report forwarded to a Magistrate under section 155 of Act XXV of 1861. This ruling is obsolete as a complaint was not then defined. In the case of *Queen-Empress v. Ma Min Mè* (3), the Judicial Commissioner of Upper Burma remarked that the mere fact that a written application or information proceeds from a police officer does not make it a police report. Whatever may have been the authority of the rulings cited under the former Procedure Codes it seems to have been the intention of the Legislature to exclude both reports and informations laid by the police officers from the definition of complaints, and it would seem that the words were introduced in the Act of 1882 to meet the objection to the necessity for examining police officers on oath when they made reports.

I would say that the meaning of the words "Report of a police officer" in sections 4 and 190, Criminal Procedure Code, include any written information given by a police officer in the performance of his duty as a public servant and not in his capacity as a private individual.

Civil 2nd Appeal
No. 42 of 1903.
August 14th,
1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Fox.

P. K. A. C. T. KADAPPA CHETTY v. MAUNG SHWE BO.*

Mr. Cawasjee—for the appellant.

Claim, to attached property—Civil Procedure Code, sections 278, 279, 280, 283.

In an investigation under section 279 of the Code of Civil Procedure, if a claimant to property which has been attached proves that at the date of attachment he was possessed of the property, the burden of proof that he is not the owner, or that he holds in trust for the judgment-debtor, is on the decree-holder, and if he fails to discharge it the Court should remove the attachment.

Similarly in a suit under section 283: the plaintiff is entitled to succeed upon proof of possession by him at the time of the attachment, if the decree-holder does not prove that he held in trust for the judgment-debtor, or that the attached property is the property of the judgment-debtor liable to present seizure and sale in execution of his decree.

The words "in trust for" should be construed in the sense that the claimant held the property as servant of or agent for or otherwise on behalf of the judgment-

(1) (1894) I. L. R., 21 Cal., 732. — (2) 8 B.H.C.R. Cr. Ca. 113.

(3) 1 U.B.R. (1892-96), page 28.

* Distinguished in *Ma Sein U v. A. L. V. R. R. M. Letchmanan Chetty*, 4 L.B.R., 228.

debtor and that he had no right to the possession of it on his own account if the judgment-debtor claimed it.

Rights of hirers of cattle in Burma noticed.

Nga Tha Yah v. F. N. Burn, (1868) 2 B. L. R., 91; *Radha Pyari Debi Chowdhra v. Nabin Chandra Chowdhry*, (1870) 5 B. L. R., 708; *Pemraj Bhavani-ram v. Narayan Shivaram Khisti*, (1882) I. L. R., 6 Bom., 215; *Govind Atmaram v. Santai*, (1888) I. L. R., 12 Bom., 270; *Ram Nath v. Bindraban*, (1896) I. L. R., 18 All., 369; *Chokalingum Chetty v. Maung Yeik* 2 U. B. R., (1897-01), 270; *Brijo Kishore Nag v. Ram Dyal Bhudra*, (1874) 21 W. R., 133; noticed.

Fox, J.—In execution of a decree which he had obtained against one Aung Myat, the appellant on this appeal attached four buffaloes which were at the time admittedly in the actual possession of the respondent Shwe Bo, who was a tenant of some land belonging to Aung Myat. The appellant applied for the attachment apparently because, according to him, Aung Myat had told him three months previously that he owned four buffaloes which were in his tenant Shwe Bo's possession.

Shwe Bo preferred a claim to two of the buffaloes under section 278 of the Code, and one Saw Ke preferred a claim to the other two.

Shwe Bo's claim was based upon his being in possession of the buffaloes in his own right, and not on behalf of Aung Myat. He alleged he had bought the two buffaloes he claimed as his own from one Nan U shortly before they were attached. Nan U confirmed the fact of the sale by him, but in the investigation proceeding he did not say how he himself had come by the animals. In the subsequent suit under section 283 of the Code Nan U stated that he had bought them from San Tun U, who was Aung Myat's son, a year previously. He admitted that he was at that time a tenant of Aung Myat's land, and that when he gave his evidence he was Saw Ke's cooly. The Judge of the Township Court dismissed Shwe Bo's claim under section 278 of the Code. His reasons for doing so are not clearly expressed, but he evidently disbelieved the witnesses who spoke to the purchase of the buffaloes from Nan U.

The effect of his order was that although Shwe Bo was in possession of the buffaloes, he was not in possession of them as owner, but held them on behalf of or in trust for the judgment-debtor Aung Myat. Shwe Bo then instituted this suit under section 283 of the Code to establish his right as owner of the two buffaloes. He sought to do this by the evidence of the same witnesses as he had called in the investigation proceeding.

All the evidence that the respondent could produce merely amounted to evidence of statements made by the judgment-creditor that the buffaloes belonged to him.

The Judge of the Township Court dismissed the suit. He again disbelieved the evidence for the plaintiff. He held that it lay upon the plaintiff to prove his story, and that it was not necessary to consider the evidence for the defence.

The Additional Judge of the District Court reversed this decision upon the ground that the original Court had wrongly placed the burden of proof upon the plaintiff, for that it being admitted that the animals were in the possession of the plaintiff when they were attach-

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ed, it lay upon the defendant to show that they were not the property of the plaintiff, and that they were the property of the judgment-debtor Aung Myat.

He did not examine the evidence of plaintiff's witnesses at all, but allowed the appeal solely upon the ground that the original Court had failed to consider that the defendant had failed to produce any evidence to show that the buffaloes were the property of the judgment-debtor. The 2nd appeal to this Court is mainly upon the ground that the Additional Judge erred in thus throwing the burden of proof upon the defendant, who is now appellant.

The case raises questions as to the position of and burdens upon a person in possession of attached property which he claims to be his own, when he takes proceedings under section 278 of the Code to assert his right, and subsequently files a suit under section 283 of the Code in consequence of a decision adverse to him in the investigation under section 278.

If such possessor prefers a claim under the latter section, that the burden of proof is upon him in the first instance has been plainly settled by the Legislature in section 279 of the Code. It adopted for all cases the decision of the majority of the Judges in the Full Bench case of *Nga Tha Yah v. F. N. Burn* (1), which held that where a claim was made under section 246 of Act VIII of 1853 by a person not in possession of property which had been attached whilst it was in the hands of Government officers, the claimant had to begin, and the onus lay upon him to prove that the goods attached were his property, or in his possession and therefore not in the possession of the judgment-debtor. The terms of section 246 of the Code of 1859 were somewhat different from the terms of the sections dealing with claims to attached property in the present Code. The Court under the Code of 1859 was to proceed to investigate the claim with the like powers, *as if the claimant had been originally made a defendant to the suit.* This provision led the dissentient Judge to hold that it was for the decree-holder to substantiate in the first instance his right to make the attachment, or in other words that it lay upon the decree-holder to show that the property was that of his judgment-debtor and was liable to be attached in execution of his decree. The facts of the case were not on all fours with those of the present case, because in that case the claimant was not in possession of the attached property. The reasoning of the dissenting Judge which led him to his conclusion would apply with far greater force to the present case than it did to that case. He says:—

"The decree-holder has attached the property alleging it to be the property of his judgment-debtor; but he has done so without satisfying the Court in any manner that it really belongs to him, or even that it was in his possession, or in that of some other person in trust for him, at the time the attachment was made. It was he who took the initiative; and if in consequence thereof a dispute has arisen between him and a third party, it is but fair and just that he should be called upon first to substantiate his right to make the attachment."

Under the present Code an attachment can be obtained by an *ex parte* verified application containing the particulars mentioned in

(1) (1868) 2 B. L. R., 91.

section 235 of the Code. Section 236 makes provision for an inventory being attached to the application when moveable property is not in the possession of the judgment-debtor, but if the applicant chooses to enter in his application under section 235 that the property is in his judgment-debtor's possession or in some other person's possession in trust for or on behalf of the judgment-debtor, there is no provision requiring the Court to test the allegation and an attachment is issued as a matter of course.

The policy of the provisions of section 279 of the Code may be open to question, at least as regards property in the possession of any one but the judgment-debtor, but it has to be followed in all cases, and under the section the claimant although in possession must adduce evidence to show that at the date of attachment he had some interest in or was possessed of the property attached. This he must do although in the application for execution it has been stated that he is in possession; consequently the provisions are not in accord, so far as proof of possession is concerned, with the ordinary rule that what is admitted need not be proved.

Although the section says that the claimant must adduce evidence, which is equivalent to saying that he must begin, it does not say how he is to prove the interest he claims, or his possession.

That is left to the ordinary law. In *Radha Pyari Debi Chowdhraïn v. Nabin Chandra Chowdhry* (1), the questions referred to the Full Bench were—

- (1) Whether a person who has been dispossessed of land or fisheries in execution of a decree against a third person to which he is no party, is bound to prove anything more than that he was really and *bond fide* in possession and had been dispossessed in execution of such decree?
- (2) Whether the decree-holder can put the plaintiff to proof of his title, or, on an application numbered and registered as a suit under section 230 (of the Code of 1859) in answer to and not merely as controverting the plaintiff's evidence of possession, can go into evidence of title himself?

Couch, C. J., held that the applicant was not bound to prove more than that he was really and *bond fide* in possession, and that if he proved that, it would be evidence of title on which he might rest his case. Upon the 2nd question he held that the decree-holder could not insist upon direct proof of title, and the plaintiff might, if he thought fit, rely upon his possession: further that the decree-holder might go into evidence to prove his own title. I take it that the ruling would apply equally in an investigation under section 278 of the present Code. If a claimant alleging possession of the attached property proves such possession, he may rest his case on that, and then the burden of proof shifts to the decree-holder, who has to prove that the property although in the claimant's possession was held by him in trust for the judgment-debtor. I leave out of consideration

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the case of land in the occupancy of a tenant, because in the present case moveable property alone is concerned.

Shwe Bo alleged not only possession, but a title by purchase. Under the above ruling he might have rested his case upon possession only, and then under section 110 of the Evidence Act, the burden of proving that he was not the owner and that he held the property in trust for the judgment-debtor would have rested on the decree-holder, the appellant in this appeal.

He did not do so, however, but tried to prove his title by purchase and failed to do so.

The question then is whether his position was different in the suit under section 283 from what it was in the investigation under section 278.

In *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (1), the facts were analogous to the present case. The claimant claimed that the attached property was his, and that he was in possession of it when it was attached. His claim was rejected. In the suit that followed to establish his right, he proved his possession but failed to prove the title alleged by him. The Full Bench held that such possession having been proved it lay upon the defendant to prove a title to the property in himself or in the judgment-debtor, and that having failed to do this, the plaintiff (claimant) was entitled to a decree declaratory of his right to the property as against the defendant.

In *Govind Atmaram v. Santai* (2), however, a Bench of the same High Court held in a case in which a claimant relied upon a sale and conveyance to her, and the defendant contended that the sale was fictitious, that in consequence of the claim having been dismissed in the investigation under section 278, it lay upon the plaintiff-claimant in the suit to prove her case, and in order to do so she had to prove the payment of the purchase money, and that she had been in possession.

This decision does not affect the question as to the position of a claimant who does prove possession, or whose possession is admitted, because it is clear that the claimant-plaintiff did not prove possession.

In *Ram Nath v. Bindraban* (3), the last-mentioned ruling was followed, but in that case also the claim was not in any way founded upon possession, for the claimant who claimed as vendee had allowed his vendor the judgment-debtor to remain in possession.

In *Chokalingum Chetty v. Maung Yeik* (4), the late Chief Judge of this Court who was then Judicial Commissioner in Upper Burma held firstly that the objector to an attachment had in an investigation under section 278 to prove not only his possession, but that he was not in possession as trustee for the judgment-debtor, and secondly that in a suit by him under section 283 in consequence of his claim having been rejected, he could not be in a better position than he was in at the investigation.

(1) (1882) I. L. R., 6 Bom., 215. | (3) (1896) I. L. R., 18 All., 369.
(2) (1888) I. L. R., 12 Bom., 270. | (4) 2 U B. R., (1897-98), 270.

He relied upon the decision in *Govind Atmaram v. Santai* (1) and two other decisions of the Bombay High Court as going to show that the order in the investigation proceedings tends to throw upon the unsuccessful party, who becomes plaintiff in the subsequent suit, something more than proof of mere possession.

In the two other cases he referred to, the plaintiffs were not objectors to the attachment, but were attaching creditors. Decisions laying down that where the attachment has been removed, and the attaching creditor brings a suit to establish his right to attach and have property sold in execution, have little bearing upon the question of what a person admittedly in possession of attached property has to prove in order to establish his right in a suit under section 283. As I have remarked before, the decision in *Govind Atmaram v. Santai* (1) also does not touch this question. The learned Chief Judge's ruling upon what an objector has to prove at an investigation appears to me to go beyond the actual words of section 279 of the Code, and not to take into account the provisions of section 110 of the Evidence Act, and to be opposed to the Full Bench rulings of Calcutta and Bombay High Courts which I have quoted. No doubt the decision of the Court in the investigation proceedings in the present case was in the words of Couch, C.J., in *Brijo Kishore Nag v. Ram Dyal Bhudra* (2), a declaration that the respondent Shwe Bo's possession was without title, but there is no strong ground for holding that a declaration in a summary and possibly perfunctory proceeding robs a possessor in a regular suit of the very strong position which the law accords him. The decision in *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (3) was a fully considered judgment of very eminent Judges in which the principles applicable were expounded, and it is the only decision of an Indian High Court bearing directly upon the question in the present case. I would therefore follow it, and hold that Shwe Bo, the plaintiff in this suit, under section 283 of the Code, was entitled to succeed upon proof of possession by him of the attached property at the time of attachment, the defendant not having proved that he held possession in trust for the judgment-debtor Aung Myat, or that the attached property was the property of Aung Myat liable to present seizure and sale in execution of his decree; and that the plaintiff was entitled to the property as against the defendant notwithstanding that the Court had dismissed his claim made under section 278 of the Code.

Although the question of the rights of a hirer of cattle does not arise in this suit, I have used some words above in contemplation of a prevalent practice in this province of tenants and cultivators of lands hiring cattle from owners for the cultivating season or other periods. The agreements or contracts under which such hirings are effected are perfectly valid, and the hirers can in no sense be held to hold the cattle in trust for the owners.

It would cause great inconvenience and injustice to the hirers if a judgment-creditor of an owner were at liberty to have the hired cattle seized and sold in execution of a decree against the owner during the

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(1) (18) I. L. R., 12 Bom., 270. | (2) (1874) 21 W. R., 133.
(3) (1882) I. L. R., 6 Bom., 215.

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period for which they have been hired out, and Courts allowing an attachment in such case to continue and prevail would be robbing hirers of an actual right to possession, although that right is only for a limited period.

If, in an investigation under section 278 as to moveable property, a Court finds that the claimant was in possession at the time of attachment, and it is not proved by the attaching creditor that the claimant was in possession in trust for the judgment-debtor, the Court should remove the attachment. The words "in trust for" should be construed in the sense that the claimant held the property as servant of or agent for or otherwise on behalf of the judgment-debtor, and that he had no right whatever to the possession of it on his own account if the judgment-debtor claimed it.

For the reasons I have given, I think the decree of the District Court was correct, and I would dismiss this appeal.

Thirkell White, C.J.—In my opinion, the ruling of the High Court at Bombay in *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (1) should be followed. Section 279 of the Code of Civil Procedure does not require the claimant or objector to adduce evidence to show that at the date of the attachment he had some interest in and was possessed of the property attached. If he shows that he was possessed of the property, the section does not require him to show that he had an interest in it. If he was not possessed of the property, at the time of the attachment, then he has to show that he had some interest in it. The case above cited and that of *Govind Atmaram v. Santai* (2) are therefore quite reconcilable. In a suit under section 283 of the Code of Civil Procedure it is not necessary to hold that the claimant is in a better position than in the investigation under section 278. But there is no good authority for holding that he should be in a worse position. If a claimant establishes that he is in possession of the property, then under section 110 of the Evidence Act the burden of proving that he is not the owner is on the person who affirms that proposition. The decision in the investigation under section 278 cannot affect the position.

I concur therefore in thinking that the decree of the District Court is correct and in dismissing this appeal.

Criminal Revision
No. 844 of
1903.
September 3th,
1903.

Before Mr. Justice Fox, Officiating Chief Judge.

KING-EMPEROR v. NGA LUN AND ONE.

Mischief—Cattle straying on crops—Indian Penal Code, section 425.

The owner of cattle which stray on another person's paddy land does not commit the offence of mischief unless he caused them to stray with the intention that they should damage, or with the knowledge that they would be likely to damage the crop.

Two buffaloes belonging to the two accused strayed on to complainant's paddy land. The accused tried to get them away with ropes, but being unsuccessful they went into the field mounted on two other buffaloes, and so managed to capture and drive them off. The Magis-

(1) (1882) I. L. R., 6 Bom., 215. | (2) (1888) I. L. R., 12 Bom., 270.

trate has convicted both accused of an offence under section 426 of the Indian Penal Code, and has sentenced them to pay a fine of 50 rupees each, or in default to suffer one month's rigorous imprisonment. He has also ordered the fines, if realised, to be paid to the complainant.

* * * * *

There is nothing on the record to show that the accused caused their cattle to enter on complainant's field intending to cause, or knowing that they were likely to cause, damage to her crop. Their entry into the field mounted on two other buffaloes appears in this case to be covered by section 81 of the Code. That being so the offence of mischief was not committed. The Magistrate should read section 425, and illustration (h). The remedies open to the complainant in cases of this kind are indicated in sections 10 and 29 of the Cattle Trespass Act, 1871. I reverse the convictions and sentences, and direct that the fines be refunded to Nga Lun and Nga Min.

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Before Mr. Justice Fox, Officiating Chief Judge.

J. PETLEY & SON v. S. AH KYUN.

Mr. Bagram—for applicant.

Messrs. Eddis, Connell and Lentaigne—
for respondent.

Trade-marks—Indian Penal Code, section 478.

*Criminal Revision
No. 1094 of
1903.
September 9th,
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The style of the "get-up" of the boxes or packages in which goods are retailed does not constitute a "trade-mark" as defined in section 478 of the Indian Penal Code.

The elder of the two complainants has for many years carried on business as a vendor of ground coffee. He has sold this in cylindrical tin boxes each containing 1 pound of coffee. On the outside of the cylindrical portion of each box he has affixed a paper label, on which is printed, amongst other things, a picture of a railway engine and carriages: over the lid and round each box vertically he has pasted an orange coloured paper band, and on this, on the portion crossing the lid, a fac-simile of his signature is printed. On the 16th June 1902 he obtained a decree in a suit on the Original side of this Court restraining a dealer in Rangoon from using a similar coloured band on tins containing coffee offered for sale by that dealer.

In July 1902 the complainants caused a letter to be addressed to the accused in the present case calling upon him to desist from selling coffee in similar tin boxes, bearing a similar band, and a label on which was printed a picture of a tramway engine and cars. The accused changed the picture on the label to a picture of a steamer, and altered the colour of the band to a shade of pink.

The complainants were not satisfied with this, and having bought a tin with the altered label and band on the 14th March 1903, they preferred a complaint on the 25th March charging the accused with having committed an offence punishable under section 483 of the Indian Penal Code in respect of such box. The evidence subsequently taken would only cover an offence under section 482 of the Code, if any offence at all was committed.

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What the complainants complained of was the use of the pinkish band bearing what purported to be a fac-simile of the accused's signature appearing in the same position as that in which the elder complainant's fac-simile signature appeared on their boxes. The Subdivisional Magistrate discharged the accused, holding that the prosecution was barred by lapse of time under section 15 of the Indian Merchandise Marks Act. In so holding he made a careless mistake. What the complainants were prosecuting on was not the label and band formerly used by the accused, but the latter one, adopted after the complainants had succeeded by letter in getting the accused to alter those he had previously used.

The complainants applied to the District Magistrate to order a further inquiry. The parties argued the merits of the case before him, but he refused to enter into those, and after pointing out the mistake the Subdivisional Magistrate had made, he ordered a further inquiry. The District Magistrate would have been better advised if he had referred the case to this Court. He had no authority to reverse the finding of the Subdivisional Magistrate that the prosecution was barred by limitation, and the Subdivisional Magistrate could not reverse his own finding. That finding, until reversed by a Court having authority to reverse it, was a bar to the Subdivisional Magistrate proceeding further with the case.

Moreover, the District Magistrate, if he dealt with the case at all, should have dealt with it fully. If it was made to appear to him that no prosecution under the criminal law would lie, it was not right that the accused should be harassed with what must result in an abortive inquiry.

I have entertained the accused's application for revision of the District Magistrate's order chiefly on this last ground, and the question whether the accused could be convicted of an offence under the Indian Penal Code for having used the band and signature complained of has been argued before me.

Section 478 of the Penal Code defines a trade-mark as "a mark used for denoting that goods are the manufacture or merchandise of a particular person." On the complainant's boxes the chief trade-mark is the picture of a railway train. They may also have a trade-mark in the fac-simile signature of the elder complainant, but that trade-mark could not reasonably be held to be infringed by the use of a signature of another person of a very different name: consequently a prosecution based on the use of what purports to be a fac-simile of the accused's name could not succeed.

The matter resolves itself into whether the band round the boxes vertically can constitute a trade-mark as defined in the Indian Penal Code. In my opinion it cannot. The band is merely a part of the "get up" of the boxes, and although in a civil suit a trader who imitates the "get up" of the packages in which another trader sells his goods may be restrained by injunction from so doing, the "get up" does not constitute a trade-mark. The Indian Penal Code deals only with trade-marks proper, and not with cases of the description referred to in

Chapter VIII of Mr. Sebastian's work on Trade-marks under the heading "Cases analogous to those of Trade-mark."

The band used by the accused not being a trade-mark, I must hold that the accused is not liable to prosecution under the Indian Penal Code for using it, and that being so it would be worse than useless and not right that any further inquiry into the case should be held.

I reverse the order of the District Magistrate dated the 25th June.

I have been asked to allow the accused costs under section 14 of the Merchandize Marks Act. If I had the power to do so, I should, under the circumstances of the case, refuse the application.

Before Mr. Justice Fox, Officiating Chief Judge.

KARIM BUX *v.* KING-EMPEROR.

Mr. D. N. Palit—for applicant.

Probate and Administration Act, V of 1881—Succession Certificate Act, VII of 1889.

The object of procedure under the Probate and Administration Act is merely in the first place, to have a representative of the deceased appointed in whom the rights of the deceased to the property shall be vested, and next to give power to revoke an appointment under certain circumstances. If the holder of a probate or of letters misappropriates the estate, the remedy is by a suit for its administration by or under the orders of the Court. Section 98 does not bar such a suit being brought within a year from the grant of probate or letters of administration.

Probates and letters of administration distinguished from certificates under the Succession Certificate Act.

The applicant applied to the District Court for letters of administration to the estate of his deceased brother Koda Bux, and valued the estate at Rs. 321-13-5.

The then Additional Judge of the Court made an order for the grant of letters to the applicant, but it does not appear from the record whether the letters were actually issued. About two and a half months after the order one Sukala, who alleged she was the widow of the deceased, filed a petition in the Court complaining that the applicant had not paid her anything, and that he was using the estate property for his own purposes.

The Additional Judge issued notice to the applicant to appear before him: the purpose for which he was to do so was not stated.

When he appeared the Additional Judge examined him, and he stated *inter alia* that Sukala had been divorced by the deceased, but that he had nevertheless paid her Rs. 74 out of pity and that he had paid away the remainder of the money he had up to that time received. Sukala was also examined, and she said she had received nothing. The Additional Judge ordered him to pay into Court, before the 3rd July, Rs. 241, which was the amount the applicant had said he had received, and to produce witnesses to the payment of Rs. 74 to the petitioner. No evidence, accounts, or money were produced, and the Additional Judge drew up an order directing the appli-

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v.
S. AH KYAN.

Civil Miscellaneous Application No. 80 of 1903. September 11th, 1903.

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cant's prosecution for an offence punishable under section 409 of the Indian Penal Code. He also called upon the applicant's surety to pay Rs. 309-1-7 into Court. This was done on the 22nd July. On the 27th July the applicant applied for fresh letters of administration to enable him to recover further sums amounting to Rs. 405-9-6 due to the estate. After opposition the Additional Judge ordered such letters to issue upon security being furnished. The proceedings in the case have been more than ordinarily irregular.

In the first place, if any letters were issued under the order of the 10th March granting them, a copy of them should be on the record. Next, the Additional Judge entirely misapprehended the scope or procedure under the Probate and Administration Act in his proceedings subsequent to that order, and those proceedings were entirely without jurisdiction.

The procedure under the Act relates to the granting and revocation of probates and letters of administration and matters connected therewith; the administration of an estate is not provided for under the Act, and this can only be done in a regular suit brought for the purpose.

No doubt the Court has power under sub-section (3) of section 98 to require an executor or administrator to exhibit an inventory or account, if he does not exhibit such inventory or account within the times allowed him as of right by the sub-section (1) of that section, and it may, upon an application under section 50 of the Act to revoke a grant, go into the question of the truth or falsity of the inventory or account, but this is only for the purpose of coming to a conclusion as to whether the grant should be revoked or not.

The object of procedure under the Act is merely in the first place to have a representative of the deceased appointed in whom the rights to the property of the deceased shall be vested, and next to give power to revoke an appointment under certain circumstances. If the applicant was misappropriating the estate, Sukala's only remedy was to bring a regular suit for its administration by or under the orders of the Court.

The fact that section 98 of the Act gives an executor and an administrator six months within which to file an inventory, and one year within which to file an account, is no bar to any person having an interest or claim to the deceased's property bringing such a suit against the executor or administrator before such times expire.

Another error on the Additional Judge's part was the entertainment of the applicant's second application for letters of administration. Apparently it was made because debts to the estate which he wished to sue for had not been included in the original valuation of the estate. This did not necessitate further letters of administration being granted to the applicant in order to entitle him to recover such debts. As long as a person holds either probate or letters of administration, he is, under section 4 of the Act, the representative of the deceased for all purposes, and all the deceased's property is vested in

him as such representative, whatever may have been the misstatements on which he has obtained the probate or letters.

Probates and letters of administration are not the same as certificates under the Succession Certificate Act. In a certificate under the latter Act the particular debt must be set out in order to entitle the holder to sue for such debt, but in a probate and in letters of administration debts are not set out, and the production of one or the other is sufficient and is, under section 59 of the Probate and Administration Act, conclusive that the holder at the time represents the deceased, and is entitled to his estate in the province in which the grant was made.

If a person applying for probate or letters of administration fails to include any property of the deceased in his valuation, Chapter IIIA of the Court-Fees Act contains provisions showing the consequences which may happen, and the courses open.

No suit having been before the Court, I must hold that the Additional Judge had no jurisdiction to entertain Sukala's petition, or to examine the applicant, or to order him to pay any money into Court, or to order him at that time to file any accounts, or to prove any accounts, or to order the surety to pay any money into Court, or to order the applicant's prosecution or to grant further letters of administration.

All the orders subsequent to the presentation of Sukala's petition are set aside, and the money paid in by the surety will be repaid to him.

Before Mr. Justice Fox, Officiating Chief Judge, and Mr.
Justice Birks.

KING-EMPEROR v. PERIASAWMY ACHARI AND TWO OTHERS.

Mr. Vakharia—for respondents.

Workmen's Breach of Contract Act, XIII of 1859—Summary trial—
Code of Criminal Procedure, section 260.

Cases under sections 1, 2, of the Workmen's Breach of Contract Act, XIII of 1859, cannot be tried summarily.

Pollard v. Mothial, (1881) I. L. R., 4 Mad., 234, followed.

Queen-Empress v. Indarjit, (1887) I. L. R., 11 All., 262, dissented from.

Fox, Officiating C.J.—The only question which arises in the case is whether the Subdivisional Magistrate had power to deal under the summary procedure of the Code with the petition for an order under section 2 of the Workmen's Breach of Contract Act, 1859, either ordering the workman to repay money advanced, or to perform or get performed the work according to his contract.

In *Queen-Empress v. Indarjit* (1), a learned Judge of the Allahabad High Court held that such a case might be tried summarily, but he gave no reasons for coming to this decision, and his judgment on the point does not deal with the provisions of the section.

(1) (1889) I. L. R., 11 All., 262.

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On the other hand in *Pollard v. Mothial* (1) a Bench of the Madras High Court held that the inquiry to be made under the first part of the section is not an inquiry into an offence which may be tried summarily, but it is an inquiry of a special character which, in some cases, may require to be conducted with much care and patience.

We concur in this view. The terms of the section themselves indicate that the first inquiry is not an inquiry into any matter in respect of which the Magistrate can at its conclusion punish the respondent by passing any sentence of imprisonment or fine. His power to pass a sentence only arises when the workman has failed to comply with the order which the Magistrate may pass on the inquiry into the original petition or complaint.

The Subdivisional Magistrate's proceedings were void, and are set aside.

The question as to whether a respondent in such a case may be examined on oath does not arise in the present case: it is therefore unnecessary to express any opinion on it.

Birks, J.—I concur in thinking that proceedings under section 2 of Act XIII of 1859 should not be tried summarily. The question was not raised in Criminal Revision No. 992 of 1903 which came before me and which was also tried summarily. The only question in that case was as to the amount in a joint contract for which the respondent was held liable. Had the question been raised then I should have directed a fresh enquiry as I concur with the Madras High Court in thinking that such cases should not be tried summarily.

Special Civil and
 Appeal No. 36
 of 1903.
 September 16th,
 1903.

Presented in (1937) 396
 Before Mr. Justice Fox, Officiating Chief Judge.

MA SEIN NYO v. MA MAI TU.

Mr. G. B. Dawson—for appellant
 (defendant).

Mr. Wilkins—for respondent
 (plaintiff).

Succession Certificate Act, VII of 1889—Provisional decree.

A Court cannot pass a decree, provisional or otherwise, against a debtor of a deceased person for payment of the debt to any person who does not hold probate or letters of administration or a certificate of succession.

Ma Naw Za v. Ma Thet Pôn, P. J. L. B., 334, dissented from.

The plaintiff sued to recover a loan made by her deceased husband and herself. She did not produce or hold either letters of administration or a certificate under the Succession Certificate Act, VII of 1889. The Subdivisional Court dismissed the suit on the merits. The Divisional Court took a different view, and made a decree in the plaintiff's favour, contingent upon the production within three months of either letters of administration to her husband's estate, or of a certificate under the above Act. It did this on the authority of the Judicial Commissioner's ruling in *Ma Naw Za v. Ma Thet Pôn* (2), in which a provisional decree was made under similar circumstances. The learned Judicial Commissioner in that case does not refer to any law or autho-

(1) (1881) I. L. R., 4 Mad., 234.

(2) (1897) P. J. L. B., 334.

rity which authorizes the making of a provisional decree in such a case. Even if such a decree could be made, it would be a decree, and section 4 of the Succession Certificate Act is explicit in forbidding a Court to pass any decree, whether provisional or otherwise, against a debtor of a deceased person for payment of the debt to a person claiming to be entitled to the effects of a deceased person, unless the claimant produces one or other of the documents mentioned in the section. I respectfully decline to follow the ruling above quoted so far as it authorises a provisional decree being passed contingent upon the production of letters of administration or a certificate under the Succession Certificate Act, within a future period.

The decree of the Divisional Court is reversed and that of the Sub-divisional Court dismissing the suit with costs is restored. The plaintiff must pay the defendant's costs in this Court and in the Divisional Court.

Before Mr. Justice Birks.

KING-EMPEROR v. NGA AUNG NYUN.

Discharge of accused—Code of Criminal Procedure, section 259.

It is only in cases of non-compoundable offences that an accused can be discharged under section 259 in the absence of the complainant on the day fixed for the inquiry.

Section 354 is not compoundable, *vide* section 345, Criminal Procedure Code. Section 324—511 is only compoundable with the sanction of the Court. The Magistrate's order discharging accused purports to be made under section 259, as the accused absconded and the complainant did not appear. It is only where offences may be lawfully compounded that such an order can be made. The mere omission of complainant to attend when she probably knows that the accused has absconded and has not been arrested is not a sufficient ground for striking off a case or discharging an accused who is evading a Court process. A complainant who files a complaint of a non-compoundable offence which necessitates a procedure under Chapter XXI for the trial of warrant cases and omits to attend on the day fixed is *prima facie* guilty of contempt under section 174. Where warrant cases are compoundable the Magistrate is justified in assuming that the non-appearance of the parties means that the case has been compounded, but he must use his discretion under section 259, whereas in summons cases, where the complainant does not appear, he is bound to acquit the accused under section 247, Criminal Procedure Code. The order of discharge is set aside and the Magistrate will proceed to deal with the case. If the accused cannot be arrested a proclamation should issue under section 87. The complainant should be summoned and asked if she really wishes to withdraw from the prosecution. If so, this fact should be recorded when the accused could be discharged for want of prosecution of the charges stated in the complaint. He is, however, liable to be prosecuted under section 172.

1903.
MA SEIN NYO
v.
MA MAI TU.

Criminal Revision
No. 1208 of
1903.
September 23rd,
1903.

Criminal Revision
 No. 1448
 1903.
 October 19th,
 1903.

Before Mr. Justice Fox.

KING-EMPEROR *v.* NGA SHWE U.

Security—Criminal Procedure Code, section 110.

Care must be exercised in the application of section 110 of the Code of Criminal Procedure. It must be proved that the accused's *general repute* is that of an habitual offender of one of the types mentioned in the section, and proper evidence that it is so must be recorded.

Further, the Magistrate must find that it is *necessary* that the alleged habitual offender should be put on security. *Ref. to in I Rau. 447.*

The Magistrate's attention is called to this Court's rulings in the cases of the *Crown v. Nga Nyein* (1) and *King-Emperor v. Nga Po Saung* (2).

The Magistrate included in his order under section 112 one matter which fell under section 109 of the Code, two matters which fell one under clause (a) and the other under clause (b) of section 110, and one matter which did not fall under either section, *viz.*, that the accused was in the habit of associating with bad characters. Clause (d) of section 110 provides for taking security from persons who habitually protect or harbour thieves, or aid in the concealment or disposal of stolen property. Such acts are beyond mere association with bad characters or thieves, which is not in itself sufficient to justify an order under section 110.

I cannot at all agree with the District Magistrate's remarks as to the questions which should have been put to the witnesses in the case.

If it is proposed to prove by evidence of general repute that a person called on to give security is an habitual offender of one of the types mentioned in section 110, the form which the chief question put to the witnesses should take should be "What, as far as you know, is the repute of the accused amongst the body of villagers of the village in which he has been living?" In order to satisfy himself that an accused's *general repute* is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities. Inquiries under section 117 should if possible be conducted in the place where the accused has lived, and the Magistrate should himself pick out at haphazard some of the villagers, and examine them as to the accused's general repute. He should not be contented with the evidence of merely such witnesses as the police or village authorities choose to send up to him. He should also consider in every case whether the necessity for putting the alleged habitual offender on security has been proved, and whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties.

The security sections are not meant to be used as a means of getting every suspected habitual offender and village loafer confined in jail, and thus saving trouble to the police and village authorities.

(1) 1 L. B. R., 90. | (2) 2 L. B. R., 4c.

It is only when the ordinary means for detection and prevention of crime, and for ensuring good behaviour, have been adopted and have failed, that resort to the special means provided by sections 109 and 110 of the Code is justifiable.

There was in the present case nothing to show that it was necessary, in order to ensure the accused's good behaviour, that he should be put on security, and the Magistrate has not found so.

I set aside the Magistrate's order and direct that the accused be released.

Referred to Mr. Justice Fox.

MAUNG THA NU AND ONE *v.* MAUNG KYA ZAN AND OTHERS.

Messrs. Palit and Maung Thin—for appellants (plaintiffs).

Mortgage of share of undivided joint property.

A sharer in undivided joint property may mortgage his share without prejudice to the rights of his co-sharers.

Ma On and others v. Ko Shwe O and others, S. J. L. B., 378; *Maung Hlaing v. Maung Tha Ka Do*, P. J. L. B., 65; *Byjnath v. Ramoodeen*, (1874) L. R. I. A., 106; and *Lakshman v. Gopal*, (1899) I. L. R., 24 Bom., 385; referred to.

The plaintiffs appeal because they have been refused a mortgage decree although it was held that the second defendant consented to the mortgage.

The land mortgaged had belonged to the second defendant and her former husband. On his death it devolved upon the second defendant as his widow and the 3rd, 4th and 5th defendants as his children by her.

The second defendant's share was a half, and over that she had an absolute right of disposal—see *Ma On and others v. Ko Shwe O and others* (1) and *Maung Hlaing v. Maung Tha Ka Do* (2).

The Additional Judge thought that as the land had not been divided and the shares separated, the mortgage was wholly bad.

If a sharer has an absolute right to dispose of his or her share, it follows that he or she may dispose of it whilst it is a share, and while the property is undivided. The right has been recognised in numerous cases, for instance in the case of *Byjnath v. Ramoodeen* (3). If a person who has only a share in property mortgages or joins in mortgaging such property, his doing so does not affect the shares of his co-sharers, but the mortgage is good and valid as regards his own share—see *Lakshman v. Gopal* (4).

I vary the decree of the original Court, and there will be inserted in it an order that if the first and second defendants do not pay the amount decreed against them, within six months from this date, the half share of the second defendant in the land mentioned in the plaint shall be sold, and the proceeds applied towards satisfaction of the amount due to the plaintiffs. The second defendant must pay the plaintiff's costs of this appeal.

(1) S. J. L. B., 378.

(2) P. J. L. B., 65.

(3) (1874), L. R. I. A., 106.

(4) (1899), I. L. R., 23 Bom., 385.

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KING-EMPEROR
v.
NGA SHWE U.

Civil 2nd Appeal
No. 219 of
1902.
September 25th,
1903.

Criminal Revision
No. 1576 of
1903.
5th December
1903.

Before Mr. Justice Birks.

KING-EMPEROR v. NGA PO CHON.*

*Security—Criminal Procedure Code, sections 118 (3), 562—Burma
Gambling Act, section 17.*

A minor called upon to give security under the preventive sections of the Criminal Procedure Code need not execute a personal bond. It is sufficient if the bond is executed by his sureties. The provisions of section 118 (3) apply to criminal bonds generally.

Two of the accused's uncles who were called by the prosecution deposed to the fact that the accused lived by thieving. The District Magistrate reduced the amount of the security order under section 110 on appeal. On the merits, I see no grounds for interference. Both officers who have dealt with the case omitted to notice that the accused was a minor, being only 17 years old. Under clause 3 of section 118, Criminal Procedure Code, the personal bond of a minor is not required. The bond must be amended accordingly. I may observe that in my opinion the provisions of section 118, clause 3, are generally applicable to bonds given in criminal cases and would apply to bonds given under section 562, Criminal Procedure Code, and under section 17 of the Burma Gambling Act.

Criminal Appeal
No. 522 of
1903.
December 10th,
1903.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Birks.*

KING-EMPEROR v. NGA PO MIN.

Mr. Giles, Assistant Government Advocate,—for the prosecution.

*Confession—Facts discovered in consequence of—Inducement, threat, or
promise—Evidence Act, sections 24—28.*

In consequence of a confession made by the accused to a village headman certain property which had been taken in a robbery was found in the jungle. The Additional Sessions Judge excluded this evidence on the ground that the confession had been obtained by improper inducement, and in the absence of other sufficient evidence acquitted the accused.

The point for decision was whether section 27 of the Evidence Act was a proviso to section 24.

Held,—that section 27 is not a proviso to section 24 of the Evidence Act; but that evidence of the fact that the accused pointed out certain property was admissible.

Per Thirkell White, C.J.—No part of a confession caused in the manner described in section 24 of the Evidence Act can be relevant except in the circumstances provided for by section 28.

Per Birks, J.—Statements that are irrelevant under one section of the Evidence Act may be relevant under other sections of the Act. The word "irrelevant" is advisedly retained in section 24 and is contrasted with "shall not be proved" in the two subsequent sections.

Queen v. Dhurum Dutt Ojha, (1867) 8 W. R., 13; *Empress v. Rama Birapa*, (1878) I. L. R., 3 Bom., 12; *Empress v. Pancham*, (1882) I. L. R., 4 All., 108; *Queen-Empress v. Babu Lal*, (1884) I. L. R., 6 All., 509; *Queen-Empress v. Nana*, (1890) I. L. R., 14 Bom., 260; referred to.

Thirkell White, C.J.—The respondent, Po Min, was convicted under section 394, Indian Penal Code, of having voluntarily caused hurt in committing robbery and was sentenced to rigorous imprisonment for four years. The conviction rested mainly on two confessions, one said

Cf. King-Emperor v. Mi Pyu, 4 L. B. R., 12.

to have been made to a Headman named On Gaing, the other recorded by the Subdivisional Magistrate. On appeal the learned Additional Sessions Judge excluded both of these confessions, the former on the ground that it was made under the influence of an inducement offered by a Police Sergeant, the latter on the ground that it was not recorded in compliance with the provisions of section 164, Code of Criminal Procedure, the Subdivisional Magistrate not having sufficient reason to believe that it was voluntarily made. The Additional Sessions Judge excluded not only the confession to On Gaing as a whole but even that part of it which related to the discovery of part of the property taken in the robbery. There being, in his opinion, not sufficient evidence on the record, apart from the confessions, to justify the conviction, the Additional Sessions Judge reversed the conviction and sentence, and acquitted the accused. It is against this acquittal that the present appeal has been preferred by the Local Government.

The main ground on which the appeal is supported is that so much of the confession alleged to have been made to On Gaing as related to the discovery of part of the stolen property should have been admitted, under section 27 of the Evidence Act. The propriety of the exclusion of the confession recorded by the Subdivisional Magistrate has not been questioned. We have been assisted by the argument of the learned Assistant Government Advocate who conducted the appeal.

The question for decision, so far as concerns the confession to the witness On Gaing, is whether section 27 of the Evidence Act is a proviso to section 24 of that Act or only to section 26. The learned Additional Sessions Judge has relied exclusively on a ruling of a Bench of the High Court at Calcutta delivered so long ago as the year 1867 in which it was ruled that, when a Police Officer had obtained a confession by means of an inducement, no part of his evidence as to discovery of facts in consequence of the confessions is legally admissible. (*Queen v. Dhurum Dutt Ojha*) (1). This ruling was given under the Code of Criminal Procedure, 1861, and before the passing of the Evidence Act, 1872. The Code of Criminal Procedure, 1861, contained sections 148, 149, and 150, almost identical with sections 25, 26, and 27 of the Evidence Act, 1872. But there does not seem to be in that Code a section corresponding to section 24 of the Evidence Act. Nor have I been able to discover any statutory provision to the effect of that section in the Indian Acts relating to evidence in force before the enactment of the Evidence Act of 1872. It is clear therefore that the ruling of 1867 cannot safely be taken as a guide to the law as it stands enacted in the Evidence Act now in force.

I have examined a number of cases in which this question or some question of a similar nature has been discussed. Those which seem to throw light on the subject are the following. The earliest case is the *Empress v. Rama Birapa* (2), in which though the law is not very clearly stated, it seems to be assumed in the judgment of a very learned jurist, West, J., that section 27 of the Evidence Act is a proviso to section 24 of that Act as well as to the two intermediate sections.

(1) (1867) 8 W. R., 13. | (2) (1878) I. L. R., 3 Bom., 12

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This ruling is noticed by the Additional Sessions Judge. The next case is the *Empress v. Pancham* (1), in which the majority of three Judges of the Allahabad High Court held that section 27 of the Evidence Act applied to section 25. The same view was taken in the leading case on the subject by a Full Bench of the same Court, Mahmood, J., dissenting, in *Queen-Empress v. Babu Lal* (2). The majority of the learned Judges held that section 27 was a proviso not only to section 26 but to section 25; and while contesting this opinion in a weighty judgment, Mahmood, J., referred to the logical result of the argument in its favour that if section 27 was a proviso to section 25 it was also a proviso to section 24. In 1889, in *Queen v. Nana* (3), a Full Bench of the Bombay High Court again assumed that section 27 applied to section 25 as well as to section 26 of the Evidence Act. There does not seem to be any direct authority on the application of section 27 to section 24 except the cases cited by the Additional Sessions Judge, and of one of these the applicability is doubtful.

The evidence which the prosecution seek to have admitted and which the learned Additional Sessions Judge has excluded is as follows:—

“He (Po Min) told me the box that was stolen was hidden in the jungle, and said he would show it to me * * * * *
 Po Min shewed us where the box was hidden. We brought it away.”

This is an extract from the deposition of On Gaing, a Village Headman.

Section 24 of the Evidence Act provides that “a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise.” There are other words in the section but it is clearly a general provision and applies to confessions made by persons whether in police custody or not and whether made to police officers or others. Section 25 excludes confessions of any kind made to a Police Officer. It declares that no such confession shall be proved. Section 26 provides that no confession made by any person whilst he is in the custody of the police, unless made in the presence of a Magistrate, shall be proved against him. Section 27 is merely a proviso. It provides that when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of the police, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. As I have already observed, sections 25, 26 and 27 are reproduced almost without change from the Code of Criminal Procedure, 1861. It seems to me to some small extent probable that, as in the Code the section which is reproduced as section 27 of the Evidence Act qualified at most the two preceding sections, the intention of the Legislature was that section 27 also should be read as a proviso at most to the two sections immediately preceding. The wording of the section points to the same conclusion. Section 24 declares that any confession made by an accused person is irrelevant if made under an inducement from some one in authority. It does not matter whether

(1) (1832) I. L. R., 4 All., 198.

(2) (1884) I. L. R., 6 All., 509.

(3) (1890) I. L. R., 14 Bom. 260

the accused person is in custody or not, or whether the confession is made to a police officer or to some one else. If it is made under the influence of an inducement, threat, or promise, it is irrelevant. Section 25 and section 26 are differently worded and aim at a different object. They provide that a confession shall not be proved, if made to a police officer, whether the person making it is in custody or not; and that if an accused person is in police custody his confession shall not be proved, whether made to a police officer or to any other person, unless it is made in the presence of a Magistrate. In both sections the wording is the same "no confession * * shall be proved." In section 24 the words used are "a confession * * is irrelevant." Now follows the proviso which enacts that, in a certain case, a confession by a person though in the custody of the police "may be proved." It seems to me most probable that this proviso refers back to the preceding sections, or at least to the preceding section, of which the wording is similar. The two preceding sections say that a confession shall not be proved in certain circumstances. Section 27 provides an exception that, even though proof would be excluded by section 26, the accused being in the custody of a police officer, under a certain condition proof may be admitted. The proviso is strictly limited in its scope; it only enables a confession or part of it to be proved, under the condition stated, if the accused person is in the custody of the police. This particular and precise wording of the section seems to me, though it is not necessary to express a decided opinion on the point, to restrict the proviso to section 26. But for this proviso a confession made by a person in police custody cannot be proved in virtue of that section. Section 27 provides that although the person is in police custody, still in given circumstances, the confession can be proved. Even though it is held that this proviso refers back also to section 25, I do not see that it must logically be held to refer back also to section 24, of which the meaning and intention are quite different. It seems to be extremely improbable that if the Legislature had intended to make this proviso apply to section 24 of the Evidence Act, it would have restricted its application to the case of a person in police custody. The absurd result would happen that if a person, under an inducement, confessed and pointed out stolen property before he was arrested or when he was on bail, his confession would be irrelevant under section 24; while if he did so after he had been arrested and while in police custody his confession, though declared to be irrelevant by section 24, could be proved by reason of section 27 of the Evidence Act. It seems to me that this is an unreasonable and improper interpretation of the law; and that it is inconsistent with the precautions taken by the Legislature to safeguard the making of confessions by accused persons to the police or while in their custody. In my opinion, after giving the matter the fullest consideration, section 24 of the Evidence Act contains an absolute rule which is not affected by the proviso, made for a different purpose, in section 27. When the Legislature wished to make an exception to the absolute rule in section 24, it did so by a separate section, namely, section 28, which declares under what circumstances a confession rendered irrelevant by section 24 may become relevant. I am

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therefore of opinion that, whether section 27 of the Evidence Act refers to section 25 and to section 26 or to section 26 alone, it does not refer to section 24; and that the learned Additional Sessions Judge was right in excluding from consideration the confession alleged to have been made by the respondent Po Min.

But I cannot go so far as the learned Judges who decided the case of the *Queen v. Dhurum Dutt Ojha* (1) and hold that no part of the evidence as to the discovery of facts in consequence of a confession improperly induced is legally admissible. It seems to me that there is no rule of law which can exclude the following passage in On Gaing's evidence:

"Po Min showed us where the box was hidden: We brought it away. It was on the slope of Toungbin in, concealed in jungle. It is the exhibit box. In it we found the papers and books, etc., exhibits."

This is a statement of facts and involves no confession of guilt on the part of the accused. Section 24 of the Evidence Act does not declare that these facts are irrelevant. Section 27 does not provide that they may be proved. It assumes that facts of this kind may be proved and provides that when evidence of them is given something further which would ordinarily be excluded may be proved also. The proviso does not apply in the present case. But this does not affect the admissibility of evidence of facts which are relevant without any reference to it. In the present case, these facts, if held to be proved, do not necessarily involve a confession of guilt on the part of the accused. On the contrary, before the convicting Magistrate Po Min admitted that he had shown where the box was concealed and he explained that he had been told by the robbers where they had hidden it. Although Po Min may have been improperly induced to deliver up part of the stolen property, I do not think that there is any rule of law which excludes proof of the fact that he did so. Whether there ought to be such a rule is another matter. It is not for us to make it.

On these findings of the law applicable to this case, it remains for us to consider whether the respondent, Po Min, has rightly been acquitted on appeal. The evidence against him is that on the night of the robbery, Shwe Peik and Ka Yat met him with three others on the Myabo embankment going towards Neikban Railway Station where the robbery was committed. There seems to be no good reason for disbelieving this evidence. There is also the evidence of Pe Gyi which the Magistrate who tried the case did not believe. There is evidence that not long after the robbery Po Min was in possession of Rs. 75. Finally, there is the fact, proved and admitted, that Po Min pointed out the place where part of the stolen property was concealed. Po Min has attempted to prove an *alibi* which was not satisfactorily established. He did not explain how he came to have a considerable sum of money in his possession. His explanation of his knowledge of the hiding place of certain exhibits is very improbable. It is most unlikely that, if he was not concerned, the robbers would have taken him into their confidence in the manner indicated. It seems to me that the ad-

(1) (1867) 8 W. R. Cr., 13.

missible evidence in this case is sufficient to raise a reasonable presumption that the respondent was one of the robbers. I would therefore reverse the finding of acquittal and convict accused Po Min of voluntarily causing hurt in the commission of robbery, and under section 394, Indian Penal Code, I would sentence him to undergo rigorous imprisonment for four years, of which three months should be passed in solitary confinement.

Birks, J.—In my opinion the statement made by the accused to the witness Maung On Gaing, though not relevant as a confession, may be proved even though the original confession to the Police Sergeant was given under an inducement which would render it inadmissible under section 24 of the Evidence Act.

This statement appears to me to be admissible under section 7 of that Act, as the immediate cause of a relevant fact, *i.e.*, the finding of the stolen box. It would also seem to be relevant as a statement explaining the conduct of the accused under section 8. The statement is not relevant as a confession under section 24 as it was made under an inducement that has not been removed within the meaning of section 28.

The explanations and illustrations to section 8 shew that a statement that is irrelevant under one section may be relevant under another.

I also concur with the learned Chief Judge in thinking that there is a considerable difference in the wording of section 24 as compared with sections 25 and 26.

The first section merely states that confessions made under inducements are "irrelevant," while the latter say confessions made to Police Officers or by accused or other persons while in the custody of Police Officers "shall not be proved."

This would exclude this proof even though relevant under other sections of the Evidence Act, but for the proviso in section 27.

This proviso seems to have been inserted to shew that the prohibitions contained in sections 25 and 26 do not apply when facts are discovered in consequence of information received from a man even though he is both himself accused of an offence and also in the custody of a Police Officer.

It is not necessary to make this proviso applicable to section 24 for sections 7, 8, and 39 are sufficient to meet the case. Section 39, it may be noted, provides for the proof of so much of a statement or conversation as the Court considers necessary in each particular case to the full understanding of the nature and effect of the statement and of the circumstances under which it was made.

This seems to me to get over the difficulty felt by Mahmood, J., in *Queen-Empress v. Babu Lal* (1) that if section 27 applied to section 24 as well as to sections 25 and 26 it would lead to an anomaly to which the learned Chief Judge has alluded in his judgment.

I concur therefore with the majority of the Court in *Queen-Empress v. Babu Lal* (1) that section 27 applies to both the preceding sections which absolutely prohibit the proof of statements made by way of confession to Police Officers.

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(1) (1884) I. L. R., 6 All., 509.

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The following passage in the judgment of the learned officiating Chief Justice in that case seems to indicate that he thought section 27 applied also to section 24 :—

“The law as it at present stands, permits the police to give evidence of the fact discovered, and even according to my brother Mahmood’s view, that they discovered it in consequence of what the prisoner told them, no matter how improperly they may have obtained the information from him. If all this is evidence despite torture, threat, inducement, or promise, it seems inconsistent to stop short there and forbid them giving the words used by the accused, which they assert led to the discovery, simply because they contain an admission of guilt.”

This particular point was not, however, before the Court in that case. I think the general provisions of the Code are sufficient to shew that statements otherwise irrelevant under section 24 may be admitted in evidence without relying on section 27 alone. The word “irrelevant” that occurs in section 24 seems advisedly retained. There was not the same necessity for excluding statements obtained by improper inducements, if relevant under other sections, as there was in excluding statements made to the police which might encourage them to torture and ill-treat the persons in their custody.

On the facts I concur with the learned Chief Judge in thinking the evidence sufficient to justify the conviction of Nga Po Min under section 394, Penal Code, and in the sentence proposed.

Full Bench.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
 Mr. Justice Fox and Mr. Justice Birks.

MA BA WE v. MI SA U AND OTHERS.

Buddhist Law : Inheritance—Shares of widow and of children by former marriages.

The plaintiff-appellant, who was the third wife of her deceased husband and who was childless, sued his children by the two former wives for her share in the estate left at his death. There was no evidence regarding the estate of the deceased at the time of, or during the subsistence of, either of the former marriages.

Held, on reference to a full Bench,—

- (1) That appellant was entitled to a one-fourth share of her husband’s *payin* property possessed by him at the time of her marriage, and to a seven-eighths share of the *lettetpwa* property jointly acquired during her marriage.
- (2) That in the absence of evidence of deceased’s estate before his third marriage, his children by the first two marriages shared equally *per capita* in the *payin* and *lettetpwa* property remaining after the widow had taken her share.
- (3) That in cases like the present one, when *payin* property changes its character during a marriage, the presumption is that it has become *lettetpwa* of that marriage.

Mi So v. Mi Hmat Tha, S. J. L. B., 177; *Mi Sein Nyo v. Ma Kywe*, 2 U. B. R., (1892—96), page 159; *Maung Chit Kywe v. Maung Pyo*, 2 U. B. R., (1892—96), page 184; *Ma Hnin Dok v. Ma U*, 2 U. B. R., (1897—01), 126; *Mi Ka v.*

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Maung Thet, S. J. L. B., 6; *Nga Po Thit v. Mi Thaing*, S. J. L. B., 18; *Ma Min E v. Ma Kyaw Thin*, P. J. L. B., 361; *Maung Shwe Ngon v. Ma Min Dwe*, S. J. L. B., 110; *Nga San On v. Mi Shwe Daing*, S. J. L. B., 223; *Ma Ta v. Ma Thu Za*, P. J. L. B., 312; *Maung Ye v. Ma Me*, P. J. L. B., 418; *Ma Po v. Ma Swe Mi*, 2 U. B. R., (1897-01), 79; *Mi San Mra Rhi v. Mi Than Dha U*, 1 L. B. R., 161; *Ma E Mya v. Ma Kun*, 2 U. B. R., (1892-96), page 162, at page 109; referred to.

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The following reference was made to a Full Bench by Mr. Justice Birks:—

Birks, J.—The plaintiff-appellant, Ma Ba We, is the third wife of Maung Tha Aung and she sues the surviving children of her deceased husband by his first and second wives for a quarter of the property brought in by her husband at the time of her marriage and seven-eighths of the *lettetpwa*. She values the jointly acquired property at Rs. 300 and the *attetpwa* at Rs. 40 so that her total claim is Rs. 272-8. The suit was first brought against Mi Sa U, the elder daughter of the first wife Mi Pa Laing, and Mi Ngwe Aung, aged 14 (represented by Mi Sa U), the daughter of the second wife Ma Shwe; but the Court of first instance has added the other children of the first wife and Maung Nyo, the 5th defendant, who purchased seven of the buffaloes left by the deceased Maung Tha Aung from Mi Sa U. Mi Za Yu, the second daughter of Mi Pa Laing, did not wish to be added as a party, but the Court of first instance considered that all the heirs of Maung Tha Aung should be joined. There is a considerable conflict of evidence as to what property Maung Tha Aung was possessed of at the time of his third marriage and the amount of property he left at his death. The Court of first instance found that Maung Tha Aung left a piece of land and one bullock worth Rs. 40 as *attetpwa*. This land has been valued by the lower Appellate Court at Rs. 100 at the hearing of the appeal. The Court of first instance found that the *lettetpwa* property consisted of nine buffaloes worth Rs. 300, a house worth Rs. 50; money lent to Maung Tun Rs. 50-4-0, interest on 40 baskets of paddy Rs. 30; value of paddy produced from the land Rs. 90 and Rs. 41-4-0 for hire of bullocks, in all Rs. 561-4. After deducting sums already received, funeral expenses, etc., the Court found that the plaintiff was entitled to a quarter share of the *attetpwa* and seven-eighths of the *lettetpwa*. A decree was therefore given for 0'795 acres of paddy land and Rs. 248-2-6. The lower Appellate Court seems to have accepted Rs. 561-4-0 as the value of the properties already detailed as *lettetpwa*, but intimated an opinion that Rs. 200 should be transferred from the *lettetpwa* to *attetpwa*. The lower Appellate Court, however, considered this immaterial as there were three families and applied the provisions of section 66 of Book X of the *Manukye*. This section does not seem applicable as it merely gives the distribution between the children of three different mothers by the same father, all the parents having died. Nothing is said either in this section about the special rights of the *auratha* child. The lower Appellate Court found that the estate for distribution amounted to Rs. 634-12-0 and that Mi Sa U was entitled to $\frac{1}{13}$, the other three children of Maung Tha Aung to $\frac{2}{13}$ each and the widow Ma Ba We to $\frac{3}{13}$. As it was found she had received

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Rs. 261-4-0 from the estate her suit was dismissed. It may be noted that the Court of first instance had given a decree against all the defendants though Maung Nyo's position is quite distinct from the others. I gather from his written statement that there has been previous litigation which may justify this defendant in his plea of *res judicata* though it would not bar a suit for partition between the heirs. No special issue was framed as to whether Maung Nyo was entitled as an innocent purchaser to retain the 7 buffaloes. I do not think it was necessary to add him as a party and I do not think he should be made to pay his own costs as ordered by the lower Appellate Court. He has not, however, preferred any appeal. Ma Ba We is not represented by any advocate. Her petition of appeal states that the distribution of the estate made by the lower Appellate Court is not in accordance with section 10 of Book X of the *Manukye*, section 23 of the Wunnana and section 35 of the Mahavicchedani and the ruling in *Mi So v. Mi Hmat Tha* (1). It is also urged that the first and second defendants did not perform their duties to their parents and are not therefore entitled to a share. The plaintiff however recognises Rs. 67-8-0 as the share due to Mi Sa U and Mi Ngwe Aung. This latter point does not appear to have been taken in the Courts below and I do not think I should consider it now. The question for determination is:— What are the proper shares of the children of the first and second marriages and the third wife on the death of the father, (1) in the *attetpwa* of the father and (2) in the property jointly acquired during the third marriage. I can find no authority for the opinion expressed by the lower Appellate Court that no distinction should be made between the *attetpwa* and *lettetpwa* property where the distribution is between a step-mother and the children of the first and second marriages. The law that seems most nearly to apply is that laid down in section 232 of the Digest. The case differs inasmuch as the husband in that case marries his step-daughter by his second wife and the third wife is left with a son. The rule is thus stated in the *Manukye*:—

“A man has sons by the first and second marriages. On the death of the second wife he marries her daughter by a former marriage, and dies leaving issue. The rule of partition among the widow, her son, and the sons of the first and second marriages is as follows:—

The property brought by the deceased husband shall be divided into 5 shares: the son by the first wife shall get three shares, that by the second wife one share, and the widow and her son one share. The property brought by the second wife shall also be divided into 5 shares: the widow and her son shall get three shares and the sons of the first and second marriages one share each. As regards the property acquired during the second marriage the offspring of that marriage shall get three shares, the son of the first marriage one share, and the widow and her son also one share. The property acquired during the last marriage shall be divided into 8 shares, the widow shall get 5 shares, and her son 2 shares; the remaining one share shall be divided equally between the sons of the first and second marriages. Debts, if any, shall be liquidated in the same proportion.”

It is not alleged that the first and second wives in this case brought in any property at their marriage with Tha Aung. Mi Sa U admits that her mother was divorced before her father's marriage with Ma Shwe. He remarried her after Ma Shwe's death and then divorced

(1) S. J. L. B., 177.

again to marry the plaintiff. The *attetpwa* in this case seems to have been the property of the father as Mi Pa Laing probably took back her *payin* at the time of the divorce and there is no evidence that Ma Shwe brought in anything. The Additional Judge of the District Court has however held that Rs. 200 of the property shown as *lettetpwa* should be transferred to *attetpwa* on the ground that Maung Tha Aung's *attetpwa* property of Rs. 200 was spent in purchase of cattle and in making loans. The decisions on this point seem to conflict; see the remarks in *Mi Sein Nyo v. Ma Kywe* (1) and *Maung Chit Kywe v. Maung Pyo* (2). This was pointed out in *Ma Hnin Dok v. Ma U* (3), but the point was not directly in issue in that case. I have referred to the following cases—*Mi Ka v. Maung Thet* (4), *Nga Po Thit v. Mi Thaing* (5), *Ma Min E v. Ma Kyaw Thin and 2* (6), *Maung Shwe Ngon v. Ma Min Dwe* (7), *Mi So v. Mi Hmat Tha and 1* (8), *Nga San On v. Mi Shwe Daing* (9), *Ma Ta v. Ma Thu Za and 7* (10), *Maung Ye and 4 v. Ma Me* (11), *Ma Po and 1 v. Ma Swe Mi* (12) and *Ma Hnin Dok and 2 v. Ma U and 1* (3). The point discussed in *Mi San Mya Rhi v. Mi Than Da U* (13) does not seem to arise, for though Mi Pa Laing was admittedly divorced the plaintiff admits that her children are entitled to some share and admits that Mi Ngwe Aung, the minor child of Ma Shwe, lived with her father after his third marriage. The case that seems most nearly analogous to the present is that of *Ma Ta v. Ma Thu Za* (10). In that case all the property for distribution was acquired during the third marriage and a division had been made by the parties before the contracting of the fourth marriage. Mr. Hosking considered that the division laid down in section 10 of Book X of the *Manukye* should have been followed but could find no rule applicable for division between the step-mother Ma Ta and the children of the former marriages. He considered that one-third to the stepmother and one-third to each of the step-daughters would be the most equitable division. Mi So's case (14) only deals with the case of two marriages. It may be noted that section 10 of Book X of the *Manukye* seems to contemplate more than one previous marriage. The following words occur:—

“If there has been any property acquired during the second marriage, let it be divided into 8 shares; let the father have 5, the son of the last marriage 2, and the sons of the former marriages one share.”

I cannot find any ruling in which the shares between the children of the first and second marriages and the widow of the third marriage have been decided. I therefore refer under section 11 of the Lower Burma Courts Act the following questions for the decision of a Bench:—

- (1) In a suit for partition brought by the widow and children of a deceased Buddhist against the children of the first and

(1) 2 U. B. R., 1892—96, page 159.

(2) 2 U. B. R., 1892—96, page 184.

(3) 2 U. B. R., (1897—01), 126.

(4) S. J. L. B., 6.

(5) S. J. L. B., 18.

(6) P. J. L. B., 361.

(7) S. J. L. B., 110.

(8) S. J. L. B., 177.

(9) S. J. L. B., 223.

(10) P. J. L. B., 312.

(11) P. J. L. B., 418.

(12) 2 U. B. R., (1897—01), 79.

(13) 1 L. B. R., 161.

(14) S. J. L. B., 177.

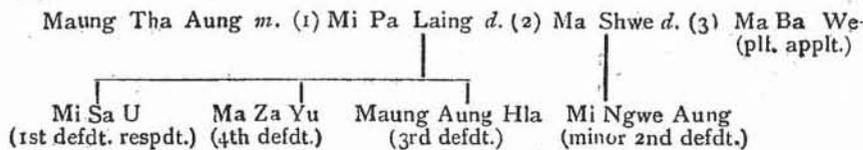
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second marriages of her husband, what rule of division is applicable—

- (a) in the property brought in by the deceased at the time of his marriage with the plaintiff,
 - (b) in the property acquired during the third marriage.
- (2) In order to make a correct division according to the Dhammathats, is it necessary to ascertain the property brought in at such marriage by the husband and wife respectively and also the *lettetpwa* of such marriage?
- (3) Does property purchased with *attetpwa* property retain its character of *attetpwa* or does it become *lettetpwa*?

The opinion of the Bench was as follows:—

Birks, J.—The table below gives the relationship of the parties to the suit in this reference:—



Maung Nyo Gyi, the 5th defendant, is merely a purchaser of some of the *attetpwa* property from Mi Za Yu.

The first question to determine is, What is the share of Ma Ba We in the *attetpwa* of her deceased husband, Tha Aung, it being admitted that his first and second wives brought in nothing at the time of their marriages? Secondly, what is her share in the property jointly acquired during the third marriage, and thirdly what are the shares in both kinds of property of the children by the first and second wives?

Since making this reference I have had the advantage of seeing the Upper Burma cases published in the 2nd volume of Mr. Chan Toon's *Leading Cases on Buddhist Law*. The case of *Maung Chit Saya v. Ma Meinkale*, page 97 of that volume, is very similar to this. The plaintiff Ma Meinkale in that case was the only child of the second wife and sued the three children of the first wife for one-fourth share of an inheritance valued at Rs. 1,200. The third wife Ma U Ma, who was the only surviving widow, was added as a party by the Court of First Appeal.

The Judicial Commissioner, Mr. Burgess, referred the question as to the shares of the children of the first and second marriages and the share of the surviving widow to the Kinwun Mingyi and the Wetmasok Wundauk, who both agreed that the *attetpwa* property should be divided into four shares, two of which were to go to the children of the first wife and one share each to the issue of the second marriage and the surviving widow. They also agreed that the property acquired during the second marriage should be treated as *payin* in a division made between the children of the former marriages and the widow; and that the issue of the marriage during which it was acquired should take two-fourths, the children of the other marriage one-fourth and the widow one-fourth.

With regard to the *lettetpwa* of the third marriage the widow would take four-sixths and the children of the other marriages their mother's shares, *i.e.*, one-sixth for each marriage.

In deciding the appeal, Mr. Burgess intimated an opinion that all the property should be subject to the same rule of division and gave the children of the first marriage two-fourths, and the child of the second marriage and the widow one-fourth each.

Both the experts consulted seem to have relied on verses from the *Atta San Keik Dhammathat*, of which the *Attathankepa Wunnana* is a commentary. The passage quoted by the *Kinwun Mingyi* seems analogous to section 66 of the *Manukye*, but that case refers to the division between the children of three different mothers on the death of all their parents.

In a subsequent case, *Ma E Mya v. Ma Kun and 1* (1), Mr. Burgess referred to the decision and noted that the present tendency was in favour of equality of distribution, and that the case was an instructive one as illustrating the comparatively small regard paid to the technical rule of the *Dhammathats*.

In Lower Burma I am inclined to think that the tendency has been to apply the principle laid down in *Mi So v. Mi Hmat Tha* (2) irrespective of the number of previous marriages and only to give the children of the former marriages one-eighth share of the property acquired during the last marriage as against the surviving widow. The share of the widow in the *attetpwa* appears to be one-fourth in any case.

The case mentioned in the order of reference at page 232 of the *Digest* (see also section 46, Book X, *Manukye*) seems to be a special case as the surviving widow was also a step-daughter. It is, however, significant as shewing that the surviving widow and her son get seven-eighths between them. In the case of a childless widow Mr. Jardine held that she should take the two shares that would have fallen to her son.

I would answer the first and second questions above as follows:—
The childless widow takes seven-eighths of the property acquired during the third marriage and one-fourth of the property brought by her husband to the third marriage irrespective of the time it was acquired.

It remains to determine what are the shares of the children of the first and second marriages between themselves after the widow's share in the property is provided for. I think the division authorized in section 60 of Book X of the *Manukye* and section 245 of the *Digest* is correct. The children of the first marriage take two-thirds, the children of the second marriage one-third. The children of each marriage would be entitled to the separate property brought in at the time of the marriage by their respective mothers and to a double share in the property acquired during each marriage.

These considerations do not apply to the present case where it is admitted that the first and second wives brought in nothing, and the Courts below have only considered what is the property acquired during the third marriage.

(1) 2 U. B. R., (1892—95), page 102, at page 109. | (2) S. J. L. B., 177.

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It remains to determine how the one-eighth share of the property acquired during the third marriage should be divided among the children of the former marriages. The *Dhamma*, *Manugyè*, *Rajabala*, *Dāyajja*, and *Amwebbñ* all agree that the sons of the first two marriages share this equally and apparently *per capita*. The *Cittara* alone gives three different divisions which are all inconsistent with each other.

I think the weight of authority is decidedly in favour of the view stated in the *Manugyè* that the children of the former marriages share the one-eighth equally between them.

The only other point remaining is the third question of the reference.

The lower Appellate Court held that because Maung Tha Aung had Rs. 200 in cash at the time of his marriage with Ma Ba We, and bought cattle which were subsequently sold, and made loans, that this Rs. 200 should be treated as *attēpwa*. The rule is laid down in Lower Burma in *Maung Shwe Ngon's* case (1). Mr. Jardine there adopted Major Spark's view that the *Hnapazon* applied to (1) all profits or interests arising since marriage from the employment or investment of the separate property of either and (2) all property acquired by their joint skill and industry.

It would, I think, be difficult to apply this rule to loose cash brought in by one party at the time of marriage. I think the law is correctly stated in the case of *Ma Sein Nyo v. Ma Kywe* (2). The following passage may be quoted :—

"The seventh ground of appeal is that it should have been held that plaintiff was entitled to a share in the mortgage debt paid off on the 125 *saihs* of land belonging to the defendant Ma Kywe's mother, which were redeemed by Ma Kywe and Maung Myat No because this was done from the usufruct of the latter's ancestral lands. In the argument it has been pointed out that some of Maung Myat No's lands were sold, or mortgaged rather, to effect the redemption, and it is contended that in equity the result is to give the redeemed land the same character as the original property disposed of and to subject it to the same charges. Virtually the argument amounts to this, that the child has such an interest in the father's property that he or she can claim to be protected against loss by the father dealing with his property and converting it into a new form. But it is admitted that under Buddhist law a child has no vested interest in the father's property and cannot interfere to prevent him from disposing of it, and if that is so it is difficult to see what right there can be to the proceeds of the disposal or what power to control the father's dealing with such proceeds in any way he may think fit. If the father chose to spend all the money obtained by the sale of his property the child could not make him responsible for its reimbursement, and the fact that instead of spending the money the father chooses to keep it or to buy property with it so as to make the money or the property subject to a different rule of inheritance cannot apparently affect the matter. The father might make a gift of such property to the person entitled to inherit it after the conversion, and the person entitled to inherit the original property if it had not been converted could not prevent him. Why then should such person have a claim to interfere with the effect of the conversion by way of inheritance, an effect which the father must presumably have contemplated when he made it ?

It appears immaterial how the money to redeem Ma Kywe's mother's lands was procured. The acquisition of the lands was made during Ma Kywe's coverture and the property resulting from the redemption must be taken as joint."

(1) S. J. L. B., 110.

(2) 2 U. B. R., (1892—96), p. 159.

In the case of *Maung Chit Kywe v. Maung Pyo and others* (1), a contrary opinion seems to have been expressed. In that case, however, the defendant was the step-father of the plaintiff and admittedly brought nothing to the marriage. He effected changes in *payin* property as trustee for his step-daughter, and the Court held that though the presumption ordinarily is that money expended by a husband and wife was their jointly made money that presumption did not apply to that particular case.

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I would therefore answer the questions referred as follows:—

1. The widow is entitled to one-fourth of all the property brought in by her husband at the time of her marriage exclusive of the separate property of his former wives, if any, and to seven-eighths of the property acquired since her marriage.

2. To determine the rights of the children of the first and second marriages between themselves it is necessary to ascertain what property their respective mothers brought in at the time of marriage and (if it can be ascertained) what property was acquired during each marriage. In the absence of such proof the children of the first marriage take two-thirds and the children of the second marriage one-third of the *attetpwa* property of their common father.

They share one-eighth of the property acquired during the third marriage equally between them *per capita*.

3. The children of the first and second marriages have no right to claim the original capital of the fund existing at the time of the third marriage, which has been used by their father who brought it in to make investments and buy property during the third marriage, the presumption being that property which changes its character during a marriage has become the *lettetpwa* of that marriage.

Thirkell White, C.J.—The first question referred for decision to the Full Bench is not without difficulty. There is no text in any of the *Dhammathats* which deals exactly with the question. The texts collected in section 232 of the *General Digest* are not precisely applicable because the first six of them refer to the special case in which the third wife is the step-daughter of the man; while in the seventh text, from *Cittara*, there is issue of the three marriages. The former case is also that stated in section 188 of the *Attasankepa*. Sections 200 and 220 of that treatise are also somewhat analogous to, but not precisely identical with the present case.

As regards authority, however, there is a case in which the facts are exactly similar. That is the case of *Chit Saya v. Ma Meinkale* (2) decided by the late learned Judicial Commissioner of Upper Burma, Mr. Burgess, in 1892. In that case one Tun E married a wife and had children by her, he had a child by his second wife, and he died leaving a childless widow. The case was decided with the aid of two very learned assessors; and the decision was that the whole of the estate of the deceased should be divided into four parts, of which the widow should have one, the children of the second marriage one, and the children of the

(1) 2 U. B. R., (1892—96), page 184. | (2) 2 U. B. R., (1892—96), page 93.

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first marriage two parts. No distinction was made between the original property of the husband and property jointly acquired during the subsistence of either of the marriages. So far as the share of the widow is concerned, this partition in respect of the *payin* or original property of the husband at the time of the third marriage, is in accordance with the opinions of the assessors. They treated all property as *payin* which the husband brought to the third marriage. I am content to follow this ruling to the above extent. It seems to be consistent with section 188 of the *Attasankepa* which the assessors cited as an authority, if the accident of the third wife having been the husband's step-daughter be disregarded. It also derives support from section 220 of the same treatise. The *Attasankepa*, it may be observed, is not an original *Dhammathat*. But it is a work of very considerable weight, being a compilation by the *ex-Kinwun* Mingyi who is well known as an authority on Burmese Buddhist Law.

I think it is clear, however, that the widow should get more of the property jointly acquired during the period of her marriage than of the property possessed by her husband at the time of the marriage. In the acquisition of the jointly acquired property she may be presumed to have taken an active part; and it is consistent with the spirit of Burmese Buddhist Law that this fact should have due weight. The assessors thought that of the jointly acquired property of the husband and the third wife, the widow should take two-thirds. In the texts from *Dhamma*, *Manukye*, *Rajabala*, *Dāyajja*, and *Amwebōn*, collected in section 232 of the *General Digest*, of the property jointly acquired during the last marriage, the widow gets five-eighths and her son two-eighths. This is the principle adopted in a somewhat analogous case, that of *Mi So v. Mi Hmat Tha* (1), where, however, there were only two marriages, not three as in the present case. And when the widow is childless she is entitled to the share which would have fallen to her children. This is the view taken by Mr. Jardine in the case last cited. I am content to concur with Birks, J., in following that ruling supported as it is by the authority which has been quoted.

But as to the division among the children of the shares assigned to them, I find some difficulty in adopting the view taken by Mr. Burgess in *Chit Saya's* (2) case that the children of the first marriage should get twice as much as the children of the second marriage. That is not the view of the learned assessors. They distinguished between *payin* of the father at the time of the first marriage, *payin* at the time of the second marriage, and *payin* at the time of the third marriage. They gave two out of four shares of the property possessed at the time of and acquired during the first marriage to the children of that marriage. But of the property acquired during the second marriage, they gave two shares to the children of that marriage. It did not enter their minds that the children of the first marriage were entitled to any larger share than the children of the second marriage of property treated as *payin* at the time of the third marriage. It seems to me that, in this case, where we have no know-

(1) 1 Leading Cases, 225; S.J.L.B., 177. | (2) 2 U.B.R., (1892-3), page 93.

ledge of the estate of the deceased at the time, or during the subsistence, of either of the first two marriages, there is no ground for giving any preference to the children of the first marriage and that there is no reason for making a distinction, so far as they are concerned, between property possessed by the deceased at the time of the third marriage and property acquired during the continuance of that marriage. I think the rules which seem to give a preference to children of the first marriage refer to property possessed by the husband at the time of that marriage, not to property possessed by him at the time of the third marriage. The equitable rule seems to be that, subject to the right of the elder son to a larger share, the whole of the property left for division, namely, three-fourths of the property possessed by the deceased at the time of his third marriage, and one-eighth of the property acquired during that marriage should be divided among the children *per capita*, as is proposed in respect of the jointly-acquired property.

I would answer the second question of the reference by saying that it is desirable to ascertain the property brought in and acquired at each marriage but that it is not absolutely necessary to do so.

As regards the third question, I concur in following the ruling in *Sein Nyo v. Ma Kywè* (1) and holding that in the present case the property acquired during the third marriage should be treated as jointly-acquired, even though it may have been purchased with money which was possessed by the deceased at the time of the third marriage.

Fox, J.—I agree with my learned colleagues in the answer they proposed regarding the surviving widow's share in her husband's *payin* property at the time of her marriage, and also as to the share to which she is entitled in the property acquired during her marriage.

I also concur in the proposed answer to the third question.

In regard to the division of the three-fourths of the *payin* property of the husband at the time of the third marriage which remains after deduction of the widow's one-fourth share, I agree in the views of the learned Chief Judge. It appears to me that if the children of the first or second marriage alleged and proved that certain property was their father's *payin* property at the time of his marriage with their mother, then the rule that such children should have a larger share in such property than the children of the other marriage would apply, but in the absence of such allegation and proof, it is not necessary for the Court to go into any question of whether there was or was not any *payin* property of the husband's when he entered into such marriages respectively.

The rule of unequal division given in section 66 of the 10th Book of *Manukye* seems to be based upon the fact of the property to be divided having been the separate property of the husband at the time of the first or second marriage respectively, but if it is not shown that it was so then there does not appear to be any ground for an unequal division.

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(1) 2 U.B.R., (1892-96), page 159, at page 165.

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I concur with my learned colleagues in thinking that the remaining one-eighth of the *lettetpwa* property acquired during the third marriage is divisible equally between the children of the first and second marriages.

Before Mr. Justice Fox.

MA YE v. MAUNG HLAU AND OTHERS.

Messrs. Agabeg and Maung Kin—for
 appellant (defendant).

Mr. Buckland—for respondents
 (plaintiffs).

Limitation—suit by co-heirs for share of land—Limitation Act, second schedule, articles 123, 127, 142, 144.

Plaintiff, defendant, and other co-heirs became entitled 13 years previous to the suit to share between them certain land inherited from their parents. Throughout the thirteen years and up to the time of the suit defendant and her husband (deceased before the suit) remained in possession of the land. Plaintiffs received no benefit from it and there was no evidence of any agreement between them and defendants touching the occupation of it.

Held,—that plaintiffs' suit for a share was barred by limitation under article 144 of the Second Schedule of the Limitation Act.

Pointed out—that the terms "joint family property" in article 127 of the Second Schedule do not apply to property held jointly by members of a Burmese Buddhist family.

Ma Nyein Aung v. Ma So, P.J. L. B., 530; *Issur Chunder Doss v. Juggut Chunder Shaha*, (1882) I.L.R., 9 Cal., 79; *Keshav Jagannath v. Narayan Sakahram*, (1889) I.L.R., 14 Bom., 256; *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan*, (1877) 1 C.L.R., 364; referred to.

The plaintiffs claimed a three-fourths share in certain paddy land which had belonged to their mother and step-father on the ground that the step-father, who survived their mother, had left this land as part of his estate, and had allotted it to the children by his wife's first marriage. The defendant was the widow of one of those children; her husband had died about 2 years before the suit. The step-father had died about 13 years before the suit.

The plaintiffs did not allege that they had ever been in possession of, or that they had ever enjoyed any of the proceeds or benefits of the land since their step-father's death. Their allegation was that they and their co-heirs had allowed the defendant and her husband to work the land, because they were poor and had no other land. This might mean that the defendant and her husband having been in possession or having taken possession, the other co-heirs did not object to their remaining in possession, or it might mean that permission to occupy the land was asked for by the defendant and her husband and was given by the co-heirs. The Judge of the District Court has not found that the latter was the state of facts; and from his judgment I take it that his view was that the defendant and her husband had been in possession before the step-father's death and that they were merely not disturbed by the other co-heirs. The defendant did not admit that the land had ever belonged to her husband's mother and step-father. This, however, was found against her. It was held that for thirteen years previous to the suit she and her husband had worked the land and paid the revenue, and that during that time the land had been assessed to revenue in their names.

The Judge of the District Court held that the suit was not barred by limitation. He only considered the question of limitation in connection with article 127 of the Second Schedule of the Indian Limitation Act, an article which had no bearing on the case.

The terms "joint family property" in that article have no application to property held jointly by members of a Burmese Buddhist family (1). The joint-family property contemplated by that article is the joint-family property known exclusively to Hindu Law.

As the Limitation Act provides a limitation for all suits except suits as against express trustees, one or other of the articles in the Second Schedule must apply to the present suit, unless it be held that the possession of the defendant and her husband was possession on behalf of themselves and the co-heirs jointly, and therefore that the co-heirs' cause of action for partition arose from day to day, and continued until the possession ceased to be joint.

I do not think that this can be said to be the case, for the co-heirs are not alleged to have ever been in possession or to have ever received any benefit from the land, and an allegation that the co-heirs allowed the defendant and her husband to work the land temporarily is not sufficient to outweigh the advantage which the law gives to actual possession for over twelve years.

Article 123 of the Second Schedule of the Act does not apply to the case, because that article applies only to suits against a representative of a deceased person—see *Issur Chunder Doss v. Juggut Chunder Shaha* (2), and *Keshav Jagannath v. Narayan Sakahram* (3). Article 142 does not apply because the plaintiffs do not allege that they were ever in possession. The only article which can apply is article 144, and under that the time from which limitation began to run against the plaintiffs was the time when the defendant and her husband's possession became adverse to the plaintiffs. Upon the finding of the District Court the position is that the plaintiffs, the defendant's husband, and other co-heirs who now make no claim became entitled 13 years previous to the present suit to share between them the land which is the subject matter of the suit. That land has been in the possession of the defendant and her husband from the death of the step-father until the death of the defendant's husband two years previous to the suit, and since then and at the date on which the suit was brought, it has been in the defendant's possession.

The question arose in the suit, whether the defendant and her husband were the owners of the land, consequently under section 110 of the Evidence Act the burden of proving that they were not the owners lay upon the plaintiffs. Until the contrary was proved, the Court was bound to presume that they were the owners, and to regard them as such from the commencement of their possession. It appears to me to follow that the Court was also bound to take it that from the commencement of their possession they claimed to be owners, and so that they

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(2) (1882) I.L.R., 9 Cal., 79.

(3) (1889) I.L.R., 14 Bom., 236.

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held adversely to every one else; until it was clearly shown that they entered into or remained in possession under some specific arrangement between themselves and the other co-heirs, or that they in some way acknowledged that they held possession on behalf of themselves and the other co-heirs.

The other co-heirs having allowed them to remain in possession without any such agreement and without obtaining any acknowledgment of their rights, it must, in my opinion, be held that a suit brought by co-heirs more than 12 years after the possession of the defendant and her husband commenced was barred by limitation under article 144 of the Second Schedule of the Limitation Act.

The case of *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan* (1) relied on by the plaintiffs' advocate, does not appear to me to conflict with this view.

I accordingly reverse the decrees of both the lower Courts and decree that the suit be dismissed with costs.

The plaintiffs must also pay the defendant's costs in this Court and in the lower Appellate Court.

Full Bench—(Civil Revision).

Civil Revision
 No. 23 of
 1903.
 July 9th,
 1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr. Justice Fox, Mr. Justice Chitty and Mr. Justice Birks.

MAHOMED NASSORUDDIN v. S. OPPENHEIMER AND ANOTHER.

Messrs. *Lewis and Giles and Buckland* | Messrs. *Eddis, Connell and Lantaigue*
 —for applicant (defendant). | —for respondents (plaintiffs).

Set-off—claim for damages—Civil Procedure Code, section 111—Court-fee stamp on written statement containing set-off.

A claim for damages for failure to supply goods of the contract quality and description cannot be made the subject of a set-off under section 111 of the Code of Civil Procedure.

Crisp v. Hady, 8 B.L.R., 307, referred to.

A written statement claiming a set-off under section 111 of the Code of Civil Procedure need not bear a Court-fee stamp.

Shri Maji Rajbai v. Narotam, (1883) I.L.R., 13 Bom., 672;

Amir Zama v. Nathu, (1886) I.L.R., 8 All., 396;

Chennappa v. Raghunath, (1892) 15 Mad., 29; dissented from.

Nagu v. Yekunath, (1881) I.L.R., 5 Bom., 400;

Cheraj Ali v. Nadir Mahomed, 12 Cal., 367;

Attorney-General v. Carlton, 2 Q. B., 158; referred to.

Fox, J.—The plaintiffs sued the defendant on a promissory note which purports to have been given "for value received in goods."

The defendant in his written statement admitted execution of the note but claimed to set-off Rs. 952-6-0 against the amount due on the note.

This claim to set-off was based on allegations to the following effect. There had been other dealings between the parties consisting of indents made by the defendants through the plaintiffs. When the

(1) (1877) 1 C.L.R., 364.

defendant had taken delivery of goods indented for, he had given the plaintiffs promissory notes for the indent prices of the goods and had paid the full amount of the promissory notes he had given. Some of such goods, however, had turned out to be not of the quality and description ordered by him; seven lots of goods are referred to as not being so. In regard to the first five lots the defendant's allegation was that when he took delivery of the goods the plaintiffs verbally undertook that they would make good any loss which the plaintiff might sustain in disposing of the goods. As regards the 6th and 7th lots his allegation was that the plaintiffs had agreed to make him an allowance at the rate of 13 annas per 10 pieces, and on this he claimed Rs. 199-14-0.

So far as the claim to set-off was for this sum, it appears to me that it legitimately fell within the provisions of section 111 of the Code of Civil Procedure, for it was an ascertained sum arrived at on an alleged definite agreement to make an allowance at a definite rate. The mere arithmetical calculation necessary to arrive at the total sum which was to be allowed can scarcely be said to render such total an unascertained sum. Counsel for the plaintiffs has admitted that this sum of Rs. 199-14-0 was a sum which the defendant would be entitled to set-off.

The claim so far as the other items are concerned seems to me to stand upon a different footing.

The allegation was that the plaintiffs verbally undertook to make good any loss which the defendant might sustain in disposing of the goods, and it was argued that as the defendant alleged he had sold the goods and had sustained losses of the definite amounts set out against the first five items, these amounts were ascertained sums.

The allegation and the argument are ingenious, but there appears to me to be a weakness which runs through them.

The allegation amounts to no more than that the plaintiffs verbally and expressly promised to do what under the state of circumstances alleged by the defendant they would have been bound by law to do, *viz.*, to compensate the defendant in the manner provided by law for breach of contract in not supplying goods of the quality and description contracted for.

If the defendant had sued for such compensation, I do not think there could be any question that his suit would have been one "sounding in damages." An allegation in such a suit that the defendant had verbally promised to pay him what he should lose in consequence of the goods not being of the contract quality and description, could not make the suit other than one for damages by reason of the defendant's breach, and the claimant would have had to prove what he had lost by reason of the breach of implied warranty.

In my opinion the defendant's claim to set-off the amounts claimed in respect of the first five items in his particulars was not admissible.

Upon the question as to whether a written statement claiming a set-off requires to be upon a Court-fee, I am unable to accept the rulings of the Bombay, Madras and Allahabad High Courts to which we have been referred as conclusively correct.

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These decisions which hold that such a written statement must be upon a Court-fee paper are based on the wording of the last paragraph of section IIII of the Code of Civil Procedure.

The wording is:—

“Such set-off shall have the same effect as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both in the original and on the cross-claim; but it shall not affect the lien upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.”

The whole of the paragraph must be read together, and so reading it, I fail to see that the wording admits of the construction that a written statement containing a set-off shall be deemed to be a plaint. Even reading the words “Such set-off shall have the same effect as a plaint in a cross-suit” apart from what follows, there is nothing in them which compels a Court to deem and treat a written statement as a plaint. It cannot, in my opinion, be assumed that the Legislature in dealing with a Code of Civil Procedure intended to make provision in it for a matter of revenue which it had already dealt with in another Act, which Act has been frequently amended and altered.

It may however be assumed that the Legislature intended that the Court-fees Act should contain the whole law as to what Court-fees documents presented to Courts should bear.

Section 6 of that Act is explicit as to documents presented to Courts other than Chartered High Courts and Courts of Small Causes in Presidency Towns. It makes documents of any of the kinds specified in the First and Second Schedules of the Act chargeable with duty.

Unless a document is specified in either of those Schedules, it appears to me that it cannot be held to be chargeable with duty.

There is no provision in either of the Schedule making a written statement chargeable with duty, consequently I would hold that a written statement is not so chargeable.

In my opinion the learned Judge erred in entirely disallowing the defendant's set-off, and I would set aside the decree and send the case back to the Small Cause Court for re-trial with a direction that the consideration of the defendant's claim to set-off the amount claimed in respect of the 6th and 7th items of the particulars is admissible.

Chitty, J.—This is a petition by Mahomed Nassoruddin, defendant in Small Cause Court suit No. 535 of 1903, asking us to revise the order of the learned Judge of the Court by which he disallowed a set-off tendered by the defendant against the plaintiffs' claim, and to order such set-off to be admitted and enquired into. The learned Judge of the Small Cause Court was of opinion that the set-off as shewn in the defendant's written statement did not fall within the provisions of section IIII of the Code of Civil Procedure and in his judgment he has quoted and declared himself bound by the decision of this Court in *Crisp v. Hady* (1). In that case the Judges of the Appellate Court agreed in dismissing the appeal against the order of

the Judge on the Original Side, but on somewhat different grounds. The present case has, therefore, been laid before this Bench for disposal. In the Small Cause the plaintiffs sued the defendant to recover a sum of Rs. 1,115-13-0 due on a promissory note. The promissory note is expressed to be "for value received in goods," and it is admitted that the amount is the price, or part of the price, of goods supplied by the plaintiffs to the defendant. The defendant admitted that the amount stated in the promissory note was due by him to the plaintiff, but tendered a written statement claiming to set-off against that debt a sum of Rs. 952-6-0, alleged to be due by plaintiffs to him. The sum of Rs. 952-6-0 is made up of seven items. As to items one to five the defendant's case is that the goods supplied by the plaintiffs were not of the quality and description ordered by him: that he took delivery of the quantities specified in these five items upon the verbal undertaking of the plaintiffs to make good any loss which he might sustain in disposing of the said goods: and that the losses actually sustained are the several amounts of those five items. As to items six and seven the defendant alleged that the plaintiffs agreed to make him an allowance of 13 annas for every 10 pieces contained in those eight cases, the total amount of such allowance amounting to Rs. 199-14-0. With regard to these two last items Mr. Connell for the plaintiffs now admits that they would properly form a subject of set-off. The amount, Rs. 199-14-0, is clearly an ascertained sum within the meaning of the section. The learned Judge of the Small Cause Court does not appear to have examined the various items of the set-off claimed, to see whether some, if not all, might not be admissible. To this extent, at least, his order rejecting the defendant's set-off is wrong and must be reversed. It was argued on behalf of the defendant that the amounts of the first five items were also "ascertained sums." It is impossible to lay down in general terms what is or what is not an "ascertained sum" within the meaning of the section. That is a question to be determined in each particular case. It is clearly not synonymous with "specified sum," for in almost every case the sum claimed is specified by the claimant, whether he be plaintiff or defendant. It may also be stated that "ascertained" must mean ascertained at the time of the pleading, and not subsequently, otherwise every sum would be included, as being capable of ascertainment at some time or other by the Court. On the other hand, it is not necessary that both the obligation on the plaintiff's part to pay, and also the amount, should be beyond dispute, otherwise the operation of the section would be confined to admitted debts, which was clearly not the intention of the Legislature. When we come, however, to examine the nature of the defendant's claim in respect of these five items, there will not, I think, be room for doubt in this particular case. The defendant in these five items is preferring what is nothing more nor less than a claim for compensation for an alleged breach of contract on the part of the plaintiffs. That is the pith and substance of paragraphs 3, 4 and 5 of his written statement.

The plaintiffs deny the verbal undertaking specified in paragraph 4, but, assuming that they gave it, it did not add to or detract from the

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statutory obligation imposed on them by section 73 of the Indian Contract Act, to pay the defendant compensation for any loss or damage caused to him by their failure to supply goods of the contract quality and description. The defendant to prove his case would have to shew first that the plaintiffs broke their contract in respect of each item, and secondly what was the loss sustained by him on the re-sale of the goods. In other words, his claim *sounds in damages*, and it has never been questioned that, whatever claims may be included in section 111, a claim for damages is not one of them. The authorities are unanimous on this point. I think therefore that the order of the learned Judge disallowing the set-off comprised in these 5 items as not coming within the purview of section 111 of the Code of Civil Procedure was correct. It has not been contended before us that the defendant is entitled in this case to what has been termed an "equitable set-off." It would appear that he is not so entitled, but it is not necessary for us to consider the case from that point of view. A further question, however, was raised by the Court, whether a written statement claiming a sum by way of set-off should not bear the Court-fee imposed on a plaint for a like amount. It has been the practice in this Court not to levy such a fee, but there does not appear to have been any definite ruling on the point. There is no doubt that the Court-Fees Act of 1870 prescribes no fee for a written statement, and if a written statement is to be chargeable, it is chargeable only because it is on the same footing as a plaint. It has been held by three of the four High Courts, that a written statement containing a claim for set-off is to be treated as a plaint in a cross-suit, and is chargeable with a Court-fee payable on a plaint of that nature [*Shri Maji Rajbai v. Narotam* (1), *Amir Zama v. Nathu* (2) and *Chennappa v. Raghunatha* (3)]. It was argued before us that the words in paragraph 3 of section 111 "shall have the same effect as a plaint" cannot be read as if they were "shall be treated as a plaint." On the other hand, it may be said that if the defendant is to have all the benefits which would accrue to a plaintiff he should also be subject to the same obligations. It certainly does not seem fair that a man merely by the accident of his having been made a defendant may prefer a claim of an unlimited amount against his adversary, have a possibly lengthy trial of his case, and ultimately obtain a decree for a large amount without having paid a fee of any kind. On this ground I was at first disposed to think that we should follow the rulings above cited and hold that a written statement containing a claim to set-off was chargeable with a Court-fee. On further consideration, however, I feel doubtful whether the provisions of the Court-Fees Act can be so extended. There is no express provision for such a charge and I think that, as that Act must be construed strictly, we are not at liberty to imply one. The question is not so important as it would have been some time ago. If the Bill to amend the Code of Civil Procedure becomes law in its present form, the levying of an institution fee on

(1) (1889) I.L.R., 13 Bom., 672. | (2) (1886) I.L.R., 8 All., 396.
 (3) (1892) I.L.R., 15 Mad., 29.

written statements containing a set-off or counter claim will be expressly provided for. I agree that the case should be remanded to the Judge of the Small Cause Court for admission of and enquiry into the defendant's claim to set-off in respect of the items Nos. 6 and 7.

Thirkell White, C. J.—I concur in the view taken by Mr. Justice Fox and Mr. Justice Chitty that the set-off is admissible as regards items 6 and 7 and, for reasons stated in their judgments, inadmissible as regards the first five items. I agree in the proposed order setting aside the decree and remanding the case for trial.

As regards the liability of a written statement claiming a set-off I think that, as there is no provision in the Court-Fees Act rendering written statements liable to payment of Court-fees, they must be held to be exempt. The last paragraph of section 111 of the Code of Civil Procedure does not seem to me to impose this liability. If the Legislature had intended to make these written statements chargeable with Court-fees, it can hardly be doubted that it would have done so by specific enactment in the Court-Fees Act. For these reasons I agree in the opinion expressed by Mr. Justice Fox and Mr. Justice Chitty on this point.

Birks, J.—I concur in the views expressed by Mr. Justice Chitty as to the meaning that should be assigned to the word "ascertained" in section 111, Civil Procedure Code. It may be noted that in illustrations (d) and (e) to that section the words "definite pecuniary demands" are used as indicating what is meant by the word "ascertained." The test seems to be that when an issue is necessary to determine the amount of the set-off it is not an "ascertained" amount. In illustration (d) the judgment would be for a definite amount with costs. It would not affect the question that at the time of pleading the set-off the cost had not been taxed as no issue on the point would be necessary.

Items 1 to 5 in the present suit seem to come under illustration (c) to that section as involving a question of damages or compensation. I concur therefore with my learned colleagues in thinking that a remand is necessary with respect to items 6 and 7.

With regard to the question as to whether a written statement, pleading a set-off under section 111, is liable to be stamped as a plaint I do not think that any written statements are liable to pay Court-fees. This has been the practice of the Courts in this Province ever since the Civil Procedure Code of 1877 came into force and is not without formal judicial sanction.

During the course of the argument it was pointed out that section 19 (3) of the Court-Fees Act, which exempts written statements called for by the Court after the first hearing, implies that previous written statements should be stamped. This question was however discussed in two cases which were not referred to in the arguments addressed to us or in the three later cases quoted by Mr. Justice Chitty.

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In the case of *Nagu v. Yekanath* (1), Birdwood, J., observes—

“The Court-fees Act, 1870, contains no express provision for the levy of a fee on written statements tendered at the first hearing. It is true that written statements called for by the Court after the first hearing are specially exempted from a fee by section 19 of the Act. But it cannot therefore be inferred that statements tendered at the first hearing are chargeable with a fee. For the Legislature by expressly providing in section 120 of Act VIII of 1859 that such statements should be written on the stamp paper prescribed for petitions and by leaving that provision unrepealed and unaltered by Act VII of 1870, did not then leave the liability to stamp duty to mere implication. So long as Act VIII of 1859 was in force a stamp was properly levied on written statements tendered at the first hearing on the authority of section 120 of the Act and not on the authority of any provision of Act VII of 1870. But so much of Act VII as was not previously repealed was expressly repealed by Act X of 1877, Schedule 3 and Schedule 1.

Written statements tendered under section 110 may therefore be written on plain papers.”

This decision was referred to with approval in *Cheraj Ali v. Nadir Mahomed* (2) where the Court also held that the mere words “petitions and applications” will not include written statements filed in civil suits.

The words in section 111 “shall have the same effect as a plaint in a cross-suit” seem to me to have no bearing on the question of Court-fees. I think this is clear from the terms of section 18 of the Court-Fees Act which provides that a complainant who has not put in a stamped complaint shall pay a fee of 8 annas. The verbal complaint and the written complaint have the same effect, but the law expressly declares that in both cases the fee must be paid unless the Court thinks fit to remit the payment.

In provinces where the Transfer of Property Act is not in force a verbal sale of property over Rs. 100 in value has the same effect as a registered conveyance, but I have never heard it argued that the parties to such verbal transfer should pay the stamp duty and fees as if they had executed a registered conveyance.

It is universally conceded that fiscal enactments should in India be strictly construed in favour of the subject. The remarks of Lord Chief Justice Russell in the *Attorney-General v. Carlton* (3) which throws doubt on the proposition in England are not applicable to India where there are no representatives of the people to impose taxation. For these reasons I agree with my learned colleagues that the written statements referred to in section 111 do not require a Court-fee any more than those to which are filed under section 110.

Civil and Appeal Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
 No. 219 of Mr. Justice Birks.

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 January 7th
 1904.

SHWE YE AND 1 v. MAUNG HLA GYAW.

Mr. Lambert—for appellants (defendants).

Jurisdiction—value of suit—Court of lowest grade—Civil Procedure Code, s. 15.

A District Court has jurisdiction to try any suit, however great or small its value. Section 15 of the Code of Civil Procedure, which requires that a suit shall

(1) (1881) I.L.R., 5 Bom., 400. | (2) 12 Cal., 367.
 (3) 2 Q. B., 158.

be instituted in the Court of lowest grade competent to try it, is merely directory, and if a District Court tries a case which should have been tried by a Township Court, the decree is not liable to be reversed for want of jurisdiction.

Suffeollah Sircar v. Begum Bibi, (1876) 25 W. R., 219; *Nidhi Lall v. Mazhar Husain*, (1884) I. L. R., 7 All., 230; *Ramayya v. Subarayudu*, (1890) I.L.R., 13 Mad., 25; *Velayudan v. Arunachala*, (1890) I.L.R., 13 Mad., 273; *Krishnasami v. Ranakasabai*, (1891) I.L.R., 14 Mad., 183; *Augustine v. Medlycott*, (1892) I. L. R., 15 Mad., 241; *Gomachandra Patnaikudu v. Vikrama*, (1900) I. L. R., 23 Mad., 367; *Matra Mondal v. Hari Mohun Mullick*, (1890) I. L. R., 17 Cal., 155; *Maung Hme Bu v. Maung Shwe Hnyin*, 2 L. B. R., 117; referred to.

Thirkell White, C.J.—The suit out of which this appeal arises was originally instituted in a Subdivisional Court. At the instance of one of the defendants, who is also one of the present appellants, it was by mistake transferred to the District Court and was tried by that Court. The value of the suit being less than Rs. 500, the defendants in the lower Appellate Court sought to have the proceedings set aside and the suit remanded to the Township Court for trial, on the ground that that Court alone had jurisdiction to try it. The Divisional Court declined to remand the case, citing as authority certain Indian rulings. The question whether the suit should be sent back for trial in the Township Court is the only point which has been argued in this appeal.

Subject to the provisions of the Code of Civil Procedure, under section 25 of the Lower Burma Courts Act the Township Court has jurisdiction to try any suit of value not exceeding Rs. 500. The District Court has jurisdiction to try any suit without restriction as regards value. Section 15 of the Code of Civil Procedure directs that every suit shall be instituted in the Court of the lowest grade competent to try it. No doubt, therefore, this suit should have been instituted in the Township Court. But it is also clear that the District Court had jurisdiction to try it. The jurisdiction of the District Court is unlimited. Neither the smallness nor the greatness of the value of the suit is a bar to that jurisdiction. The Legislature might have restricted the jurisdiction of the District Court to suits exceeding Rs. 3,000 in value. It might also have restricted the jurisdiction of the Subdivisional Court to suits in value between Rs. 500 and Rs. 3,000. But as a matter of fact, it has not done so. And no doubt one reason for this is that while any local area in Lower Burma must be within the jurisdiction of a District Court, it is in the discretion of the Local Government to constitute Civil subdivisions and townships; and there may be and are local areas not included in any Civil subdivision or township. In such cases, the District Court exercises the jurisdiction which would ordinarily be exercised by the Subdivisional or Township Court respectively. In other words, the District Court has jurisdiction to try any suit, but where that jurisdiction is concurrent with the jurisdiction of Subdivisional and Township Courts, the District Court does not exercise it in cases which those Courts are competent to try.

There is abundant authority for the position that section 15 of the Code of Civil Procedure is merely directory and that it does not

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deprive a Court of any inherent jurisdiction. In *Suffeollah Sircar v. Begum Bibi* (1), the High Court at Calcutta held as follows:—

“The Subordinate Judge is empowered by section 19 of Act VI of 1871 to try cases of any value; and although he might very properly if he had found the value of the subject matter of the suit to be under Rs. 1,000 have sent it to the Munsiff's Court to be tried there, he had clearly jurisdiction to try it himself, and the fact that he did try it is no ground of error in special appeal.”

This case is quite undistinguishable from the present case, the provisions of the Bengal Act being similar to those of the Lower Burma Courts Act in this respect.

The same point was fully considered by a Full Bench of the Allahabad High Court in *Nidhi Lall v. Mashar Husain* (2). The learned Judges were unanimous in holding that section 15 of the Code of Civil Procedure did not in any sense affect jurisdiction and that when a Subordinate Judge tried a case which should have been tried by a Munsiff, the decree was not liable to be reversed for want of jurisdiction.

On the other hand, the Madras High Court in two cases, *Ramayya v. Subarayudu* (3) and *Velayudan v. Arunachala* (4), held the contrary opinion and remanded for retrial cases which had been wrongly tried by a superior Court instead of by a Court of a lower grade. In neither of these cases was reference made to the Calcutta case or the Allahabad case above cited.

But later Madras cases are the other way. In *Krishnasami v. Ranakasabai* (5), although the point was not expressly decided, the Calcutta and Allahabad rulings were cited with approval. In *Augustine v. Medlycott* (6) the Calcutta and Allahabad cases were explicitly followed in a precisely similar case. In *Gomachandra Patnaikudu v. Vikiama Deo* (7), the two cases last cited were approved and the ruling in *Velayudan v. Arunachala* (4) was doubted.

In another case, that of *Matra Mondal v. Hari Mohun Mullick* (8), the High Court at Calcutta expressed a view similar to that taken in the earlier Calcutta case and in the Allahabad case already cited.

In my opinion these rulings should be followed. The present suit should no doubt have been instituted in the Township Court, but it cannot be said that the District Court had no jurisdiction to try it. There was an irregularity but there was no error affecting the merits or the jurisdiction of the Court. I would therefore hold that the Divisional Court was right in declining to direct the retrial of the suit; and I would dismiss this appeal under the provisions of section 551 of the Code of Civil Procedure.

Birks, J.—I concur in the above judgment. I may also cite the authority of this Court's ruling in *Maung Hme Bu v. Maung Shwe Hnyin* (9). I understand that it was Mr. Lambert's client who applied for the mistaken transfer to the District Court and therefore

(1) (1876) 25 W. R., 219.

(2) (1884) I. L. R., 7 All., 230.

(3) (1890) I. L. R., 13 Mad., 25.

(4) (1890) I. L. R., 13 Mad., 273.

(5) (1891) I. L. R., 14 Mad., 183.

(6) (1892) I. L. R., 15 Mad., 241.

(7) (1900) I. L. R., 23 Mad., 367.

(8) (1890) I. L. R., 17 Cal., 155.

(9) 2 L. B. R., 117.

it does not lie in his mouth to say that that Court had no jurisdiction. I concur in dismissing the appeal under section 551, Code of Civil Procedure.

Full Bench—(Criminal Revision).

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Fox and Mr. Justice Birks.*

AH KON AND 3 OTHERS v. KING-EMPEROR.

Mr. Bagram—for the applicants.

Mr. Giles, Assistant Government Advocate,—for the Crown.

Gambling in licensed toddy-shop—Burma Gambling Act, ss. 5, 10.

A licensed toddy-shop is not a "place to which the public have access" within the meaning of sections 5 and 10 of the Burma Gambling Act (I of 1899).

Maluba Mariah and others v. Queen-Empress, (1898) 4 B. L. R., 99;

Ex-parte Freestone, L. J., (1898) 25 Exch., p. 120;

Queen-Empress v. Nga Hmat Gyi, (1885) S. J. L. B., 317;

Langrish v. Archer, L. R. (1882) 10 Q. B. D., 44;

Powell v. Kempton Park Race Course Company, (1897) 2 Q. B., 242, and (1889) A. C., 143; referred to.

The following reference was made to a Full Bench by Mr. Justice Fox:—

The District Magistrate pointed out the mistakes made by the Subdivisional Magistrate, and rightly reversed the convictions of offences punishable under the sections under which the Subdivisional Magistrate had convicted.

The first three grounds for revision are based on the Subdivisional Magistrate's proceedings, but the learned counsel who framed them cannot have been aware of the recent Full Bench Ruling (1) of this Court as to the meaning of the term "Police report" in section 190 (b) of the Code of Criminal Procedure. That ruling meets the objections as to the Subdivisional Magistrate's procedure.

The question for determination is whether the District Magistrate was right in convicting the accused of offences punishable under section 10 of the Gambling Act.

The learned counsel for the applicants has submitted that the applicants were not afforded an opportunity of answering charges under that section. The record does not disclose that the District Magistrate gave any intimation to the accused's pleader that in his opinion the evidence would justify convictions under that section. I think that if an Appellate Court comes to the conclusion that a conviction by the original Court of one offence cannot be sustained, but is of opinion that the evidence will justify a conviction of some other offence, it should give the accused full opportunity for shewing cause against conviction of such other offence.

The first accused was the agent of a licensee of a toddy-shop. He was not alleged to have taken part in any gambling or to have received any commission or other profit from gambling in the shop. The other

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(1) *King-Emperor v. Nga Po Thin*, page 146.

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accused was alleged to have taken part in what is referred to as the "Three-card trick." The process is not described by the witnesses, but it has been assumed in the argument before me that it was what is commonly referred to as the three-card trick, namely, the throwing of three cards in such a way as to mislead on-lookers about the position in which one or more of the cards has or have fallen. It has been contended that if the process is a game at all, it is a game of mere human skill covered by section 4 of the Act. It may be so so far as the thrower is concerned, but it appears to me that with the staker it must be ordinarily a matter of pure chance whether he hits upon the correct position of the card he had chosen.

The offence under section 10 (a) of the Act consists in playing for money with an instrument of gaming in a place falling within the first clause of the section. The staker at the three-card trick plays for money in the belief or hope that the position of a card which he chooses will turn out to be correct. Although he does not himself touch the cards, it appears to me that he plays for money with an instrument of gaming in the same way as a staker at, say, a roulette table does.

If the only question in the case were whether the three-card trick is covered by section 4 of the Act, I should not refer the case to a Bench.

A more important question is whether by playing for money with instruments of gaming in a licensed toddy-shop any of the accused has rendered himself liable to punishment, under section 10 of the Act, which enacts that "Any person who in any street or thoroughfare or *place to which the public have access* plays for money, etc., shall be liable to punishment."

The District Magistrate has held that a licensed toddy-shop is a *place to which the public have access*. In a sense no doubt that is so, because the keeper of the toddy-shop invites members of the public generally to enter his shop, and to buy his toddy. But every shop-keeper in like manner invites the public to enter his shop and to buy his goods, and if a liquor shop is a *place to which the public have access* every shop is so, and under section 5 of the Act a police officer of even the lowest grade may arrest without warrant any person whom he sees playing for money with an instrument of gaming in any shop.

It appears to me doubtful whether the Legislature could have contemplated such a state of law. The object of the Gambling Act being to forbid certain forms of gaming in public and in common gaming-houses, gaming in such an open place as a native's shop usually is, may no doubt be as harmful as gaming in a street, but on the other hand a shop is private and not public property, and an Act which renders liable to punishment a shop-keeper who indulges in a game of cards with his friends in his shop, unless they do not play for money, and which authorizes any police officer to arrest without warrant any person whom he sees so playing for money in a shop, is a strong measure. The words "street or thoroughfare" denote places to which the public have access as of right. The question raised is as to whether the words "*place to which the public have access*" must not be read in the sense of "place to which

the public have access as of right." If so, then a shop is not such a place, for although a shop-keeper by implication invites the public to enter his shop, there is nothing to prevent him excluding any member of it, and forbidding him to enter. It is not therefore in my opinion a place to which the public have access as of right.

The District Magistrate convicted the first accused of an offence under section 10 of the Gambling Act, by applying section 114 of the Indian Penal Code to his case. His reasoning is that this accused was bound under the terms of the license for the shop not to permit gambling in the shop, and as he did permit it, there was an illegal omission on his part within the 3rd case stated in section 107 of the Indian Penal Code, and being present at the time he must, under section 114 of the Code, be deemed to have himself played for money with an instrument of gaming, although none of the witnesses said that he did so.

The terms of the license are not before the Court, and it does not appear whether the first accused as the servant of the licensee was bound not to permit gambling in the shop. Even if he was so bound, the question arises whether his omission to prevent the gambling in the shop was an *illegal* omission within the meaning of section 107 of the Indian Penal Code.

Failure to comply with the terms of an excise license is not necessarily a breach of law, or an *illegal* omission, and as there was no such omission on the first accused's part there does not appear to be justifiable ground for his conviction. It appears to me that the first accused's offence, if any, was punishable under section 109 of the Indian Penal Code read in conjunction with section 10 of the Gambling Act.

Further questions arise as to whether this accused can be said to have intentionally aided the gambling by his omission to stop it and whether the gambling took place in consequence of such omission within the meaning of section 109 of the Indian Penal Code.

There was evidence that the 2nd accused threw the cards. As to him the principal question appears to be whether he played for money with an instrument of gaming in a place to which the public have access. The 3rd and 4th accused appear to have acted as touts for players, but there is some evidence that the 4th accused also threw the cards.

Under section 11 of the Lower Burma Courts Act, 1900, I refer to a Bench of the Court the following questions:—

- (1) Whether any one of the accused was liable to punishment under section 10 of the Burma Gambling Act for having played for money with cards in a licensed toddy-shop?
- (2) Whether the accused Ah Kon was liable to punishment under that section for having permitted or for not having prevented the playing for money with cards in such shop?
- (3) Whether the accused Tun Baw was liable to punishment under that section for having invited passers-by to enter the shop?

The opinion of the Bench was as follows:—

Birks, J.—There are three questions referred to us, and of these the first is the most important as it involves the question whether a licensed

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toddy-shop is a place to which the public have access within the meaning of section 10 of Burma Act I of 1899. This section reads as follows :—

Any person who, in any street or thoroughfare or place to which the public have access,—

- (a) plays for money or other valuable thing with an instrument of gaming ; or
- (b) sets any birds or animals to fight ; or
- (c) being there present aids and abets such public fighting of birds or animals,

shall be liable to a fine not exceeding fifty rupees or to imprisonment for any term not exceeding one month.

Until the framing of this Act, the law in force was Act III of 1867 which, as far as Lower Burma is concerned, is amended by the Burma Gaming Act XVI of 1884. In section 13 of the Act of 1867, which is the corresponding section to section 10, the words originally were :—

A police officer may apprehend without warrant any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming, used in playing any game not being a game of mere skill, in any public street, place or thoroughfare situated within the limits aforesaid * * * Such person when apprehended shall be brought without delay before a Magistrate and shall be liable to a fine, etc.

In Lower Burma the words "public street, place or thoroughfare" are replaced by "street or thoroughfare or place to which the public have access," see section 6 of Act XVI of 1884, and this change has been incorporated in sections 5 and 10 of the present Act.

The question for determination is whether these words "or place to which the public have access" are to be taken in their simple natural meaning or whether they are qualified by the preceding words "street or thoroughfare."

Mr. Agabeg for the accused relies mainly on the following passage in Maxwell on the Interpretation of Statutes, page 461, 3rd edition. The passage reads as follows :—

When two or more words susceptible of analogous meaning are coupled together, *noscuntur a sociis*; they are understood to be used in their cognate sense they take, as it were, their colour from each other ; that is, the more general is restricted to a sense analogous to the less general. The expression, for instance, "places of public resort" assumes a very different meaning when coupled with "roads and streets" from that which it would have if the accompanying expression was "houses."

It is clear that the words "street" and "thoroughfare" are *ejusdem generis*, and the word "place" that follows would seem to be limited by this rule to open spaces of the same nature.

It is therefore for the prosecution to shew that the restricted meaning which primarily attaches to the general word should be rejected "as there are adequate grounds to shew it was not used in the limited order of ideas to which its predecessors belong" (see page 475 of the same work).

Now the preamble to Burma Act I of 1899 runs as follows:—

Whereas it is expedient to make provision for the punishment of public gaming and the keeping of common gaming-houses and for the suppression of certain forms of gaming, it is hereby enacted, etc.

Section 3 defines a common gaming-house as follows:—

"Common gaming-house" means any house, enclosure, room, vessel or place whether public or private, in which—

- (a) any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room, vessel or place, whether by way of charge for the use of the instruments of gaming as such, or of the house, enclosure, room, vessel or place, or otherwise howsoever for gaming purposes.

Section 5 comes under a separate head "Arrest without warrant, etc., for offences in public places," and provides as follows:—

A police officer may arrest without warrant any person who in any street or thoroughfare or place to which the public have access, and within the view of such police officer,—

- (a) solicits or collects stakes for the game of *ti* or any other game or pretended game of a like nature; or
 (b) plays for money or other valuable thing with any instrument of gaming; or
 (c) sets birds or animals to fight; or
 (d) being there present aids and abets such public fighting of birds or animals.

I think this section clearly contemplates that the gambling referred to is in an open space and within the view of the police constable on his beat. Section 6 on the other hand prescribes a special procedure for searches in any house, enclosure, room, vessel or *place* used as a common gaming-house.

Sections 10 and 13 provide penalties for the class of offences referred to in section 5 as "offences in public places," while sections 11 and 12 deal with the offences referred to in sections 6, 7, 8, and 9 which refer to "common gaming-houses."

It may be noted that the word "place" occurs in both sections 5 and 6, but if read in conjunction with the preceding words it would in the first case appear to apply to open spaces to which the public can resort practically without let or hindrance even though private rights may exist, while in the latter, to buildings or enclosures which are owned by private persons and whose rights require safe-guarding.

Mr. Agabeg has cited *Maluba Mariah and others v. Queen-Empress* (1). In that case the learned Recorder held that a mill-compound was not a public place under the Gambling Act. The case was decided in March 1898. Act No. III of 1867 had then been amended by Act XVI of 1884, but the alteration appears to have escaped the learned Recorder's notice, for he cites various Indian rulings which referred to "public place."

Mr. Giles for the Crown relies chiefly on the fact that legislation both in England and Burma has been to extend the meaning of the term "public places."

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As far as England is concerned this is apparent from a comparison of the terms used in section 4 of 5 Geo. IV, c. 83, with section 3 of the Vagrant Act (Amendment Act) of 1873. The words in this first Act are:—

Every person "playing or betting in any street, road, highway or other open or public place," etc., * * shall be deemed a rogue and vagabond.

While in the latter Act the words are:—

"any street, road, highway or other open and public place or any open place to which the public have or are permitted to have access."

The only cases cited, in which the word "place" in these Statutes has been applied to covered places, are *Ex-parte Freestone* (1) where the Court intimated an opinion that a railway carriage might be a public place within the meaning of 5 Geo. IV, c. 83, section 4, *if used on the railway*, and a latter case reported in Col. 587, Vol. 7, Mewes' Digest, where the Court held that the fact of access being dependent on the payment of a railway fare would not affect the question.

It may be noted, however, that these Acts deal with rogues and disorderly persons and not solely with the suppression of gambling and gambling-houses.

As far as this Province is concerned it seems probable that section 13 of Act III of 1867 was amended by Act XVI of 1884, in conformity with the English decisions cited by Mr. Giles, in which the Judges held that a "public place" meant "a place to which the public have access."

The ruling of the Special Court given in *Queen-Empress v. Nga Hmat Gyi* (2) was given after the Act of 1884 was passed.

I am not aware of any decision that has held a shop to be a public place within the meaning of any of the Acts or Statutes cited at the hearing of the case.

It does not seem necessary to give the word "place" that occurs in sections 5 and 10 of the Burma Gambling Act so wide a signification. A licensed vendor of toddy is liable to forfeiture of his license and a prosecution under section 52 of the Excise Act if he permits gambling in his shop.

Other shopkeepers would render themselves liable to a prosecution under sections 17 and 12 of the Burma Gambling Act if they permitted gambling as an attraction to draw customers.

I would therefore answer the first question as follows:—

A licensed toddy-shop is not a place to which the public have access within the meaning of sections 5 and 10 of the Burma Gambling Act of 1899, and therefore the accused are not liable to punishment under section 10.

This answer renders it unnecessary for me to determine the other two questions in this reference.

Thirkell White, C.J.—The allegation against the accused was that they played for money with cards in a licensed *tari* shop. The first question under reference is practically whether a licensed *tari* shop is a "place to which the public have access" within the meaning of that phrase as used in section 10 of the Burma Gambling Act.

(1) L. J., 25 Exch., page 120.

(2) (1885) S. J. L. B., 317.

It will be convenient to set forth the course of legislation in respect of this section. The Public Gambling Act, 1867, applied to the Punjab, the North-West Provinces and Oudh, Assam, the Central Provinces, and Burma. Section 13 of that Act rendered liable to punishment "any person found playing for money * * * with cards * * * or other instruments of gaming * * * in any public street, place, or thoroughfare." The Burma Gaming Act, 1884, amended this section in Burma only, and for the words "public street, place, or thoroughfare" substituted the words "street, or thoroughfare, or place to which the public have access." The Act of 1884 was repealed and the Act of 1867 ceased to be operative in Burma at the commencement of the Burma Gambling Act, 1899. Section 10 of that Act, which adopted the wording of section 13 of the Act of 1867 as amended by the Act of 1884, is (so far as material to the present case) as follows:—

"Any person who in any street, thoroughfare, or place to which the public have access * * * plays for money * * * with any instrument of gaming."

There are thus no Indian Rulings on the construction of the phrase in this Act, "place to which the public have access." Such rulings as there might be would relate to the construction of the phrase "public place." The only Burma cases cited are also both concerned with the meaning of that phrase. Although, from the preamble of the Act of 1884, it may be gathered that it was the object of the Legislature to extend and not to restrict the scope of section 13 of the Act of 1867, and therefore that the phrase "place to which the public have access" is of wider signification than the phrase "public place," I do not find that much light is thrown on the present case by any Indian or Burma ruling.

The cases which may be of assistance are those in the English Courts where similar words used in Acts for the suppression of certain kinds of gambling have been discussed. The only English case which has a direct application to the present case is that of *Langrish v. Archer* (1). In that case the question for decision was whether persons who gambled in a railway carriage in the course of a journey were liable to conviction under the Statute which rendered punishable "every person playing * * * in any street, road, highway, or other open and public place or in any open place to which the public have or are permitted to have access." Although it was conceded that a railway carriage was not an open and public place of the same character as a road or highway, effect was given to the additional words of the section, and it was held that a railway carriage in which passengers were actually travelling was included in the words "any open place to which the public have or are permitted to have access." The main reason for the decision seems to have been that the Company could not exclude any person from the carriage while there was room and he was ready to pay his fare. Lord Coleridge, C.J., said:—

"When this condition is complied with the public have access to the carriage as they have to a highway, and the section nowhere says that "access" is to mean access without the obligation of paying anything for it."

(1) L. R. (1882) 10 O. B. D., 44.

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Although, therefore, the above case interprets the words "to which the public have access" and not the words "to which the public are permitted to have access," which do not occur in our Act, it is not a definite authority for the proposition that a place from which the proprietor could exclude the public at will is a place to which the public have access. Now it is admitted that a *tari* shop stands on the same footing as any other shop; and it is not contended that the *tari* shop-keeper is bound to admit any one into his shop or to serve him with *tari*. It is urged that the phrase under consideration refers to and includes only a place to which the public have access as of right.

The reasons in favour of the adoption of this construction are, it seems to me, the distinction drawn in the English Statute (36 and 37 Vic., c. 38) between a place to which the public have access and a place to which the public are permitted to have access; and the ground indicated above as the basis of the decision in respect of the railway carriage. If the words "place to which the public have access" mean and include any place to which they have access as a fact whether by right or by leave, then addition of the words "to which they are permitted to have access" seems unnecessary. If the Railway Company had the right to exclude any one at their pleasure, the decision in *Langrish v. Archer* (1) might have been different. On the other hand, if the phrase as used in the Burma Act means only a place to which the public have access as of right, it is difficult to see what could have been the object of substituting it for the phrase "public place." There are no doubt places to which, though they are private property, the public have access as of right. Possibly a railway carriage on a journey may be such a place. A field over which the public have a right of way would certainly be such a place. But it is improbable that the Legislature would have altered, in order to extend its scope, the wording of section 13 of the Public Gambling Act, 1867, for the purpose of including these very exceptional cases. Even the word "public place" has been held to include a *kwin*, or stretch of private fields, from which the crops have been reaped. [*Queen-Empress v. Hmat Gyi* (2)]. If this case was well decided, it would seem that a "place to which the public have access," which is a phrase of more extended scope than the expression "public place," may well be held to include and mean a place, whether private or public, to which, as a matter of fact, the public have access. It seems to me that this is the correct construction of the section and that, so far as concerns the words "to which the public have access," a *tari* shop, or any other shop open to all comers, is within the meaning of the phrase. Doubtless a shop might be opened for the exclusive use of certain classes of people. But it is not suggested that there is any exclusion or restriction in the case of this *tari* shop. And when a shop is kept for the use of persons of all classes, when the public are not merely permitted but invited, explicitly or implicitly, to enter it, I think that in the ordinary and reasonable use of the words,

(1) L. R. (1882) 10 Q. B. D., 44.] (2) (1885) S. J. L. B., 317.

it is a "place to which the public have access." In this a shop differs from a Club, to which only members and their friends have access, as a matter of fact; and from a private house to which access is even more narrowly restricted.

There remains, however, another question, whether the word "place" should be construed as meaning a place of any kind, or a place of the same kind as a street or thoroughfare. The general rules of construction, when words susceptible of analogous meaning are used together, or when specific words are followed by a word of general import, are thus laid down:—

"When two or more words susceptible of analogous meaning are coupled together, *noscuntur a sociis*; they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the less general. The expression, for instance, "places of public resort" assumes a very different meaning when coupled with "roads and streets" from that which it would have if the accompanying expression was "houses (1)."

"The general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words: or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to shew that a wider sense was intended."

On the other hand, it is said:—

"The restricted meaning which primarily attaches to the general word, in such circumstances, is rejected when there are adequate grounds to shew that it was not used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey.(2)."

The most recent cases in which the meaning of the word "place" has been considered, with reference to the doctrine of *ejusdem generis*, are the two cases of *Powell v. Kempton Park Race Course Company* in the Court of Appeal (3) and in the House of Lords (4) respectively. In all the judgments delivered in these two cases, it is, I think, laid down or assumed that the word "place" must have some limitation, and that the limitation must be gathered from the nature of the specific words preceding it, the mischief indicated in the preamble and the intention of the Legislature as understood from a general survey of the Statute being also taken into account. So in the section under consideration, the word "place" must have some limitation, for if it merely meant a place of any kind there would be no object in prefixing the words "street or thoroughfare." It would have been sufficient to say "Any person who in any place to which the public have access." The introduction of the words "street or thoroughfare," according to the recognised rules of construction, renders it necessary to construe the word "place" which follows them as meaning a place akin to or of the same nature as a "street or thoroughfare," unless a survey of the Act as a whole in-

(1) Maxwell on the Interpretation of Statutes, 3rd Edition, page 461.

(2) *Ibid*, page 475.

(3) (1897) 2 Q. B., 242.

(4) (1899) A. C., 143.

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dicates that the Legislature clearly had a different intention. Now, the objects of the Burma Gambling Act, as stated in the preamble, are three-fold:—(1) the punishment of public gambling; (2) the punishment of the keeping of common gaming-house; and (3) the suppression of certain forms of gaming. Sections 5 and 10 of the Act provide for the arrest and punishment of public gamblers. These are provisions quite distinct from those sections which deal with the keeping of common gaming-houses. And in each case the place where the gambling against which the sections are directed is carried on is described as a "street or thoroughfare or place to which the public have access." The doctrine of *ejusdem generis* is not a new invention. It was well known before the enactment of the Burma Gambling Act; and I cannot think that it was not present in the mind of the Legislature when it inserted the specific words before the word of more general import. I think that sections 5 and 10 of the Gambling Act are aimed at gambling in streets and thoroughfares and other similar places to which the public have access, and that gambling in houses is dealt with in other parts of the Act and under different conditions. I therefore concur in the answer proposed by Birks, J., to the first question in the reference.

In view of this opinion, it is not necessary to express an opinion on the other two questions.

Fox, J.—I concur with my learned colleagues in the answer which they propose to give to the first question referred.

The answer being in the negative and involving the acquittal of the accused, it is unnecessary to consider the other questions referred.

Criminal Appeal
No. 640 of 1903.
January 19th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Birks.

NGA SAN v. KING-EMPEROR.

Murder—Provocation—Indian Penal Code, s. 302.

The fact that the accused, who was convicted of murder, was intoxicated does not affect the presumption as to his intention and cannot relieve him of responsibility for his action. But it may be considered in estimating the probable effect on his mind of the words or actions of others, and in determining whether provocation given was grave and sudden.

King-Emperor v. Nga Tha Sin, 1 L. B. R., 216, referred to.

Thirkell White, C.J.—I think that there is no reason to dissent from the conclusion of the learned Additional Sessions Judge as to the facts of this case. It is proved beyond reasonable doubt that Nga Kyaw Zaw died from the effects of blows delivered by the appellant Nga San, the weapon used being a carpenter's axe. The blows were delivered on the head with such force that the skull of the deceased was fractured in two places and the base of the skull was also fractured. It appears that the deceased and the appellant had been drinking, though it is not clear that they were actually drunk. It also appears that the deceased, a little while before the commission of the crime, did insult the appellant, in the drinking shop. Further, there was

a quarrel immediately before the commission of the crime. The appellant is said to have pulled the deceased's jacket; and the deceased certainly assaulted the appellant with an umbrella. The appellant thereupon struck the deceased on the head with the blunt side of an axe and as he lay on the ground struck him again, one or two blows. There can be no doubt that the act by which death was caused was done with the intention of causing such bodily injury as the appellant knew to be likely to cause death. The case falls within the second, if not within the first clause of section 300, Indian Penal Code.

The fact, which may be taken as established, that the appellant was more or less under the influence of intoxicating liquor does not affect the presumption as to his intention and cannot relieve him of responsibility for his action. The offence committed was murder unless it falls within the scope of one or other of the exceptions to section 300, Indian Penal Code.

There is evidence that the deceased struck the appellant on the breast with an umbrella immediately before the fatal blows were delivered. This is stated by only one witness, but another witness speaks to the deceased aiming at the appellant, or seeming to be about to strike him, with an umbrella. There seems no reason to disbelieve the evidence of Maung Pe, who says that the appellant was actually struck by the deceased. It was in return for this blow that the appellant attacked the deceased with the hatchet which he had in his hand and inflicted injuries which caused immediate death.

The exceptions which may possibly apply are exceptions 1 and 2 to section 300, Indian Penal Code. I do not think that the case can be held to fall under section 300, Indian Penal Code. For I find it difficult to hold, even if it be conceded that the appellant acted in exercise of the lawful right of private defence, that he had not the intention of doing more harm than was necessary for the purpose of that defence. The continuance of the assault after the deceased had fallen to the ground renders that position untenable.

But the question whether the appellant was not deprived of the power of self-control by grave and sudden provocation seems to me more worthy of consideration. And in connection with this question, the fact that the appellant was more or less intoxicated seems to me to be of very great importance. Although intoxication cannot be considered as affecting the intention of the accused (Section 86, Indian Penal Code), it is a fact to be taken into account in forming a judgment as to the accused's state of mind. An act which might not seriously provoke a sober man might provoke a drunken man to an extremity of frenzy. There is no rule or principle of law which prevents the recognition of this possibility. The fact that a man is intoxicated may rightly be taken into consideration in estimating the probable effect on his mind of the words or acts of others. In this case, it is in evidence that the deceased insulted the appellant when they were drinking together and that the appellant made no reply. To take the view of the sequence of events presented by the witness Maung Pe, the two men were quarrelling outside a shop; the appellant pulled the deceased's jacket and the deceased struck him with his umbrella. Then

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the appellant struck the deceased with a hatchet which he had in his hand. Now, it seems to me most likely that, in his semi-drunken state, the appellant was moved to sudden fury by the blow with the umbrella. A blow might be held to constitute grave and sudden provocation even in the case of a sober man. It is still more likely to do so in the case of a man already excited by drink. I think, on the evidence, it is reasonable to hold that the appellant was deprived of the power of self-control by grave and sudden provocation. The question remains whether, by pulling the deceased's jacket, the appellant sought, or voluntarily provoked, the provocation, as an excuse for killing or doing harm to the deceased. The witness, Maung Pe, says that this seemed to him to be a challenge to fight. This may be so; but after all it is merely the opinion of the witness and the act may wear a different complexion. It is difficult to believe that, in the state in which the appellant is said to have been, he pulled the deceased's coat in order that the deceased might attack him and that he might then have an excuse for striking him with the hatchet in his hand. If he had, at this time, intended to use the hatchet, it is more likely that he would have done so in the first instance when he came up with the deceased.

For these reasons, I am of opinion that the appellant should be given the benefit of exception 1 and that the conviction should be changed to one of culpable homicide not amounting to murder. The case falls within the first part of section 304, Indian Penal Code; and should be visited with the severest penalty allowed by that section. The appellant acted with much ferocity and deserves a heavy sentence. I would set aside the capital sentence and under section 304, Indian Penal Code, I would sentence the appellant, Nga San, to transportation for life.

The Additional Sessions Judge will find guidance as to the principles which he should adopt in passing sentences on convictions of murder in the Full Bench case of *Crown v. Tha Sin* (1) which is the ruling authority on the subject. Earlier rulings which are not consistent therewith should not be followed.

Birks, J.—I concur.

Criminal Appeal
No. 668 of
1903.
January 29th,
1904.

Before Mr. Justice Birks.

THA HMU v. KING-EMPEROR.

Indian Penal Code, s. 394—Identification—Evidence.

A conviction should not be under section 397 alone, which merely provides a minimum sentence, but under one of the preceding sections read with section 397.

It is seldom safe to convict on the evidence of a single witness as to identification, when the identification has been made after dark and the witness has at first professed to be unable to identify any one.

Tha Zan v. Crown, 1 L. B. R., 292, referred to.

The District Magistrate has gone into the evidence carefully and convicted the accused under section 397 of the Penal Code and sentenced him to seven years' rigorous imprisonment which was commuted to seven years' transportation.

The conviction, if maintained, should be under section 394 read with 397 as the latter section merely provides for a minimum sentence either in a case of robbery or dacoity. The attention of the District Magistrate is also invited to the latest orders of this Court as to the proper procedure under section 59, Indian Penal Code, in *Tha Zan v. Crown* (1). I admitted this appeal as the case against the accused depends wholly on the identification by the complainant, Maung Pyaung, an old man of 54, at a time when, as the District Magistrate remarks, it was so dark that a man cannot recognize his own brother.

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It is admitted also that the complainant at first told both Maung Thin and Maung Tha Myat that he could not recognize anybody. He says he did not mention the name of the accused Tha Hmu till he got to his house; he admits that he did not mention his name to his nephew Nga Hme because he did not ask him who had cut him.

Maung Myat Hmaing says it was on the cart on the way back that complainant first mentioned the name of the appellant and that Ma Kyu was then present. Ma Kyu corroborates this statement, and both these witnesses say the complainant seemed wandering in his mind at that time. Maung Tha Myat says he questioned the complainant at night as he thought possibly that the complainant had not answered consciously. It seems rather curious that he was not told that complainant had mentioned the accused's name in the cart on the way back. All these witnesses are related to the complainant.

The evidence of Maung Thin, the headman, is the most valuable. It appears that the complainant was able to tell him a good deal as he said he told the robbers he had no money and that there were two men. Had he really identified Tha Hmu his name would be the first thing he would naturally mention.

No doubt all these witnesses seem to think that complainant was not in full possession of his senses when first questioned and there does not seem any adequate motive for making a false charge.

On the other hand, the accused called his wife and other witnesses to prove an *alibi*. They seem to remember the date as a *pōngyi* went to an *ahlu* that day. I do not think sufficient reasons have been given for discrediting these witnesses.

There is no doubt that the complainant was attacked by two robbers, but I very much doubt his identification of the appellant. It is rarely safe to convict a man on the evidence of a single witness as to identification especially when this identification is made after dark and the witness has at first professed to be unable to identify any one.

For these reasons I set aside the conviction and direct the acquittal of the appellant.

(1) I. L. B. R., 292.

Civil
Miscellaneous
Appeal No. 48
of 1903.
February 4th,
1903.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Birks.

S. T. MACINTYRE v. THE SECRETARY OF STATE FOR INDIA IN
COUNCIL.

Messrs. Cowasjee and Cowasjee—for appellant (plaintiff).

Land Acquisition Act (I of 1894)—Reference to Court—Procedure.

When a reference is made to the Court under section 19 of the Land Acquisition Act (I of 1894), the proceedings in the Court are intended to constitute a separate inquiry and must terminate with a specific award. A mere dismissal of the application is not contemplated by the Act.

Thirkell White, C.J.—By Revenue Department Notification No. 184, dated the 22nd May 1902, it was declared by the Local Government under section 6 of the Land Acquisition Act, 1894, that certain land in the Hanthawaddy District was required for the purpose of a necropolis for East Rangoon. The appellant, Mr. S. T. MacIntyre, owned two plots of this land, shown on the map in the Collector's proceedings as holdings Nos. 56 and 58, aggregating 4 acres. He claimed as compensation a sum of Rs. 9,697, made up as follows:—

	Rs.
Four acres of land at Rs. 1,200 an acre	4,800
House valued at	150
Trees	4,667
Eight wells	80
Total	9,697

After recording evidence, the Collector awarded Rs. 2,300 made up as below:—

	Rs.
Four acres at Rs. 500	2,000
Fifteen per cent.	300
Total	2,300

Mr. MacIntyre required the matter to be referred to the Court and a reference was made accordingly to the District Court.

The District Court seems to have treated the proceedings for the determination of the objection partly as an appeal and partly as an original proceeding. It took evidence but it seems to have considered also the evidence taken by the Collector. This is not quite clear from the proceedings in this case; but it is obvious in another case in which the appeal was heard with this appeal. The Judge made no award but dismissed the application with costs.

It may be convenient to state for the guidance of District Courts when dealing with cases of this nature, the proper procedure to be observed. The reference to the Court is not, in strictness, an appeal in the technical sense of the word. The Judge is bound, after hearing the objector, to make an award. A mere dismissal of the application is not contemplated by the Act. It seems to be the intention of the Act that the Judge of the Court should hold a separate enquiry. He

may and should take into consideration the reasons assigned by the Collector for his award. But if it is intended to treat all or any of the evidence recorded by the Collector as evidence in the proceedings for the determination of the reference, this should be clearly stated on the Court's record; and the assent of the parties should be obtained. Except with the consent of parties, it does not appear that evidence before the Collector can be considered as evidence in the case before the Court. But the main point to be borne in mind is that the proceedings in the Court are intended to constitute a separate enquiry and that they must terminate with a specific award.

The learned Judges then dealt with the facts of the case.

Before Mr. Justice Birks.

KING-EMPEROR *v.* APPULSAWMY.

*Attempt to commit suicide—Section 309, Indian Penal Code—Jurisdiction—
Revisional power of High Court.*

Severe sentences should not be passed in cases of attempt to commit suicide, where the accused suffers from a bodily affection which is likely to cause him acute mental depression.

Sub-section 5 of section 439, Criminal Procedure Code, does not debar the Chief Court from dealing with a case on revision reported by the Sessions Judge or District Magistrate of his own motion and not on the application of the accused who could have appealed but did not do so.

I concur with the learned Sessions Judge in thinking the sentence of six months' simple imprisonment passed under section 309 was needlessly severe under the circumstances described. Clause 5 of section 439, Criminal Procedure Code, does not appear to oust the jurisdiction of this Court to deal with cases reported by the District Magistrate or Sessions Judge who has examined a record under section 435, Criminal Procedure Code, from a perusal of the monthly conviction statement. It is not quite clear from the order of reference whether this was the case or whether the accused applied himself to the Sessions after the period of appeal had expired. The Sessions Judge will be asked to report on this point before final orders are passed.

Read report of the Sessions Judge. It appears that this reference was made by the Judge of his own motion and not at the instance of accused. It would be desirable in future that this should be clearly stated in the order of reference. For the reasons stated in his order of reference the sentence is reduced to three months' simple imprisonment.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Birks and Mr. Justice Bigge.*

KING-EMPEROR *v.* MAUNG LAT.

Mr. Giles, Assistant Government Advocate,—for the Crown.

*Criminal Procedure Code, section 556—Quashing of commitment made by
Magistrate personally interested—Sections 215, 532.*

The District Magistrate, without obtaining the permission of the Court to which an appeal lay from his Court, committed to Sessions a case in the investigation of which he had taken an active part as District Superintendent of Police.

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No. 136 of 1904.
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Miscellaneous
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Commitment quashed by the Chief Court on revision, after reference to sections 215 and 532 of the Code of Criminal Procedure.

Thirkell White, C.J.—It appears from the report of the learned Additional Sessions Judge and from the papers which have been placed before us that the District Magistrate of Salween who is also District Superintendent of Police took an active part in the preliminary investigation of certain charges brought against the accused Maung Lat, who is an Inspector of Police, and wrote for and obtained sanction for his prosecution. He did this in his capacity of District Superintendent of Police. The enquiry was not a Magisterial enquiry but either a Police investigation or a Departmental enquiry. After this, in his capacity of District Magistrate, Mr. Hertz enquired into the charges against Maung Lat and committed him for trial.

The Additional Sessions Judge represents that, under section 556 of the Code of Criminal Procedure, the commitment is bad as the District Magistrate was disqualified from committing the case. His only doubt was whether he could himself quash the commitment and direct a fresh enquiry under section 532, Criminal Procedure Code, or whether the commitment should be reported to this Court to be dealt with under section 215, Criminal Procedure Code.

I think it is clear that the case does not fall within the scope of section 532 of the Code of Criminal Procedure. That section refers to a commitment by a Magistrate purporting to exercise powers duly conferred, which were not so conferred. There is no suggestion in this case that the District Magistrate purported to exercise powers not duly conferred. It is not suggested that Mr. Hertz is not the duly appointed District Magistrate; the only question is whether he was personally disqualified from exercising his powers as District Magistrate in this particular case.

If section 532 of the Code of Criminal Procedure does not apply, the case must apparently be dealt with under the revisionary powers of this Court. Section 215 which has been cited is not an enabling but a restricting section. It does not expressly authorize the High Court to quash a commitment. It merely declares that a commitment once made by a competent Magistrate can be quashed only by the High Court and only on a point of law. This does not mean that the High Court cannot quash a commitment made by some one who is not a competent Magistrate. In quashing a commitment the High Court acts under the revisionary powers conferred by section 439 of the Code of Criminal Procedure, with reference to clauses (c) and (d) of section 423, sub-section (1). But its powers are limited by section 215. It seems to me that it would be absurd to hold that the High Court may quash a commitment by a competent Magistrate and cannot quash a commitment by a Magistrate who was not competent to make it. In view of the exceedingly doubtful nature of the interpretation of the term "competent Magistrate" I do not think it can safely be held that a commitment by a Magistrate who is considered not to be competent is in itself void and does not need to be quashed.

In this view, it seems to me unnecessary to consider whether, in this case, the District Magistrate was not competent because he was disqualified, or whether, though competent, he was disqualified.

There is no doubt that the District Magistrate was disqualified by section 556 of the Code of Criminal Procedure from committing this case for trial. The section expressly prohibits a Magistrate, except with the permission of the Court to which an appeal lies from his Court, to try or commit for trial any case in which he is personally interested. The explanation then provides that a Magistrate shall not be deemed to be personally interested in any case by reason only that he is concerned therein in a public capacity. But the illustration to the section shows that when in a public capacity a Magistrate directs a prosecution he is disqualified from trying the case. The effect of the section and illustration seems to me to be perfectly clear and simple. The mere fact that the District Magistrate is also District Superintendent of Police does not of itself disqualify him from trying or enquiring into cases investigated by the police of his District. But the section does disqualify him from dealing as a Magistrate with any case in the police investigation of which he has taken more than a formal part. That is what the District Magistrate did in this case; and unless he obtained the permission of his Appellate Court he was disqualified from committing this case for trial. I do not think that permission can be given after the provisions of the section have been contravened.

The inconvenience alluded to in the course of this reference may be obviated by the District Magistrate abstaining from personal concern in police investigation; or by his applying to the Appellate Court for leave to try or enquire into any specified case in which he has been so concerned.

I would quash the commitment of Maung Lat and direct that a fresh enquiry be held by the District Magistrate of Thatôn.

Bigge, J.—I concur.

Birks, J.—I concur in the judgment of the learned Chief Judge but would like to add a few remarks.

A somewhat similar point came before me in Criminal Miscellaneous No. 33 of 1903, *King-Emperor v. Po Aung and others*. In that case the first accused objected to being tried by the District Magistrate for similar reasons. This objection was at first overruled on the ground that the District Magistrate had merely been compelled to initiate the proceedings as the District Superintendent of Police was ill and other responsible police officers prevented by various causes from taking up the case. On a subsequent reference by the District Magistrate the case was transferred for trial to another District.

In the present case I find that the District Magistrate took action under section 191, Code of Criminal Procedure, and informed the accused he would not be tried but committed to Sessions. The accused maintained his objection.

I think it is clear from the terms of section 190 (c) that the "knowledge or suspicion" therein referred to is that which is obtained as a

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"Magistrate" and not as a police officer after an investigation in this capacity. If an accused objects on the ground that the Magistrate has taken an active part in the investigation the proper course is to apply for leave to make a committal or to transfer to some other Court. For these reasons I concur in the order proposed.

Criminal Appeal
No. 9 of 1904.
February
24th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

PAUNG NGA AND FOUR OTHERS v. KING-EMPEROR.

Messrs. Jordan and Villa—for the appellants.

Mr. Giles, Assistant Government Advocate,—for the Crown.

Gambling Act—Meaning of term "report" in sections 6 and 14.

The expression "report" in section 14 of the Gambling Act includes any report of a Police Officer, and not only the report prescribed by section 6, sub-section (4), in cases where a house has been searched under a warrant.

Duty of Police in proceedings under section 6 of the Gambling Act explained.

King-Emperor v. Po Thin, 2 L. B. R., 146, referred to.

The appellants Paung Nga, Chit Ba, Sa Wa, Wa Ki and Sun Sein have been convicted under section 12 of the Burma Gambling Act and have been sentenced each to rigorous imprisonment for six weeks.

The first point taken in this appeal is that there was no complaint, report, or information before the Magistrate within the meaning of section 14 of the Gambling Act, to enable him to take cognizance of the offence of which the appellants were accused. The facts are as follows. The Commissioner of Police issued a warrant after strict compliance with the provisions of section 6 of the Gambling Act. The warrant was addressed to Mr. Burke, Superintendent of Police, by whom it is endorsed as executed, the endorsement being dated 20th December. The only report on the record is a paper signed by a police officer in which he records that Mr. Burke laid information at the Police Station to the effect that he had applied for a warrant and made a raid and caught certain persons mentioned and seized certain gaming implements. The accused were said to be brought and the information given at the station. The five appellants are among the persons named. This paper is signed by Maung Po Chein and apparently purports to be the record of an information laid at a Police Station. Mr. Burke's signature is also on it; but whether he signed as informant or countersigned as Superintendent of Police, it is impossible to say. There is also on the record a form headed "Burma Gambling Act, Charge Sheet," signed by Mr. Burke and dated 22nd December, which is a convenient record of various points.

The contention of the learned counsel for the appellants is that under section 6, sub-section (4), of the Gambling Act, Mr. Burke was bound after execution forthwith to submit the warrant to the nearest Magistrate empowered to take cognizance of offences otherwise than on complaint or Police Report, together with a report of the proceedings under the warrant; and that this is the only report on which under section 14, clause (i) of the Act, the Magistrate could take cog-

nizance of the offence alleged to be committed by the accused. It is no doubt the case that the word "report" in section 14, clause (b), does include the report which is required to be made under section 6, sub-section (4). But I do not see any reason whatever for thinking that when proceedings are taken under section 6, the effect is to restrict the meaning of the term "report" in section 14, clause (b), to the report required by section 6, sub-section (4). The Full Bench Ruling in the *King-Emperor v. Po Thin* (1) enlarged the meaning of the term "police report" in section 190, sub-section (1), clause (b), of the Code of Criminal Procedure. In my judgment in that case I suggested the probability that in section 14 of the Gambling Act the term report was not restricted to a report under section 6. The point having now come up for decision, I have no hesitation in deciding that the term is not so restricted. The Legislature has provided careful safeguards for the due prosecution of public gambling and against the abuse of the law on this subject. I think that, if it had intended to provide that when a house has been entered under section 6 of the Gambling Act, a Magistrate should not take cognizance of an offence committed under the Act by persons arrested under the warrant except on the report prescribed in sub-section (4) of that section, it would have made a specific provision to that effect. In my opinion the expression "report or information" in section 14 of the Act has a very wide significance and any report of a police officer is included in the term "report" as used in that section.

In the present case, it seems to me that when the report or information signed by Po Chein and Mr. Burke was placed before him, the District Magistrate had sufficient legal material before him to justify him in taking cognizance of the offences charged against the accused.

I am bound to say, however, that in my opinion the paper signed by Po Chein and Mr. Burke is not the report contemplated by section 6 of the Gambling Act. I regret that, although I have already on at least one occasion especially called the attention of the Rangoon Police to the provisions of section 6 of the Gambling Act, my remarks seem to have been entirely unheeded. I do not see how I can make the law clearer than it is in section 6, sub-section (4); but I will endeavour to do so. When a police officer, in this case Mr. Burke, has executed a warrant under that section, the law requires him forthwith, that is with the least practicable delay, to submit the warrant to a qualified Magistrate, that is, either to the District or Subdivisional Magistrate. When so submitting the warrant, he must send with it a report of the proceedings taken under it. He must make this report to the Magistrate, not to the nearest Police Station. He must also send any person arrested and all articles seized with the report and warrant to the Magistrate. If he cannot produce the accused before the Magistrate within three hours of their arrest, he may, probably must, release them on their own recognizance. Mr. Burke did none of these things, except perhaps the last. He did not, so far as appears from the records, submit the warrant to a Magistrate; he did not submit forthwith a report of his proceedings in the execution of the warrant. Instead of doing these very simple things, he endorsed "executed" on the warrant and

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he lodged an information of his proceedings with a subordinate police officer. It is true that in the course of a day or two, this information reached the proper Magistrate. But it is absurd to say that there was any attempt to comply with the plain direction of the law which required him to send the warrant and his report to a Magistrate. I hope that the proper procedure will be adopted in future.

But as I have indicated, this irregularity does not deprive the Magistrate of power to take cognizance of the offence. Nor has it been argued that an irregularity in the proceedings after entry prevents the Court from making the presumption described in section 7 of the Gambling Act. Such a contention could not be upheld.

On the merits I see no good grounds to interfere with the conviction of the appellants under section 12 of the Gambling Act. There is the evidence of the informers that the first four appellants acted as *daings* or managers of the gambling. That the house was a common-gaming house and that the persons found therein were present for the purpose of gaming is a presumption which arises under section 7 of the Act and which has not been rebutted. The evidence of the informers is to some extent corroborated by that of Mr. Burke at least as against the first two appellants. There is no doubt that the fifth appellant was in charge of the door and as such I think he may rightly be held to have assisted in conducting the business of the gaming-house.

I think that the District Magistrate was quite justified in taking into consideration the fact that the house in question had formerly been used as a common gaming-house and persons managing it had been fined; and I do not consider the sentences passed on the appellants too severe. At the same time, as they have been imprisoned for more than three weeks and as they have been released on bail, I do not think it necessary to remand them to jail. I therefore reduce the sentences on Paung Nga, Chit Ba, Sa Wa, Wa Ki and Sun Sein to sentences of imprisonment for the terms already undergone; and I direct that their bail-bonds be discharged.

The delay in the submission of the record should not have occurred.

Before Mr. Justice Birks.

SHWE HNIT AND 1 v. KING-EMPEROR.

Mr. Giles, Assistant Government Advocate,—for the Crown.

Evidence of accomplice—Criminal Procedure Code, section 288.

One of the accused in a dacoity case confessed, retracted his confession, and subsequently confirmed it. He was tendered a pardon and gave evidence as an approver before the committing Magistrate. In the Sessions Court he withdrew his confession and went back upon his evidence. The Additional Sessions Judge admitted his evidence before the committing Magistrate.

Held,—that the action of the Additional Sessions Judge was justified by the terms of section 288 of the Code of Criminal Procedure. In view of the corroborative evidence, conviction upheld and appeal dismissed.

Queen-Empress v. Soneju, (1899) I.L.R., 21 All., 175; *Queen-Empress v. Nirmal Das and others*, (1900) I. L. R., 22 All., 445; referred to.

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The two appellants in this case have been convicted of dacoity at the house of Maung Thet She on the night of the 26th October 1903, and each has been sentenced to 7 years' transportation. The learned Additional Sessions Judge has gone very carefully into the evidence, and held that the evidence of the eye-witness, Ma Shwe Hnit, and that of the approver, Maung Shwe Hman, was sufficient to justify the conviction of accused Nga Shwe Hnit and Nga Lu Wa, as they have not, like Nga Shwe Lu, proved a satisfactory *alibi*. I admitted the appeals as the approver, Maung Shwe Hman, had once retracted his confession and subsequently confirmed it, as he gave evidence as an approver after obtaining a pardon before the committing Magistrate. He finally withdrew his confession and resiled from his evidence before the Sessions Judge and alleged that he was beaten and illused.

The learned Additional Sessions Judge admitted his depositions before the committing Magistrate under section 288, Criminal Procedure Code, after referring to two rather conflicting decisions of the Allahabad High Court. These cases are *Queen Empress v. Soneju* (1) and *Queen-Empress v. Nirmal Das and others* (2). In the latter case the learned Judges go too far in my opinion. They say "that it never was the intention of the Legislature that the substance of such a statement before the Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence if it stood by itself." In that case there was no other evidence against the accused and I concur that it would be as a rule very unsafe to convict on such evidence alone. As to whether such evidence is admissible the learned Additional Judge seems to me to correctly state the law when he says:—

"Now the statement to the committing Magistrate could be used to contradict the witness even if section 288 of the Code of Criminal Procedure did not exist." (The Judge is doubtless referring to section 145 of the Evidence Act.) "If that section only authorises the use of the statements made to the committing Magistrate to contradict the witness it is superfluous. And the wording of the section is clear that the statement to the committing Magistrate may be used "as evidence in the case" (the actual words in the Act are "treated as evidence") "which I take to mean as substantial evidence of the facts alleged."

This seems to have been the view taken by Strachey, C.J., and Knox, J., in the case first cited, though their reasons are not given. The use of the word "evidence" seems to place evidence of this kind on a somewhat higher footing than the confession of a co-accused which can only be "taken into consideration" during a joint trial. Section 133 of the Evidence Act says that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But this section must be read with illustration (b) to section 114. It is obvious that if the uncorroborated evidence of an accomplice, even when unretracted, requires corroboration it must still more require corroboration when retracted.

The learned Additional Sessions Judge has not attached undue weight to this evidence, but says it is hardly of any value except as

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(1) (1899) I.L.R., 21 All., 175. | (2) (1900) I.L.R., 22 All., 445.

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against Shwe Hman himself. He has perhaps hardly attached sufficient weight to the evidence of Maung Thet She. I think it is probable that he did recognize the voice of his grandson, Shwe Hman, and he may well have been confused by the beating at first. There seems to have been some light as the dacoits struck matches and put blankets over the heads of the complainants and they did not seem to have had any difficulty in finding the property.

The Additional Sessions Judge has given sufficient reasons for convicting the accused. I dismiss the appeals.

Criminal Revision
No. 204
of 1904.
March 7th,
1904.

Before Mr. Justice Birks.

KING-EMPEROR v. THA TUN AUNG.

Reformatory Schools Act, s. 8—Criminal Procedure Code, s. 562—Procedure distinguished.

The Magistrate has confused the procedure to be adopted under section 8 of Act VIII of 1897 (the Reformatory Schools Act) with the procedure to be adopted under section 562, Criminal Procedure Code. In the former case a substantive sentence of transportation or imprisonment has to be first passed and the Court may then direct that instead of undergoing that sentence the accused shall be sent to a Reformatory School. Under section 562 the Court may, *instead of sentencing him at once* to any punishment, direct that he be released on his entering into a bond to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour. The sentence of three months' rigorous imprisonment passed in this case is therefore premature and is set aside. If the accused commits any breach of his bond he will be liable to such sentence as is provided by law and as the Magistrate may deem fit.

Full Bench.—(Criminal Reference.)

Criminal Reference
No. 5 of 1904.
February 6th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Bigge and Mr. Justice Birks.

NGA TE v. KING-EMPEROR.

Criminal breach of trust—Stake-holder misappropriating stakes—Indian Penal Code, s. 406.

A stake-holder who misappropriates to his own use the stakes deposited with him for a wager, is liable to prosecution for criminal breach of trust under section 406 of the Indian Penal Code.

Meaning of "dishonestly," "unlawful means," considered.

Queen-Empress v. Po Twe, (1881) S. J. L. B., 130, *pro tanto*, over-ruled.

The following reference was made to a Full Bench by a Bench consisting of the Chief Judge and Mr. Justice Bigge :—

Thirkell White, C.J.—The Courts are no doubt bound by the published rulings of the Special Court, the Judicial Commissioner, and the Recorder, within their respective jurisdictions, unless or until they are superseded by rulings of this Court. The Magistrate was therefore not justified in declining to follow the ruling of the Special Court

in *Queen-Empress v. Po Twe* (1). That ruling, it may be observed, was directed mainly to the consideration whether a person depositing money with a stake-holder could recover his stake and winnings by civil suit. It seems to have been held that a depositor could recover his stake, if he sued before it was paid away; but he could not recover his winnings and he could not recover if he sued for both his stake and his winnings. The question whether the stake-holder who misappropriated the deposits could be prosecuted for criminal breach of trust was summarily disposed of in the last paragraph of the judgment. The learned Judges held that as there was no legal contract to pay over to the winners, a Criminal Court could not treat the case as one of criminal breach of trust. It is not permissible to the Subordinate Courts to question this decision. But it is within the competence of this Court to examine the grounds of the decision and to decide whether it should be followed.

It seems to me that the learned Judges did not consider the point that, though there was no legal contract to pay over the stakes to the winners, there was an obligation legally enforceable on the part of the stake-holder to repay the deposit not to the winner but to the person making the wager, until he had paid it over to the winner. If, therefore, instead of paying it over to the winner, he misappropriates it, or converts it to his own use, why should the fact that there is no legal contract to pay over to the winner absolve him from the consequences? The decision to the contrary appears to be a *non sequitur*. He can be made to refund by civil suit, if he holds back the stakes. If he converts them to his own use why should he not be criminally as well as civilly liable?

The definition of criminal breach of trust in section 405 of the Indian Penal Code may be examined. Its terms are very wide. It applies to one who is in any manner entrusted with property, or dominion over property. There can be no doubt that the accused in this case was entrusted with money. The section does not require that the trust should be in furtherance of any lawful object. It seems to me that the accused clearly comes within this part of the definition. The section then provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him he commits criminal breach of trust. This part of the definition is complete in itself. It has no reference to the provisions as to disposal in violation of a direction of law, or of a legal contract. There are separate ways in which criminal breach of trust may be committed. One way is, when a person being in any manner entrusted with property dishonestly misappropriates or converts to his own use that property. The question whether the case under reference falls within this definition seems to me to depend entirely on the meaning of the word "dishonestly." Now a person is said to do a thing "dishonestly" when he does it with the intention of causing wrongful gain to one person or wrongful loss to another person (section 24, Indian Penal Code); and "wrongful gain" is gain by unlawful

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means of property to which the person gaining is not legally entitled; wrongful loss is loss by unlawful means of property to which the person losing it is legally entitled. In this case, it cannot be said that the stake-holder is legally entitled to the stakes; he may return them to the depositors and may be compelled to do so by civil suit; he may absolve himself from civil liability, by paying them over, before they are demanded back, to the winner; but there is no law or rule which justifies him in converting them to his own use. If he does so, it seems to me that he acts with the intention of causing to himself "wrongful gain" within the meaning of the definition and that he acts "dishonestly." I am unable to apprehend the force of the words "by unlawful means" in the definition of "wrongful gain," and I doubt if they have any definitive force. The definition of theft includes the word "dishonestly"; but it will be found difficult to give any value to the words "by unlawful means" in analysing the definition of theft. If the stake-holder does not act dishonestly in converting the stakes to his own use, would any one who took them out of his possession and used them for his own profit or advantage commit theft? Undoubtedly, he would be held to do so, because he acted with the intention of causing wrongful gain to himself. If the person who uses the property for himself is not a thief but the person entrusted with it, why should he be held to act otherwise than with the intention of causing to himself "wrongful gain"? In my opinion, the stake-holder who acts as the accused is proved to have done in the present case acts dishonestly and comes within the definition of criminal breach of trust.

I am unable to see that, if it is held that criminal breach of trust is not committed, the offence of criminal misappropriation is disclosed. The definition of criminal or dishonest misappropriation also includes the word "dishonestly"; and in order that the misappropriation or conversion may be held to be punishable under section 403, Indian Penal Code, it must be shewn that the accused acted dishonestly. Section 403 deals with cases in which there is dishonest misappropriation or conversion but no trust. When a trust is superadded, the offence defined in section 405, Indian Penal Code, is disclosed. As I have shown, the definition in that section includes any kind of trust. I find myself unable to hold that, if there is not criminal breach of trust in this case, there is criminal misappropriation.

The offence, if any, committed by the accused was not cheating. In order that the accused may be convicted of cheating it must be shewn that he induced some one to do a certain act, by deceiving him, and that he acted fraudulently or dishonestly. In other words, he must have the deceitful and dishonest or fraudulent intention at the time of offering the inducement. If it could be shewn, or inferred beyond reasonable doubt, that the accused from the first intended to misappropriate the stakes, he would certainly be guilty of cheating, but not otherwise.

As my learned colleague is inclined to concur in this view of the case, so far as concerns the liability of the accused to conviction

under section 406 of the Indian Penal Code, and as this opinion is contrary to that of the late Special Court, I think it desirable to refer to a full Bench under section 11 of the Lower Burma Courts Act the following question :—

“Is the holder of the stakes of a wager who appropriates or converts to his own use those stakes without the consent of the depositor or of the winner of the wager, liable to conviction under section 406 or section 403, Indian Penal Code, or for any other offence?”

Bigge, J.—I concur in the terms of this reference.

The opinion of the Bench was as follows:—

Thirkell White, C.J.—I have little to add to the remarks already made in the order of reference. For the reasons therein stated, I am of opinion that the answer to the reference should be that the holder of the stakes of a wager who appropriates them or converts them to his own use without the consent of the depositor or of the winner of the wager is liable to conviction under section 406, Indian Penal Code; and to that extent I think the decision of the Special Court in *Queen-Empress v. Po Twe* (1) should be overruled. On further consideration, and after hearing the argument of the learned Assistant Government Advocate, I am disposed to think that the words “by unlawful means” in the definition of “wrongful gain” and “wrongful loss” are intended to refer to an act which would render the doer liable either to a civil action or to a criminal prosecution.

Birks, J.—The view taken by the Special Court in *Queen-Empress v. Po Twe* (1) appears to be that when the winner of a wager sues the stake-holder for both his deposit and his winnings, such a suit will not lie under section 30 of the Contract Act; and that therefore as the stake-holder is under no legal obligation to pay the stakes to any body he may appropriate them to himself on the ground that his doing so does not cause wrongful loss to the depositor as he (the stake-holder) has not acquired the stakes by unlawful means and the depositor has lost his legal right to recover them. This finding seems to assume that a subsequent suit by the depositor repudiating the wager and seeking to recover the actual stakes deposited would be barred by any previous suit to recover the stakes and his winnings. I do not think section 13 of the Civil Procedure Code would necessarily bar such subsequent suit; the plaintiff would be litigating under a different title and the only point to be decided by the Court in the previous suit would be whether the suit was maintainable as being based on a wagering contract.

The Indian Penal Code considers primarily the intention of the wrong doer. In his *Criminal Law of India*, under the head of culpable homicide, Mr. Mayne remarks, “Culpable homicide is perhaps the one breach of criminal law in which an Indian student must be most careful in accepting the guidance of English authorities. Although in the great majority of cases the same results are arrived at in England and India the power by which they are reached is completely

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different. In England the main question to be considered is the character of the act. In India it is the intention, express or implied, of the person who does it." Now it does not seem to me in any way to affect the intention of the stake-holder in appropriating the stakes to himself that the depositor may by the form of his suit have deprived himself of all legal rights to recover them. The stake-holder may not have caused wrongful loss to the depositor but he has caused wrongful gain to himself. As it has been held that a suit will lie to recover stakes deposited if the wager is repudiated, I am of opinion that the stake-holder commits criminal breach of trust in disposing of those stakes to his own advantage. Till they are actually paid away under the wagering contract he can never tell whether that contract will be repudiated. I concur therefore in the proposed answer to this reference.

Bigge, J.—I concur in the proposed answer to the reference.

Before Mr. Justice Birks.

RAM LALL v. KING-EMPEROR.

Messrs. *Hamlyn* and *Hla Baw*—for appellant.

Transfer of case—Criminal Procedure Code, s. 528—Disqualification of Magistrate—s. 556.

The accused applied to the District Magistrate, under section 528 of the Code of Criminal Procedure, to transfer the case from the Magistrate of the second class before whom he was being tried, on the ground that the latter was corrupt and had demanded money from him. The District Magistrate, after inquiry, found that the allegation was false and rejected the application. The Magistrate then applied for leave to prosecute the accused and at the same time proceeded with the trial, which had been stayed, and convicted the accused.

Held,—that the Magistrate after he had sent in his application for leave to prosecute the accused should have taken the further orders of the District Magistrate as to whether he was to go on with the case, but that accused was not entitled to a fresh trial as he had endeavoured to procure the transfer by making a charge found to be false.

The petitioner in this case has been convicted by the second class Magistrate under section 506 of the Indian Penal Code and sentenced to three months' rigorous imprisonment for saying, "You people are aiding my opponent in my case. When my case is finished I will see you and wipe you out from the very root. I will mix you with the earth and I will break up your committee," or words to that effect. The petitioner applied to the District Magistrate to transfer the case on the ground that the Magistrate was corrupt and had demanded Rs. 500 from him in another case. The proceedings were stayed and the orders of the District Magistrate taken as to whether the case should be tried. The District Magistrate held a departmental enquiry into these charges and found them to be false. The second class Magistrate then applied for leave to prosecute the petitioner, but this was refused by the Local Government on the 9th February 1904. The application for transfer made by the petitioner was dismissed on the 11th January 1904, and on the following day the second class Magis-

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trate went on with the case against the petitioner. It was decided on the 27th January 1904 or before the orders of the Local Government with regard to the second class Magistrate's application had been received. It appears from the Chief Secretary's letter of the 9th February that the Magistrate applied for sanction to prosecute the petitioner during the course of these proceedings, for his application was forwarded on the 16th January 1904. Whether it was advisable for the District Magistrate to allow the second class Magistrate to go on with the case after such charges had been preferred against him is somewhat doubtful, but he might well have withdrawn the case when he knew that he wished to prosecute the man, for under these circumstances he could not bring an unbiassed mind to bear on the evidence. The fact that the second class Magistrate had applied to prosecute the petitioner for making false charges against himself was a disqualification within the meaning of section 526 (a), Criminal Procedure Code, preventing him from going on with the criminal charge under section 506. It would seem also that he was personally disqualified under section 556, for at the time he convicted the accused he had applied for leave to prosecute him for applying for a transfer on false grounds. No doubt he had the initial permission of the District Magistrate to go on with the case. There is also evidence on the record which has been improperly admitted. I refer to the evidence of the fifth witness, Saidu Singh, who gave evidence that the accused had criminally prosecuted him in December 1903 under section 506 and that his house was burnt in consequence. This case was compounded and the effect of the composition is that the accused was acquitted. This evidence was irrelevant under the first exception to section 14 of the Evidence Act, *vide* illustrations (o) and (p). It is not relevant as evidence of character under section 54, for when given the accused did not call evidence of good character, nor did he subsequently call evidence to prove his good character. The Magistrate has alluded to this evidence in his judgment as a good ground for convicting the accused.

I feel some doubt as to the proper course to pursue in this case. Ordinarily where there are grounds for suspecting bias the accused is entitled to a transfer, but in this case he attempted to procure that transfer by making charges against the Magistrate which were found to be false. If such a ground were allowed, the accused has only to go on making similar false charges against every Magistrate in the District to escape trial on the ground that they are all biassed against him. The accused has by his own act deprived himself of any right of transfer, though I am bound to say that the second class Magistrate should have himself asked for a transfer on the ground that it was difficult for him to deal with the case with an unbiassed mind. I have, however, examined the evidence and think there are sufficient grounds for maintaining the conviction even when the evidence of the fifth witness is excluded. The language used would be likely to cause alarm. The sentence passed was needlessly severe. The threats were of a vague nature and do not seem to have been repeated. I reduce the sentence of imprisonment to that already undergone and

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direct that the accused do give his personal bond with one surety for Rs. 100 that he will keep the peace for a period of six months under section 106 (2), Criminal Procedure Code. The bond now given will be cancelled when this order for security is carried out.

Civil Miscellaneous
Appeal No. 5
of 1904.
March 30th,
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Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Bigge.

GORID DUT BOGLA v. PERUSHAW SORABSHAW.

Messrs. Eddis, Connell and Lentaigne—for appellant (defendant).
Mr. Vakharia—for respondent (plaintiff).

Applications for *ad interim* injunctions or appointment of Receivers—Civil
Procedure Code, ss. 493, 494, 503.

An application for an *ad interim* injunction or the appointment of a Receiver should ordinarily be made by a separate petition supported by affidavit, and should not be embodied in a plaint. Save for exceptional reasons, such applications should not be granted without notice to the opposite party.

Srimuta Prosonomog Devi v. Beni Madhab Rai, I. L. R., 5 All., 556, at p. 561; *Sidesevari Dabi v. Abhogesevari Dabi*, I. L. R., 15 Cal., 818, at p. 822; *Chandidal Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459; referred to.

Bigge, J.—The appellant who lives in Moulmein and the respondent who is a resident of Bombay on 1st of October 1902 entered into partnership to deal in timber and rice. The respondent supplied all the capital which is alleged in his plaint to have amounted to considerably over six lacs and all timber and rice shipped to Bombay was consigned to his order. The partnership was dissolved on the 30th of June 1903, and on the 8th of July 1903 the parties executed a release which the respondent is now seeking to set aside while each has invoked the aid of the Criminal Courts at Moulmein against the other. The plaint which is extremely voluminous prays for *inter alia*,—

1. Cancellation of the deed-of-release.
2. An order that the books, bills and vouchers relating to the partnership which were in the custody of the District Magistrate should be brought into Court.
3. An injunction restraining the defendant from dealing with partnership property in his possession or from recovering outstandings.
4. The appointment of a Receiver.

The plaint was admitted on the 22nd January last and in the order of admission the learned District Judge appointed Mr. O'Sullivan, Receiver, to collect all the property that can be shewn to be property belonging to the partnership previous to 30th June 1903 and to collect outstandings, and issued an injunction in terms of the prayer of the plaint. This appeal is against that order.

Though I am unable to say that it is illegal to ask for the reliefs prayed for in the plaint it is obvious that the usual course of applying for an *ad interim* injunction or the appointment of a Receiver by separate petition is more convenient and should as a rule be followed.

The application for such relief should certainly always be supported by affidavit and should not rest merely on the allegations in a verified plaint, even when it sets out the plaintiff's case so minutely as the one before us. In granting an injunction without affidavit and *ex parte* the learned Judge lost sight of sections 492 and 494, Civil Procedure Code, the first of which clearly contemplates that as a general rule an application for injunction should be supported by affidavit, while 494 provides that the Court shall in all cases, except when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction direct notice of the application for the same to be given to the opposite party. There is absolutely nothing on this record to show that the object of the injunction would be defeated by delay; and seeing that while the partnership was dissolved on 30th June 1903 this suit was not filed till more than six months later the matter could not have been of pressing urgency. The learned Judge therefore acted with undue haste in granting an injunction without notice to the opposite party. Mr. Lentaigne has withdrawn the appeal as regards the attachment of the books and papers.

Though section 503 does not require in terms that as a rule the opposite party should receive notice of an application for a Receiver before an appointment is made, it is obvious both on principle and authority that, except under very exceptional circumstances, no such order should be made except on notice, and that the application should be supported by affidavit. The appointment of a Receiver is a relief which, while certain to prove inconvenient, may be also absolutely ruinous in its effects on the business of the party concerned, and therefore an application for it should be dealt with with the greatest caution and judicial discretion. The remarks of the Judges in *Srinuta Prosonomog Devi v. Beni Madhab Rai* (1) are most apposite to this case, as are those in *Sidesevari Dabi v. Abhogesevari Dabi* (2). The learned Judges there say that "both the Deputy Commissioner and the Judge seem to think that it is sufficient to justify the appointment of a Receiver if the allegations of the plaintiff shew a sufficient cause of action and if the management of the estate has been and is such as to render the appointment expedient," and I think that in this case the learned District Judge has fallen into exactly the same error.

The judgment in *Chandidal Jha v. Padmanand Singh Bahadur* (3) in which the last cited case was approved is also of great value. I am of opinion that the order of the learned Judge cannot be supported and would allow this appeal and dissolve the injunction and set aside the order appointing a Receiver. The respondent should pay the costs of this appeal.

Thirkell White, C. J.—I concur.

(1) I. L. R., 5 All., 556, at p. 561. | (2) I. L. R., 15 Cal., 818, at p. 822.
(3) I. L. R., 22 Cal., 459.

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Civil 1st Appeals
Nos. 45 and 46
of 1903.
April 4th,
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Referred to in 11 R: 39.
Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Bigge.

MA MYA ME v. MAUNG BA DUN.

Messrs. *Lewis and Giles*—for appellant (plaintiff).

Messrs. *Cowasjee and Cowasjee*—for respondent (defendant).

Adoption—Keiktima and apatittha children—Evidence—Letters of administration.

An alternative claim to the status of adoption either by the *keiktima* or by the *apatittha* mode may be made.

Evidence in the case considered, and kinds of evidence necessary to prove adoption discussed with reference to previous rulings.

Decision between two rival claimants for letters of administration, both legally qualified to obtain them.

Maung Aing v. Ma Kin, 1 L. C., 157; *Ma Sa Yi v. Ma Me Gale*, 2 L. C., 181; *Ma Gun v. Ma Gun*, 1 L. C., 147; *Ma Bwin v. Ma Yin*, 1 L. C., 151; *Ma Mein Gale v. Ma Kin*, L. C., 168; *Ma Gyan v. Maung Kywin*, 1 L. C., 393; *Ma Thine (Thaing) v. Ba Pe*, 2 L. C., 53; *Ma Tin Shwe v. Kan Gyi*, 2 U.B.R. (1897–1901), 142; cited.

Thirkell White, C.J.—The appellant, Ma Mya Me, and the respondent, Ba Dun, each applied for letters of administration to the estate of Ma Ku, deceased. Ma Mya Me claimed as the adopted daughter of the deceased; Ba Dun as her only son. Ba Dun denied that Ma Mya Me was the adopted daughter of the deceased; Ma Mya Me admitted that Ba Dun was the legitimate and only son of the deceased, but alleged that he had forfeited his claim to inherit by reason of his unfilial conduct. The two applications were heard together. The questions for decision were (1) whether Ma Mya Me was the adopted daughter of Ma Ku, and (2) whether Ba Dun had lost his right to inherit. Both these questions were answered by the learned Judge of the Original Side of this Court in the negative and as the result, Ma Mya Me's application was dismissed and Ba Dun's was granted. These appeals, which have also been heard together, are against these two orders.

In the course of the trial in the Court of first instance, the learned counsel for the appellant Ma Mya Me argued that his client's case did not rest exclusively on a claim that she was adopted as a *keiktima* child; and that if she was held not to have established adoption in the *keiktima* form she would still be entitled to a share in the inheritance if it was found that she was an *apatittha* adopted child. The learned Judge of the Original Side disallowed this contention and held that the petitioner must stand or fall by her claim to be a *keiktima* child. I do not think that this ruling is correct. In both cases, Ma Mya Me merely alleged that she was the adopted daughter of Ma Ku. I do not find that she alleged that she was a *keiktima* child; nor do I think that that is a necessary implication from the wording of her petitions. She set forth in her affidavit on her objection to Ba Dun's application that she was adopted by Ma Ku and acquired the status of her daughter. There is no special significance in the reference to the "status of a daughter." Both a *keiktima* son and an *apatittha* son are classed as sons entitled to inherit in certain circumstances. It seems to me that, on the petitions, it was open to Ma Mya Me to show that

she was either a *keiktima* or an *apatittha* child. Probably there should have been an issue on this point. The authorities which have been cited do not indicate that an alternative claim of this kind cannot be put forward in the Court of first instance. In *Maung Aing v. Ma Kin* (1), it was merely remarked that it was questionable whether the plaintiff, having based her claim on her status as *keiktima*, could properly be allowed in an application for revision to change her claim to one founded on the status of another kind of adoption. In *Ma Sa Yi v. Ma Me Gale* (2), it was observed by Fox, J., that, as the plaintiff made no alternative claim upon the basis of her being an *apatittha* daughter, it was not necessary to consider what her rights might be, if she had made such a claim. Birks, J., did not go even so far as this; but considered what would be the rights of the plaintiff if she was held to be *apatittha*. So far from indicating the view that alternative claims of this kind could not be advanced in the Court of first instance, these cases seem to indicate that alternative claims might be so made. In this case, as I have said, it does not seem to me that the appellant was precluded by anything in her petitions from relying on the status of an *apatittha* child if her status as a *keiktima* child was held not to be established. All she alleged was that she was the adopted child and had the status of a daughter. She did not specify the kind of adoption on which she relied or what sort of a daughter she claimed to be. I think, therefore, that it was open to the Court below and that it is open to this Court to find that the appellant was an adopted daughter, whether by the *keiktima* or by the *apatittha* mode. At the hearing of the appeal, the learned counsel for the appellant explicitly abandoned the claim that she was a *keiktima* child and rested his case on the claim that she was an *apatittha* child.

As regards the first question, whether the appellant was the adopted daughter of Ma Ku, there is a good deal of evidence on both sides. Of the actual facts of the adoption the evidence for the appellant was only that of Ma Kin, her natural mother; Ma Kyan Hmôn, the sister of Ma Ku; and Ma San Shwe and Ma Thin, nieces of Ma Ku. Ma Kin, who is Ma Ku's niece, said that Ma Ku wished to adopt the child when she was a year old; but that she did not consent till she was about four years of age. Ma Ku, when she first asked for the child, said that she wanted to adopt her and prosper and if she was in good circumstances the child would also be in good circumstances. The child was given in adoption in Ma Kyan Hmôn's house in the presence of Ma Kin's parents and Ma Kyan Hmôn and no one else. As Ma Mya Me was 26 at the time of the trial, this would have happened about 22 years before. The parents of Ma Kin are both dead. Ma Kyan Hmôn also testified to the actual adoption, though her evidence was not so explicit or detailed as Ma Kin's. Ma San Shwe's evidence is of less value. She testified to the adoption, and says that she was living in the house at the time but was not present. The elder relatives settled the matter. Ma Thin was also living in the

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(1) 1 L. C., 157.

(2) 2 L. C., 181.

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house at the time ; she is a sister of Ma Kin. She said that Ma Ku frequently asked for the child. She was not actually present when she was given in adoption but she came back from bazaar and found that the child was gone. Of the actual adoption, therefore, there is only the direct evidence of Ma Kin and Ma Kyan Hmôn. Ma Kin no doubt is not an impartial witness in her own daughter's cause ; and her evidence must be accepted with reserve. Ma Kyan Hmôn does not seem to have any interest in supporting Ma Mya Me's claim ; but she is on bad terms with Ba Dun who had prosecuted her for defamation, and on this account her impartiality may be questioned. But I do not think that her evidence can be entirely rejected.

The rest of the evidence in support of Ma Mya Me's claim is that of people who say that she lived for many years in Ma Ku's house and was treated by her as a daughter. On this point there is the evidence of Ma Mya Me herself, who says that she lived with Ma Ku as long as she could remember and believed Ma Ku to be her own mother ; she used to have her meals with Ma Ku and to sleep with her ; she kept the accounts of the household and the keys of the safe, and was allowed to spend what she pleased. Of course, no great weight can be attached to Ma Mya Me's evidence and she was clearly anxious to make the best of her case. Ma Kin, whose evidence is also to be accepted with allowances, says that after Ma Ku took Ma Mya Me, the child never lived with her own mother or was maintained by her in any way. Ma Kyan Hmôn's evidence is to the same effect ; and she says that the people of the quarter thought Ma Mya Me was Ma Ku's daughter. Maung Po Thaug (1), who does not seem to be particularly favourable to Ma Mya Me though he is her second cousin, says that she was treated like a daughter by Ma Ku ; and, in a qualified way, that Ma Ku's friends and acquaintances take her to be a sort of adopted daughter. His evidence seems to me of a very shifty kind. But much of it corroborates Ma Mya Me's story. He says that there was a difference in the way Ma Mya Me was treated by Ma Ku, as compared with other girls living in the house. There was a difference in confidence and consideration. Ma Mya Me was entrusted with the keys of the safe ; went everywhere with Ma Ku ; and slept with her. This witness was consulted by Ma Ku as to the disposition of her property, of which she intended to give Ma Mya Me as well as others a share. From what Ma Ku told him he thought Ma Mya Me was casually adopted (*apatittha*). In the proposed disposition of property, as testified to by this witness, it is clear that it was intended to make a distinction favourable to Ma Mya Me as compared with other girls. Of that part of this witness' evidence which is unfavourable to Ma Mya Me's claim I shall speak later. The evidence of Maung Po Thaug (2), who is Ma Ku's distant cousin, is strongly in favour of the appellant. He said at first he thought Ma Mya Me was Ma Ku's own daughter. Ma Ku spoke of her and treated her as such. They were always together ; and Ma Mya Me kept the keys of the safe and took money or jewellery as she thought fit. So far as he knew Ma Mya Me was regarded by the people as an adopted daughter. There was a vast difference between the treatment of Ma Mya Me

and that of Ma E Mya, another woman living in the house. The former was adorned with jewels and used to sleep with Ma Ku. It was common talk among the relations that she was adopted. Ma Lok, a neighbour and no relation, says that Ma Mya Me was in the position of a child. She has known her as living in Ma Ku's house for 14 or 15 years. Ma Ku treated Ma Mya Me as a daughter and addressed her as such; and also told the witness that she had adopted her. She was kept as a proper daughter; by which the witness seems to mean as a *keiktima* child. Ma Hmwe Yon, another neighbour, saw Ma Ku and Ma Mya Me always together when they went to the Pagoda, the monastery, and Moulmein. They addressed each other as "mother" and "daughter." Every one said that Ma Mya Me was Ma Ku's daughter, adopted since infancy. Ma Kin (2) is another neighbour, sister of Ma Lok. She has seen Ma Mya Me in Ma Ku's house ever since she was 8 or 10 years old. Ma Ku said she was her daughter and treated her as such in every way. She took Ma Mya Me with her to Moulmein. Ma Ngwe, another neighbour, knew Ma Ku for seven or eight years and saw Ma Mya Me in her house all that time. She was like a daughter and was addressed as such. Ma Ku said she was her daughter and for some years the witness thought she was Ma Ku's own daughter. Ma San Shwe is Ma Ku's niece. She says that after being adopted Ma Mya Me lived with Ma Ku up to her death and was treated like a daughter. They called each other "mother" and "daughter." Ma Thin is another niece of Ma Ku. Her evidence is to the same effect as that of the last witness. Ma Pu, who was examined on commission, says that Ma Ku told her that Ma Mya Me was adopted by her. Ma Mya Me lived in Ma Ku's house for the last 20 years and was treated as a daughter. She first saw her when she was six or seven years old. Ma Mya Me was treated differently from Ma E Mya and others; and went with Ma Ku to Moulmein, Mandalay and Ceylon. Besides this evidence of witnesses called by the appellant, there is the evidence of the respondent's witness Maung Shan O. He saw Ma Mya Me in Ma Ku's house since she was five or six years old. She was treated differently from Ma E Mya; used to keep the keys and slept together with Ma Ku. He thought Ma Mya Me lived in Ma Ku's house as a daughter. Ma Ku treated her as such. This evidence seems to me of considerable value as the witness was certainly hostile to the appellant and did all that he could to minimize any part of his evidence which was in her favour.

On the other hand, there is evidence to disprove or render improbable the fact of the alleged adoption. The appellant's own witness, Maung Po Thaug (1), says that Ma Ku told him she would not keep a *keiktima* daughter; and that some friends of the family considered her as only living with Ma Ku and not as adopted by her. Ba Dun, the respondent, says that Ma Mya Me first came to his mother's house when she was ten or eleven years of age. Ma E Mya and a little girl named Ma Thin Hlaing were treated in the same way. But as it is not suggested that this witness lived continually in Ma Ku's house during the past ten years, his evidence on this point, if

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otherwise of value, does not carry much weight. Maung Po Pe is Ma Ku's brother and therefore Ma Mya Me's uncle. He says that Ma Mya Me went to live in Ma Ku's house when she was six or eight years old. She went there to be taught. She did not live there altogether but only when her parents were on the move. He never heard that she was adopted by Ma Ku. But in cross-examination he said that Ma Mya Me went to live with Ma Ku when she was six or seven years old and lived with her ever afterwards. This witness had a varied career. He was employed in the Telegraph Department for 7 or 8 years, in Police for 4 or 5 years, as a teacher (presumably of Burmese), in a rice-mill for 2 years; and for the last 2 years he has worked only off and on. I doubt whether this man is of a class on which much reliance can be placed. Ma Pyu, who was an intimate friend of Ma Ku for about thirty years, says that she first saw Ma Mya Me in Ma Ku's house when she was eight or nine years of age. She came at first to stay a while and go away a while. Afterwards she stayed there permanently. She was treated like Ma E Mya. This witness also says that she actually suggested to Ma Ku that she should take over the child and adopt her; and that Ma Ku declined to do so. She made this suggestion because Ma Ku was like a mother to the child. Ma Nyan I says that Ma Mya Me first came to live in Ma Ku's house when she was seven or eight. She never heard that Ma Ku had adopted Ma Mya Me. The appellant lived permanently with Ma Ku till her father's death, when she went to her mother's house for three or four months and then returned to Ma Ku's. This witness also advised Ma Ku to adopt Ma Mya Me by deed in order that she might be *keiktima*. But Ma Ku declined to have a deed. The only reason on the face of the record for throwing any doubt on the evidence of this witness is that she owes the estate of Ma Ku Rs. 400; but it has not been suggested that she is under the influence of Ba Dun on account of this debt. Shan O was Ma Ku's business agent in Moulmein. As I have already noted, part of his evidence is in favour of Ma Mya Me. But he says that he never was told by Ma Ku that she had adopted the appellant; and he never heard any one else say it till after Ma Ku's death. This witness also tried to get Ma Ku to adopt Ma Mya Me, but she curtly refused. His explanation of the reason why he made this suggestion is vague and unsatisfactory. He made it because he thought it would be fitting. It may be observed that he saw Ma Mya Me in Ma Ku's house since she was a child of five or six years. There is nothing on the record to show that this witness is not worthy of credit. But his evidence seems to me to be inconsistent in parts. Maung Paw merely says that he knew Ma Ku and never heard that she had adopted Ma Mya Me. He lived in Moulmein and came to Rangoon only occasionally. Ma E Mya who lived also in Ma Ku's house, and who claims to be an adopted daughter, says that Ma Mya Me came to live with Ma Ku when she was nine or ten years of age. After her father's death, she left the house for a considerable time. This witness never heard that Ma Mya Me was adopted by Ma Ku. At the same time, she said that Ma Mya Me was treated

like herself and that she therefore thought that Ma Mya Me, too, was an adopted child; but afterwards she said she did not think so. As the learned Judge of the Court of first instance has pointed out, this witness' evidence is of no value. She has clearly been bought over by the respondent. Great reliance has been placed on the evidence of Maung Shwe Waing, an unimpeachable witness in every respect. He says that he lived opposite Ma Ku for four or five years and was on visiting terms with her. He never heard that she had adopted Ma Mya Me and he thinks he would have known if the girl had been adopted when he was living near Ma Ku. But it seems to me that this witness proves too much; for he never even saw Ma Mya Me or knew that she was living in the house; and she certainly was living there on the footing of a daughter or at least of a member of the household, during the period of his acquaintance. If he was so little acquainted with the family as not to know of Ma Mya Me's existence, he might very well have been ignorant of her status in the house. It is not clear, moreover, whether he meant to say that if she had been adopted prior to his becoming acquainted with Ma Ku he would have known it, or that if the adoption had taken place in his time he would have been aware of it. The distinction is of some consequence. Ma Thet Ta is the wife of Po Thaung (1). She knew Ma Ku well and never heard that she had adopted Ma Mya Me. We are asked to treat this witness as an obviously false witness because she gave an account of Ba Dun's conduct towards his mother in direct contradiction to what the learned Judge who tried the case describes as the absurd story set up by Ba Dun. I think that the inference is reasonable; and that this witness may be disregarded. In any case, the evidence is of little value. If, however, this witness has been suborned, the fact tends to throw doubt on so much of the evidence of her husband Po Thaung as is in Ba Dun's favour, or to explain his attitude as a trimmer. Po Lwin says that he was brought up by Ma Ku and that Ma Mya Me came to live there when she was 8 or 9. He would be at the time about 10 or 11. When Ma Mya Me's father died, she went to her mother's house and stayed there for over two months. He never heard that Ma Ku had adopted her. The only reason to suspect that this witness may be partial is that when he was a boy he lived for two years at Bassein with Ba Dun. I think some weight should be attached to this fact. It is also apparent that he did not live continuously with Ma Ku and may not therefore have known the relationship between Ma Ku and Ma Mya Me. Considering his own age at the time, I am not disposed to attach much value to his evidence as to Ma Mya Me's age when she came to live with Ma Ku. According to his evidence, Ma Mya Me first came to Ma Ku's for purposes of tuition and came permanently when her parents went to Bassein and she was ten years old. Maung Pe Gyi, who is a clerk in the Irrawaddy Flotilla Company's office and seems to be a man of years and respectability, says he was a tenant of Ma Ku and that Ma Mya Me came to live with her when she was about eight years old. He never heard that she was adopted; nor does he seem

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to have been aware that she came to learn to read and write. It does not seem that he had any special opportunity of knowing either fact. The only point on which his evidence is of any value is as to Ma Mya Me's age when she came to live with Ma Ku.

This is the substance of the evidence on both sides, so far as it concerns the question of Ma Mya Me's adoption. On the evidence, it seems to me to be established beyond any possibility of doubt that for a period variously stated as from 14 to 22 years, the appellant Ma Mya Me lived in the house of Ma Ku, was treated by her as a daughter, with marked distinction as compared with other members of the household, took her meals with her, slept with her, was entrusted with the keys of the safe where money and jewels were kept, and accompanied her on visits to Moulmein, Mandalay and Ceylon. As to the period during which this intimate relationship lasted, there are no doubt discrepancies in the evidence of several witnesses. There is some direct evidence that Ma Mya Me was taken over at the age of about four years; on the other hand the respondent's witnesses for the most part say that she was some years older; and some of the appellant's own witnesses did not see her in the house till she was six or seven or eight or ten years old. On the other hand, Shan O, the defendant's own witness, says that she came when she was five or six. It is impossible to expect consistency in a matter of this kind. There are four witnesses who say definitely that the child was adopted at the age of three or four years. As I have said, there seems to be no very good reason to disbelieve Ma San Shwe or Ma Thin, whatever doubt there may be as to Ma Kin and Ma Kyan Hmôn. Taking the evidence as a whole, and paying special regard to that of Maung Po Thaug (2), Shan O, and Pe Gyi, I think it safe to conclude that Ma Mya Me lived with Ma Ku for about 20 years. That she was treated as a daughter and that she was not on the same footing as Ma E Mya and others in the house seems to me to be fully proved. Even Po Thaug (1), who was not entirely favourable to the appellant and whose wife was distinctly hostile and has been discredited, admitted as much, and so did the respondent's own witness Shan O.

There is evidence that Ma Ku said that she had adopted Ma Mya Me and still more evidence that she described her as her daughter. I can see no ground for disbelieving the evidence in general of Maung Po Thaug (2), Ma Lok, Ma Hmwe Yôn, Ma Kin (2), and Ma Ngwe on these points, though they may have exaggerated to some extent the explicit nature of Ma Ku's description of Ma Mya Me. I distrust the evidence of the three witnesses who, according to their own account, officiously advised Ma Ku to adopt Ma Mya Me. It would, indeed, be curious if these three persons, who were merely friends of Ma Ku, had taken upon themselves each independently to tender the same impertinent advice. Even if they did so, which seems to me improbable in the extreme, I do not think that any inference adverse to the appellant could reasonably be drawn from Ma Ku's natural reply that the advisers should mind their own business. Again, if this advice really was tendered, the facts seem to me to support the

evidence that Ma Mya Me was treated as a daughter though not secured as such by a formal deed. I am unable to see that the evidence for the respondent in any way disproves the account given by the appellant of the nature of her relations with Ma Ku. As to the fact of the adoption, there is some evidence, possibly the best that could be procured after this lapse of time, that Ma Mya Me was actually given in adoption by her mother in the presence of three relatives of standing. I am not prepared to say that this is sufficient to prove the fact of the adoption. But I think that the bearing on this evidence of the other facts held to be established should be considered. The other facts which I think are established are that for about 20 years Ma Mya Me lived in Ma Ku's house and was treated as a daughter and that she was regarded as Ma Ku's adopted daughter by members of Ma Ku's family and some at least of her friends and neighbours. On the latter point, I see no good reason to reject the evidence of the appellant's witnesses. The evidence of the respondent's witnesses to the contrary seems to me of far less value and quite insufficient to outweigh that of the witnesses on the other side.

From this point of view I proceed to consider the legal aspect of the case. I think it will be convenient to summarize the cases which seem to bear upon the subject. There is a course of decisions in Lower and Upper Burma which may be regarded as settling the Burmese Buddhist law in relation to adoption and which do not purport to be in any way inconsistent with one another.

The first case is that of *Ma Gun v. Ma Gun* (3) decided by Mr. Sandford, Judicial Commissioner, so long ago as 1874. I cannot find that it has ever been dissented from. After citing texts from the *Manugyè Dhammathat*, the learned Judicial Commissioner said:—

“It is plain that the law requires no ceremony, no written document, nothing indeed but a request from parents, and a notorious and public taking and bringing up, in order that, or with the understanding that they, *i.e.*, the children, may inherit.

In this case we have one witness who deposes to a formal asking of the girl from her mother and a formal consent given; and it is sufficiently proved, in my opinion, that the girl, consequent on this asking and consent, left her mother's house and lived for some twelve years with the adoptive parent. It is also shewn that the parents made no secret of the adoption.

I think this is a sufficient fulfilment of the requirements of the law in regard to publicity. The girl left her mother's house and lived openly and publicly in the adoptive parents' house. Short of a formal publication of the adoption in the market place, or in the presence of elders, which it appears the law does not require, it is difficult to say what could be a more effective method of making the adoption public and notorious than the unconcealed taking of the girl home and supporting her for twelve years.

Adoption was the only explanation of the proceeding that could have suggested itself to any one in the neighbourhood who took the trouble to think about it. Just as an open living together is among Burmans presumptive proof of marriage, so I should hold that the open bringing up of a child, and supporting her for so many years, is presumptive proof of adoption, especially where the parents are childless and the child is a niece.

And, in addition to this, we have here the communications made to relatives and neighbours.”

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In the case of *Ma Bwin v. Ma Yin* (4), decided by the Special Court in 1878, there seems to have been no evidence of the original adoption but there was strong evidence that the alleged adoptive father recognized and spoke of the plaintiff as his adopted daughter; and her claim was upheld by the Court.

The next case is that of *Maung Aing v. Ma Kin* (5). In that case the plaintiff Ma Kin had been brought up by one Maung Kaing and his wife since infancy. The evidence as to the original adoption was conflicting and inconclusive. But there was good evidence that the plaintiff lived with Maung Kaing and his wife as their daughter and that they publicly recognized her as their adopted child. The adoption was held to be established.

The next case, that of *Ma Mein Gale v. Ma Kin* (6) is the case most frequently cited in recent years. The question was whether Ma Kin was the *keiktima* adopted daughter of U To. There was some evidence of the original adoption; that U To and Ma Kin lived in the same house and that she called U To father. But the evidence of the manner in which Ma Kin was treated by U To and of his acknowledgment of her as his adopted daughter was conflicting and weak. The learned Judge observed in words that have been often quoted:—

“It has been held that no particular ceremony is required for adoption, but there can be no doubt that an essential part of adoption is publicity of the relationship and of the intentions of the adoptive parents in regard to the inheritance of their estate by their adoptive child * * *

* * * The existence of the tie of adoption can be gathered only from the conduct and declarations of the parties themselves. The law thus most properly requires that adoption shall not be a hole-and-corner matter, but a matter of publicity and notoriety so that there may be no room for questions to be raised and disputes to be encouraged. * * * The Courts are therefore bound to insist upon strict proof when questions of the kind come before them and it seems that this has generally been done.”

The adoption was held not to be established.

The next case is that of *Ma Gyan v. Maung Kywin* (7) which was decided by the learned Judge who decided the case last cited. The question was whether one Ma Gyi was adopted by one San Aung. The material part of the judgment is as follows:—

“Ma Gyi was the daughter of Maung Kywin and, her mother having died when she was an infant of some twelve months old, San Aung and his wife, who were then childless, took her and brought her up. This took place over 30 years ago, and Ma Gyi never returned to her natural father's house but always lived with San Aung up to the time of her marriage. She was treated by San Aung and his wife, So Me, as a daughter; they called her daughter; and she called them father and mother; and she called her own father, at times at least, uncle.

There is no evidence that can be quite trusted of what took place exactly when the child was made over to San Aung, but considering the lapse of time, this is no matter of surprise.

* * * The want of formality was perfectly natural in view of the relationship between the two fathers. Some of the evidence is valueless and there are contradictions or discrepancies on certain points of detail, such as the circumstances of the giving of Ma Gyi in marriage, but they are not of any solid importance. The main broad facts remain clear, that Ma Gyi was taken out of

(4) (1878) 1 L. C., 151.

(5) 1893) 1 L. C., 157.

(6) (1893) 1 L. C., 168.

(7) (1895) 1 L. C., 393.

the family of her natural father, that she never returned to it, and that she was taken to the family of her own father's brother as the daughter of the house. It is impossible to believe that she could have been taken over by San Aung and his wife in any other capacity, and it is equally impossible to believe that her father would have allowed her transfer from his family to his brother's in the way of adoption of any kind inferior to the *Kitima*, or what may be called the perfect form."

The adoption was upheld.

The case of *Ma Thine (Thaing) v. Ba Pe* (8), decided by the High Court of Calcutta on appeal from the Recorder of Rangoon, may also be cited. In this case there seems to have been no evidence of the circumstances of the actual adoption; at least no reference is made thereto in the judgment of the Court. The adoption was upheld on evidence of treatment and acknowledgment.

The case of *Ma Tin Shwe v. Kan Gyi* (9) is one in which it was held that *Keiktima* adoption could be proved by treatment and acknowledgment, even though it was proved that the child had originally been brought during a war and that his parents were unknown.

Finally, there is the case in this Court of *Ma Sa Yi v. Ma Me Gale* (10) in which the learned Judges adopted, without modification, the principles laid down in the case of *Ma Mein Gale v. Ma Kin* (11).

The effect of these cases seems to be that the publicity of the relationship is the essential point to be established. It has not been laid down at any time that there must be strict proof of a formal and public taking over of the adopted child with a definite pronouncement of the intention of the adoptive parents that the child should inherit, or share in the inheritance of, their estate. If the law required strict proof of the circumstances of the original adoption, proof in these cases, unless there was a formal deed, would usually be a very difficult matter. For the investigation of these claims is commonly undertaken many years after the date of the alleged adoption. In no case that has been reported in which the adoption has been upheld has there been strict proof of the original giving and taking. In my opinion, when Mr. Burgess spoke of an adoption not being a hole or corner affair, he referred not to the original taking so much as to the general publicity and notoriety of the relationship. I infer this more particularly from his remarks in the case of *Ma Gyan v. Maung Kywin* (12) which was tried after the case of *Ma Mein Gale v. Ma Kin* (11) had been decided and reported. In that case, there was clearly no formality, no summoning of neighbours and friends. Nor were there any such formalities in the case of *Ma Gun v. Ma Gun* (13) where they were explicitly held to be unnecessary. In both these cases, the complete severance of the adopted child from the house and family of its natural parents and its maintenance for a long course of years in the family of its adoptive parents on the footing of a child were held to be strong evidence of the fact of an adoption. The Upper Burma case of *Ma Gyan v. Maung Kywin* and the Lower Burma

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(8) (1897) 2 L. C., 53.

(9) (1899) 2 U.B.R. (1897-1901), 142.

(10) (1901) 2 L. C., 181.

(11) (1893) 1 L. C., 168.

(12) 1 L. C., 393.

(13) 1 L. C., 147.

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case of *Ma Gun v. Ma Gun* seem to me very similar to the present case. It may be true that Burmans take children into their houses and keep them without adopting them. But no case has been cited, nor am I aware of any, in which a child has been taken into a family completely severed from its own family in the lifetime of its parents, and openly treated as a child of the adoptive house and not as a mere dependant, and in which it has been held that there has been no intention that such a child should be regarded other than as a waif and stray brought up out of charity. It seems most unlikely that the natural parents would consent to such an arrangement. There is no evidence in this case that Ma Mya Me ever went back to her mother's house after she went to live with Ma Ku, except for a brief visit of two or three months after her father's death. Even if this visit is held to be proved, I do not think it can be regarded as breaking the continuity of her relationship to Ma Ku. She remained with Ma Ku, but for this brief visit, probably for 20 years up to the time of Ma Ku's death. It seems to me that the facts which are proved afford the strongest basis for the presumption that she was adopted by Ma Ku; and in coming to this conclusion I do not think that I am departing from the principles which have been laid down in the previous cases either in Lower or in Upper Burma. In my opinion, Ma Mya Me's claim to be an adopted daughter of Ma Ku has been established beyond reasonable doubt. I think that whatever may have been the form of adoption, this finding is sufficient to give her the status necessary to entitle her to obtain letters of administration; and I do not think it necessary to express an opinion as to whether she was a *keiktima* or *apatittha* child.

As regards the second question, I concur with the learned Judge of the Court of first instance in thinking that the respondent, Ba Dun, is not shown to have forfeited his rights to inherit by his conduct towards his mother. The son who is not entitled to inherit is the dog-son or, I think, more properly, the "son like a dog," who is disobedient to his parents and lives independently of them, who is self-willed and disobedient to his parents, who is disobedient to his parents and behaves like an enemy, who has been expelled from the family on account of disobedience, who is disowned by the parents for disobedience.* The subject of exclusion is also more fully treated in a later section of the Digest,† and I think it is clear that something more than a single act of opposition or disobedience, and something quite other than general misconduct, are regarded as grounds of exclusion. As was said by the learned Judicial Commissioner of Upper Burma (Mr. Adamson) in *Ma Tin Shwe v. Kan Gyi*,‡ the strictest proof would be required that a son had conducted himself as an enemy to justify a Court in disinheriting him under a law. The mere fact of the institution of a suit by a son to obtain from his mother a share of his father's estate cannot in itself be regarded as unfilial conduct.

* Digest of Buddhist Law, section 17. | † Section 21.

‡ 2 U. B. R. (1897—1901), 142.

Nor does the fact that the suit was brought out of time or that a larger share than the law allows was claimed make it so. I think it is clear that the respondent quarrelled with his mother about money matters some years ago and left her house. But I think it is also reasonably certain that they were to some extent at least reconciled for some time before her death, though the evidence as to the affectionate terms of their relationship is no doubt exaggerated. I think therefore that Ba Dun is not shown to be disqualified from inheriting and that he too has the status necessary to entitle him to obtain letters of administration.

The question then remains for consideration whether letters should be granted to the appellant or respondent. I do not think exclusive weight should be attached to the consideration that respondent is entitled, as may be the case, to the larger share. The law does not limit the discretion of the Court in this way. The appellant Ma Mya Me lived with the deceased up to the time of her death and apparently assisted in the conduct of her affairs. There has been no suggestion that she is not of good character; and though still comparatively young she is of the age of discretion. There seems no reason why she should not manage the estate properly. The respondent on the other hand, though he is not proved to have done anything which would disentitle him to inherit, has for long lived apart from his mother and has had independent interests. He is not shown to be an habitual drunkard; but it is, I think, proved that he came drunk to his mother's house and it is unlikely that this is a casual and isolated instance of inebriety. It is clear that he is an untruthful person as he had made statements on oath at different times of an entirely inconsistent nature. He is not a scrupulous person; for he made up a story in this case which the learned Judge of the Court below characterized as absurd and, in my opinion, he attempted to support that story by false evidence. In my judgment, there is no doubt that the estate is likely to be administered better by Ma Mya Me than by Ba Dun.

I would therefore reverse the orders of the Court of first instance; dismiss Ba Dun's application; and direct the issue of letters of administration to Ma Mya Me on the usual terms as regards security. I would direct Ba Dun to pay the costs throughout; and I would fix advocates' fees for the hearing of the appeal at five gold mohurs.

Bigge, J—I concur.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

KING-EMPEROR v. KAUNG NGA.

Bail bonds—Liability of sureties—Criminal Procedure Code, ss. 498, 499.

When an accused person is released on bail with sureties, the sureties should ordinarily be made jointly and severally liable for the same amount as the accused, and cannot be made liable for more. The total of the sums recovered from them must not exceed this amount.

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Crown v. Nga Naing, 1 L. B. R., 79; *Queen-Empress v. Nga Hla*, 1 U. B. R., (1897—1901), p. 26; referred to.

In this case Kaung Nga, who was accused under section 324, Indian Penal Code, executed a bond with two sureties, Saung Nga and Po Hla, for his appearance whenever required by the Court. The accused absconded and the bail bond was properly declared by the Court to be forfeited. The bond was in Police Form No. 17 and purported to bind the principal in Rs. 100 and the sureties in Rs. 200 each. The Magistrate ordered the sureties to pay the sum of Rs. 400 and that amount has been paid by them.

In *Crown v. Nga Naing* (1), it was held that, in the case of a bond executed under section 118, Code of Criminal Procedure, the amount for which the sureties should be made liable was the same as that for which the accused is made liable; and the reasons for this view were explained in *Queen-Empress v. Nga Hla* (2), which is a case decided by the late learned Chief Judge as Judicial Commissioner of Upper Burma. It seems to me that the reasons on which these rulings are based apply with at least equal force to a bond such as this, executed under section 499, Code of Criminal Procedure. Section 498 speaks of "the amount of every bond." Section 499 directs that before any person is released on bail a bond for such sum of money as is thought sufficient shall be executed by the accused, and in the case of a release on bail, by one or more sureties. Section 514 refers to the penalty of the bond. It is clear that the intention is that the penalty of the bond should be a specific sum which the principal and the sureties bind themselves jointly and severally to pay in case of default. This sum can be recovered from the principal or from any or all of the sureties, but more than the penalty of the bond in all cannot be recovered from them. In this case the amount of the bond which the accused bound himself to pay was Rs. 100 and the sureties could not be made liable for more than that sum. Each of the sureties might be made liable for part of the penalty of the bond. Thus in this case, each of the sureties might have been bound in the sum of Rs. 50; or one might have been bound in the sum of Rs. 75 and one in the sum of Rs. 25. But the most convenient plan is for the sureties to be made jointly and severally liable for the full amount of the bond. In this case the intention may have been to require security to the extent of Rs. 500, in which case the principal should have been bound in that sum and the sureties should have been jointly and severally liable in the same amount. But as the bond stands, I am of opinion that not more than Rs. 100 could be recovered from the sureties.

I therefore direct that the sum of Rs. 300 be refunded to the sureties, Saung Nga and Po Hla, in such proportions as will make the total sum paid by each Rs. 50.

(1) 1 L. B. R., 79.

(2) 1 U. B. R., (1897—1901), p. 26.

Before Mr. Justice Birks.

KYIN BAW *v.* MAUNG LON.

Maung Kin—for appellant (defendant).

Messrs. *Pennell and Thin*—for respondent (plaintiff).

Civil 2nd Appeal
No. 171 of
1903.
April 19th,
1904.

Appeals—Question of limitation not raised on first appeal—Civil Procedure Code, s. 542—Limitation Act, s. 4.

If a question of limitation is not included in the grounds of appeal, the appellant is not entitled to be heard on it without the leave of the Court granted under section 542 of the Code of Civil Procedure. The statement, as a ground of appeal, that "the judgment of the lower Court is contrary to law," does not indicate that a question of limitation was raised in the lower Court, or is intended to be raised in the Appellate Court.

A Court of Appeal is not bound by section 4 of the Limitation Act to inquire into a question of limitation which has not been raised in the lower Court, but is raised for the first time orally before it.

Dutta v. Kasai, I. L. R., 8 Bom., 535; *Ahmed Ali v. Warri Hussein*, I. L. R., 15 All., 312; *Maung Shwe Sa v. Maung Shwe Gon*, P. J. L. B., p. 539; cited.

The plaintiff-appellant in this case sued to recover 11.12 acres of paddy land on payment of Rs. 400. The suit was really one for pre-emption. It is possible that this fact may have escaped the notice of the Judge of the Court of first instance, for the plaint is rather voluminous. It appears from paragraph 4 of the plaint that the plaintiff's mother Ma Kyein Aung sold the land in dispute to 1st defendant, Maung Kyaw Dun, with the consent of the other heirs, for Rs. 400, on the understanding that if the purchaser wanted to sell again he was to sell to one of the co-heirs for the same amount. Paragraph 7 sets out that in 1901 plaintiff wanted to redeem the land from the 2nd defendant, to whom the 1st defendant had mortgaged it, but redemption was refused unless Maung Kyaw Dun joined in the redemption. Paragraph 9 alleges that the plaintiff afterwards discovered that Ma Nyein Aung had sold the land outright in 1895 to the 2nd defendant. Paragraph 10 alleges fraud on the part of the 1st and 2nd defendants. No question of limitation was raised in the Court of first instance and both Courts have agreed in decreeing plaintiff's claim.

It is now urged that the plaintiff's claim was really for pre-emption and that the suit is barred under article 10 of the 2nd schedule of the Limitation Act.

An affidavit has been filed saying that the 1st ground of appeal taken in the Court below, which was "that the plaintiff had no cause of action," was explained to the Judge of the Court of First Appeal as meaning that the suit was barred under article 10 of the 2nd schedule. Now I think it is clear that the 10th paragraph of the plaint alleges fraud, and under section 18 of the Limitation Act, some time which would otherwise run against the plaintiff would have to be excluded if this fact were established.

The Court of first instance seems to have suspected the 1st defendant of fraud as he kept out of the way, and it has found that the 1st defendant and his mother sold the land to the 3rd defendant without the knowledge and consent of the other heirs and without such

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circumstances as would justify a mother in selling inheritance paddy lands.

If I allowed the case to be remanded to decide the point of limitation it would be necessary to frame an issue as to whether time should not be excluded on account of fraud.

Maung Kin for the appellants relies on section 4 of the Limitation Act, illustration (b); but this section does not require an Appellate Court hearing an appeal to ascertain of its own motion that the original suit was filed in time. Though the original suit might have been time-barred the decree of the Court is valid unless it is reversed, and its proceedings are not void as would be the case if the Court entertaining the plaint had no jurisdiction to try it.

Mr. Pennell has quoted the case of *Dutta v. Kasai* (1), decided by West, C.J., and Heridas, J., which has been followed by three Judges of the Allahabad High Court in *Ahmed Ali v. Warri Hussein* (2). In the 1st of these cases the question of limitation was not raised on 1st appeal at all and the appellant was held to have waived it. This case has not been overruled and was noticed with approval by the Judicial Commissioner in *Maung Shwe Sa v. Maung Shwe Gon* (3). In the second case the point that the 1st appeal was barred was only taken orally in the 2nd appeal; the Court held that the appellant was not entitled as of right to be heard in support of it without the leave of the Court granted under section 542, Civil Procedure Code. This ground will also apply to the action of the Judge in the Court below. The question of limitation was not raised in the Court of first appeal. The first ground of appeal was only that the plaint disclosed no cause of action. No application seems to have been made to amend the grounds of appeal, and it is obvious that the plaint does disclose a cause of action and that this is quite a distinct allegation from that now raised, *i.e.*, that there was a cause of action but it was barred by limitation.

The object of section 542 is to confine the appeal to specific grounds. In many of the appeals that come before this Court such allegations as "the judgment of the Court of Appeal is contrary to law" are inserted. Such allegations if unexplained do not give a respondent a clear notion of the case he has to meet.

I entirely disapprove of the practice of filing affidavits in the Court of Second Appeal to atone for the neglect of the advocate in presenting his case in the Court below.

As the Judge says nothing in his judgment about the question of limitation it must be taken that he refused to allow this ground to be raised under section 542, Civil Procedure Code, and his action in so doing would be justified by the rulings above quoted. On the merits the Courts below have concurred and there is no other question of law involved. I dismiss the appeal with costs.

(1) I. L. R., 8 Bom., 535.

(2) I. L. R., 15 All., 312.

(3) P. J. L. B., p. 539.

Before Mr. Justice Birks.

KING-EMPEROR v. KYAN BAW.*

Examination of accused—Criminal Procedure Code, ss. 244, 342, 537.

The examination of the accused, prescribed by section 342 of the Code of Criminal Procedure, is imperative in all cases.

In a summons case, where the Magistrate did not examine the accused under section 342, nor hear him and take the evidence for the defence under section 244, *Held*,—that the trial was invalidated by these omissions. Conviction set aside and retrial ordered.

Thet U v. King-Emperor, 2 L. B. R., 115, referred to.

For the reasons stated by the District Magistrate in his order of reference the conviction is set aside and a new trial ordered. The Magistrate should note that section 342, Criminal Procedure Code, is imperative and requires the accused to be examined after the witnesses for the prosecution have been examined. This applies to all trials, but in summary trials the provisions of section 364 as to the mode of recording such examination do not apply. The answer of the accused recorded under section 242 in summons cases takes the place of a plea to a formal charge, but when the witnesses for the prosecution are finished, section 244 requires the Magistrate to hear the accused again and to take such evidence as he produces in his defence. In the present case the trial is bad as the accused has neither been examined nor called on for his defence. The attention of the Magistrate is invited to the Ruling in *Nga Thet U v. King-Emperor* (1).

Criminal
Revision No. 426
of 1904.
April 20th,
1904.

Full Bench—(Criminal Reference).

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Bigge and Mr. Justice Birks.

RAJ CHUNDRO v. PO SEIN.

Jurisdiction of High Court to revise proceedings under Chapter XII, Criminal Procedure Code—Criminal Procedure Code, s. 453 (3).

A High Court not appointed by Royal Charter is barred by sub-section (3) of section 435 of the Code of Criminal Procedure from interfering on revision in proceedings taken under Chapter XII of the Code.

Pandurang Govind, (1900) I. L. R., 24 Bom., 527; *Laldhari Singh and others v. Sukdeo Narain Singh*, (1900) I. L. R., 27 Cal., 892; *Krishna Kamini v. Abdul Jabbar*, 6 C.W.N., 737; *Hurbullubh Narain Singh v. Lutcheswar Prosad Singh*, (1899) I. L. R., 26 Cal., 188; *Sri Mohan Thakur v. Narsing Mohan Thakur*, (1900) I. L. R., 27 Cal., 259; *Krishna Kamini v. Abdul Jabbar*, (1903) I. L. R., 30 Cal., 155; *Dewan Chand v. Queen-Empress*, (1899) 34 P. R. Cr. 5; *Dhani Ram v. Bhola Nath*, (1902) 37 P. R. Cr. 59; *Pandurang Govind Pujari*, (1901) I. L. R., 25 Bom., 179; cited.

The following reference was made by Mr. Justice Birks to a Full Bench:—

The petitioner, Raj Chundro, applies for revision of the orders of the Sessions Judge of Arakan passed in Criminal Revision case

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Reference
No. 12 of 1904.
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* Distinguished in *King-Emperor v. Ba Pe*, 4 L. B. R., 143.
(1) 2 L. B. R., 115.

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No. 1 of 1903 refusing to interfere with a preliminary order passed by the 1st class Magistrate of Sandoway in Criminal Trial No. 70 of 1903 putting Maung Po Sein, the respondent, in possession of certain land.

Six grounds of revision are alleged as follows:—

- (1) That the lower Courts erred in law in not finding who was in actual possession of the lands in suit at the time when the order was made;
- (2) That the petitioner being acquitted on a charge under section 447 of the Indian Penal Code, the possession which he had at the time of the order should not have been disturbed, and there was no likelihood of any breach of the peace after the petitioner's acquittal on the said charge;
- (3) That the reasons given by the learned Magistrate for the order are not warranted by law and his order is without jurisdiction;
- (4) That it having been considered by the Sessions Judge that the illegal act of the Superintendent, Land Records, caused the petitioner to take possession of the disputed land, whether he did so rightly or wrongly, he was admittedly in peaceful possession of the same and the Courts below should not have disturbed his possession;
- (5) That the petitioner having cultivated the paddy growing upon the land, as the evidence of the witnesses conclusively proved, should have been retained in possession thereof;
- (6) That the lower Courts erred in law in deciding questions of title in a case under section 145, Criminal Procedure Code.

There appear to be grounds for dealing with the case on revision as I find that when the petitioner was acquitted Maung Po Sein was directed to take civil proceedings to establish his rights so that this virtually amounted to an order by a Criminal Court declaring the petitioner to be entitled to possession till ousted by a decree of a Civil Court.

A preliminary question arises in this case, whether this Court has power to interfere on revision, for according to section 435, Criminal Procedure Code, proceedings under Chapter XII are not "proceedings" as contemplated in that section. It has, however, been held by the Bombay and at one time by the Calcutta High Court that where a Magistrate exceeds his jurisdiction under section 144 or 145 the High Court has power to interfere under section 439. In the case of *Pandurang Govind* (1) the High Court interfered on the ground that the Magistrate had not followed the proper procedure. He must set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace and issue notice to all parties concerned. In that case the District Magistrate, purporting to act under section 145, passed an *ex-parte* order prohibiting one of

(1) (1900) I. L. R., 24 Bom., 527.

two parties between whom a dispute existed as to the right of performing a certain religious service, from taking part in such service. The Civil Court had previously declared that both parties were entitled to officiate. The order was set aside as conflicting with the orders passed by the Civil Court and as otherwise defective.

In *Laldhari Singh and others v. Sukdeo Narain Singh* (2), Amir Ali and Stanley, JJ., held that an omission to join the tenants, who were the real persons in actual possession, was an illegality that affected jurisdiction and would justify interference. Amir Ali, J., expressed an opinion that the High Court had this power also under the Criminal Procedure Code. This case appears to have been overruled by a Full Bench in *Krishna Kamini v. Abdul Jabbar* (3). In this case it appears to have been held by all the five Judges who composed the Bench that the High Court had no powers of interference under the Criminal Procedure Code, though they had power to interfere under section 15 of the High Courts Act (24 and 25 Vic., c. 104) on questions of jurisdiction only. This opinion appears opposed to that of Ranade and Crowe, JJ., in the Bombay cases and to that expressed by Amir Ali, J., in the Calcutta case, quoted above.

I therefore refer the following questions to a Bench :—

- (1) Is the jurisdiction of a High Court not appointed by Royal Charter to interfere on revision in proceedings taken under Chapter XII entirely barred by clause 3 of section 435?
- (2) If not, to what questions is it limited?

The opinion of the Bench was as follows :—

Thirkell White, C.J.—The question referred is whether the jurisdiction of a High Court, not appointed by Royal Charter, to interfere on revision in proceedings taken under Chapter XII is entirely barred by sub-section (3) of section 435 of the Code of Criminal Procedure.

Section 435 of the Code of Criminal Procedure enables the High Court to call for and examine the record of any proceeding before any inferior Criminal Court. Sub-section (3) of that section declares that proceedings under Chapter XII of the Code are not proceedings within the meaning of the section. There have been many decisions as to the meaning of this provision.

In *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh* (4), it seems to have been held that the power to revise an order purporting to be passed under Chapter XII but not really falling within its scope was exerciseable under section 15 of the Charter Act, and not under the Code of Criminal Procedure. In *Sri Mohan Thakur v. Narsing Mohan Thakur* (5), it was said :—

“It is quite clear that, under the provisions of section 145, as now amended, no order under that section can be set aside by this Court in its revisional jurisdiction, except under the provisions of the Charter, and on the ground of want of jurisdiction.”

(2) (1900) I. L. R., 27 Cal., 892.
(3) 6 C. W. N., 727.

(4) (1899) I. L. R., 26 Cal., 188.
(5) (1900) I. L. R., 27 Cal., 259.

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In *Laldhari Singh v. Sukdeo Narain Singh* (2), it was said by Prinsep, J. :—

“A case under section 145 is not one with which we can deal as a Court of Revision under the Code of Criminal Procedure. Such cases are expressly excluded from our cognizance as a Court of Revision under that Code. Our powers are under the Charter Act and these can be exercised only in respect of jurisdiction.”

But in the same case Amir Ali, J., was of opinion that the High Court had power to interfere both under its revisional jurisdiction and also under clause 15 of the Charter. The grounds of this opinion are not stated.

In the case of *Pandurang Govind* (1), the High Court at Bombay held that it had ordinarily no jurisdiction to interfere with an order under Chapter XII of the Code of Criminal Procedure, but when the Magistrate exceeded his jurisdiction under sections 144, 145, it had power to interfere in its extraordinary jurisdiction. The head-note says that it was held that the Court had power to interfere under its revisional jurisdiction (section 439). But I cannot find this in the judgment; and I shall be disposed to think that the learned Judges were referring to their extraordinary jurisdiction under the Charter.

In *Krishna Kamini v. Abdul Jabbar* (6), it seems to have been held by a Full Bench of the Calcutta High Court that the power to revise proceedings under Chapter XII of the Code was exercised under section 15 of the High Courts Act, not under the Code. This is explicitly stated by Banerji, J., and seems to have the view of the other members of the Full Bench.

In *Dewan Chand v. Queen-Empress* (7), it was held by a Full Bench of the Chief Court of the Punjab—

“that where an application has been made under section 145, Code of Criminal Procedure, in a case where an order might properly be passed under section 145, Code of Criminal Procedure, but where the Magistrate has adopted none of the procedure required by section 145, Code of Criminal Procedure, and has passed an order without reference to that section, that the order is not really an order under that section, and is open to revision under sections 435 and 439, Code of Criminal Procedure.”

In another Punjab case, *Dhani Ram v. Bhola Nath* (8), Chatterji, J., observed :—

“Proceedings under Chapter XII are not proceedings which can be sent for under section 435, Code of Criminal Procedure, by the High Court, the Sessions Judge or the District Magistrate for any of the purposes specified in that section. Nor are the proceedings (criminal proceedings) in the proper sense of the word. * * * They can be revised only by the High Court under section 439 on the ground of want of jurisdiction or grave irregularity in the proceedings or non-compliance with the provisions of the Code amounting to abuse of jurisdiction.”

In the case of *Pandurang Govind Pujari* (9), Jenkins, C.J., observed :—

“Proceedings under section 145 of the Code are by section 435 expressly excluded from the class of proceedings liable to be dealt with on revision. And

(6) (1903) I. L. R., 30 Cal., 155.

(7) (1899) 34 P. R. Cr. 5.

(8) (1902) 37 P. R. Cr. 59.

(9) (1901) I. L. R., 25 Bom., 179.

in all the cases in which the High Courts have interfered with proceedings purporting to have been taken under Chapter XII, that interference has been justified by the fact that the orders revised were not really orders under that Chapter at all, but would have required, to validate them, powers which the Legislature has not seen fit to confer on any one."

It seems to me that the answer to the reference, as set forth, must be in the affirmative. The Legislature has explicitly declared that proceedings under Chapter XII of the Criminal Procedure Code are not proceedings which may be called for under section 435. As has been consistently held by all the High Courts whose rulings have been examined, the intention is to remove proceedings under this Chapter from the revisionary power of the High Court. The question whether the High Court has power to revise proceedings which, though purporting to be held under Chapter XII, do not really come within its scope, does not seem to arise on the reference as stated. It is unnecessary therefore to express an opinion on it.

I would answer the first question in the affirmative.

In that view, it is not necessary to answer the second part of the reference.

Bigge, J.—I concur.

Birks, J.—I concur in the judgment of the learned Chief Judge. There is no question but that the proceedings in this case purport to be under section 145; and though in my opinion proceedings were not required under that section in view of the orders passed by the 2nd class Magistrate in Criminal Trial No. 301 of 1902, there does not appear to be such an abuse of jurisdiction as would warrant this Court in interfering on revision.

Before Mr. Justice Birks.

MAUNG THA CHU AND ONE *v.* MAUNG PO KAU.

Messrs. *Jordan and Villa*—for appellants (defendants).

Mr. *Palit*—for respondent (plaintiff).

Altering prayer of plaint—Suit for declaratory decrees.

Although a suit for mutation of names in a Revenue Register of holdings cannot lie, the Court may allow the prayer of the plaint in such a suit to be altered to a prayer for possession.

Maung Shwe Lin v. Ma Le, 2 L. B. R., 4, referred to.

In this case the Courts below have concurred on the facts. It is admitted that the land in dispute stood in the name of Maung Tha Chu when it was purchased by Lu Ein, and Mr. Villa contends that the plaint should have contained an allegation that Lu Ein had notice of the plaintiff Maung Po Kau's title when he purchased. This question had not however arisen on the pleadings, for both the defendants alleged that the land was purchased from Ma Min Ye herself. The Courts have both found that she sold her interest to the plaintiff and it is admitted that the land was in the plaintiff's name before the sham sale to Maung Tha Chu. The 2nd defendant Lu Ein also admits that the plaintiff demanded rents from him and he knew that the 1st defendant never worked the land though it stood in his name. Lu Ein

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states he made enquiries from the 1st defendant when he bought the land and was told that it belonged to Ma Min Ye. As he admits the plaintiff demanded rents he had notice of some claim on the plaintiff's part. He has never paid any revenue on the land. The Courts below have believed the plaintiff's evidence that he himself leased the land in dispute for two years to the 2nd defendant; this is proved by Ex. 3, executed several years after the repurchase by the plaintiff. The plaintiff should no doubt have alleged that the 2nd defendant had notice of the plaintiff's title, but it does not seem necessary to remand the case as it is abundantly clear that Lu Ein attorned to the plaintiff before his alleged purchase from Ma Min Ye. The Courts seem to have gone very carefully into the evidence and both Courts have dealt with the facts in a satisfactory way. The lower Appellate Court has modified the decree of the Court of first instance by giving a simple declaratory decree on the ground that the plaintiff originally only sought a declaratory decree in order to evade stamp duty, and the case of *Chokalinga Perhana v. Achiyar* (1) has been cited. In that case, however, there was a great disparity in the stamp duty as the property was worth Rs. 19,000. In the present case it is only worth Rs. 600, and the plaintiff's mistake in not asking for possession was probably due to the fact that he thought a suit for mutation of names would lie. The original plaint contained a prayer for mutation of names and the Court of first instance has allowed him to substitute a prayer for possession for a prayer for mutation of names. This seems a proper exercise of judicial discretion. If some consequential relief is not prayed for the plaint should have been rejected under section 42 of the Specific Relief Act. Mr. Palit has taken cross-objections to this modification of the decree of the Court of first instance and these objections should be allowed. The ruling of this Court in *Maung Shwe Lin v. Ma Le* (2) shews that a prayer in a plaint may even be amended on 2nd appeal.

I dismiss the appeal of the defendants with costs and restore the decree of the Court of first instance as it originally stood.

Criminal Revision
 No. 341 of
 1904.
 April 27th,
 1904.

Before Mr. Justice Birks.

SHUNSHANISA v. KING-EMPEROR.

Mr. Lambert—for applicant.

Arms Act, ss. 19 (f), 20, 29.

The appellant was convicted by the Subdivisional Magistrate under section 19 (f) of the Arms Act and sentenced to one year's rigorous imprisonment. The District Magistrate had not sanctioned the prosecution under section 29 of the Act. The Sessions Judge held that he intended to convict under section 20 as he quoted certain circulars, but allowed the conviction to stand although an offence under section 20 would not be triable by a 1st class Magistrate.

Conviction and sentence set aside.

The appellant, Shunshaniisa, has been convicted under section 19 (f) of the Arms Act and sentenced to one year's rigorous imprisonment. It appears from the judgment of the Subdivisional Magistrate, Buthi-

(1) I. L. R., 1 Mad., page 40.

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

daung, that information was received that Budiadin, the son of the appellant, had three balls of opium. In the search for opium eleven flasks of gun-powder and shot and caps were found with lead and sulphur besides opium and ganja. Budiadin ran away, but the appellant who is his mother has been prosecuted under three separate charges, of which the present is one. It is admitted that the District Magistrate did not sanction this prosecution under section 29 of the Act.

The Magistrate in his judgment refers to Judicial Department Circular No. 20 of 1892 and Criminal Circular No. 398, but he has not recorded that any concealment was practised and the accused was not charged under section 20 read with section 19 (f).

The learned Sessions Judge dismissed the appeal, holding that the Magistrate intended to convict under section 20 as he had quoted these circulars. He could not have altered the conviction to one under section 20, for this would be to enhance the sentence, for section 20 is punishable with 7 years' rigorous imprisonment and such a case is only triable by a Court of Session (*vide* last page of 2nd Schedule to the Criminal Procedure Code). The sentence as it stands is illegal as the prosecution was not sanctioned. I have read the evidence to see if there is sufficient evidence to shew that concealment was practised and to consider whether a fresh trial should be ordered. The gun-powder was found in a basket in the bed-room which was dark at the time of the search, but there seems no evidence of any concealment. The sentence passed seems also too severe in the case of the appellant, who was only the mother of the 10-house-gaung, Budiadin, who absconded. She was sentenced on the 2nd January 1904 and her sentence was suspended on the 16th March when the appeal was admitted. Even if she had a guilty knowledge that her son had possession of this ammunition this would have been a substantial sentence. I set aside the conviction and direct the acquittal of the accused.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Birks.

MA GYI v. MA YEIK AND TWO OTHERS.

Messrs. *Lewis and Giles*—for appellant (defendant).

Messrs. *VanSomeren, McDonnell and Fagan*—for respondents (plaintiffs).

Suit instituted by wrong person—Addition of plaintiffs—Civil Procedure Code, s. 27—Addition of person as party who ought to have been joined, s. 32.

It appeared that the plaintiff, who instituted the suit, had no right to sue, that right belonging to her children. The Court allowed the addition of the children as plaintiffs, and a consequential amendment in the prayer of the plaint, and proceeded with the suit.

Held,—that in the circumstances this course was equitable, and not at variance with any provision of law; and that if there was any error, it was covered by section 578 of the Code of Civil Procedure.

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Civil 1st Appeal
No. 2 of 1903.
July 10th,
1903.

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 v.
 MA YEIK.

Taqi Jan v. Obaidulla, (1894) I. L. R., 21 Cal., 866; *Chunder Coomar Roy v. Gocool Chunder Bhu Hacharjee*, I. L. R., 6 Cal., 370; *Mohina Chundra Roy v. Atul Chundra*, I. L. R., 24 Cal., 540; *Sheorania v. Bharal Singh*, I. L. R., 20 All., 90; referred to.

Of the five persons entitled to sue the appellant (defendant) in the same right for their share in the deceased's estate, only two were plaintiffs in the suit.

Held,—after discussion of the effect of section 32 of the Code of Civil Procedure, as interpreted by judicial authority, that the other three persons should have been added as parties; and *ordered*, that the case be remanded for the addition of parties and retrial on the merits.

Vyānadayyan v. Sitaramayyan, (1882) I. L. R., 5 Mad., 52; *Foy Gobind Doss v. Goureeproshad Shaha*, (1867) 7 W. R., 202; *Soroda Pershad Mitter v. Kylash Chunder Banerjee*, (1867) 7 W. R., 315; *Fergusson v. The Government*, (1868) 9 W. R., 158; *Oh Ling Tee v. Aw Kinifee*, (1868) 10 W. R., 86; *Ahmed Hossein v. Mussamut Khodeja*, (1868) 10 W. R., 368; *Kalee Pershad Singh v. Foy Narain Roy*, (1869) 11 W. R., 361; *Saligram Singh v. Gheenoo Singh*, (1871) 16 W. R., 19; *Dukheena Mohun Roy v. Ameerooddin Mahomed*, (1869) 12 W. R., 247; *Kewal Sahoo v. Issur Dyal Roy*, (1869) 12 W. R., 334; *Ram Surun Singh v. Mahomed Ameer*, (1870) 13 W. R., 78; *Konjal Sahoo v. Guroo Buksh Kooer*, (1870) 13 W. R., 362; *Ram Taruck Ghossal v. Raddha Bullab Sircar*, (1871) 15 W. R., 97; *Tha Ya v. Mee Khan Mhone*, (1870) 13 W. R., 443; *Naraini Kuar v. Durjan Kuar*, (1880) I. L. R., 2 All., 738; *Ramayya v. Venkataratnam*, (1894) I. L. R., 17 Mad., 122; *Har Narain Singh v. Kharag Singh*, (1887) I. L. R., 9 All., 447; *Habid Bakhsh v. Baldeo Prasad*, (1901) I. L. R., 23 All., 167; *Mahomed Kahoor Ali Khan v. Butta Koor*, (1868) 9 W. R., 1 P. C., 9; cited.

Thirkell White, C. J.—This suit was originally instituted by Ma Yeik, the 2nd and 3rd plaintiffs-respondents being subsequently added. Ma Gyi is the daughter, and administratrix to the estate of Maung Lu Gale, deceased. The relationship between the parties and the other members of Maung Lu Gale's family whom it is necessary to mention is as follows. Besides other children who died without issue, Maung Lu Gale had two sons, Maung Kyaw and San Hla, and a daughter Ma Gyi, the present appellant. Maung Kyaw, who is dead, married successively Ma Thin, by whom he had a daughter Ma Mya Me; Ma Bo, by whom he had a son Kan Nyun; Ma Win Thin, by whom he had a child Ma Sa Me; and Ma Yeik, the first respondent, by whom he had two sons, Ba Sein and Ba Shwe, the second and third respondents.

The first point on which we heard argument and which we have decided by a verbal order was the objection taken by the appellant that, as the first plaintiff Ma Yeik had, admittedly, no right to sue, the plaint should have been dismissed and the second and third plaintiffs should not have been added.

At the time of the institution of the suit, the second and third plaintiffs, Ba Sein and Ba Shwe, were minors. The suit should have been instituted in their names by Ma Yeik as their next friend. Instead of doing this, Ma Yeik sued in her own right for Maung Kyaw's share in the estate of his father Maung Lu Gale. Subsequently, when her sons had attained their majority, an application was made to add them as plaintiffs. The proper course would have been to substitute them as plaintiffs for Ma Yeik, under section 27 of the Code of Civil Procedure. There is no doubt authority for the position taken by the appellant that when the original plaintiff had no right to sue, as

in this case, others cannot be joined as plaintiffs; and that the proper course is to dismiss the suit. On the other hand, there is the authority of the case of *Taqui Jan v. Obaidulla* (1) for treating the person improperly made a plaintiff as non-existent and for allowing the suit to proceed in the name of the right plaintiff.

In one respect the present case is distinguishable from those cited by the learned counsel for the appellant, in that not only were other plaintiffs added but the plaint was amended so as to include a prayer for the share of the inheritance alleged to be due to the second and third plaintiffs jointly with their mother, the first plaintiff. In these circumstances, it seems to me that the Court might rightly proceed to hear the suit on the amended pleadings and to dismiss it as regards the first plaintiff and decree it as regards the second and third plaintiffs. And this is in effect what the Court did.

The cases examined by my learned colleague are, in my opinion, distinguishable; and I think it was within the competence of the lower Court to allow the amendment of the plaint, to add the necessary parties, and to proceed with the case. There seems to be nothing in the Code of Civil Procedure to prohibit this course, which is clearly the most equitable course to adopt. I think it also probable that, if there has been an error in this respect, it is covered by section 578 of the Code.

I therefore concur with my learned colleague in deciding on the first ground of appeal in favour of the respondents.

The third ground of appeal is that the other surviving children of Maung Kyaw should have been made parties to the suit. We have heard arguments on this point and have also considered an application made by Ma Mya Me, the daughter of Maung Kyaw and his wife Ma Thin, to be made a party to the suit. This application, and by implication the third ground of appeal, were strenuously opposed by the learned counsel of the respondents. The question whether the application of Ma Mya Me should be granted, and as a necessary consequence, the third ground of appeal allowed, depends on the construction of section 32 of the Code of Civil Procedure as interpreted by judicial authority. So far as they are material to the present issue, the terms of that section are as follows:—

“The Court may * * * * * order * * * * * that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The terms of section 73 of the Code of 1859, on which most of the rulings cited in argument are based, are somewhat different. It may be convenient to cite the relevant parts of that section:—

“If it appear to the Court * * * * * that all the persons who may be entitled to, or who claim some share or interest in the subject matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may * * * * *

(1) (1894) I. L. R., 21 Cal., 866.

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direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be."

The policy of the two sections is the same. It is to avoid multiplicity of suits and to promote finality in litigation. This was discussed by the High Court of Madras in *Vyidianadayyan v. Sitaramayyan* (2) with reference to the identical terms of section 32 of the Code of 1877. The following passage may be cited from the judgment of Turner, C.J. :—

"Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit? or is it meant completely and effectually determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, 'between the parties to the suit,' and there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will, as between the parties to the suit, not be final. On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them."

The principle of the rules on which the section was based was, it was added, "that a material question common to the parties and to third parties should be tried once for all."

The earliest case cited by the learned counsel for the respondents is that of *Joy Gobind Doss v. Goureeproshad Shaha* (3), a case which has been much discussed. In that case, a certain person had been added as a party to a suit. The Court held that he should not have been made a party because, though he claimed an interest in the subject matter, he was not likely to be affected by the result. He claimed adversely to the title both of the plaintiff and of the defendant. He claimed no community of interest with either of them. The ruling is not precisely applicable to cases under section 32 of the present Code as it turns on words which are not found in that section. But even here the learned Chief Justice (Sir Barnes Peacock) cited with approval the following passage from Story's Equity Jurisprudence :—

"The general rule in Equity is, that all persons are to be made parties who are either legally or equitably interested in the subject matter and result of the suit."

This case was distinguished in *Saroda Pershad Mitter v. Kylash Chunder Banerjee* (4), where, though the intervenor claimed adversely both to the plaintiff and defendant, he was made a party because he had an interest in the decision of the suit. It was followed in *Fergusson v. The Government* (5), wherein Markby and Bayley, JJ., approved the rule "that those persons only should be joined as defendants in a suit, whose claims were necessary to be taken into consideration before deciding on the plaintiff's title."

The case next in order of time, that of *Oh Ling Tee v. Aw Kiniffee* (6), was the case on which the learned counsel for the respondents most

(2) (1882) I. L. R., 5 Mad., 52.

(3) (1867) 7 W. R., 202.

(6) (1868) 10 W. R., 86.

(4) (1867) 7 W. R., 315.

(5) (1868) 9 W. R., 158.

relied. But it does not support his objection in any way. The plaintiff sued for one-eleventh of the estate of a deceased. The learned Judges held that the Court below had not the power to transform the suit into a general administration suit. They also held that if, at the hearing of the suit, it appeared to the Court that all persons who might claim some share or interest in the subject matter of the suit, that is to say, in the one-eleventh for which the plaintiff was suing, had not been made parties, the Court might order them to be made parties. That is precisely what we are asked to do in this case. There is no intention of converting the suit into a general administration suit, a course against which the learned counsel for the respondents protested with perhaps unnecessary warmth and reiteration. If we grant the prayer of Ma Mya Me and allow the third ground of appeal we shall be adopting the course approved in this case of adding as parties persons who claim an interest in the share for which the plaintiffs sue, without converting the suit into a general administration suit.

The case of *Ahmed Hossein v. Mussamut Khodeja* (7) follows the *Foy Gobind Doss* (3) case in holding that "it would be most inconvenient and contrary to all principle if every person claiming a title adverse to those set up both by the plaintiff and the defendant should be allowed to intervene" although not likely to be affected by the result of the suit.

The two cases last cited were considered and explained by Markby, J., in his judgment in *Kalee Pershad Singh v. Foy Narain Roy* (8). It was there shown that the Courts were not restricted to the decision of questions between the plaintiff and defendant; but might at times have to decide questions between rival defendants. As regards the practice of the English Court of Chancery the following passage may be cited:—

"According to Lord Redesdale, 'all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigation may be prevented' (Mitford on Pleading, 164). According to Lord Hardwicke, 'the general rule is that you must have all parties before the Court who will be necessary to make the determination complete and to quiet the question' (*Poon v. Glocke and Atkins*, 515)."

I understand the conclusion to be that in this country it was the intention of section 73 of the Code of 1859 to give our Courts a discretion as to the addition of parties and not to bind them by so strict a rule as that last cited. But the principles underlying the passages quoted seem to be those which are the basis of section 73 of the Code of 1859 and section 32 of the Code of 1882. This ruling was followed in *Saligram Singh v. Gheenoo Singh* (9). *Dukheena Mohun Roy v.*

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(7) (1868) 10 W. R., 368.

(8) (1869) 11 W. R., 361.

(9) (1871) 16 W. R., 19.

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Ameerooddin Mahomed (10) went further and adopted the rule of the English Court of Chancery that all persons interested must be joined. Norman, J., said:—

“A similar principle is expressed in Comyn’s Digest, namely, ‘that all concerned in the demand ought to be made parties in equity.’ ‘Not all concerned in the subject matter respecting which a thing is demanded, but all concerned in the very thing which is demanded, in the matter petitioned for, in the prayer of the bill, or in other words in the object of the suit.’”

In *Kewul Sahoo v. Issur Dyal Roy* (11), the question of the addition of parties was raised. But it was not decided that parties had been wrongly added. The decision went on another point.

Ram Surun Singh v. Mahomed Ameer (12) approved the addition of a party whose interests were not adverse to those of the defendants and who had an interest in the result of the suit.

Konjul Sahoo v. Guroo Buksh Kooer (13) is another case in which intervention was allowed on the ground that the intervenor claimed an interest in the suit and would be affected by the result, although apparently his title was adverse to those set up by both the plaintiff and defendant. To the same effect is the ruling in *Ram Taruck Ghossal v. Radha Bullab Sirkar* (14).

The case of *Tha Ya v. Mee Khan Mhone* (15) is strongly in favour of a liberal construction of the law regarding intervention. The words of Norman, J., may be cited:—

“I am strongly disposed to think that a very liberal construction should be put upon the words ‘persons who may be entitled to, or who claim some share or interest in, the subject matter of the suit, and who may be likely to be affected by the result.’ I would construe them as enabling the Court to add any persons to the list of plaintiff or defendant in whose absence the subject matter of the suit or the claim of the plaintiff in the suit cannot be fully investigated and disposed of. I am inclined to think that the words ‘who may be likely to be affected by the result’ may be construed as ‘likely, if added as parties, to be affected by the result of the investigation and determination of the question in the cause.’”

In *Naraini Kuar v. Durjan Kuar* (16), it was said by Straight, J.:—

“The terms ‘questions involved in the suit’ must be taken to mean questions directly arising out of an incident to the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged.”

There is nothing in this canon to exclude the intervenor, Ma Mya Me, in the present suit. Her interest as against the defendant is identical with that of the plaintiffs.

Vyidianadayyan v. Sitaramayyan (17) has already been cited. It was followed in *Ramayya v. Venkataratnam* (18) on the principle that:—

“When the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors, from whom he can claim a discharge, ought to

(10) (1869) 12 W. R., 247.

(11) (1869) 12 W. R., 334.

(12) (1870) 13 W. R., 78.

(13) (1870) 13 W. R., 362.

(14) (1871) 15 W. R., 97.

(15) (1870) 13 W. R., 443.

(16) (1880) I. L. R., 2 All., 738.

(17) (1882) I. L. R., 5 Mad., 52.

(18) (1894) I. L. R., 17 Mad., 122.

be parties to the suit in order that the decree which may be passed therein may effectually discharge him as against all."

Similarly in this case the defendant was entitled to insist that all persons claiming through Maung Kyaw should be made parties so that there might be one decree in respect of them.

Har Narian Singh v. Kharag Singh (19) is another case on which the defendants' counsel placed much reliance. It refers directly to the appointment of a person to be a respondent in an appeal, not a plaintiff or defendant. But the point was decided with reference to section 32 of the Code of Civil Procedure. The relevant passage is as follows:—

"Now, when we look to section 32, we find that the second paragraph of that section only applies, so far as the adding of a plaintiff or defendant is concerned, to cases where the adding of the person will enable 'the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.' I do not think there can be any doubt that all the questions above referred to must be questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or between co-plaintiffs *inter se*."

The Madras case last cited, in which a contrary opinion was expressed; and the case of *Kalee Pershad Singh v. Joy Narain Roy* (20) were not referred to. Even accepting this ruling as a correct exposition of the law, I should still hold that it did not prevent the addition as parties in this suit of persons claiming as co-heirs with the plaintiffs.

I think I have now mentioned all the cases in which a question in any way similar to that under consideration has been decided.

It seems to me that the weight of authority is strongly in favour of the contention that the other children of Maung Kyaw ought to have been made parties to the suit on the application of the defendant. Their presence on the record was necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. The main question was to what share, if any, were the children of Maung Kyaw entitled. It is obvious that unless all the children are made parties, there may be a succession of suits on the same cause of action whereby the defendant will be needlessly harassed. This has been regarded as a good ground for adding parties. If all the children are added, it will be within the competence of the Court to decide to what shares, if any, of the amount decreed each of them is entitled. The Court of first instance saw the necessity of this and proceeded to adjudicate on the claims of the other children although they were not parties to the suit. This, it need hardly be said, the Court had no power to do.

The next question is as to the proper course to be adopted. There have been divergent opinions on this point. I think we may safely be guided by the considered judgment of Strachey, C.J., in *Habib Bakhsh v. Baldeo Prasad* (21), in which it was held that a suit might be remanded on first appeal for retrial on the merits when an Appellate

(19) (1887) I. L. R., 9 All., 447. | (20) (1869) 11 W. R., 361.
(21) (1901) I. L. R., 23 All., 167.

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Court ordered the addition of fresh parties. I would therefore reverse the decree of the District Court; direct the addition as plaintiffs of Ma Mya Me, and if they consent of Kan Nyun and Ma Sa Me, the other surviving children of Maung Kyaw, and remand the suit for a fresh hearing. If Kan Nyun and Ma Sa Me do not wish to be plaintiffs they should be added as defendants. The trial will have to be held afresh. The Court will determine the rights (if any) of the parties, and if there is a decree for the plaintiffs will decide to what share each of them is entitled. The appellant must have her costs, I think, in this Court. In the circumstances, I think that the appellant should have her costs in the Court below also. My learned colleague concurs and there will be an order accordingly.

Dirks, J.—The first plaintiff-respondent in this case, Ma Yeik, is the 5th wife of Maung Kyaw, the 6th child of Maung Lu Gale and Ma Ka. It is admitted that at the time of his death in 1898 he was the eldest surviving son of Maung Lu Gale and Ma Ka, but the Additional Judge of the District Court has found that his elder brother Maung Bo Gyi, who died earlier in 1898, was alive at the time of Maung Lu Gale's second marriage with Ma Pe. It is admitted that Maung Kyaw died before his father Maung Lu Gale and that his widow Ma Yeik has no right of her own to share in Maung Lu Gale's undivided estate. In her plaint she claimed the two shares due to her husband as eldest son leaving two shares for the younger children Maung San Hla and Ma Gyi, the present appellant and administratrix to Maung Lu Gale's estate. Paragraph 6 of the plaint, however, refers to her application for letters of administration. From paragraph (d) of that application it is clear that she admitted the rights of her two sons Maung Ba Sein and Maung Ba Shwe and proposed to share the portion of the estate that would have come to her husband between his sons and his children by a former marriage, Maung Kan Nyun and Ma Mya Me.

The plaintiff Ma Yeik sued alone as a pauper. Her plaint was filed on 5th August 1901. Ma Gyi filed her first written statement on the 3rd September 1901. Paragraph 7 of that written statement points out that Maung Kyaw was dead and not in possession of the share of the father's estate and that the suit was bad unless Ma Yeik had letters of administration.

The plaintiff was permitted to sue as a pauper on the 27th September 1901, but the case dragged on as the Additional Judge considered she should give security for costs. This order was set aside by this Court in Civil Revision No. 71 of 1902 on the 3rd July 1902.

The defendant Ma Gyi filed a long written statement dated 13th August 1902 in which she definitely asserts that the plaintiff Ma Yeik has no rights of her own.

On the 4th September 1902, an application was made to amend the plaint. Apparently the Additional Judge had been transferred, for the case came before the District Judge, who noted that it really was an application to join two other parties as plaintiffs.

On the 4th November Mr. Pratt, the Additional Judge, newly appointed, passed the following order:—

Ma Yeik applies for permission to amend the plaint by including the names of her own two sons, who were minors at the time the suit was instituted but are now of age.

Defendant objects on the ground that the plaintiff herself had no cause of action and that the inclusion of their names alters the nature of the suit.

Although plaintiff nowhere expressly states in her plaint that she sued on behalf of her children, it is quite obvious that she intended to do so, and they are mentioned in the plaint.

I consider that the children should have been made parties from the first. To dismiss the plaint and direct the plaintiff to bring a fresh suit with her children, would only put her to unnecessary expense.

I see no reason why the plaint should not be amended. And I consider it should be so amended.

The amendment will accordingly be made.

Ma Gyi filed a further written statement, dated the 11th November. Issues were framed on that date and the Additional Judge finally gave a decree for the second and third plaintiffs for three-tenths of the estate of Maung Lu Gale or its value Rs. 8,734-12-9.

The present appeal is against the decision and it has been agreed that the first ground of appeal should be considered separately, for if decided in the appellant's favour it is obvious that the suit must be dismissed.

The first ground of appeal is that the District Court erred in adding the second and third plaintiffs, the first plaintiff being admittedly not entitled to recover on her own account.

The chief case relied upon by Mr. Buckland for the appellant is *Chunder Coomar Roy v. Gocool Chunder Bhu Hacharjee* (22).

In that case A sued as only son and heir of his father B. C, the widow of B, having, with the concurrence of A, taken out letters of administration to B's estate, was, on the application of A, made a co-plaintiff under section 32, Civil Procedure Code.

The Court held that in as much as A had no right to sue at all, C ought not to have been joined as a plaintiff.

The case is not parallel to the present as the plaintiff was suing for a debt to the estate, which suit could only be brought by the administratrix. It is admitted that in this case Ma Yeik could sue as next friend of her minor children against Ma Gyi for partition of the property. When the order of the 4th November 1901 was made the minors had attained their majority. If the application to amend the plaint had been made under section 27 for the substitution of the names of her children for their mother and had there been an application on the record showing that Ma Yeik was merely suing on behalf of her children, the point now taken would hardly arise.

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The case of *Mohina Chundra Roy v. Atul Chundra* (23) is also hardly applicable, for it was held there "that the suit was bad for misjoinder of plaintiffs as the suit of plaintiff No. 2 ought properly to have been brought against all the holders of the portion including plaintiff No. 1 and not merely against the defendants in the suit." It is obvious that the same party cannot be plaintiff and defendant in the same suit.

Mr. VanSomeren for the plaintiff relies on the ruling in *Taqi Jan v. Obaidulla* (24). In that case the suit was brought by the mother and guardian of a minor and the suit was dismissed on the ground that the minor had attained his majority before the institution of the suit. On appeal Trevelyan and Ameer Ali, JJ., held that the name of the next friend might be treated as mere surplus-age and that the so-called minor should be given an opportunity of going on with the suit. The Judges noted that if the decision of the Court below were upheld the plaintiff would be barred by the law of limitation. The Court therefore directed the plaint to be amended.

It is true that in a very similar case this ruling was dissented from *Sheorania v. Bharal Singh* (25), mainly on the ground that the plaint was not properly verified by Lachmi Narian, the father of Sheorania.

In my opinion the irregularities in this case can be cured by section 578 of the Code. The plaintiff was, I think, *bonâ fide* mistaken in thinking she was an heir to the undivided portion of Maung Lu Gale's estate that would have come to her husband had he outlived his father, and had the issues been framed while her children were still minors the errors would have been discovered in time for the Court itself to direct an amendment of the plaint which could hardly have been objected to.

The present amendment order as it stands is not quite correct, for the name of the first plaintiff should have been struck out and the names of her two sons substituted.

Under the authority of the Privy Council Ruling in *Mahomed Zahoo Ali Khan v. Butta Koer* (26) we could now order this to be done.

This point is not now of so much interest as I concur with my learned colleague in thinking that the appellant should succeed on the 3rd ground of appeal and that a remand will be necessary.

The authorities on this point have been so exhaustively considered by him that I have nothing more to add. As a retrial will be necessary on account of the addition of fresh parties it is not necessary to make any formal amendments to the plaint at this stage of the proceedings. On the first ground of appeal I find in favour of respondents and on the 3rd in favour of appellant.

I concur in his order of remand and in the advocate's fee proposed.

(23) I. L. R., 24 Cal., 540.

(24) I. L. R., 21 Cal., 866.

(25) I. L. R., 20 All., 90.

(26) (1868) 9 W. R., 1 P. C., 9.

Full Bench—(Civil Reference).

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Bigge and Mr. Justice Birks.

MA THIN AND ONE v. MA WA YON.

Buddhist Law : Inheritance : Partition—Rights of single daughter on
death of father.

Civil Reference
No. 1 of
1904.
January 29th,
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A daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter re-marries after the father's death.

Ma On and others v. Ko Shwe O and others, (1886) S. J. L. B., 378; *Maung Seik Kaung v. Maung Po Nyein*, (1900) 1 L. B. R., 23; *Ma Me v. Ma Myit*, (1893) P. J. L. B., 48; *Mi Saung and others v. Mi Kun and another*, (1882) S. J. L. B., 115; referred to.

The following reference was made to a Full Bench by Mr. Justice Bigge:—

The respondent sued in the lower Court as an adopted daughter of the 1st appellant and her deceased husband Po Bya to recover one-fourth share in the property of her adopted father and for Rs. 500 being her *thinthi*.

The first ground of appeal which impugns her adoption has been abandoned and there only remains the second, that the plaintiff had no right to claim one-fourth share during the lifetime of her adoptive mother.

The appellant and her husband had no issue. In *Ma On and others v. Ko Shwe O and others* (1), the learned Judicial Commissioner said, after considering a certain chapter of the *Manugyè Dhammathat*:—

“On the death of one of the parents the eldest son or daughter may claim his or her share, and the remainder of the property vests in the surviving parent for himself and herself and the remaining children.”

This would appear to be a clear authority in favour of the respondent, but for the judgment of this Court in *Maung Seik Kaung v. Maung Po Nyein* (2), in which it is stated:—

“It is not quite clear that in the decision cited from page 378, Selected Judgments, the learned Judicial Commissioner intended to lay down that on the death of either the father or the mother the eldest son may claim a share of the inheritance; or that on the death of one of the parents either a son or a daughter, as the case may be, may claim a share.”

In *Ma Me v. Ma Myit* (3), Mr. Hosking, then Judicial Commissioner, said:—

“There are authorities for holding that the eldest son or the eldest daughter may claim one-fourth of the property during the lifetime of one surviving parent, but this rule, in my opinion, means the eldest son, or the eldest daughter where there are no sons.”

The latter is the case which is before me on this appeal. In *Mi Saung and others v. Mi Kun and another* (4), Mr. Jardine, after considering the position of the eldest son, says:—

(1) (1886) S. J. L. B., 378, at p. 385.

(2) (1900) 1 L. B. R., 23.

(3) (1893) P. J. L. B., 48.

(4) (1882) S. J. L. B., 115, at p. 120.

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"Under certain circumstances the eldest daughter, at least when there is no son competent to assume the parental duty, takes the paraphernalia of the deceased mother. * * * They are rights additional to the fractional share of the inheritance, which on the death of one parent the eldest son or eldest daughter is entitled to demand from the surviving parent."

In *Maung Seik Kaung v. Maung Po Nyein* already referred to, after an elaborate survey of the authorities, the learned Judges referred to the *Digest* of the *Dhammathats* compiled by the Kinwun Mingyi. Section 31 deals with the case of mother's and daughter's share on the father's death and summarises the general effect as this, that in such a case the daughter gets her ornaments given her before the death of the father and by both parents and certain specified property, namely, one pair of bullocks, buffaloes, goats, grain, etc., and that the mother should have the rest of the property—a method of division which it seems to me is somewhat difficult to apply to the conditions and property of modern Burmese Buddhist life. The ground for such a decision apparently is that, although the daughter is the offspring of the father, still it is the mother who has direct control over her. So that should the mother exhaust the property during her lifetime, it must be so; but if anything is left unexhausted the daughter should get it. The *Vilāsa Dhammathat* seems to have contemplated what, I venture to consider, would be a more equitable method of distribution, and according to it the eldest daughter would get her mother's ornaments as well as the ornaments which had been given to her during the life of her mother and the rest of the property would be divided into four shares of which the mother would get three and the eldest daughter one share. The distribution under this *Dhammathat* is to be found in section 33 of the Kinwun Mingyi's *Digest*, which relates to the partition between father and daughter on the death of the mother, but he says at page 71 of his work, "The rule of partition between mother and daughter on the death of the father is, *mutatis mutandis*, the same as that between father and daughter on the death of the mother." So that there appears to be the sanction of venerable authority for the position laid down by Mr. Meres and Mr. Hosking in the case already referred to. The learned author of "The Principles of Buddhist Law," after stating at page 107 as follows—

"Most of the important *Dhammathats* recognise the eldest daughter's right to a fourth share on the death of the mother which the eldest son possesses on the death of the father"—the reason being that "as the eldest son takes the position of the father so does the eldest daughter take the place of the mother on the latter's death;"

goes on to refer to and to criticise the judgment in *Ma Me v. Ma Myit*. He says:—

"It is submitted that this construction of the rule is opposed to the spirit of the *Dhammathats*. If the mother dies first there is no object in giving a fourth share to the eldest son as the father is still alive; nor can the eldest daughter claim her fourth share during the lifetime of the mother; but it is provided that in such an event the eldest son or daughter, as the case may be, should receive some bullocks, buffaloes and the like, but not a fourth share of the property."

This is the conclusion arrived at by the learned Judges of this Court in their summing up of the rules contained in section 31 of the Kinwun Mingyi's *Digest*, but it leaves out of sight the rule laid down in the *Vilāsa Dhammathat* to which I have already referred. But for the weakening effect of the judgment of this Court in *Maung Seik Kaung v. Maung Po Nyein* on the law as I believe it was laid down by Mr. Meres and Mr. Hosking viewed by the light of the *Vilāsa Dhammathat*, I should have decided the one point now before me in favour of the respondent; but having regard to that decision I think that it is incumbent upon me to refer the following point for the decision of a Full Bench, namely,—

“Is an elder or only daughter upon the death of her father, natural or adoptive, entitled to claim against her surviving mother a fourth share in the property of the mother and father?”

The opinion of the Bench was as follows:—

Birks, J.—The question referred to us for decision is stated as follows:—

“Is an elder or only daughter upon the death of her father, natural or adoptive, entitled to claim against her surviving mother a one-fourth share in the property of the mother and father?”

It does not appear necessary for us to answer the question as thus broadly stated, for it is admitted that the suit out of which this reference arises was brought against the surviving widow and her second husband Ko Po Saw.

The learned Judge who has made the reference was of opinion that the ruling of the Special Court in *Ma On and others v. Ko Shwe O and others* (1) was a clear authority in favour of the plaintiff's right to claim a one-fourth share. The rule there is thus broadly stated:—

“On the death of one of the parents the eldest son or daughter may claim his or her share and the remainder of the property vests in the surviving parent for himself or herself and the remaining children.”

The question in issue in that case was whether the widow's interest in the joint property was an absolute or merely a life interest.

The learned Judge, however, thinks that the ruling in *Maung Seik Kaung v. Maung Po Nyein* (5) throws doubt on this ruling and also on that of Mr. Hosking in *Ma Me v. Ma Myit* (3).

The point to be decided in *Maung Seik Kaung's* case was whether the eldest son could claim one-fourth of the joint estate of his father and mother on the death of his mother and after the re-marriage of his father.

The learned Judges decided that there was unquestionable authority that he could, and relied on paragraph 2 of section 2, Book X, *Manugyè*.

The case now referred to us is the exact converse of the above and is provided for in section 4 of Book X of the *Manugyè*. The two sections run as follows:—

(5) (1900) 1 L. B. R., 23; Chan Toon's L. C., II, 67.

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SECTION 2 :—

“The partition between the father and son, on the death of the mother.”

Oh excellent king! the two modes of partition between the father and son on the death of the mother are as follows :—

Let the eldest son have one male slave, one pair of good buffaloes, one pair of oxen, one foreign and one Burman goat, with one *pay* of arable land; with the exception of these things, let the father and younger children have all the property, animate and inanimate. If there be no slaves, the price of one male slave shall be ten ticals of silver; of a buffalo, five ticals; a bullock, two and a half ticals; of a goat, one and a quarter ticals; of the land, twenty ticals. If the father has not any of these things, let him pay his eldest son in money according to the above rate. But if he had no property, it is not contended that he shall give this; only if he has property, animate or inanimate, such as three or four slaves, ten buffaloes, ten oxen, goats in the same proportion, and twenty-five *pays* of land, let the eldest son receive as was at first said (1). If there be slaves, let him have one of them; if there be no goats, let them be excepted; no fields, let them be excepted. If there be none of the things but much silver and grain, let him have all that was at first said, at the prices laid down. If there be nothing but land, he shall have only fields; he shall have no right to claim more. This is the law of inheritance when the father does not marry again.

In the same case of the mother dying, I will relate another manner of partition. If, after the death of the mother, the father marries again, let him take his riding elephant, riding horse, clothes and ornaments, his sword, betel apparatus, and goblet, with the slave who carries his water goblet and betel; and let him give to the eldest son what has been laid down above according to his means; let the eldest son also have all that personally belonged to his

SECTION 4 :—

“The partition between the mother and daughter, on the death of the father.”

Oh excellent king! when a father dies, there are two laws for the partition of the property between the mother and daughter, which are these :—

Let the daughter have one female slave, two milch cows, two milch goats, one young male and female buffalo, one *pay* of grain land, and all the seed, vetches, paddy, corn, barley, sat, mayau, and sessamum. Let the mother and younger daughters take all the residue of the property, animate and inanimate. The price of a female slave is seven ticals of silver and a half; a cow and a calf, three ticals each; the goat and kid, one and a half ticals each; the male buffalo, five ticals; the female, two and a half; the *pay* of land, twenty ticals; and all the seed grain, two and a half ticals of silver. If none of the things now mentioned, and of which the price has been fixed, are in possession, if only gold and silver and other property is left, let the price now laid down be paid to the eldest daughter instead. If there be not the full number of ten cows or goats, and there be ten buffaloes, the last only shall be divided; let the others that do not amount to this number be left out of the partition. A division shall only be made when there are three or four female slaves, the buffaloes, cows, and goats, and twenty-five *pays* of land; this when the mother shall not take a second husband. If the mother has consumed the whole for necessary subsistence, let her have the right to do so. If the partition be made after the mother has taken another husband, let all the father's clothes and ornaments be divided into four portions, three of which the mother and younger daughters shall take, and let the fourth be given to the eldest daughter; let the mother have the house. The property, animate and inanimate, given to the eldest daughter, shall be noted before witnesses, and (they) shall take care of it; and if the mother dies, let the eldest daughter have

(1) If the inheritance falls short of this, it would appear that the eldest son's share would be one-fifteenth of the estate, this being the proportion which his share, as above defined, bears to the value of the property here enumerated.

mother, her clothes, and ornaments; and having divided the remaining goods into four parts, let the father have three parts, and the house. If the son be too young to separate from his parents, but remains with his father and step-mother, let the property be divided before witnesses, and taken care of separately; and if the father dies without issue by the second wife, let the son have all that was first divided, animate and inanimate, namely, elephant, horse, slaves, clothes, and ornaments. The remainder shall be divided into four parts, and let the step-mother have one; let her retain the property she brought with her originally at her marriage; it shall not be divided. Let the house be valued, and the step-mother have one-fourth of the value and the son have the house; let the father's debts also be divided and the step-mother pay one-fourth of them. This is when the property is that of father and mother originally.

the property above allotted to her. Let the property brought by the mother be divided into four lots: let the step-father have one, and the eldest daughter and relations (brothers and sisters) three. The property brought by the step-father and his debts shall not be divided. The house shall be valued, and the price divided into four parts, of which let the step-father have one, and let the house go to the eldest daughter, because it is the property of her parents.

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Under the first part of each paragraph the rights of the son and daughter respectively seem very similar: one *pay* of land out of 25 is given and the total value of the property comes to $47\frac{1}{2}$ ticals in the case of the son and $46\frac{1}{2}$ in the case of the daughter. These properties are described in *Mi Saung's* (4) case as distinct from the one-fourth share.

When the surviving parent marries again the position of the son according to the *Manugyè* is somewhat better than that of the daughter. The son takes all his mother's clothes and ornaments and one-fourth of the joint property, leaving the father the remaining three-fourths and the house.

The daughter on the other hand takes only one-fourth of the father's clothes and ornaments. The daughter's share is apparently that specified in the first part of the section and as long as the mother lives it is kept in trust for her. On the death of the mother as well she gets three-fourths of the joint property of the first marriage.

In *Maung Seik Kaung's* (2) case the learned Judges considered that this one-fourth share did not refer only to the clothes and ornaments but to the joint property, for they say, "And conversely when the father dies (section 4) the daughter gets specified property, buffaloes, bullocks, etc., or a one-fourth share if her mother re-marries." This opinion seems supported by other *Dhammathats* but not by the *Manugyè*.

Now in section 31 of the *Digest* no less than 27 *Dhammathats* are quoted on the partition between the mother and daughter on the death of the father. Only three of these, the *Vilāsa*, *Rāsi* and *Kyetyo*, speak of the daughter getting a one-fourth share of the property as the eldest child; the others speak of her as directly under her mother's control and not entitled to anything. The mother is allowed to exhaust the property and the daughter gets only what is left at her mother's

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death. The properties referred to in the first paragraph of sections 2 and 4 of the *Manugyè* are clearly not the one-fourth share of the joint property. All the *Dhammathats* seem to allow the daughter if living with her mother to retain ornaments given her before the death of the father.

It may be noted that the *Manu, Pyu, Kandaw, Kaingza, Tejo, Vannadhamma, Rāsi, Manu Vannana* and *Kyannet* all draw an implied contrast between an eldest son and an eldest daughter which is wanting in section 32 which deals with the converse case of a partition between the son and father on the death of his mother.

It is most fully stated in the *Vannadhamma*, "Why should not the eldest daughter being like the eldest son an offspring of the father get one-fourth of the inheritance? Because the daughter is entirely controlled by the mother."

Section 44 of the *Digest*, however, is the one that deals with partition between the mother and children on the death of the father when the mother wishes to re-marry. Twelve different *Dhammathats* are here quoted. The *Vilāsa, Rāsi* and *Kyetyo* have already allowed the eldest daughter a one-fourth share in section 31 on the ground that the eldest born has been obtained through the prayer of the parents offered at the commencement of their union and property has been acquired with his or her assistance, and these are not referred to again. In addition to these the *Yazuthat, Rājabala, Panana, Kaingza, Minja, Dhammasāra* and *Cittara*, all seem to give the eldest child one-fourth share when the mother wishes to re-marry; while the *Manugyè, Manu, Amwebôn* seem to say that the eldest daughter is merely entitled to a one-fourth share of the father's clothes and ornaments.

The passage in the *Kyetyo* quoted at page 96 of the *Digest* seems to clearly indicate the superiority of the eldest son to the eldest daughter.

Section 159 of the *Attasankhepa* runs as follows :—

The father having died, the mother is desirous of marrying again: or the mother having died, the father is desirous of marrying again: in either case, the law of partition between such parent and the *orasa* and *kanittha* sons :—

If the mother has an *orasa* son, and he has already received his *orasa* share of inheritance, let him keep that share; but, if he had not already received his *orasa* share, let a division be made as shown above. If there is no *orasa* son, but only an *orasa* daughter, she shall retain not only that which has already been given her and has passed into her possession as stated above, but shall also receive the share of an *orasa* son. Should there be no *orasa* children, but only *kanittha* children the whole of the property, both animate and inanimate, shall be equally divided between the mother and the *kanittha* children. If, after having received shares as shown above, the mother contracts a second marriage, and the children refuse to accompany her (to her new home), but elect to live in separate houses, the children of the first marriage forfeit all claim to any property that the mother may have taken with her, as also to any property that may be acquired subsequently. All such property shall go to the second husband and to the children of the second marriage. If, however, after the division of the estate as shown above, the children choose not to live in separate houses, but to accompany the mother to her new home, and, if their shares of the property can be kept apart for them, then, on the death of the mother, such children shall receive in full the shares so kept apart. The property which the mother took with her after the first division with her children, shall be divided into four shares, of which the step-mother shall get one share,

and the children of the first marriage three shares. Debts, if any, shall be liquidated in the same proportion. If the shares of the children have not been kept apart, they cannot claim their shares in full, as a division has already been made in their favour, and the property must, in that case, be considered as property which the mother took with her to her second husband. All the clothing and other personal property belonging to the mother shall be divided equally between the step-father and the children of the first marriage. The property brought by the step-father shall not be claimed by the children of the first marriage, and he may keep all.

If, on the other hand, the mother dies and the father contracts a second marriage, the law of partition between the step-mother and the *orasa* and *kanittha* children shall be similar to that shown above.

This section seems to contemplate an equal division between the mother and the younger children of the joint property of the first marriage, and if the children live with the mother in the new house they get three-fourths of the property brought by the mother to the second marriage.

As a matter of fact partition of property is generally effected on a second marriage and the principle appears to be that a single child gets one-fourth of the joint estate, the mother getting three-fourths; while if there are a number of children the mother takes half and the other children half between them.

The point decided in *Mi Saung's* (4) case was that no child other than the eldest can claim a share of the inheritance from the surviving mother.

I do not find that this decision was overruled in *Maung Seik Kaung's* (2) case and there is certainly ample authority in the *Dhammathats* for holding that a single daughter is entitled to claim one-fourth share of the joint estate from her mother on the death of the father when her mother re-marries.

It does not affect the question that the plaintiff is an adopted daughter, for the *keiktima* adopted child takes the same place as the natural child.

I would answer this reference accordingly.

Thirkell White, C. J.—I concur in the answer to the reference proposed by my learned colleague, Birks, J., and have nothing to add to his examination of the authorities.

Bigge, J.—I concur and have nothing to add.

Before Mr. Justice Chitty.

PAI BENG TENG v. KO MAUNG AND ONE.

Messrs. Cowasjee and Yain—for plaintiff, | Mr. Hamlyn—for defendants.

Chinese Law—Chinaman marrying foreign woman of different religion, and claiming to administer her estate after her death.

Plaintiff, a Chinaman, had two Chinese wives whom he had married in succession. On coming to Rangoon, he went through a ceremony of marriage with one Ma Bi, a Burmese (Zerbadi) woman, who lived with him and was recognised by the community as a wife. Plaintiff was a follower of Confucius; Ma Bi was either a Buddhist or a Mahommedan. On Ma Bi's death, plaintiff applied for letters of administration to her estate. Defendants failed to establish any rights as *caveat*ors.

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Held,—after consideration of the legality of the marriage, and of the rights which it gave to plaintiff in Ma Bi's estate after her death, that in the circumstances plaintiff's claim was just and reasonable, and *ordered* accordingly.

Civil Regular No. 21 of 1900, *Ma Yin v. Kai Ya and another*, (unreported); *Fone Lan v. Ma Gyi and others*, (1903) 2 L. B. R., 95; referred to.

This is an application by Pai Beng Teng for letters of administration to the estate of Ma Bi, whose husband the plaintiff claims to have been. The application is opposed by Ko Maung, the step-father of the deceased, and Ma Sein Nyun who claims to be her adopted daughter, and as such entitled to inherit the whole of Ma Bi's estate. It is not quite clear why Ko Maung has joined in filing the *caveat*. He does not put forward any claim to inherit or to administer the estate. The case is a somewhat peculiar one, and gives rise to a number of interesting questions, to which it is not easy, owing to the paucity of authorities and the uncertainty as to the law to be applied, to give satisfactory replies. At the settlement of issues only the one general issue was raised, whether the plaintiff was entitled to letters of administration. The determination of this question involves the consideration of others, (1) whether the deceased Ma Bi was lawfully married to the plaintiff; (2) what rights such marriage gave him in her estate after her death; (3) whether Ma Sein Nyun was the adopted daughter and heiress of Ma Bi. The difficulties to which I have referred arise mostly with reference to the plaintiff's case. As to the adoption of the *caveatrix*, Ma Sein Nyun, there can be but little doubt, and it will be well to deal with that point first. It should be stated that Ma Bi was the daughter of a Mahomedan, Mirza Taki, by a Burmese wife, Ma Thein. She appears to have been born about 1860 as she is said to have been 43 when she died on 23rd June 1903. She was first married to a Mahomedan named Esuf, who died about 13 years ago. She was therefore, up to the date of Esuf's death at least, a Mahomedan. She is said by the plaintiff to have afterwards become a Buddhist, but when this conversion took place there is no evidence whatever to show. From Ko Maung's evidence in cross-examination it would appear that she remained a Mahomedan for some time, as he gives the fact that she was a "kala" as a reason, not a very good one, why she could not have married the plaintiff. About two years after Esuf's death, Ma Bi formed the alliance with the plaintiff, as to the nature of which I have to decide in considering the plaintiff's claim. The alleged adoption of Sein Nyun is said to have taken place shortly after Esuf's death, *i.e.*, about 12 years ago. There is this initial difficulty in the defendants' way, in attempting to prove the adoption by Ma Bi, that at the date alleged it is extremely doubtful whether Ma Bi was not a Mahomedan, and so not competent to adopt a child. She was certainly a Mahomedan up to and after her husband Esuf's death. There is no evidence whatever to show when, if at all, she became a Buddhist. Ko Maung himself admits that she was a Mahomedan, or, as he called it, a "kala" at the date of the adoption. If this was so it follows that there was no such adoption as would give Ma Sein Nyun any rights under Buddhist Law. Apart, however, from the initial difficulty, it is clear that on the evidence no adoption has been proved.

Ma Sein Nyun herself does not profess to remember anything about it. This in itself is a most extraordinary fact, as she is now over 19 and must therefore have been at least seven when the adoption took place. It is most incredible that she should remember nothing of her life before that age, or of her transfer from her natural to her adoptive mother. There is also no doubt that Ma Sein Nyun told a deliberate falsehood when she said that she did not know who her natural mother was. The proof of the adoption rests on the evidence of Ko Maung and Ma Yin. They speak to the request for the child being made and complied with. It is said to have taken place in the presence of *luggis* or elders, Maung Tun U and Ah Hmein. Neither of these persons appears to be a *luggi* at all. Maung Tun U is a poverty-stricken old man who sweeps the Pagoda platform and earns a few pice daily. Ah Hmein is a young Chinaman, 33 years of age, who was therefore only 21 when the adoption must have taken place. Maung Tun U denied having been summoned, and says that luckily enough he happened to be present. Ah Hmein also appears to have been casually visiting at the house. The suggestion of a prearranged and formal ceremony has broken down completely. As to the treatment of the girl as a daughter or of any intention on Ma Bi's part that she should inherit we have no evidence at all. Ma Sein Nyun was referred to by two witnesses as a servant girl employed in the house after Esuf's death, and it does not appear that she was kept there in any higher or better capacity than this. Under these circumstances it is clear that the case of the *caveators* fails, and having no interest in the estate of the deceased they have really no *locus standi* in this suit.

It is however necessary to consider the plaintiff's claim to administer the estate of Ma Bi on its merits. The facts in this connection as admitted or proved I take to be as follows:—

Pai Beng Teng was and is a Chinese by birth and religion. He is a follower of Confucius, and unlike many of his countrymen who have settled in Burma, is not a Buddhist. He came to Burma many years ago and since 1886 has been a naturalised British subject. Before leaving China he married his first wife, a Chinese woman, who is still alive and resides in China. On his way here he took another wife, Geok Yong, also a Chinese woman, at Penang. She too is alive and lives with him in Rangoon. Some ten years ago, about two years after Esuf's death, Pai Beng Teng went through a form of marriage with Ma Bi. It is clear that not all the six preliminary steps to a first class marriage (which are enumerated on page 9 of Parker's work on Comparative Chinese Family Law) were performed on that occasion. At the same time preliminary negotiations had taken place and the marriage was arranged between the families on either side as required by Chinese Law. Then there was a meeting of the bridegroom and his friends at the bridegroom's house, and the subsequent procession to the bride's house, where tea and refreshments were served, and all joined in eating and drinking. The evidence of the various elders recorded goes to show that these ceremonies are considered sufficient by Chinese marrying women of this country to form a legal tie, and so I regard it.

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Pai Beng Teng and Ma Bi continued to live as man and wife until her death. It is true that she did not reside in the same house as the wife from Penang but she was apparently recognised by that wife, and the wife from China who was here for a year or so, resided with Ma Bi during a considerable portion of that time. Pai Beng Teng had one child by Ma Bi which lived for seven months. She gave birth to another child, but it was still-born. As I have said before, Ma Bi is said to have become a Buddhist. It is not clear when that event took place. It may have been a gradual change of religion. When she died in June 1903, she was buried according to Chinese rites, Pai Beng Teng defraying the funeral expenses. *Pongyis* are said to have attended the funeral. I do not consider it necessary to analyse in detail the evidence of the various witnesses on which I have formed the above conclusions of fact, because it is all given on the plaintiff's side. For the *caveators* we have the evidence of Ko Maung alone. He now pretends to be entirely ignorant of the relationship between Pai Beng Teng and Ma Bi, and even of the birth and death of the child, which was born and died in his own house. He is constrained to admit that Pai Beng Teng was a constant visitor there; one of his witnesses, Maung Po Kun, says that both Ma Bi and Pai Beng Teng told him that they were husband and wife. Another, Ko Ba Ba, knew them as such. None of the witnesses, not even Ma Yin, denies the fact of the marriage in so many words. I have therefore no difficulty in coming to the conclusion that Pai Beng Teng and Ma Bi went through a form of marriage and regarded themselves and were regarded by others as man and wife. The real question that I have to decide is whether this relationship between Pai Beng Teng and Ma Bi was such as to give him a right to administer her estate. It is not easy to say what was the exact legal relationship between them, or how far Pai Beng Teng became entitled as an heir. The difficulty is caused principally by the fact of their being and remaining of different religions. If the question were as to succession to Pai Beng Teng's estate, it would be easily answered, for in his case the Succession Act would apply. Ma Bi, however, being a Mahomedan or a Buddhist, succession to her estate would not be governed by the provisions of that Act, unless they became applicable by reason of the marriage. For such a proposition I can find no authority, and it might be urged that it is contrary to the principles of the Act itself. It is not, however, in my opinion necessary to decide the case on that ground. From such authorities on Chinese Law as I have been able to refer to (1), it is clear that a Chinese, unless he is heir to two persons, *e.g.*, a father and an uncle, can have only one wife properly so called: he may however take any number of secondary wives. These secondary wives have a legal status, though what that legal status is, is not quite clearly shown in the works at my disposal. It would however appear not quite correct to denominate the secondary wife as a concubine. She is evidently something higher than what that word denotes to our ideas. Mr. Parker in his 5th Excursus says that

(1) Staunton's Translation of the Penal Code of China: Alabaster on Chinese Criminal Law: *Le Mariage Chinois* by Pierre Hoang; and Parker's Comparative Chinese Family Law.

the condition of the first and secondary wives may be translated by the terms *matrimonium juris civilis* and *matrimonium juris gentium* respectively. The secondary wife appears to be a wife by customary law. The evidence of the elders and others in this Court shows that a woman so married is considered to be legally married, to be, in short, the *wife* of the man and not his *mistress*. I was referred to two cases in this Court. In Civil Regular No. 21 of 1900, *Ma Yin v. Kai Ya and another*, the plaintiff as widow of a Chinese, Chan Phee, claimed to be entitled to take out letters of administration to his estate. The deceased left two daughters and two adopted sons. The right of the widow to administer was upheld. This case, however, is not of much assistance as it appears that Ma Yin was herself a Chinese, the daughter of a Chinaman, and she was also the first wife of the deceased and married to him according to Chinese rites and ceremonies. She was not, so far as I can gather from the record, a secondary wife. The right of the first wife to administer, even though she does not inherit, is recognised in China,—see Alabaster on Chinese Criminal Law, p. 578. In the second case, Civil Regular No. 67 of 1900, *Fone Lan v. Ma Gyi and others* (2), the plaintiff claimed to be the adopted daughter of Ah Choung, deceased. Ma Gyi, his widow, had apparently been a secondary wife. Letters of administration were granted to her by this Court, but not, so far as I can ascertain, after any contest. The question in that suit was as to the right of a Chinese Buddhist to adopt. In delivering the judgment of the Appellate Court, Fox, J., said:—

“It would be in accordance with the principles of the decisions of the Courts of India to accord to the Oriental, whose estate is in question, the rules of succession applicable to one of his class dying in his native country. There does not appear to be any written law on the subject of succession in China, therefore the law applicable would be the customary law.”

Now there is no use in attempting to discover what would be the customary law in China on the point at issue. In China a woman is regarded as incapable of holding property; there could, therefore, never be any question of inheritance to or administration of her estate. When, however, as in the present case, a Chinese marries a woman in a foreign country and that woman is capable of possessing and does possess property, there may be a customary law governing the succession to such property. Two witnesses only, Taik Hwat and Ah Shain, touched on this point. Both expressed an opinion that if the wife died without children the husband would inherit all her property. This might not be regarded as sufficient evidence of a custom having such momentous consequences. If, however, the matter had to be decided, under section 13 (3) of the Burma Laws Act, 1898, according to justice, equity and good conscience, the decision would be in my opinion to the same effect. The only other point of view would be to regard Ma Bi as a Mahommedan or Buddhist, and to regulate the succession to her estate by Mahommedan or Buddhist Law. It is unnecessary to determine which she was at the time of her death, but as I have said the evidence rather tends to show that she was a Buddhist. By either system, she

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having left no children, her husband would be an heir and presumably entitled to administer. This appears to me sufficient for the purposes of this case. Although there may be some uncertainty as to the answer to each individual question as it arises, there is little doubt, I think, that from whichever aspect the case is regarded the plaintiff's claim to administer the estate of the deceased is just and reasonable and must be upheld. There will be an order to that effect. The defendants must pay the plaintiff's costs of suit. Advocate's fee ten gold mohurs.

Before Mr. Justice Bigge.

MAUNG KYIN v. PO THIN AND ONE.

Messrs. *Lewis and Giles*—for appellant (defendant).

Mr. *McDonnell*—for respondents (plaintiffs).

Court-fee in suit to set aside document—*Court-fees Act, s. 7 (iv) (c), schedule II, article 17 (c).*

The cancellation of a document involves consequential relief, and the plaint in a suit for cancellation must be stamped, under section 7, sub-section (iv), clause (c), of the *Court-fees Act, 1870*, according to the amount at which the relief sought is valued.

Tacoorden Tewarry v. Nawab Syed Ali Hossein Khan and others, (1874) 21 W. R., 340; *Jog Narain Giree v. Grish Chunder Mytee and others*, (1874) 24 W. R., 438; *Samiya Mavali v. Minammal*, (1900) I.L.R., 23 Mad., 490; followed. *Shrimant Sagajirao Khanderao Naik Nimbalkar v. Smith*, (1896) I. L. R., 20 Bom., 736; *Karam Khan v. Daryai Singh*, (1883) I.L.R., 5 All., 331; dissented from.

Followed in W.B.R. II (1914-16) 102.

In this case the plaintiff sued to set aside two sale documents affecting paddy land of the value of Rs. 700 and a dhani garden of the value of Rs. 100.

The plaint and memorandum of appeal in the lower Courts all bear a Rs. 10 stamp, as does the present appeal, and the question has arisen whether the suit does not fall under section 7 (iv) (c) of the *Court Fees Act*, instead of under Article 17 of Schedule II of the same Act, as the plaintiff does not ask for a declaratory decree at all but for the specific cancellation of a document and that the value of the relief claimed is capable of assessment.

In *Tacoorden Tewarry v. Nawab Syed Ali Hossein Khan and others* (1), in which the respondents sued for confirmation of their possession of certain Mouzahs, and their plaint, which declared that their suit was for that confirmation, prayed that it might be done after a reversal of a summary proceeding and after setting aside a fraudulent deed set up by the appellant, it was held by their Lordships of the Judicial Committee of the Privy Council, *inter alia*, that the plaint in asking for cancellation of the deed prayed for substantial relief. This case was followed in *Jog Narain Giree v. Grish Chunder Mytee and others* (2), in which it was held that a plaint asking for confirmation of possession and for setting aside a forged or invalid will could not come under Article 17, clause (iii) of Schedule II, but must be stamped according to the value of the subject matter of the suit.

(1) (1874) 21 W. R., 340.

(2) (1874) 22 W. R., 438.

Specific Relief Act No. I of 1887.

In the Full Bench ruling in *Karam Khan v. Daryai Singh* (3), relied on by Mr. Giles, which was a suit to set aside a mortgage deed, the taxing officer was of opinion that the suit was one to obtain a declaratory decree or order where consequential relief was prayed and that it fell under section 7 (iv) (c) of the Court Fees Act, 1870. Straight, J., in referring the point said that he had hitherto held this view and had so decided as he considered himself bound by the rulings I have just cited; but as these decisions were passed long before the Specific Relief Act came into operation and as the case seemed to be one exactly of the kind mentioned in section 39 of that Act and to be in the nature of a simple declaratory suit he thought it desirable to refer the point. The Full Bench delivered the following opinion:—

“We concur in the opinion expressed in the reference that the case is in the nature of a simple declaratory suit.”

Section 39 of the Specific Relief Act provides that “any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.” I am unable to see how the enactment of that section has altered the law as laid down by their Lordships of the Privy Council and followed by the Calcutta High Court in the case I have already referred to in Volume 24 of the Weekly Reporter. Indeed, when examined the section seems an authority the other way, for it provides for a declaration that the instrument is void and the further relief of cancellation, and moreover Chapter VI of the Act deals with declaratory decrees.

In *Shrimant Sagajirao Khunderav Naik Nimbalkar v. Smith* (4), it was held that a suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief and that Article 17, clause (iii), and not section 7, clause (7), of the Court Fees Act, 1870, is applicable to it, and Jardine, J., in the course of his judgment said: “It was mooted that in the present case the relief asked for was the cancelling of a fraudulent decree, and that this was consequential relief. But in *Karam Khan v. Daryai Singh* (5), a Full Bench held the contrary, even though cancelling of a deed was prayed for.”

The Allahabad case was considered in *Samiya Mavalí v. Minam-mal* (6). In that case plaintiff was granted a decree (which was affirmed on appeal by the subordinate Court), declaring a sale deed invalid on the ground that it had been obtained by fraud, coercion, undue influence and without consideration. One of the defendants preferred a second appeal to the High Court, and the question arose as to the amount of duty payable on such appeal. The appeal first came on for hearing with reference to the question as to the amount of stamp duty payable and the Court in its order said that it had been said that the subject-matter in dispute was one the money value

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(3) (1883) I.L.R., 5 All., 331.
(4) (1896) I.L.R., 20 Bom., 736.

(5) (1883) I.L.R., 5 All., 331.
(6) (1900) I.L.R., 23 Mad., 490.

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of which it is not possible to estimate, and that it was said that the decree for which the plaintiff asked was a declaratory decree only without any consequential relief, and on that latter point they had been referred to the Allahabad decision in *Karam Khan v. Daryai Singh* (5). In reference to that case they said, "The report of the case is "extremely brief, but, if it was intended to hold that the law, as "understood before the Specific Relief Act came into force, was "altered by section 39 of that Act, we are unable to agree with the "decision," and it was held that section 7 (iv) (c) of the Court Fees Act must be taken to apply and a Court-fee stamp was ordered to be paid on the value which the plaintiff had placed on the subject-matter of the suit, namely, Rs. 800. I think that in arriving at this decision the learned Judges of the Madras High Court were entirely right and I am unable, with respect, to follow the Full Bench ruling of the Allahabad High Court; and I therefore order that the appeal must be valued on the subject-matter of the suit, namely, Rs. 800, and direct the Court-fee stamp to be paid in accordingly on or before the 14th day of March 1904.

Civil Revision
 No. 10 of
 1904.
 March 3rd,
 1904.

Before Mr. Justice Bigge.

LU GALE AND ONE v. MAUNG MO.

Messrs. Chan Toon, Christopher and Das—for applicants (plaintiffs). | Messrs. Pennell and Thin—for respondent (defendant).

Evidence of oral agreement varying terms of document—Evidence Act, section 92 (5).

A advanced certain money to B and C on a bond. On the face of the bond, B and C were jointly and severally liable for the amount. Subsequently A sued C for the amount, foregoing in his plaint his claim on B on the ground that the latter could not be found. The Judge of the Court of first instance admitted oral evidence to prove that, by the custom of the trade, B was the principal debtor and C merely the surety, and, holding that the abandonment of the claim against B had the effect of releasing C, dismissed the suit.

Held,—That the learned Judge had erred in admitting oral evidence of a condition which was repugnant to and inconsistent with the express terms of the bond.

Harek Chand Babu and others v. Bishun Chandra Banerjee and another, (1903) 8 C. W. N., 101, referred to.

The suit was brought on a bond dated the 27th November 1901 whereby in consideration of Rs. 500 advanced by the plaintiffs to Maung Po Thin and Maung Mo (therein called the boat-owner or boat-owners) for the purpose of supplying paddy to the plaintiffs (therein called the brokers) they hypothecated to the brokers a boat upon the condition set out in the bond. The boat-owner or boat-owners agreed on demand to pay to the brokers the said sum of Rs. 500 with interest at two per cent. per mensem. The bond contains a power of sale and this clause:—

"If the said proceeds are not sufficient for the payment in full of the said expenses and of all sums so remaining due as aforesaid the said boat-owner or boat-owners binds himself or themselves to make good the deficiency."

Upon the face of the bond no question of principal and surety arises, both of the boat-owners being equally liable. The plaint states that Maung Po Thin had disappeared and that on him the plaintiffs "forego their claim," but after the hearing and before judgment the plaintiffs asked to amend by striking out the words "and on whom the plaintiffs forego their claim," and the learned Judge's refusal to allow the amendment is one of the grounds on which they have applied here for revision. No doubt section 53, Code of Civil Procedure, gives very wide powers of amendment, but they are at the discretion of the Judge and I cannot say that the learned Judge acted without discretion in refusing to allow these words to be deleted when the whole hearing had proceeded on the assumption that the plaintiffs' claim was withdrawn against Maung Po Thin. It is not the case of a plaint being prepared by the parties themselves or by some ignorant petitioner, for it bears the signature of plaintiffs' advocates, and I think it would be most undesirable to set a precedent whereby a suit which has been launched with a plaint containing certain allegations, and has been heard on that basis, should be finished with these allegations absent simply because a litigant's advisers find or think that they find them inconvenient at the last moment. The other ground for revision is more substantial, namely, that the lower Court erred in law in admitting oral evidence to alter the terms of the document. The learned Judge found that there could be no question, after plaintiffs' own evidence, that Maung Po Thin was the principal debtor and the respondent his surety, and that there was no express agreement on these lines; it was admittedly the custom of the business, and the partner contracted with reference to it; and that this being so the abandonment of the claim against Maung Po Thin had the effect of releasing his surety.

The respondent's advocate relies on proviso 5 to section 92 of the Evidence Act which allows "any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description" to be proved, but this proviso is subject to the one that follows, that "the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract." It would require overwhelming authority to convince me that the incident which it is proposed to annex to this bond—in which both parties are equally liable—namely, that of principal and surety, is neither repugnant to nor inconsistent with its terms, and none has been produced.

I have of course been referred to the judgment of Lord Campbell quoted at page 641 of Ameer Ali and Woodroffe's *Law of Evidence* (1), but I find nothing there to warrant any Court in transforming an ordinary and clearly expressed contract such as that before me, in which the parties stand in the legal relation of creditor and debtors, into a contract of guarantee in which one of them, who on the face of the contract is a joint and several debtor, becomes the surety of the other, undertaking to discharge liability only in case of his default,

(1) Second Edition, 1902.

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and it may be as well to emphasize these very significant words of his Lordship:—

“Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is immaterial. In either view it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument.”

But while no authority has been cited to support the view taken by the learned Judge, the case of *Harek Chand Babu and others v. Bishun Chandra Banerjee and another* (2) is most strongly against it. That is a case in which evidence had been admitted to shew that one of the executants of a promissory note signed it only as a surety, and it was held that such evidence was inadmissible under section 92 of the Evidence Act. But in as much as the evidence admitted does most certainly labour under the objection referred to by Lord Campbell and was inadmissible under proviso (5) to section 92, no authority was necessary to guide the Court to a right conclusion.

This application is allowed; the decree of the lower Court is set aside and one will be entered against the respondent with all costs.

Criminal Appeal
 No. 87 of
 1904.
 March 25th,
 1904.

Before Mr. Justice Birks.

SHWE BWIN v. KING-EMPEROR.

The Hon'ble Mr. Lewis, Government Advocate,—for the Crown.

Magistrate refusing to summon witnesses for defence—Section 257, Criminal Procedure Code.

When a Magistrate refuses to summon witnesses called for the defence, he should record his reasons for holding that the application is made for the purpose of vexation or delay or for defeating the ends of justice.

I admitted this appeal as the memorandum of appeal states that the accused named five witnesses who were not summoned or examined and the appellant alleges that he has been convicted without being allowed to defend himself. I find that accused named five witnesses but only one was examined. The Government Advocate who has appeared to support the conviction concurs with me in thinking the reason given by the Magistrate for refusing to call these witnesses is inadequate. It may be that the *alibi* that the accused can prove will not be inconsistent with the case for the prosecution, but I notice that the accused alleges a previous quarrel and is entitled to have his witnesses called. Under section 257, Criminal Procedure Code, the Magistrate can only refuse to issue process on the ground that the application is made “for the purpose of vexation or delay or defeating the ends of justice.” No such grounds are recorded in the present case and the accused should have been given an opportunity under clause 2 of that section of depositing their expenses. This is a power which should be sparingly exercised as it creates an impression that

(2) (1903) 8 C. W. N., 101.

the Magistrate is biased in favour of the prosecution. The case will therefore be remanded to the District Magistrate to take the evidence of the other witnesses named and return the proceedings to this Court with any further remarks as to the weight to be attached to their evidence that he may wish to record.

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Before Mr. Justice Birks.

TUN HLA AND ONE v. MAUNG TO AND THREE OTHERS.

Messrs. *Agabeg* and *Maung Kin*—for applicants (defendants).

Suit for winnings on a wager—Indian Contract Act, section 30.

Civil Revision
No. 157 of
1903.
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A suit for the amount deposited by the plaintiffs with a stake-holder, on a wager, will lie; but a suit for the amount deposited by both parties to the wager is barred by section 30 of the Indian Contract Act.

Queen-Empress v. Nga Po Twe, (1881) S. J. L. B., 130; *Savage v. Madder*, (1867) L. J., 36 N. S. C. L., 178; *Nga Te v. King-Emperor*, (1904) 2 L. B. R., 216; referred to.

The petitioners in this case are the third and fourth defendants, who were sued jointly with the two stake-holders by the two plaintiffs for both their winnings and the original stakes.

The Court of Small Causes, Toungoo, gave the plaintiffs a decree on the ground that section 30 of the Contract Act did not apply to a pony-race and the case of *Queen-Empress v. Nga Po Twe* (1) was distinguished on this account. The Court seems to have held that as the Government had sanctioned the holding of the pony-race, wagers made with regard to that race were legally recoverable. In *Po Twe's* case, in the discussion of the civil aspect of a wager on a boat-race the case of *Savage v. Madder* (2) was followed, and it was held that the plaintiffs, having never repudiated the wager but demanded the whole stakes, could take nothing, not even the stakes they themselves deposited. It is clear from the judgment in *Po Twe's* case that the Civil Courts should apply section 30 of the Contract Act to such a case as this. Neither boat-races nor pony-races are illegal in themselves. This judgment has recently been over-ruled in part in *Nga Te v. King-Emperor* (3) where a stake-holder misappropriated to his own use the stakes deposited. It remains, however, good law in so far as the action of the Civil Courts is concerned. The plaintiffs' suit must therefore be dismissed. They will be allowed to repudiate the wager and can claim the original stakes deposited by a separate suit if necessary: but their present suit is vitiated by the fact that it is based on a wagering contract. The application is allowed, petitioners will recover costs. Advocate's fee two gold mohurs.

(1) (1881) S. J. L. B., 130. | (2) (1867) L. J., 36 N. S. C. L., 178.
(3) (1904) 2 L. B. R., 216.

Full Bench—(Criminal Reference).

Criminal Reference No. 23 of 1904. April 18th, 1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, Mr. Justice Bigge and Mr. Justice Birks.

KING-EMPEROR *v.* PAKIRI.

Mr. Giles, Assistant Government Advocate.

Mr. Banurji—for the accused.

False evidence—Indian Penal Code, sections 191, 193—Statements made before Revenue Officers in certain cases—Indian Oaths Act, 1873, section 4.

In order that a person making a statement to a Revenue Officer may be legally bound to speak the truth, it is necessary that the Revenue Officer should be acting in the discharge of some duty or in the exercise of some power imposed or conferred on him by law.

A Revenue Officer to whom an application for a grant of land is made and who enquires into matters not specified in Rule 3 or Rule 46 of the Rules under the (Lower) Burma Land and Revenue Act; or a Revenue Officer enquiring into an objection to the issue of an order of eviction under Rule 52 of these Rules, is not proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law; and a charge of giving false evidence in respect of statements made in such enquiries will therefore not lie.

Meaning of "witness," "evidence," considered with reference to section 3 of the Indian Evidence Act and section 5 of the Indian Oaths Act.

"Rules" and "Directions" under the (Lower) Burma Land and Revenue Act distinguished.

The following reference was made to the Full Bench by Thirkell White, C.J. :—

In 1900, an application from one Pakiri for a grant of 50 acres of land was presented to the Deputy Commissioner of Pegu. On 22nd December 1902, Pakiri made a statement before an officer who describes himself as Special Grant Officer. He made a further statement on 26th January 1903 before the same officer. The deponent is stated to be Pakiri, the son of Kuponin. The application was rejected on 4th February 1903. The depositions were, I understand, made in the course of an enquiry held under the Deputy Commissioner's orders. In August 1903, Pakiri petitioned the Deputy Commissioner in respect of a notice of ejection from this land which had been served on him. He was examined by the Deputy Commissioner on 28th September 1903. Thinking the statements made by Pakiri before the Special Grant Officer and himself respectively to be inconsistent, the Deputy Commissioner by order dated 2nd December 1903, directed the prosecution of Pakiri before the Headquarters Magistrate. I understand that the Deputy Commissioner's intention was that Pakiri should be tried for giving false evidence either before the Special Grant Officer or before the Deputy Commissioner in one or other of the Revenue proceedings above mentioned. Neither of these depositions was made on oath.

The Headquarters Magistrate held that the statements in respect of which the prosecution was ordered were not made in the course of a judicial proceeding and that therefore the accused could not have

committed an offence under section 193 of the Indian Penal Code. His order should have been to discharge the accused. But no formal order to this effect was recorded.

The District Magistrate has referred the case to this Court for orders under section 437, Code of Criminal Procedure, and the accused has been called upon to show cause why further enquiry should not be ordered. He has shown cause through his advocate, and I have been much assisted by the learned argument of the Assistant Government Advocate on behalf of the Crown.

The first and obvious comment on the case is that it is not necessary to show that the proceedings before the Special Grant Officer or the Deputy Commissioner were judicial proceedings. A person may give false evidence otherwise than in a judicial proceeding and is then punishable under the latter part of section 193, Indian Penal Code. For the purposes of this case, as no oath was administered to the accused, the definition of giving false evidence, as contained in section 191, Indian Penal Code, is as follows:—

“Whoever, being legally bound by any express provision of law to state the truth, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.”

The question is therefore whether, when making the statements under consideration before the Special Grant Officer and the Deputy Commissioner, the accused was “legally bound by any express provision of law to state the truth.” It may be necessary or desirable, for the purpose of section 193, Indian Penal Code, to determine whether the statement alleged to be false was made in the course of a judicial proceeding. But if it is held that it was not so made, the accused might still be liable to conviction of the offence of giving false evidence.

Under section 57, clause (c), of the (Lower) Burma Land and Revenue Act, 1876, the Local Government may invest any Revenue Officer with any power exercised by a Civil Court in the trial of suits. Under section 99 of the Directions to Revenue Officers, Deputy Commissioners and Subdivisional Officers have been empowered to exercise the powers specified in the above clause. The Deputy Commissioner reports that the Special Grant Officer, who I understand is a Myoök, has been authorized under clause (7) of this Direction to exercise the powers conferred on Subdivisional Officers. For the purposes of this discussion, I assume this to be the case and that all legal requirements to this end have been complied with. I think that the intention and effect of this Direction is that Deputy Commissioners and Subdivisional Officers, when acting as Revenue Officers, can exercise any power exercised by a Civil Court in the trial of suits.

One of the powers exercised by a Civil Court in the trial of suits is that of receiving evidence. This is a proposition which cannot be questioned. By section 4 of the Indian Oaths Act, 1873, all persons having by law authority to receive evidence are authorized to administer oaths and affirmations in discharge of the duties, or in exer-

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cise of the powers, imposed or conferred on them by law. A Revenue Officer empowered under section 57, clause (c), of the Land and Revenue Act being a person having by law authority to receive evidence has therefore also authority to administer oaths and affirmations, and that authority is conferred by the Oaths Act. By section 14 of the Oaths Act, every person giving evidence on any subject before any person authorized by the Oaths Act to administer oaths and affirmations is bound to state the truth on that subject. And by section 13 of the Oaths Act, no omission to take an oath or make an affirmation affects the obligation of a witness to state the truth. It follows that every person giving evidence on any subject before a Revenue Officer empowered as aforesaid, in the discharge of any duty or in the exercise of any power imposed or conferred on him by law, is bound to state the truth on that subject.

The question is therefore narrowed to the consideration of the occasions on which a person making statements to a Revenue Officer duly empowered as above mentioned can be held to be giving evidence within the meaning of section 14 of the Oaths Act; and the occasions on which a person making such statements is a witness within the meaning of section 13 of that Act.

Section 3 of the Evidence Act defines "Evidence" exhaustively for our purpose as being "all statements which the Court" (including in this case, by virtue of the definition of "Court" in the same section, a Revenue Officer empowered as aforesaid) "permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry." This leads to the consideration of the question, Who is a witness? The only approach to the definition of the word "witness," so far as I am aware, is that given in section 5 of the Oaths Act which is as follows:—"All persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having, by law or consent of parties, authority to examine such persons, or to receive evidence." According to this definition, a person who may lawfully be examined by a Revenue Officer is a witness. Section 118 of the Code of Civil Procedure empowers the Court to examine a party to a suit. Section 165 of the Code empowers the Court to require any person present in Court to give evidence. Revenue Officers empowered under section 57, clause (c), of the Land and Revenue Act have these powers. The definition cited from section 5 of the Oaths Act no doubt applied to the word "witness" as used in section 13 of the Act. It cannot be applied to the word as used in the Evidence Act, which was passed a year before the Oaths Act. In the absence of a definition in the Evidence Act, the word "witnesses" in section 3 of that Act must be construed in its ordinary and natural meaning. It may be taken to mean and include all persons competent to testify and who do actually testify before a Court. It seems to me that the ordinary and natural meaning of the word "witness" is at least wide enough to include the definition in the Oaths Act. I think therefore that any person who

Officer empowered under section 57, clause (c), of the Land and Revenue Act, when acting in the discharge of a duty or in the exercise of a power imposed or conferred by law, is a witness, and that in making such a statement he is giving evidence.

As might have been expected, the fundamental consideration is whether the statement is made before the Revenue Officer on an occasion when he is acting in the discharge of a duty or the exercise of a power imposed or conferred on him by law. One of the essential links in the chain of reasoning in the case is the power of the Revenue Officer to administer an oath or affirmation; and that power is conferred on the Revenue Officer only in discharge of the duties, or in exercise of the powers, imposed or conferred upon him by law. On the occasion when he is discharging such a duty or exercising such a power, the Revenue Officer, if empowered as aforesaid, may lawfully examine any person; any person so examined is bound by express provision of law to state the truth on the subject on which he is examined; and this obligation is not affected by the omission of the person so examined to take an oath or make an affirmation.

This being the general rule deducible from consideration of the several enactments which have been examined, the question for decision in this case is whether the statements made by Pakiri were made in the course of enquiries or proceedings which the Revenue Officer was required or empowered by law to hold. The enquiry held by the Special Grant Officer was held with a view to ascertaining whether Pakiri was a proper person to obtain the grant for which he had applied, and whether the person who appeared and called himself Pakiri was really the person who had applied for the grant. Was this enquiry one which the Special Grant Officer was required or empowered by law to make? I do not think that section 1 of the Directions to Revenue Officers, cited by the District Magistrate, legally imposes that duty, or confers that power. For, as I understand, this direction is not a Rule made under the Land and Revenue Act with the sanction required by section 60. Indeed I am disposed to think that the Direction to make what must be taken to be a departmental, as distinguished from a legal, enquiry affords some indication that an enquiry into the matters specified in the Direction is not provided for by Rule. But Rule 3 of the Rules under the Land and Revenue Act has the force of law; and that Rule prescribes that the applicant for a grant or lease of land shall, if so required, satisfy the Revenue Officer that he possesses sufficient means to fulfil the purpose and conditions of the grant. I have no doubt that this Rule implies that the Revenue Officer has power to make an enquiry on this point. I cannot find that the Revenue Officer is explicitly empowered or required by law to make any other enquiry in respect of applications for grants, except into objections under Rule 46. That Rule expressly provides for an enquiry when there are objections. But by Rule 44, the Revenue Officer is required to make a grant to the applicant only if no good reason exists why the grant should not be made. It may be argued that this implies that the

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Revenue Officer may enquire in order to ascertain whether any good reason exists against the making of the grant. But I am in doubt whether this possible implication can be said by law to impose the duty or confer the power of making such an enquiry. The point seems to me to be one of much difficulty. On the one hand, it seems unreasonable to say that the Revenue Officer cannot hold a legal enquiry into, for example, the identity of the applicant and his fitness to be a grantee. On the other hand, provision is made for a departmental enquiry into these matters; and moreover the material provision of law is that the Revenue Officer should be discharging a duty or exercising a power imposed or conferred by law. It seems doubtful whether the duty of enquiring into these matters can be held to be imposed by law, or the power of enquiring can be held to be conferred by law, when the law is silent on the point.

Similarly, as regards the proceedings before the Deputy Commissioner, there does not seem to be any definite rule that an enquiry may or must be held in cases in which an order of eviction has been, or is intended to be, issued under Rule 52 of the Revenue Rules. It seems unreasonable to say that a Revenue Officer has not the power to hold an enquiry before passing such an order; still less that he cannot enquire into any objection that may be taken to the order after it is issued. But the fact still remains that the law does not, apparently, require him or explicitly authorize him to hold such an enquiry. And it is doubtful, in these circumstances, whether if he does hold any such enquiry he is exercising a power conferred on him by law. It may be remarked, in respect of both cases, that the Revenue Officer abstained from administering an oath, a circumstance which seems to indicate that he did not regard himself as holding a legal, but rather a departmental, enquiry. In either case or both cases, the Revenue Officer may have been mistaken.

These two points seem to me to be of so difficult and doubtful a nature that I think they should be fully considered. Under the provisions of section 11 of the Lower Burma Courts Act, I therefore refer to a Bench the following questions:—

- (1) Is a Revenue Officer to whom an application for a grant of land is made, and who enquires into matters not specified in Rule 3 or Rule 46 of the Rules under the Burma Land and Revenue Act, proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law?
- (2) Is a Revenue Officer enquiring into an objection to the issue of an order of eviction under Rule 52 of the Rules under the Burma Land and Revenue Act proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law?

The opinion of the Bench was as follows:—

Thirkell White, C.J.—In my opinion both questions in the reference should be answered in the negative. I have little to add to what I have said on the subject in the order of reference. On con-

sideration of the points therein specified, and after hearing the arguments, I am of opinion that when holding an enquiry, a Revenue Officer cannot be said to be acting in discharge of a duty imposed, or in exercise of a power conferred, by law, unless he is required or authorized by some specific provision of law, or by necessary implication from some specific provision of law, to hold that enquiry. It is clear that there is no specific provision of law which requires or authorises either of the enquiries specified in the two questions referred. And I do not think it can reasonably be held that the duty or authority to hold such an enquiry is necessarily implied by any section of the Land and Revenue Act or by any Rule made thereunder. The fact that the Act and Rules make specific provision for certain enquiries indicates that this view is correct. There is still further support for this proposition in the fact that the Directions to Revenue Officers explicitly provide for a departmental enquiry into matters respecting which an enquiry is not provided for by Rule.

Birks, J.—I concur.

Bigge, J.—I concur.

The final order in the case was as follows:—

Thirkell White, C.J.—In accordance with the decision of the Full Bench, and the opinions on the other points involved stated in my order of reference, I am of opinion that the accused, Pakiri, cannot have given false evidence in either of the proceedings in which he was examined by the Special Grant Officer and by the Deputy Commissioner respectively. The proceedings may therefore be returned.

Before Mr. Justice Birks.

MAUNG CHEIN v. MA SHWE THON AND 2 OTHERS.

Messrs. *Das and Christopher*—for applicant (defendant).
Mr. *Lambert*—for respondents (plaintiffs).

Addition of parties—Party added in appeal who was not a party to the suit
—*Civil Procedure Code, sections 32, 559, 562, 564.*

When a Court hearing an appeal is of opinion that a person not a party to the suit, and not entitled to be brought on the record in a representative capacity, should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.

Mihin Lall v. Imtiaz Ali, (1896) I. L. R., 18 All., 332; *Habib Baksh v. Baldeo Prasad*, (1901) I. L. R., 23 All., 167; *Ma Gyi v. Ma Yeik*, (1903) 2 L. B. R., 245; cited.

The plaintiffs-respondents in this case sued Maung Thein and Maung Han for Rs. 89-12-0, being the value of three cartloads of paddy. It is clear from paragraphs 1 and 2 of the plaint that the plaintiffs sold the paddy in their granary to advocate Maung Chein, the present petitioner, but he was never added as a party in the Court of first instance.

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KING-EMPEROR
v.
PAKIRI.

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144 of 1903.
May 4th,
1904.

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 MAUNG CHEIN
 v.
 MA SHWE THON.

He was added as a respondent in the lower Appellate Court and now appeals on the ground that there is no authority for such a procedure. The lower Appellate Court gave a decree against Maung Chein alone who admitted that he had sent some one to take delivery. Now section 559 of the Code of Civil Procedure enables the Court to add as a respondent any person who was a party to the suit in the Court against whose decree the appeal is made, but I have not been able to find any authority for adding a complete outsider. Mr. Das for the appellant has referred to the case of *Mihin Lall v. Imtiaz Ali* (1). In that case Mihin Lall, who was not a party in the Court of first instance, was added as a defendant-appellant and his appeal with others was dismissed. No decree was made out against him in the Court of first instance, and it was held that therefore he had no right of appeal. The learned Judges say:—

“When an Appellate Court thinks it is necessary to have as a party before it in appeal a person not appearing in a representative capacity and who is not a party to the suit in the Court of first instance, the Appellate Court should, in our opinion, remand the case to the Court of first instance, direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issue raised between him and the opposite side. It was the intention of the Legislature that in cases which might go in second appeal to the High Court or which might go to Her Majesty in Council, the parties to the suit should have the benefit of their issues of fact and of law being tried by two Courts.”

This case was referred to with approval in *Habib Bakhs v. Baldeo Prasad* (2), where the effect of section 564, Civil Procedure Code, was discussed. That section provides that “an Appellate Court shall not remand the case for second decision except as provided in section 562.” Section 562 would not ordinarily apply, for in that case as in this the Court of first instance disposed of the case on the merits and not on a preliminary point. In that case the learned Judges held that section 564 must be read with sections 27, 32, 53, and other sections of the Code, and that where it is necessary to give effect to these provisions a remand of the case to the Court of first instance for a further trial on the merits is permissible, though no express power of remand is given in the Code beyond sections 562 and 566. In the case then decided the Judge of the Court of First Appeal had remanded the case under section 562 (by way of analogy) for substitution of the names of the managers of the temple as plaintiffs in place of the idol.

There is also a recent decision of this Court in *Ma Gyi v. Ma Yeik* (3), in which the Chief Judge and I remanded a case for fresh trial on the ground that the necessary parties had not been added, where this decision of Strachey, C.J., was followed. The advocates who have argued this application concur in the necessity of a remand and suggest the following issues:—

- (1) Was Maung Thein the agent of Maung Chein or was his agent Kawidó?
- (2) Was delivery of the paddy made at Maung Chein's mill or at plaintiff's house?

(1) (1896) I. L. R., 18 All., 332. | (2) (1901) I. L. R., 23 All., 107.
 (3) (1903) 2 L. B. R., 245.

It will be open to the Court of first instance to make further issues if necessary when Maung Chein has filed his written statement. The appeal is accordingly allowed; the decisions of the Court below are set aside and the case will be remanded for fresh trial after the addition of Maung Chein as a party.

The costs of this application will be costs in the suit and will follow the result.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

KING-EMPEROR v. ÔN ME.

Vaccination Act, 1880—Burma Vaccination Law Amendment Act, 1900.

Failure to comply with a notice for the vaccination of a child, issued by the Superintendent of Vaccination under section 17 of the Vaccination Act, 1880, is not punishable under section 7 of the Burma Vaccination Law Amendment Act, 1900, but should be dealt with under sections 18 and 22 of the Act of 1880.

The Burma Act of 1900 provides for matters not contained in the Act of 1880, and is not intended to provide a summary procedure for cases already provided for in the Act of 1880.

There seems to be some confusion in this case. The conviction is said to be under the Vaccination Act, section 7. It is conjectured that the reference is to the Burma Vaccination Law Amendment Act, 1900. For that section is a penal section, whereas section 7 of the Vaccination Act, 1880, is not a penal section.

Section 7 of the Act of 1900 renders punishable any person who refuses or neglects to be vaccinated, or to be inspected, or who does certain other things in contravention of the Act. But it is not alleged that the accused in this case did any of the things specified in this section. What is alleged in the complaint is that she failed to attend the Vaccination Dépôt to vaccinate her child. It is clear that what the accused was alleged to have done was to fail to comply with a notice issued under section 17 of the Vaccination Act, 1880. The proper course then was for the Superintendent to report the matter to the Magistrate or Bench of Magistrates, if they have been duly appointed under section 18. The Magistrate or Bench could then, after enquiry, make an order under section 18, and disobedience of this order would be punishable under section 22.

The Burma Act of 1900 is supplementary to the Act of 1880, and deals with quite different matters. It provides for matters not contained in the Act of 1880. It is not intended to provide a summary procedure for cases already provided for in the earlier Act.

Before Mr. Justice Birks.

MA NGE v. MA MA AND ONE.

Mr. D. N. Palit—for appellant (plaintiff).

Messrs. Agabeg and Maung Kin—for respondents (defendants).

Review of order of dismissal for default—Advocate engaged in a case elsewhere—“Sufficient cause,” section 629, Code of Civil Procedure.

An Advocate, who was engaged in several cases on the same day before different Judges, expected that one of his cases would not be called before a certain hour. It was, however, called earlier, when he was engaged elsewhere, and was dismissed for default under section 556 of the Code of Civil Procedure.

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MAUNG CHEIN
v.
MA SHWE THON.

*Criminal Revision
No. 288 of
1904.
May 10th,
1904.*

*Special Civil and
Appeal No. 135
of 1903.
May 10th,
1904.*

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 MA NGE
 v.
 MA MA.

Held,—on an application for review of the order of dismissal, that the Advocate had not shewn “prevented by sufficient cause from appearing” in the sense section 629 of the Code.

Oriental Finance Corporation, Limited v. The Mercantile Credit and Finance Corporation, Limited (1866) Bom. H. C. R., II, 267; *Hardatrai Shrikisandas v. Bullion Association*, (1866) Bom. H. C. R., III, 60; *Kaj Narain Burdhun and another v. Akroor Chunder Roy Chowdhry*, (1876) 24 W. R., 141; cited.

This is an application made by Mr. Palit, advocate for the appellant Ma Nge, to restore Civil Second Appeal No. 135 of 1903. The affidavit which states the grounds on which this application is based is to the following effect:—

1. “On the 22nd February last I had two cases before the Honourable Judges composing a Bench sitting in Appellate Court-room No. 1.

2. I did not at all anticipate that the above appeal would be called on before 1 P.M., and as I had several cases in other Courts as well, I sent my clerk to get them postponed.

3. My two cases before the Bench were finished at about 12-30 P.M., and immediately after I ran to this Honourable Court and to my extreme regret I found that Mr. Lentaigne was arguing the case next to mine, and I was told by the Bench Clerk that my case had been called and dismissed for default.

4. My mistaken calculation was the reason for my not requesting some other advocate to get the above appeal put at the bottom of the day's board.

5. My client was not present in Court at the time when the case was called on as she is a resident of Sandoway and her advocate sent the case to me.”

Mr. Palit relies on two rulings of the Bombay High Court. The first of these is the *Oriental Finance Corporation, Limited v. The Mercantile Credit and Finance Corporation, Limited* (1).

In that case the Attorney made a *bonâ fide* mistake in thinking that a particular case was not down on the cause list for the day. This was held to be “sufficient cause” within the meaning of section 119 of the Code of 1859, and similar words occur in section 102 of the present Code.

In the second case, *Hardatrai Shrikisandas v. Bullion Association* (2), the mistake was that the plaintiff's Attorney understood one month's time to mean one calendar month, and the case was fixed in a less time.

This was held to be a *bonâ fide* mistake.

Both these cases can be distinguished from the present. Mr. Palit does not allege that he did not know that the case was down on the board for hearing, but merely miscalculated the time which the preceding cases would take; in other words, he took the risk of these cases not being quickly disposed of.

(1) (1856) Bom. H. C. R. II, 267. | (2) (1866) Bom. H. C. R., III, 60.

The case cited by Maung Kin is more applicable to the facts of this case. In *Raj Narain Burdhan and another v. Akroor Chunder Roy Chowdhry* (3), the Court held that the fact that the pleader's absence was accounted for or that he was engaged elsewhere was not sufficient cause.

Jackson and McDonnell, JJ., observed—

"It is very unfortunate that the Appellate Court should have encouraged the plaintiff in the belief that the Munsif was bound to defer the case until it was convenient to him or his pleader to attend."

There is, moreover, a case of this Court which seems exactly in point. In Special Civil Second Appeal No. 14 of 1902 the Chief Judge remarked as follows:—

"Mr. Banerji tells me that he was absent from the Court because he was under the impression that the learned Judge would not be ready to call the case until a somewhat late hour. Under section 629, Civil Procedure Code, before I can readmit the application, it must be proved that the applicant was prevented by some sufficient cause from attending when the application was called on for hearing. I am unable to see how it can be held that in this case either the applicant or his pleader was prevented from attending. The pleader thought fit to make an erroneous and unjustifiable assumption."

In Special Civil Second Appeal No. 167 of 1902 Mr. Justice Fox arrived at a similar conclusion. For these reasons I must dismiss this application with costs.

Before Mr. Justice Birks.

MAUNG MO v. PO MIN.

Maung Kyaw—for applicant (defendant).

Judge personally interested in suit in his Court—Transfer of case—Lower Burma Courts Act, 1900, section 33—Code of Civil Procedure, section 25.

When a Judge feels himself to be personally interested in a case in his Court, the procedure prescribed by section 33 of the Lower Burma Courts Act, 1900, should be observed.

Lubri Domini and others v. Assam Railway, (1884) I. L. R., 10 Cal., 915; *Aloo Nathu v. Gagubha Dipsangji*, (1895) I. L. R., 19 Bom., 608; referred to.

The plaintiff-respondent in this case sued the four defendants, of whom the present petitioner is the first, to recover Rs. 300 due as cooly hire for working the upper portion of the Kyauknaw Pagoda. The 1st defendant pleaded that the work was badly done and that Rs. 60 had been already paid under the agreement entered into. The other defendants seem to have denied their liability under the agreement.

The plaint was filed on the 12th May 1903; issues were framed on the 10th June and three witnesses for the plaintiff were examined on the 22nd June. On the 17th July the following order appears in the diary:—"The defendant in this case wants the case to be transferred to the Subdivisional Court as the plaintiff is one of my men in whose case I am supposed to be interested. The proceedings are submitted to the Subdivisional Court for disposal."

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MA NGB
v.
MA MA

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No. 5 of
1904.
May 16th,
1904.

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 MAUNG MO
 v.
 PO MIN.

On the 4th August the proceedings were received back with the remark that the transfer was irregular. It appears from the judgment, though it is not mentioned in the diary, that the 2nd, 3rd and 4th defendants were struck out. The plaintiff obtained a decree in full against the 1st defendant.

The 1st defendant appealed to the District Court, and one of the grounds of appeal was that the Judge of the Court of first instance should not have tried the case as being personally interested. The Judge of the District Court noted that two adjournments had been granted to enable the defendant to move for a transfer.

Application for revision is now made on the ground that the Judge of the Court of first instance should have moved the District Court to make a transfer as he was personally interested.

It may be observed that no application for a transfer was made till three witnesses for the plaintiff had been examined. Objections of this kind should be taken at the earliest opportunity and not after the party applying has got an idea how the case is likely to go.

Maung Kyaw has only cited one authority in support of his application. The majority of the cases I have examined as to the transfer of suits do not deal with the question now raised.

In the case of *Loburi Domini and others v. Assam Railway* (1), it was held that a Judge having expressed an opinion on the merits of a certain matter in his executive capacity was disqualified from dealing with it judicially. This ruling was followed in *Aloo Nathu v. Gagubha Dipsangji* (2), where it was held that "no Judge can act in any matter in which he has any pecuniary interest, or in which he has any interest, though not a pecuniary one, sufficient to create a real bias."

Section 33 of the Lower Burma Courts Act, 1900, provides as follows:—

"(1) No Judge or Additional Judge of a Court under this Act shall hear or determine any suit, appeal or other proceeding to which he is a party or in which he is personally interested.

(2) When any such suit, appeal or other proceeding comes before any Judge of a Subordinate Court he shall forthwith transmit the record of the case to the Court empowered to transfer cases to which he is subordinate, with a report of the circumstances attending the reference, and such superior Court shall thereupon hear and determine the case or transfer it to some other Court.

(3) When any such suit, appeal or proceeding comes before an Additional Judge of a Subordinate Court he shall forthwith transmit the record of the case to the Judge of the Court, who shall hear and determine the case."

Now the Judge of the Township Court does not appear to be also the Additional Judge of the Subdivisional Court, and he should have referred the case in the first instance to the District Court through the Subdivisional Court for a transfer under section 25 of the Code of Civil Procedure.

(1) (1884) I. L. R., 10 Cal., 915. (2) (1895) I. L. R., 19 Bom., 680.

Section 33 of the Lower Burma Courts Act throws the onus of the reference on the Judge who feels that he may be personally interested. The District Court in deciding this question held that the reference should have been made by the party wishing the transfer under section 25 of the Civil Procedure Code. This is true in ordinary cases where the mere convenience of the parties or a question of jurisdiction is the cause of the application for transfer. The provisions of section 33 of the Lower Burma Courts Act, 1900, appeared to have been overlooked. The Judge having felt himself to be personally interested, and having asked for a transfer on these grounds, I think the only course open to me is to set aside all the proceedings in the case as made without jurisdiction, and to direct a fresh trial before either the Judge of the District Court or such Subordinate Court having jurisdiction as he may appoint.

The petitioner will recover the costs of this application which will be costs in the case; his advocate's fee will be fixed at two gold mohurs.

Before Mr. Justice Birks.

MAUNG HAN v. SU YA.

Messrs. Pennell and Maung Thin for appellant (plaintiff). | Messrs. Agabeg and Maung Kin for respondent (defendant).

Indian Limitation Act, section 5, proviso.

An erroneous assumption that a suit is one of a kind in which no second appeal lies is not "sufficient cause," in the sense of the proviso to section 5 of the Indian Limitation Act, for extending the period within which the second appeal may be presented.

In re Manchester Economic Building Society, (1883) L. R. 24 Ch. D., 488; *Huro Chunder Roy v. Surnamoyi*, (1886) I. L. R., 13 Cal., 266; cited.

Krishna v. Chathappan, (1890) I. L. R., 13 Mad., 269; *Corporation of the Town of Calcutta v. Anderson*, (1884) I. L. R., 10 Cal., 445; followed.

Bechi v. Ahsan Ullah Khan and others, (1890) I. L. R., 12 All., 461, dissented from.

The plaintiff-appellant in this case filed a petition to revise the decree of the Additional Judge of the District Court of Pegu reversing the decree of the Township Court of Nyaunglebin dated the 25th March 1904.

The Assistant Registrar pointed out that a second appeal lay under section 30 of the Lower Burma Courts Act, and that therefore this application for revision was inadmissible and it would be two days time-barred as a second appeal.

Mr. Pennell for the appellant has accepted the Assistant Registrar's opinion as correct and has filed an affidavit explaining the cause of delay, and apparently asks for an extension of time under section 5 of the Limitation Act.

I may note that the original petition has not been amended, nor does it contain a prayer for extension of time.

The main ground urged by Mr. Pennell is that "the suit being one for damages, I assumed it was a Small Cause and that hence no second

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MAUNG HA
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SU YA.

appeal would lie." Mr. Pennell argues that suits for damages for illegal attachment are rare, and that he has had no experience of them himself. He has cited several cases in which the Courts have exercised discretion in admitting appeals under section 5 of the Limitation Act. The English case cited, *In re Manchester Economic Building Society* (1), turns on the construction of the 15th Rule of Order LVIII, which states:—"No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of 21 days, and no other appeal shall, except by such leave, be brought after the expiration of one year." The wording of this rule differs from section 5 of the Limitation Act, which requires the applicant to satisfy the Court that he had "sufficient cause" for not presenting the appeal or making the application within the proper period.

Mr. Pennell has also cited *Huro Chunder Roy v. Surnamoyi* (2), where an appeal which should have been filed in the District Court was wrongly filed in the High Court. Here the suit was originally valued at Rs 18,000, but the valuation was reduced and there were some grounds for thinking that there was a *bonâ fide* mistake.

In the case of *Krishna v. Chathappan* (3), the Judges held, "We are not prepared to hold that a mistake in law is under no circumstances a sufficient cause within the meaning of section 5 of the Limitation Act"; and they held that the test was whether due care and attention had been exercised. This ruling, however, appears to have been dissented from in *Bechi v. Ahsan Ullah Khan and others* (4), where Mahmood, J., held that the maxim *ignorantia legis neminem excusat* applied and that mere ignorance of law cannot be recognised as a sufficient reason for delay under section 5 of the Limitation Act, for that would be a premium on ignorance.

In the *Corporation of the Town of Calcutta v. Anderson* (5), the Court held that the mistake of counsel as to the time he had to file an appeal was not a ground for extending time under section 5.

Now in the present case Mr. Pennell seems to have made a quite unwarrantable assumption that all suits for damages were of a Small Cause Court nature. Article 35 of the Second Schedule to Act IX of 1887 contains no less than 12 kinds of suits for compensation which are debarred from the cognizance of Small Cause Courts.

I do not think either that such suits under clause (7) of that Article are so exceptional. I have had several in the course of my own judicial experience, and remember that the parties generally claim the whole damage of Rs. 1,000 which section 491, Code of Civil Procedure, allows as a maximum in the case of an improper attachment or arrest.

I do not think any sufficient cause has been shewn for admitting this second appeal, and I dismiss it with costs.

(1) (1883) L. R. 24 Ch. D., 488.

(2) (1886) I. L. R., 13 Cal., 266.

(3) (1890) I. L. R., 13 Mad., 269.

(4) (1890) I. L. R., 12 All., 461.

(5) (1884) I. L. R., 10 Cal., 445.

Full Bench—(Criminal Revision).

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Bigge and Mr. Justice Birks.

KING-EMPEROR v. HLA GYI.

Mr. Giles, Assistant Government Advocate,—for the Crown.

Reference of case for higher punishment—Charge—Scope of section 349, Code of Criminal Procedure—section 254.

It is not illegal or irregular for a Magistrate of the second or third class to frame a charge against an accused person, in a case which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Subdivisional Magistrate to pass sentence. Section 254 of the Code of Criminal Procedure must be read as subject to the general provision in section 349.

Queen-Empress v. Fakira, Ratanlal's Unrep. Cases, 499, dissented from.

Imperatrix v. Abdulla, (1880) I. L. R., 4 Bom., 240; *Queen-Empress v. Havia Tellapa*, (1886) I. L. R., 10 Bom., 196; *Chinnimarigadu*, (1876) I. L. R., 1 Mad., 289; *Queen-Empress v. Velayudam*, (1882) I. L. R., 4 Mad., 233; *Queen-Empress v. Viranna*, (1886) I. L. R., 9 Mad., 377; *Abdul Wahab v. Chandia*, (1886) I. L. R., 13 Cal., 305; *Queen-Empress v. Chandu Gowala*, (1887) I. L. R., 14 Cal., 355; *Empress v. Kallu*, (1882) I. L. R., 4 All., 366; *Queen-Empress v. Tha Dun*, (1892) S. J. L. B., 574; *Nga Pan E v. Queen-Empress*, (1896) P. J. L. B., 258; *Crown v. Nga San E*, (1901) I. L. B. R., 141; cited.

Thirkell White, C.J.—The first question which arises in this case is whether a Magistrate of the second or third class may proceed to charge an accused and complete the trial up to sentence, with the intention, if he is of opinion that the accused is guilty, of submitting the case to the District or Subdivisional Magistrate under section 349, Code of Criminal Procedure.

The sections of the Code of Criminal Procedure which seem to bear directly on the point are sections 254, 346, 347, 348 and 349. Section 254 directs the Magistrate to frame a charge against the accused if he is of opinion that there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which, in his opinion, can be adequately punished by him. It is urged, and the learned Additional Sessions Judge has ruled, that unless the Magistrate is of opinion that the offence can be adequately punished by himself he is not authorised to frame a charge. No doubt if this section stood alone there would be some difficulty in the adoption of any other construction. Section 346 prescribes the procedure to be adopted when a Magistrate thinks that the case is one which should be tried by some other Magistrate. There is no specific reference to punishment in this section; and the classes of cases to which it may be taken to refer are reasonably obvious. Section 347 enables a Magistrate to commit a case which he has himself begun to try. Section 348 directs that persons with previous convictions of certain offences shall be tried by the District Magistrate or committed to Sessions unless the Magistrate who begins the case thinks that he himself can pass an adequate sentence. Section 349 enacts that when a Magistrate of the second or third class, after hearing the evidence

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for the prosecution and the accused is of opinion that the accused is guilty and that he ought to receive a punishment differing in kind from, or more severe than that which he can inflict, or that he ought to be required to give security to keep the peace, he may record his opinion and submit his proceedings to the District or Subdivisional Magistrate. The difficulty is to give effect to section 349 without attaching a violent construction to section 254. If the intention of the Legislature is that a Magistrate shall not charge an accused unless he is of opinion that he himself can pass an adequate sentence on conviction, then section 349 is of little practical use. For it comes to this, that, apart from the somewhat exceptional cases which involve a demand for security to keep the peace, this section can be applied only when the Magistrate, at the time of framing the charge, is of opinion that he can adequately punish the offence and sees reason to alter his opinion in consequence of something which comes to his notice after the charge is framed. It seems unlikely that the section would have been inserted or retained to meet these very rare cases. This construction would not merely limit the power of Magistrates of the second and third classes to the trial of unimportant cases. If that were so, the reason of such a rule could be apprehended. It would also deprive them of the power to try many petty cases involving no difficulty. For it would prevent any Magistrate of the third class and any Magistrate of the second class (unless specially empowered) from trying any case in which whipping could appropriately be awarded. It would prevent them from trying most cases in which juvenile offenders were concerned and many petty first offences for which a few stripes would be the most suitable penalty. It seems unlikely that the Legislature intended to make section 349 of the Code a dead letter.

There are other reasons which lend support to the opinion that section 254, which is the section where the difficulty lies, should not be construed in the sense in which it is understood by the learned Additional Sessions Judge. It is somewhat curious that the point under consideration seems to have been made the subject of judicial determination only in one case, and that unreported. This is the case of the *Queen-Empress v. Fakira* (1) in the Bombay High Court, in which it was observed that when a Magistrate of the second class is of opinion that whipping would be an appropriate punishment, he should not frame a charge but refer the case under section 346 of the Code of Criminal Procedure. That ruling is exactly apposite in support of the view taken by the Additional Sessions Judge. We have not been referred to any other judicial pronouncement of any High Court and I have not succeeded in tracing any. There is, indeed, a Circular Order (2) by the Chief Court of the Punjab to the same effect. On the other hand, in this Province, the rule of practice prescribed in section 101 of the Circulars (Criminal) of the Judicial Commissioner is to a different effect. It is as follows:—

“If an accused is prosecuted and, if convicted, would be punishable with enhanced punishment under section 75, Indian Penal Code, by reason of there being

(1) (1890), Ratanlal's Unrep. Cases, 499.

(2) Cited in Agnew and Henderson's Code of Criminal Procedure, 6th Ed., 380.

one previous conviction against him of an offence punishable with three years' imprisonment or upwards, there is no objection to a Magistrate of the second class trying him if the case is not a serious one; but if, on the conviction of the accused, it is found that the case is one calling for higher punishment than the Magistrate is competent to award, he should send up the accused to the District Magistrate or Subdivisional Magistrate, as the case may be, for higher punishment under section 349, Criminal Procedure Code."

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The rule of practice in Upper Burma is the same as in Lower Burma. (*Upper Burma Courts Manual, paragraphs 310 and 312.*)

But there are several cases which have an incidental bearing on the question under consideration. There is the case of *Imperatrix v. Abdulla* (3) which was considered by five Judges of the High Court of Bombay. In that case, the accused was convicted of house-breaking with intent to commit theft in a house. He had been thrice previously convicted of similar offences. He was tried by a Magistrate of the second class who found him guilty, and thinking that he deserved a more severe punishment than he was competent to inflict submitted the proceedings to the District Magistrate, who ordered the accused to be committed for trial. The Sessions Court sentenced him to transportation for life, and on appeal the High Court reduced the sentence to one of transportation for ten years. The point of law which was considered by the High Court was the legality of the District Magistrate's order for committal. But though it seems impossible that the Magistrate of the second class should have thought when he framed the charge that he could pass an adequate sentence on conviction, there is no suggestion in the judgments of any of the learned Judges that he should not have charged the accused. On the contrary Melvill, J., said:—

"If the offence is within the Subordinate Magistrate's jurisdiction, he may, in his discretion, either convict and pass sentence himself, or convict and refer the proceedings to the superior Magistrate, if he thinks that a sentence of two years' imprisonment will be adequate; or refrain from convicting, and commit, or cause the committal of, the case to the Court of Session."

In the same High Court there is the case of the *Queen-Empress v. Havia Tellapa* (4), in which the case was of such a serious nature that committal to Sessions was considered necessary by the Magistrate to whom it was referred.

From the Madras High Court may be cited the Full Bench cases of *Chinnimarigadu* (5), also a case committed to Sessions; *Queen-Empress v. Velayudam* (6), a case of cattle-lifting; and *Queen-Empress v. Viranna* (7), a case of theft in a building by an old offender in which committal to Sessions was ordered.

In the Calcutta High Court, there are the cases of *Abdul Wahab v. Chandia* (8) and *Queen-Empress v. Chandu Gowala* (9), in both of

(3) (1880) I.L.R., 4 Bom., 240.

(4) (1886) I.L.R., 10 Bom., 196.

(5) (1876) I.L.R., 1 Mad., 289.

(6) (1882) I.L.R., 4 Mad., 233.

(7) (1886) I.L.R., 9 Mad., 377.

(8) (1886) I.L.R., 13 Cal., 305.

(9) (1887) I.L.R., 4 Cal., 355.

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which the accused were committed to Sessions, in the latter on account of a previous conviction.

In the Allahabad High Court, there is the case of *Empress v. Kallu* (10), in which a sentence of imprisonment for one year was passed on proceedings held by a Magistrate of the third class.

Some of these cases were disposed of under the Code of Criminal Procedure of 1872, others under the Code of 1882. The provisions of these Codes do not differ materially from those of the present Code. (Section 46 of the Code of 1872=section 349 of the Codes of 1882 and 1898; section 216=section 254.) These cases seem to have been of some importance and, though only in the case first cited are the facts fully stated, it seems impossible to suppose that they are all cases in which it did not occur to the Magistrate till after he had charged the accused that he could not pass an adequate sentence. But in none of them was any exception taken to the legality of the procedure of the second or third class Magistrate on that ground. It seems to me to be a fair inference that the construction which it is now sought to put upon these provisions of the Code is not that which has prevailed in other parts of India. It is very improbable that, if the construction adopted by the learned Additional Sessions Judge is correct, the point should have been overlooked in so many considered judgments of four High Courts during a period of 20 years; and that, except in one obscure case, there should be no judicial pronouncement to that effect during a longer period. As to the presumption in favour of the correctness of a course of procedure followed during many years by general consent, reference may be made to the remarks of Fulton, J., in the case of the *Queen-Empress v. Tha Dun* (11).

In my opinion, the true construction is to regard the Code of Criminal Procedure as a whole, and to read section 254 as subject to the general provision in section 349, so as to give proper effect to both sections. I think that the words in section 254 on which reliance has been placed in support of the contrary opinion are intended to distinguish between offences which can be adequately punished by a Magistrate exercising ordinary powers and offences for which the accused should be placed on his trial before the District Magistrate or the Court of Session. I am confirmed in this conclusion by consideration of section 258, sub-section (2) of the Code. That sub-section is as imperative and unconditional as section 254. It is to the effect that if in any case under Chapter XXI (Warrant cases) in which a charge has been framed, "the Magistrate finds the accused guilty, he shall pass sentence upon him according to law." This is clearly not a rule of universal application, as would seem from its wording, for section 349 provides for cases in which though a charge has been framed, and though the Magistrate is of opinion that the accused is guilty, he need not pass sentence but may send the accused to another Magistrate for that purpose. Unless a distinction is drawn between finding an accused guilty and being of opinion that he is guilty, which

(10) (1882) I.L.R., 4 All., 366.

| (11) (1892) S. J. L. B., 574.

will hardly be contended, it is clear that section 258 must be read as subject to section 349. If then section 258 is subject to section 349, it is not unreasonable to hold that section 254 is also subject to it.

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For these reasons, I am of opinion that it is not illegal or irregular for a Magistrate of the second or third class to frame a charge against an accused person, in a case which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Subdivisional Magistrate to pass sentence.

If this view is adopted, it is not necessary to consider the other point which might arise in this case.

I would return the records merely remarking that in view of section 101 of the Criminal Circulars, the Additional Sessions Judge should not have issued a ruling contrary to the spirit, if not to the letter, of that Circular. He should have expressed his doubts and caused the matter to be referred to this Court for an authoritative decision.

Bisge, J.—I concur.

Birks, J.—The accused Nga Hla Gyi was tried by the second class Magistrate of Zegyi of an offence under section 379 of the Penal Code. He had two previous convictions, and the second class Magistrate stayed proceedings under section 346 of the Criminal Procedure Code and sent up the case to the Subdivisional Magistrate, who ordered him to take the rest of the evidence under section 349, Criminal Procedure Code, and send the case up to him if necessary for higher punishment.

The accused was finally convicted by the Subdivisional Magistrate on the proceedings being completed under section 349, and was sentenced to 18 months' rigorous imprisonment and 30 lashes as the two previous convictions were proved against him.

The learned Additional Sessions Judge has dismissed his appeal from this conviction, and has now reported the case as he considers the Subdivisional Magistrate's action illegal in sending back the case which was referred to him under section 346.

We have now to decide whether the learned Sessions Judge is correct in his interpretation of section 349 as only applying when the Subordinate Magistrate trying the case is unable to make up his mind as to whether he will be able to pass an adequate sentence till after the evidence for the defence is taken, and the case is practically concluded.

Mr. Giles has argued in support of the view taken by the Judge that section 349 only applies to very exceptional cases. It is argued that section 254 contemplates that each case shall be tried by a single Magistrate who is himself competent to deal with the case

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throughout. The section runs as follows and is the same in the Acts of 1882 and 1898 except as to the words in italics:—

“If when such evidence and examination have been taken and made, *or at any previous stage of the case*, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame a charge against the accused.”

I do not see that this section prevents him from framing a charge if his superior considers that he is mistaken. Section 556, Code of Criminal Procedure, contemplates a case in which a Magistrate may think himself personally disqualified and can yet proceed with the case when the orders of his superior have been obtained.

There are many sections in the Code which show that its general provisions are not to be construed so strictly as to cause administrative inconvenience. Section 350, for instance, provides that one Magistrate succeeding another may act on the evidence recorded by his predecessor in whole or in part as long as the accused is not prejudiced.

Section 251, clause (7), is also imperative in its terms that a previous conviction must be set out in the charge if it is to be used for the purpose of enhancing the sentence; but this section again must be read with section 535 which deals with omissions to frame charges.

Section 17 of the Code enables the District Magistrate to make rules for the distribution of work among his subordinates consistent with the Code. In some of the smaller districts in this Province the only Magistrate exercising first class powers is the District Magistrate himself, and section 349 may well have been inserted to relieve such officers of a burden they would otherwise be unable to bear.

The danger of applying isolated sections of the Code and not considering its general scope was pointed out by Mr. Aston in *Nga Pan E v. Queen-Empress* (12). The Code must be worked as a practical measure. In this particular case the Subdivisional Magistrate could not pass a more severe sentence if he began the proceedings all over again than he could if the second class Magistrate completed the proceedings and recorded his opinion that the accused was guilty and should receive a more severe sentence than he himself could pass.

The second class Magistrate probably sent the case up to know whether the Subdivisional Magistrate considered that he could deal with it or whether it should be sent up to the District Magistrate for trial under his special powers. The Subdivisional Magistrate before whom the case was then pending, within the meaning of section 348, was of opinion that he could pass an adequate sentence himself if the accused was convicted and the previous conviction established. The second class Magistrate would have jurisdiction to try the case under clause (2) of section 346 if the previous convictions were not proved, and if they were the provisions of section 349 would enable the

second class Magistrate to refer the case for punishment merely to an officer who had already expressed an opinion that a sentence of two years' rigorous imprisonment was an adequate punishment for the offence.

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It seems to me that the words "after hearing the evidence for the prosecution and the accused" were inserted to show that the second class Magistrate should not refer a case under this section, under which he practically finds the accused guilty and merely sends him up for sentence, without taking the whole of the evidence in support of his opinion.

His opinion that the accused is guilty and deserves a more severe sentence than he can impose would in the majority of cases be formed after the evidence for the prosecution was complete, and if the view of the learned Sessions Judge is adopted, it would in all cases be his duty to stay further proceedings, as it is very rare for the evidence for the defence to be of such a nature that the Magistrate would think a more severe sentence necessary after hearing it. It seems a more reasonable construction of the Code to hold that when a second class Magistrate thinks a sentence of two years will be sufficient he can go on with the case under section 349 and leave the sentence to the Magistrate to whom he is subordinate.

There are several other sections in the Code under which the services of Subordinate Magistrates can be utilised for recording evidence on which their superiors can act,—sections 148, 157, 202 and 380. The last of these sections is specially significant, for it enables a Magistrate who has jurisdiction to pass orders under section 562, Criminal Procedure Code, on proceedings submitted by the third class Magistrate who can have no jurisdiction under section 562, "as if the case had originally been heard by him." This procedure is very similar to that in section 349 and seems to negative the theory that section 349 was only introduced to meet the rare cases where circumstances are discovered at the close of a trial which render a more severe sentence necessary. I think it is clear that the Code regards the want of jurisdiction for the purpose of passing an adequate sentence as distinct from a want of jurisdiction to deal with the case at all.

For these reasons I do not think there was any illegality in the order of the Subdivisional Magistrate, directing the second class Magistrate to go on with the case. If the case had been originally sent up under section 349, he would have committed an illegality within the meaning of the ruling of this Court in the *Crown v. Nga San E* (13), but his order was passed under section 346(2).

As I hold there was no illegality, the second question noted by the Chief Judge in his order constituting this Bench does not in my opinion arise. The learned Sessions Judge does not say that the sentence passed was inadequate or that there are any other grounds for our interference otherwise.

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No. 25 of
1904.
July 18th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Birks.

TUN MYAING v. BA TUN (A MINOR) BY HIS NEXT FRIENDS MAUNG PO
THIN AND MA THEIN MYA.

Messrs. Eddis, Connell and Lentaigue—for appellant (defendant).

*Buddhist Law: Inheritance; Orasa son: Partition—Right of grandson to claim
a share on remarriage of grandfather*

A had two minor sons, and a minor grandson D, whose father E, the *orasa* son of A, predeceased E's mother, A's first wife. On A remarrying after his first wife's death, D sued A for a share in his grandparents' estate, joining his uncles, A's two minor sons, as defendants.

Held,—that the eldest born son is the *orasa* by right but he does not attain the complete status as such till he attains his majority and becomes fit to assume his father's duties and responsibilities. If he dies before he attains his majority, or if he is incompetent to fulfil the prescribed conditions, his next younger brother, subject to the same conditions, succeeds to his position as *orasa*. If the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next brother does not succeed to it.

Held also,—after consideration of the texts and rulings relating to *orasa* sons and grandchildren, that as there were surviving sons, the grandson could not sue.

Ma On and others v. Shwe O and others, (1886) 1 L. C., 258; *Ma Mya Thu v. Po Thin*, (1869) 2 L. C., 61; *San Dwa v. Ma Min Tha and others*, (1901) 2 L. C., 207; *Ma Gun Bon v. Po Kywe and another*, (1897) 1 L. C., 406; *Ma Saw Ngwe and others v. Ma Thein Yin*, (1901) 2 L. C., 210, and (1902) 1 L. B. R., 198; *Ma Thin v. Ma Wa Yon*, (1904) 2 L. B. R., 255; *Maung Hmaw v. Ma On Bwin and others*, (1901) 2 L. C., 124, and (1901) 1 L. B. R., 104; cited.

Ruling in *Ma Mya v. Maung Po Thin*, (1899) P. J. L. B., 585, explained.

Thirkell White, C.J.—The first point for consideration is the question of law, whether the plaintiff-respondent, the minor Ba Tun, is entitled to claim a share in the property of his grandparents on the remarriage of his grandfather, the appellant-defendant Tun Myaing.

The case was not well presented in the lower Court and several matters of importance have not been fully elucidated. It appears that Tun Myaing, the appellant, had a wife, Ma Dun Aung. Their eldest son was Po Daik who died in 1260 B.E. (=1898-99 A.D.). Ma Dun Aung died in 1264 B.E. (=1902-03 A.D.). Tun Myaing has since married Ma Gyi. Tun Myaing is said to have two minor sons, Po Yaik and Po Kywet. Whether they are sons of Ma Dun Aung is not stated. In October 1903, when the suit was filed, they are said to have been minors. But in January 1904 Tun Myaing gave the age of Po Yaik as 19 years. If he had completed his 19th year in January, he could not have been a minor in the preceding October. The date of Tun Myaing's marriage to Ma Gyi is nowhere stated. It may, perhaps, be assumed that Ba Tun, who is the only son of Po Daik, and the surviving sons of Tun Myaing, Po Yaik and Po Kywet, were minors at the time of Ma Dun Aung's death and at the time of Tun Myaing's second or subsequent marriage.

Po Daik was the eldest son of Tun Myaing and Ma Dun Aung; and, so far as appears, the eldest child. He attained man's estate and married. He died before his mother, leaving Ba Tun, his son. The question is whether, on the marriage of Tun Myaing and Ma Gyi, Ba Tun, a minor, had the right to demand a share of the joint property of his grandparents, there being at the time of the said marriage other sons, also minors, of Tun Myaing.

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One of the arguments against the claim of the minor plaintiff, as I understand it, is that even if, in certain circumstances, the right of a grandchild to claim a share on the remarriage of his grandparent is admitted, this right cannot exist when there is an *orasa* son who can claim the same right. In that case, it is contended that the right of the *orasa* son would be preferred to that of the grandson, and it is clear that the father or grandfather cannot be made to surrender more than one-fourth of the joint estate. To the remaining three-fourths he has an indefeasible title, at least in his life-time, in accordance with the principle laid down by the Special Court in *Ma On and others v. Shwe O and others* (1). In my opinion this contention is well founded, and my examination of the texts and authorities has not indicated any flaw in the argument. In this view, it seems to me to be necessary to consider very carefully the doctrine of the *orasa* son.

The term *orasa* has two distinct meanings. It applies to all legitimate natural-born children, as opposed to adopted and illegitimate children (2); and it means also the eldest legitimate son or daughter, or as has been said the eldest legitimate child (3). It is in the sense of the eldest son or daughter that it is generally used in the reported decisions. The question is whether, on the death of the *orasa* son, the status of *orasa* devolves on his next surviving younger brother. The subject of the right of the eldest son to claim a share in the estate on the death of his father is dealt with in section 30 of the *Digest of Buddhist Law*. The substance of the rule laid down in *Manu*, *Kaingza*, *Myingun*, *Dhammathakkyaw*, *Kandaw*, *Vannadhamma*, *Rāsi*, *Manuvannanā*, *Vicchadani* and *Kyannet* is that the eldest son is entitled to claim a share, if he is competent to assume the duties and responsibilities of his father. In *Pyu*, *Vilāsa*, *Dhammathakkyaw*, *Vannanā* and *Rāsi* the condition which entitles the eldest son to claim a share on his father's death is that he has helped the parents in the acquisition of the estate. In some of the *Dhammathats*, namely, *Pyu*, *Vilāsa*, *Rāsi*, and *Kyetvo*, the further condition is imposed that the eldest son should be the eldest born child.

In section 48 of the *Digest* are extracts from *Manuvannanā* and *Pānam* which declare the right of the mother to the whole estate on the death of the father and the eldest son; and the former text explicitly contemplates the existence of other sons.

(1) (1886) 1 L. C., 2-8.

(2) General Digest, ss. 17, 18, 19.

(3) Cf. Dr. Forchhammer's note to section 9 of the *Wajam Dhammathat* (Sir John Jardine's Notes, No. V).

Cf. also Chan Toon's *Principles of Buddhist Law*, 2nd Ed., 127.

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Section 62 of the *Digest* provides for the supersession of the eldest child by a younger child who is competent to undertake the parental responsibilities when the eldest is incapable. The competency of the younger son is clearly a condition. One would have hoped to find here a rule as to the effect of the death of the eldest son in his parents' lifetime; but there seems to be no such rule.

The rules in section 162 of the *Digest* deal with the rights of the son of the *orasa* who dies before his parents. There is a consensus of authority in the texts on this point. Here, again, it is not suggested that when the *orasa* son dies another of the sons becomes the *orasa*.

Section 155 of the *Attasankhepa Vannandā* distinguishes between the *orasa* son and *kaniitha* or younger children. Section 159 clearly refers to a case in which there are no *orasa* children but only *kaniitha* children; which seems to show that the rights of the *orasa* do not pass necessarily, on his death, to the next in order among his brothers. Section 212 contains rules similar to those in section 162 of the *Digest*.

As regards the decisions which bear upon the point, they are not very numerous. In *Ma Mya Thu v. Po Thin* (4), the learned Judicial Commissioner (Mr. Birks) held that the eldest son, if competent, is the representative of the father, and that his rights pass to the next son. This view was adopted by Fox, J., in *San Dwa v. Ma Min Tha and others* (5). In the Upper Burma case of *Ma Gun Bon v. Po Kywe and another* (6), it was pointed out that if the eldest son or daughter die before the parents, the children are given a special share on account of the superior claims of the *orasa* heir. In *Ma Saw Ngwe and others v. Ma Thein Yin* (7), it was held that there could not be more than one *orasa* child in a family. But I think the meaning of this is that there cannot be both an *orasa* son and an *orasa* daughter at the same time.

From consideration of the texts and rulings, I think that the following principles are to be deduced. The eldest born son is the *orasa* by right; but he does not attain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as *orasa*. If, however, the eldest son attains his majority and fulfils the prescribed conditions, and then dies before his parents, his position as *orasa* remains unfilled and the next brother does not succeed to it. These principles are consistent with the previous decisions, and they reconcile the rulings and texts which provide for the devolution of the status of *orasa*, in certain circumstances, and the texts

(4) (1899) 2 L. C., 61.

(5) (1901) 2 L. C., 207.

(6) (1897) 1 L. C., 406.

(7) (1902) 2 L. C., 210.

which distinguish between *orasa* and *kanittha* children, even after the death of the *orasa*. I think it may also be deduced from the texts that it is only when the *orasa* has attained his majority before the death of his father that he can claim his fourth share of the inheritance, unless the mother marries again. There is no authority, so far as I am aware, which recognizes the right of an *orasa* son, who is a minor at his father's death, to claim from his mother a share on his attaining majority. But this is merely a suggestion and the question does not arise in the present case.

The principles set forth above seem to me also to explain the rules concerning the right of grandchildren to claim a share on the death of one of their grandparents. The rules are contained in section 256 of the *Digest*. According to *Vinicchaya*, *Pakāsani*, *Rājabala* and *Dhammasāra*, grandchildren who live with the grandparents and whose parents have died can claim partition on the death of one of the grandparents, and get one-fourth of their parents' share. It seems to me that the only way of reconciling this rule with that which entitles the *orasa* son to a share on his parents' death is to construe the rule as to the *orasa* son in the manner indicated above. For the rules distinctly contemplate the existence of the other children of the deceased grandparent, and it has been accepted that not more than one person can claim a share from the surviving parent and grandparent. If, therefore, the eldest surviving son is always the *orasa*, grandchildren, when there are surviving sons, could never claim a share under this rule. And this conclusion is contrary to the plain meaning of the texts. If, however, the principle in respect of the *orasa* son set forth above is correct, then the difficulty as regards the grandchildren disappears. I think it is also clear that the only grandchildren who can claim a share on the death of one grandparent are the children, or it may be the eldest child of the deceased *orasa* son. For the grandchildren are entitled only to a part of their parents' share, and the only parent entitled to any share on the death of one of his parents is the *orasa* child.

So far, therefore, as the decision of the present case turns on the question whether either of the younger sons of Tun Myaing was the *orasa* at the time of his mother's death, I would hold that, Po Daik having fully attained the status of *orasa*, after his death neither of his brothers could succeed to that status or claim partition on his mother's death.

But the special case arises as to the respective rights of the sons and grandson when Tun Myaing, the father and grandfather, married again. As regards the rights of the sons, the case is provided for in section 45 of the *Digest*. The rule prescribed in *Dhamma*, *Manugyè*, *Rājabala*, and *Manu*, is that the eldest son is entitled to a share; and *Manugyè* makes it clear that this share can be claimed even if the son is a minor. There is no reference in this section to the *orasa* son, or to any condition as to competency to assume the father's duties. In my opinion, this rule applies to the eldest surviving son, unless his right can be defeated by that of a grandson.

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As regards the rights of grandchildren, whose parents are dead, to demand a share from a surviving grandparent who marries again, the only authority in the *Digest* is the extract from *Vinicchaya* in section 260. The other extracts in that section from *Yasathat* and *Kungyalinga* refer to the rights of grandchildren whose parents are alive only in the case where there has already been partition.

The right of the grandson to demand partition in this case, it will be seen, rests on a solitary text in the *Digest*. The other texts in the same section are not explicit as to the rights of grandchildren when there are children surviving as well. The reason of the rule, as stated in the extracts from *Yasathat* and *Kungyalinga*, is that the surviving grandparent ought to live on the support and maintenance of the grandchildren. This reason can have no force in such a case as the present when the grandson is an infant, incapable of supporting any one.

In the case of *Ma Gun Bon v. Po Kywe and another* (8), already cited, it was said:—

"No doubt grandchildren are not in the same position as children, but this seems to be when there are children to compete with them. Full representation is not allowed to grandchildren and partial representation is granted grudgingly."

I think that this correctly states the principle of the law. A similar view was taken by a Bench of this Court in *Maung Hmaw v. Ma On Bwin and others* (9). The textual authority for the right of the eldest son to claim a share as given in section 45 of the *Digest* is far stronger than the scanty authority in section 260 for the right of the grandson.

It is to be regretted that the respondent was unrepresented in this appeal. And it may be that evidence could have been adduced to show what has been the custom in cases of this kind. No such evidence is on the record and we are compelled to rely on the authority of the texts and such general principles of the law as may be illustrative of their application. Accepting the position that not more than one-fourth of the joint estate can be claimed from the surviving grandparent, regarding the explicit authority of the texts which regulate the right of the eldest son, and applying the general principle that nearer heirs are preferred to those who are more remote when these two classes come into competition, I am of opinion, though not without hesitation, that the rule in *Vinicchaya* (section 260 of the *Digest*) cannot be applied when there is a son who could exert the right given by the texts cited from section 45 of the *Digest*. I admit that this is equivalent to ignoring the text of *Vinicchaya* entirely. But I think the decision is more in accordance with authority than any other alternative finding.

For these reasons I would allow the appeal and dismiss the suit. But considering the doubtful and difficult nature of the question involved, I would order each party to bear his own costs in both Courts.

(8) (1897) 1 L. C., 406, at p. 414. | (9) (1901) 2 L. C., 124.

Birks, J.—The plaintiff-respondent in this case, Ba Tun, is the grandson of the first defendant, Maung Tun Myaing, and he sued by his next friend, Maung Po Thin, a pleader, his grandfather and his two uncles, who were both minors, Maung Po Yaik and Maung Po Kyiwet, for one-fourth share of the *lettetpwa* property of his grandmother, Ma Dun Aung, and grandfather, the former having died in Kason 1264. He sues on the ground that his deceased father, Maung Po Daik, was the eldest son of Tun Myaing and Ma Dun Aung, and that he is therefore entitled as *orasa* son to one-fourth of this property. The plaint also alleges that the grandfather, Maung Tun Myaing, has illegally transferred holding No. 6, measuring 128.77 acres, to his own minor sons, and that they are, therefore, added as defendants.

A schedule was filed with the plaint setting out 15 pieces of land as comprising the *lettetpwa* property, and 22 head of cattle.

The defendants pleaded that as Maung Po Daik had died in 1260, and Ma Dun Aung not till 1264, the plaintiff was an out-of-time grandchild and had no claim to the *lettetpwa* of his grandparents; that plaintiff's mother, Ma Thein Mya, had accepted Rs. 818 and four ticals of gold on condition that she made no further claim on behalf of her son, the plaintiff; and that he has therefore forfeited any rights he might have had on the death of first defendant. The written statement also alleges that the land transferred to the second and third defendants was not *lettetpwa* property, and that plaintiff has no cause of action against the second and third defendants.

Three issues were framed as follows:—

- (1) Is plaintiff entitled to any share in the jointly acquired property of defendants and Ma Dun Aung? If so, to what share, and can he assert his claim during the life-time of the defendants?
- (2) Did Ma Thein Mya (plaintiff's mother) accept the property mentioned in paragraph 4 of the written statement on condition that she made no further claim on the estate? If so, does this bind the plaintiff?
- (3) Of what did the *lettetpwa* estate consist?

The first issue in the case raises a point which has not, I think, been directly decided by the Courts. The plaintiff alleges that the rights of the eldest son pass to his son on his death, and that this grandchild can sue his grandfather on the death of his grandmother in the same way as his father could have done.

The Court of first instance decided this issue in the plaintiff's favour and relies upon 256, 260 and 164 of the *Kinwun Mingyi's Digest* and a ruling of this Court in *Ma Saw Ngwe and two others v. Ma Thein Yin* (10), in support of this proposition. I will deal with the case cited first.

In that case Ma Thein Yin was the grandchild of Ma Thaw (deceased) by her second child, Ma So Ma Gale, who had died before Ma Thaw. Both the grandparents were dead, and Ma Thein Yin

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sued her two uncles, one of whom was admittedly the *orasa* son, and the children of the fourth child. It was held that the plaintiff not being the daughter of the eldest child, was only entitled to one-fourth of what her mother would have had, had she survived. It is not quite clear to me how the learned Judge could have held that this case was an authority for thinking that the son of the eldest son could sue his surviving grandparent for the one-fourth share which his father could undoubtedly have claimed had he survived.

There seems no reason to doubt that on the death of Maung Tun Myaing, the plaintiff in this case will be, if he is, as I understand, the only child of Maung Po Daik, entitled to the same share in the estate of his grandparents as his uncles, the second and third defendants; for this is what the ruling quoted contemplates.

Mr. Lentaigne has suggested that the rights of Maung Po Daik, as *orasa* son, passed to the next eldest son, and he evidently refers to the ruling of the Judicial Commissioner in *Ma Mya v. Maung Po Thin* (11).

In that case the first-born son had died in infancy, and the respondent was the only other son though younger than his two sisters; he had exercised the duties of eldest son and I held that being a son he would be preferred to any daughter. I did not hold, and did not mean to hold, that if the eldest son had been competent to take the place of his father, and predeceased him, his rights as *orasa* son would pass to his next younger brother. My remark in *Ma Saw Ngwe's* case, that there can be only one *orasa* son in a family, was not intended to overrule the principle laid down in *Ma Mya's* case, that if the eldest son is incompetent, his rights as *orasa* pass to the next eldest son; but the third principle laid down in that case, namely, that the rights of the eldest son or daughter pass to the next eldest as representatives of the father or mother, is, I think, too broadly stated. There seems to be two factors in determining the rights of the *orasa* child: (1) that such child is the representative of father or mother, and (2) that he is entitled as being the first-born child.

As pointed out in Civil Reference No. 1 of 1904, *Ma Thin and one v. Ma Wa Yon* (12), there are only three *Dhammathats*—the *Vilāsa*, *Rāsi* and *Kyetyo*—which put the fact of primogeniture as the only essential condition of the rights of the *orasa* child.

The learned Judge has, I think, overlooked the principle laid down in *Maung Hmaw v. Ma Ōn Bwin and others* (13) where it is stated:

“It is a principle of Buddhist Law that only those closely related should inherit (see *Dhammathakya*, section 378, *Digest*); and that relations of the same degree should inherit to the exclusion of those of a more remote degree; that, for instance, children should exclude grandchildren. But there are exceptions to this last rule.”

It may be noted in passing that this is the principle laid down in Sparks' Code (*vide* section 64, and the table attached). The learned Judges in *Maung Hmaw's* case then proceed to discuss the rights of

(11) (1899) P. J. L. B., 585. | (12) (1904) 2 L. B. R., 255.
 (13) (1901) 1 L. B. R., 104.

out-of-time grandchildren, under section 162 of the *Digest*, on which the learned Judge now relies. I think it is clear that this section contemplates that both the grandparents are dead and, merely, that their estate has not been divided. Reference throughout is made to uncles and aunts and not any surviving grandparent. The *Vilāsa* states the rule as follows:—

“The eldest son of a deceased *orasa* shall receive as much as the youngest of his uncles, but the younger sons shall only receive a quarter as much. *Because a son is a nearer kin than a grandson*, the latter shall not receive, out of the estate of his grandfather, as much as the co-heirs (brothers and sisters) of his deceased father.”

It may be noted that out of the 26 *Dhammathats* quoted in this section, 25 give the eldest son of the *orasa* the same share as the youngest uncle; one, the *Dhammathatkyaw*, gives him only half such share instead of one-fourth which the other out-of-time grandchildren get. The result of these *Dhammathats* is to show that the eldest son of the *orasa* child only ranks equally with the younger uncles and aunts. It is settled law that on the death of one parent it is only the eldest child that can claim a one-fourth share during the life-time of the surviving parent, and it would seem from this that the plaintiff can have no better rights than his youngest uncles during the life-time of the surviving grandparent.

Sections 258 and 261 of the *Digest* must now be considered. These deal with the partition between the grandfather and his grandchildren; they are the converse cases to those mentioned in sections 256 and 260 quoted by the Judge. In these sections it is contemplated that the grandchildren are all living with the surviving grandparent, while the parents are living separately; only those whose parents are dead are allowed to claim a one-fourth share of what their parents would be entitled to. These sections seem to show that when grandchildren are living with their grandparents and supporting them, the parents living separately, they can claim partition and will get one-fourth of what their parents would have had if they survived, and one-half if the surviving grandparent marries again. The living with the grandparents seems an essential condition, and those children whose parents are still alive cannot yet claim their shares.

I do not think these *Dhammathats* are sufficient authority for holding that, although there are minor children living with the surviving grandparents, a grandchild can come forward and claim partition of right because his own father is dead.

In my opinion the suit brought by the plaintiff is premature, and he has no right to sue for his father's share till the death of Maung Tun Myaing.

I would therefore allow the appeal, and dismiss the suit. I concur with my learned colleague in thinking the parties should pay their own costs.

1904.
TUN MYAING
v.
BA TUN.

Criminal Revision
No. 719 of 1904.
July 20th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

V. KARUPANNA *v.* MADA NADAN.

Mr. Dutta—for applicant.

Workman's Breach of Contract Act, 1859, sections 1, 2—Sanction to prosecute for false charge.

Proceedings under the first paragraph of section 2 of the Workman's Breach of Contract Act, 1859, are criminal proceedings; and a prosecution under section 211 of the Indian Penal Code, for instituting proceedings without just cause under section 1 of that Act, will lie.

Ram Sarup Bhakat, (1900) 4 C. W. N., 253; *Averam Das Mochi v. Abdul Rahim*, (1899) 4 C. W. N., 201; *King-Emperor v. Periasawmy Achari*, (1903) 2 L.B.R., 163; *Queen v. Whitchurch*, (1881) L.R. 7 Q. B. D., 534; *Seaman v. Burley*, (1896) 2 Q. B. D., 344; *Southwark and Vauxhall Water Company v. Hampton Urban District Council*, (1898) 1 Q. B. D., 273; referred to.

The petitioner in this case, V. Karupanna, complained to a Magistrate, under section 1 of the Workman's Breach of Contract Act, 1859, that the respondent, Mada Nadan, had received from him an advance and contracted to work for him for a fixed period and had refused to carry out his contract. The Magistrate enquired into the complaint and dismissed it. Thereupon Mada Nadan applied for sanction to prosecute Karupanna, under section 211, Indian Penal Code, for bringing a false charge against him. Sanction was granted by the Magistrate's successor.

The first point taken in this application to revoke the sanction granted by the Magistrate is that the preference of a complaint to a Magistrate under section 1 of Act XIII of 1859 does not, in law, amount to bringing a false charge of an offence or to the institution of criminal proceedings. In support of these propositions two cases of the High Court of Bengal are cited. In the case of *Ram Sarup Bhakat* (1) it was held that a matter under the Act abovementioned is not an offence within the definition of the term. In *Averam Das Mochi v. Abdul Rahim* (2), a doubt was expressed whether a proceeding under the first clause of section 2 and under section 3 of the Act was a criminal proceeding; but the point was not definitely decided.

I do not think it is necessary to express an opinion as to whether a matter under Act XIII of 1859 is an offence. It will be sufficient to consider whether a proceeding under the first paragraph of section 2 of that Act is a criminal proceeding within the meaning of section 211 of the Indian Penal Code. On this point, there is no definite authority, the matter having been left in doubt in the only case which has been cited or which I have been able to trace.

Briefly section 2 of the Act under reference, in its first paragraph, empowers the Magistrate to order repayment of the advance or the performance of the work. The second paragraph empowers the Magistrate, on failure of compliance with such an order, to sentence to imprisonment the person against whom the order is made. The on-

(1) (1900) 4 C. W. N., 253.

(2) (1899) 4 C. W. N., 201.

tention on behalf of the petitioner in this case seems to be that while proceedings under the latter paragraph may be criminal proceedings, those under the former paragraph cannot be so regarded.

On this contention, it may be remarked, in the first place, that the power of a High Court in the exercise of its criminal revisional jurisdiction to deal with cases under the first paragraph of section 2 of the Act has never been questioned. That power was exercised by a Bench of this Court in *King-Emperor v. Periasawmy Achari* (3). If the proceedings were not criminal proceedings, it is difficult to imagine how the Court could have dealt with them in exercise of its jurisdiction as a Court of Revision under the Code of Criminal Procedure. This would in itself be sufficient to decide the point.

But further support for the opinion that these are criminal proceedings may be obtained from reference to decisions of the English Courts. In the *Queen v. Whitchurch* (4) it was suggested by Bramwell, L.J., that every proceeding is either civil or criminal; and the question whether a certain matter was a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, section 47, was discussed. The case is not precisely analogous to the case under consideration, though, so far as it is similar, it supports the conclusion indicated above. But *Seaman v. Burley* (5) is very similar to this case. The question was whether a certain proceeding was a "criminal cause or matter." And the conclusion stated by Lord Esher, M.R., is that, "when the proceeding is before Magistrates, and it is one which may end in imprisonment, it must be considered to be a criminal proceeding." In that case, it was not competent to the Magistrates to pass a sentence of imprisonment at once. They had first to issue a distress warrant and they could award imprisonment in default of distress. In principle the case seems identical with a case under section 2 of Act XIII of 1859, where imprisonment can be awarded only after disobedience to a preliminary order. It was in connection with the issue of a warrant of distress, not with an award of imprisonment, that the question arose. It was said that the test was not whether the proceeding must, but whether it may, end in imprisonment. Kay, L.J., said:—

"If there be a provision in a statute that that which is merely a civil liability, may be enforced by a proceeding in its nature criminal, that proceeding is none the less criminal * * * * * because it is applied to a civil liability."

These remarks seem to me to apply with special directness to proceedings under Act XIII of 1859.

A subsequent case in which *Seaman v. Burley* (5) was distinguished, namely, *Southwark and Vauxhall Water Company v. Hampton Urban District Council* (6), went on a Statutory provision which does not affect the principles of the previous decisions.

(3) (1903) 2 L.B.R., 163.
(4) (1881) L.R. Q.B.D., 534.

(5) (1896) 2 Q.B.D., 344.
(6) (1898) 1 Q.B.D., 273.

1904.

KARUPANNA

v.
MADA NADAN.

1904.
KARUPANNA
v.
MADA NADAN.

In view of these considerations, I have no doubt that proceedings under the first paragraph of section 2 of Act XIII of 1859 are criminal proceedings; and I think that a prosecution under section 211, Indian Penal Code, will lie.

On the merits, I am not prepared to say that sanction should not have been granted in this case.

I therefore dismiss this application.

Criminal Revision
No. 721 of 1904.
August 2nd,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Birks.

KING-EMPEROR v. HTUKTALWE AND TWO OTHERS.

Sanction to prosecute—Criminal Procedure Code, section 339 (3)—sections 195, 476, 537—Magistrate or Judge personally interested, section 556.

The absence of the sanction of the High Court, required by section 339, sub-section (3), of the Code of Criminal Procedure, to a prosecution for giving false evidence in respect of a statement made by a person who has accepted a tender of pardon, is an illegality which invalidates the trial.

A Judge who has directed a prosecution should not hear the appeal of the accused when convicted, even although it is not against the conviction but only against the severity of the sentence.

Mussamat Sharina v. The Empress, (1884) P. R. Crim., 92; Queen-Empress v. Pa Twe Wa, (1896) 1 U.B.R., 2; referred to.

Thirkell White, C.J.—The three accused, Htuktalwe, Kamswe and Latwe, were offered pardons under section 337 of the Code of Criminal Procedure. They made statements before the Magistrate by whom the pardon was offered; and they made inconsistent statements in the Sessions Court. At the conclusion of the trial, the Sessions Judge directed their prosecution under section 193, Indian Penal Code, for having given false evidence. The accused were tried and convicted under that section by the Senior Magistrate, exercising special powers under section 30 of the Code of Criminal Procedure. They appealed to the Sessions Court, and the Sessions Judge who had directed the prosecution took upon himself to determine the appeals because they were only against the severity of the sentence. The appellants were not deprived of their right to have their appeals heard by an impartial tribunal because their appeal was not against the justice of the conviction but against the severity of the sentence. In my opinion, the Sessions Judge (Mr. Burne) was not qualified to determine the appeals of these men and should have reported the case to this Court for orders.

There is, however, an even more important point. The prosecution directed by the Sessions Judge was entertained by the Magistrate in direct contravention of the provisions of section 339, sub-section (3), of the Code of Criminal Procedure, which directs that "no prosecution for the offence of giving false evidence in respect of [a statement made by a person who has accepted a tender of pardon] shall be entertained without the sanction of the High Court." The Magistrate was no doubt misled by the direction given by the Sessions Judge.

The question that arises is whether the want of sanction in this case is a mere irregularity or whether it is an illegality which invalidates the trial. Section 537 of the Code of Criminal Procedure expressly declares that the want of any sanction required by section 195 or any irregularity under section 476 shall not invalidate a trial. But in this case, it is not the want of sanction under section 195 or an irregularity under section 476, but the failure to obtain the sanction explicitly declared necessary by section 339, that is in question. But for the provision in section 537, clause (b), I think it would certainly be held that want of sanction under section 195 deprived the Court of jurisdiction in the cases specified under that section. If the Legislature had intended to class the omission to obtain sanction under section 339 as a mere irregularity, I think the intention would have been made clear in section 537. In my opinion, section 339 establishes the sanction of the High Court as a necessary condition precedent to the entertainment of a prosecution in the case specified in sub-section (3) of that section. I think therefore that the Magistrate had no jurisdiction to try the accused and that his proceedings are void. The same view, I may remark, was taken by the Chief Court of the Punjab in *Mussamat Sharina v. The Empress* (1); and a similar opinion was held in an analogous case, by the late learned Chief Judge of this Court as Judicial Commissioner of Upper Burma in the *Queen-Empress v. Pa Twe Wa* (2).

I would therefore reverse the convictions and sentences of Htuktalwe, Kamswe and Latwe, and direct that so far as this case is concerned they be released.

In the circumstances, I do not think that sanction to the prosecution should now be accorded.

Birks, J.—I concur.

Before Mr. Justice Birks.

KING-EMPEROR *v.* PO SAING AND AUNG PE.

The Hon'ble Mr. Lewis, Government Advocate.

Mr. Lambert—for respondents.

Appeal by Local Government from judgment of acquittal—Criminal Procedure Code, section 417.

Under the Code of Criminal Procedure, the Local Government has the same right of appeal against an acquittal as a person convicted has of appealing against his conviction and sentence, and there is no distinction between the mode of procedure and the principles upon which both classes of appeals are to be decided.

Empress of India v. Gayadin, (1881) I.L.R., 4 All., 148; *Queen-Empress v. Robinson*, (1894) I.L.R., 16 All., 212; dissented from.

Queen-Empress v. Bibhuti Bhusan Bit, (1890) I. L. R., 17 Cal., 485; *Queen-Empress v. Prag Dat*, (1898) I. L. R., 20 All., 459; *Queen-Empress v. Karigowda*, (1894) I. L. R., 19 Bom., 51; followed.

This is an appeal by the Local Government under section 417 of the Code of Criminal Procedure against the orders of the Township Magistrate of Minhla, acquitting Po Saing of a charge of causing grievous hurt to Eyu Wa with a *dashe*, and Aung Pe of abetting that offence and also of causing hurt to Dewa.

1904.
KING-EMPEROR
v.
HTUKTALWE

Criminal Appeal
No. 365 of
1904.
August 8th,
1904.

(1) (1884) P. R. Crim., 92

(2) 1896) 1 U. B. R., 2.

1904.
 KING-EMPEROR
 v.
 PO SAING.

There are four grounds of appeal but they really amount to one, namely, that the acquittal is against the weight of the evidence, as the Magistrate has attached undue importance to certain minor discrepancies in the evidence of the witnesses for the prosecution. The facts appear to be as follows:—

There was a Chinese Festival between 22nd and 28th of February 1904 and a Chinese *pwè* was being held on the 27th. Po Saing, the 1st accused, came up with two other men, being Aung Pe and Po Han, the latter of whom has absconded, and asked Sit Pyan for liquor; when told it was too late and that liquor would be given next day, he threatened to stop the *pwè*, saying that Chinese *pwè*s should not be allowed but only Burmese *pwè*s. They went off some 30 or 40 feet and threw stones and bottles at the *pwè* shed. Eyu Wa, Suya and Dewa went out to remonstrate but were chased by Po Saing, who cut Eyu Wa on the back, while Aung Pe struck Dewa with his stick, and Po Han stabbed him on the spine with a pointed bamboo. Stones had doubtless been thrown by the Chinamen in return, for Po Saing had two bruises on the head and was treated as an out-patient at the hospital. There is no reason to doubt that he reported to Pwin Nan, the Chinese elder, at 11 P.M. Pwin Nan washed his head and advised him to go to the police, which he declined to do.

The accused admitted going together near the *pwè* that night. Aung Pe says it was at 8 P.M.; they denied asking for liquor; he stated stones were thrown by the Chinese at them, while they were talking with Kyaw Wa. They do not explain how it was that the Chinese threw stones at them. Kyaw Wa fixes the time that Po Saing told him he was hit on the head, about 8-30 P.M.

The witnesses for the defence say the Chinese *pwè* was broken up by stone throwing and immediately afterwards Po Saing was found with a wound on his head and that this was about 8-30 or shortly after the Letpadan train left Minhla. It seems clear that after this Po Saing went on to the Burmese *pwè*. It does not much matter what the time was, for Po Saing admits he went to Pwin Nan after he was hit, and he has called him as a witness. He corroborates the prosecution witnesses as to the time, that it was about 11 P.M.

The Magistrate has acquitted the accused because there are discrepancies as to whether Po Saing was armed with a *dah* when he came to ask for liquor, and also because some of the Chinese witnesses say the accused ran away after Eyu Wa went out, while Eyu Wa and Dewa tried to make out that they were cut in the *pwè* and not on the road. The Magistrate also thought it would be unlikely for Po Saing to report to a Chinese elder if he had really cut a Chinaman himself, as Pwin Nan's house was close to the *pwè*. On the other hand it is difficult to see why Eyu Wa and Dewa should falsely charge the accused. The wounds were on their backs, which seems to show that Eyu Wa's account was true, and that though they went out to remonstrate they ran away when they saw Po Saing come at them with a *dah*. There would be a bright moon and Po Saing had been to the *pwè* just before and asked for liquor; the stones thrown are said to have come from the direc-

tion in which he went off, having threatened to stop the *pwè*. Po Saing has given no satisfactory explanation as to why the Chinamen threw stones at him. The Magistrate speaks of the evidence for the defence being just as good as that for the prosecution; but it seems to me not inconsistent with the story told by the witnesses for the prosecution. The witnesses only know what Po Saing told them about his wounds and that he spent the remainder of the night at a Burmese *pwè*.

Boh Wa, Sa Nan, La Nan and Hira all corroborate Eyu Wa and Dewa, as to the accused being the persons who committed the assault, and they do not seem to be seriously shaken in their evidence on cross-examination.

After this the Chinese seem all to have run away and it was not so unlikely that accused having got a blow on the head himself should have gone at once to report. In cases of affray where injuries are received on both sides there is often a race as to who shall be the first to report. If this were a false charge, I cannot say why the name of Po Han should have been mentioned at all. The most serious injury on Dewa is attributed to him. The Magistrate has, I think, given too much weight to minor discrepancies in the evidence and disregarded the direct evidence in the case.

In the earlier rulings under section 417, *Empress of India v. Gayadin* (1), *Queen-Empress v. Robinson* (2), it was held that there must be some perversity or incompetence in the decision of the Subordinate Court before its finding of acquittal could be set aside; but the ruling in *Queen-Empress v. Bibhuti Bhusan Bit* (3), that there is no distinction between the mode of procedure and the principles upon which appeals against acquittals and against convictions are heard, seems more in conformity with the terms of the Code, and has been followed by the Allahabad High Court in *Queen-Empress v. Prag Dat* (4), and in *Queen-Empress v. Karigowda* (5).

I do not for a moment say that the Magistrate has not given his careful consideration to the evidence, but I do think he has been mistaken in attaching too much weight to slight variations in a narrative of the prosecution witnesses which strikes me, on the whole, as a true one. If the accused had been convicted I should have had no hesitation in summarily dismissing their appeals, provided the sentences passed were appropriate.

I therefore reverse the finding of acquittal and direct that Po Saing do suffer two years' rigorous imprisonment under section 326, and that Aug Pe do suffer six months' rigorous imprisonment under section 323 and six months' rigorous imprisonment under section 326-114, the sentences to run consecutively.

(1) (1881) I. L. R., 4 All., 148. | (2) (1894) I. L. R., 16 All., 212.

(3) (1890) I. L. R., 17 Cal., 485.

(4) (1898) I. L. R., 20 All., 459. | (5) (1894) I. L. R., 19 Bom., 51.

1904
KING-EMPEROR
v.
PO SAING.

Criminal Revision
No. 1020 of 1904.
August 10th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

U THAUNG v. PO AUNG.

Mr. Villa—for applicant.

Application for further inquiry—Criminal Procedure Code, section 437—practice of Chief Court in admitting applications.

The power conferred by section 437 of the Code of Criminal Procedure, to order further inquiry into the case of an accused person who has been discharged, is exercised by the Sessions Judge and District Magistrate concurrently with the Chief Court, and the Chief Court will not ordinarily admit applications for the exercise of that power, except in cases where what is sought is not really further enquiry but a reconsideration of the evidence on the record, unless the applicant has in the first instance moved the Sessions Judge or District Magistrate.

King-Emperor v. Aung Nyun, (1903) 2 L. B. R., 165; *Crown v. Po Ka*, (1901) 1 L. B. R., 100; and *Po Win v. Crown*, (1902) 1 L. B. R., 311; referred to.

This is an application for the exercise of the power conferred on this Court by section 437, Code of Criminal Procedure, to order further enquiry into the case of an accused person who has been discharged. The power to order further enquiry is exercised by this Court concurrently with the Sessions Judge and the District Magistrate.

The general rule of practice is that this Court will not interfere, when there are other remedies available, until those remedies have been exhausted. It is no doubt the case that the practice has not been uniform and that applications for the exercise of powers under section 437, Code of Criminal Procedure, have been accepted by this Court although no application has been made to and refused by the Sessions Judge or District Magistrate. The case of *King-Emperor v. Aung Nyun* (1) has been cited as an instance. It does not appear on the face of the ruling in that case that no other remedy has been sought. But even if that case is in point, it does not establish a rule of practice. It is merely an instance of the exercise by the learned Judge of a discretion undoubtedly vested in him by law to entertain the application.

In the case of the *Crown v. Po Ka* (2), it was held that, when there is really no further enquiry that can properly be directed but when what was sought was a reconsideration of the evidence on the record, the proper course was for the Sessions Judge or Magistrate to refer the matter to the High Court. That ruling was followed and explained in *Po Win v. Crown* (3). In cases covered by those rulings, the proper course for a person aggrieved is no doubt to bring his application directly to this Court.

But in cases such as the present, where further enquiry is desired, and where the Sessions Judge or District Magistrate is not precluded by those rulings from dealing with the matter under section 437, Code of Criminal Procedure, I think it should be laid down as a rule of practice, without limitation of the exercise of the

(1) (1903) 2 L. B. R., 165.

(2) (1901) 1 L. B. R., 100.

(3) (1902) 1 L. B. R., 311.

discretion of this Court to accept any application under that section if it thinks fit to do so, that ordinarily this Court will not admit applications for the exercise of the power conferred by that section unless the applicant has in the first instance moved the Sessions Judge or District Magistrate. I am authorized to say that my learned colleagues at present sharing with me the exercise of the appellate and revisional jurisdiction of this Court concur in the adoption of this rule.

The present application, with its annexures, is accordingly returned to the learned counsel for the applicant, for presentation, if it is thought fit, to the Sessions Judge or District Magistrate.

1904.
U THAUNG
v.
PO AUNG.

Full Bench--(Civil Reference).

Ref: to in 12 R. 179

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
Mr. Justice Fox and Mr. Justice Bigge.

Civil Reference
No. 5 of 1904.
November 24th,
1904.

Mr. Giles,—Assistant Government Advocate.

Meaning of term "receipt" in section 2, sub-section 23, of the Stamp Act—Certificate to the effect that a premium on an insurance policy has been paid issued for the purpose of supporting a claim to exemption from income-tax not a receipt.

The meaning of the terms "acknowledged" and "acknowledgment" used in section 2, sub-section 23, of the Stamp Act must be limited to documents given to or issued for the benefit of the debtor, acknowledging to him the payment of money, etc., or delivery of goods, in discharge or satisfaction of his debt or the demand upon him.

Accordingly a certificate to the effect that a premium on an insurance policy has been paid issued for the purpose of supporting a claim to exemption from income-tax on the amount paid and not primarily intended for use as evidence of payment between the policy-holder and the Insurance Company is not a receipt, and is therefore exempt from stamp duty.

Rex v. James Harvey, (1812) Russell and Ryan, 227; *In the matter of* (Act XVIII of 1869) *the Uncovenanted Service Bank*, (1879) I. L. R., 4 Cal., 829; *Queen-Empress v. Fuggernath*, (1885) I. L. R., 11 Cal., 267; referred to.

The opinion of the Court was delivered by—

Fox, J.—This is a reference by the Financial Commissioner of Burma under section 57, sub-section (1), of the Indian Stamp Act, 1899 (XI of 1899), as amended by the Lower Burma Courts Act, 1900 (VI of 1900), Schedule I.

The question referred is:—"Are the two documents attached to this order of reference receipts within the meaning of section 2, sub-section (23), of the Stamp Act, and therefore chargeable with stamp duty in accordance with Article 53, Schedule I of the Act?"

With the exception of dates and figures the documents are in identical terms.

The first is as follows:—

“ESTABLISHED 1845.

NEW YORK LIFE INSURANCE COMPANY.

8, Old Court House Street.

Certified that Baboo M. C. Gupta has paid his quarterly premium Rs. 23-8-8, under Policy No. 3189230, due on the 25th day of April 1903. He is therefore entitled to an exemption of income-tax on that amount.

CALCUTTA: } (Sd.) GEO. LANE ANDERSON,
The 30th April 1903. } Resident Manager.”

The documents were attached to his salary bills by Baboo M. C. Gupta presumably in support of a claim to exemption from income-tax on the amounts paid. They were impounded by the Treasury Officer. The Collector sanctioned the prosecution of Mr. George Lane Anderson before the Presidency Magistrate, Calcutta, under section 65 of the Act. The latter communicated with the Collector of Stamp Revenue, Calcutta, who referred to the Insurance Company, and ascertained that it issued duly stamped receipts to persons paying premia, and that documents in the form above set out were issued merely for the purpose of supporting claims to exemption from income-tax. In the Calcutta Collector's opinion the documents were not chargeable with any stamp duty. The Presidency Magistrate agreed with him, and no further criminal proceedings appear to have been taken against Mr. George Lane Anderson.

One of the Financial Commissioner's predecessors had ruled that similar documents were chargeable with stamp duty. In the province of Lower Bengal the Board of Revenue holds them to be not so chargeable.

In consequence of the conflict of opinion the matter has been referred to this Court.

In our opinion the documents are not chargeable with stamp duty, and the answer to the question referred must be in the negative.

The definition of “receipt” in the Stamp Act is as follows:—

“Receipt” includes any note, memorandum or writing—

- (a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or
- (b) whereby any other moveable property is acknowledged to have been received in satisfaction of a debt, or
- (c) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or

(d) which signifies or imports any such acknowledgment, and whether the same is, or is not, signed with the name of any person."

The question turns upon the meaning of the words "acknowledged" and "acknowledgment." The learned Assistant Government Advocate has submitted that the legal meaning of these terms must be limited to documents given to or issued for the benefit of the debtor, acknowledging to him the payment of money, etc., or delivery of goods, in discharge or in satisfaction of his debt, or of the demand upon him.

We concur in this view, which is supported by authority.

So long ago as 1812, nine learned Judges in England held in *Rex v. James Harvey* (1) that a document in the following terms:—

"William Chinnery, Esq., paid to *x tomson*, the som of 8 pounds
Feb. 13, 1812"

could not be considered as a receipt. It was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof.

In the matter of the Uncovenanted Service Bank (2) the learned Judges, dealing with the case of an acknowledgment of receipt of money by the Bank issued to a person who had paid in money to the account of one of its depositors, said, "We consider that the document in question was not a receipt or discharge within the meaning of the Act, because it was not given to the party who paid the money."

Obviously it could not have been intended that every acknowledgment of payment of a debt should be chargeable with stamp duty. For instance it is not to be supposed that the Legislature contemplated that a letter written by one friend to another stating that he had received payment of a debt from some third person, must be stamped with an anna stamp.

The decision in *Queen-Empress v. Juggernath* (3) shows that the intention of the parties as to the operation of the document must be considered.

In the case of the present documents, they contain mere statements that the payer had paid certain monies as premia, and on the face of them they appear to be intended as documents to be put before an income-tax authority in support of a claim to exemption, and not to be documents primarily intended for the use of the debtor as the evidence between him and the Company of the payment of the premia.

They stand on the same footing as a letter from the Manager to the Treasury Officer to the same effect would, and such a letter would clearly not be liable to duty.

The case will be sent back to the Financial Commissioner with this intimation of the Court's opinion.

(1) (1812) *Russell and Ryan*, 227. | (2) (1879) *I. L. R.*, 4 Cal., 829.

(3) (1885) *I. L. R.*, 11 Cal., 267.

*Criminal Revision Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Bigge.*
No. 1209 of
1904.
October 17th,
1904.

KING-EMPEROR v. NGA NYO AND ONE.

Mr. Giles,—Assistant Government Advocate.

*Attempt to commit an offence under section 215, Indian Penal Code—
When complete.*

In order to constitute an attempt to commit an offence under section 215, Indian Penal Code, it is not necessary that the person who is willing to take, and the person who is willing to give, the illegal gratification should agree both as to the object for which the gratification is to be given and also as to the shape or form the gratification is to take. When once a proposal has been made for the payment of an illegal gratification whether it is completed by an agreement or not, the offence of an attempt to commit an offence under section 215 is complete.

Queen-Empress v. Chittar and another, (1898) I.L.R., 20 All., 389, dissented from.

Bigge, J.—Maung Kya Ne lost his buffalo and it was found by Tun E, who had also lost cattle at the Taukkyan Police Station. Four or five days after the loss Nga Nyo came to him and asked what he would give to get it back and he said Rs. 20, but Nga Nyo said that it could only be returned on payment of Rs. 40. As he was going to the Police Station to identify his buffalo he was again approached by Nga Nyo, who asked him if he would not pay, on which he asked why he should as he was just going to the Police Station to get the buffalo, and on Nga Nyo saying "then I will not give it," he called the thugyi, who arrested him. The learned Additional Sessions Judge has accepted the facts found by the Magistrate, namely, that Nga Nyo, the first accused, having learned that a stolen buffalo was in police custody, tried to induce the owner to pay him money to recover it and that although different sums were asked nothing was paid as the owner recovered his buffalo without any payment being necessary. He has convicted Nga Nyo under section 215-511, Indian Penal Code, and declined to follow the ruling in *Queen-Empress v. Chittar and another* (1) which decided that in order to constitute the offence punishable under section 215 it is necessary that the person who is willing to take, and the person who is willing to give, the illegal gratification must agree not only as to the object for which the gratification is to be given but also as to the shape or form the gratification is to take. As regards a substantive offence I agree with the learned Judge who decided that case, but I am unable to follow and adopt the reasoning whereby he arrived at the conclusion that the appellants could not have been punished for an attempt to commit an offence under section 215 and it is to be observed that the head note which I have quoted is silent on the point.

The learned Additional Sessions Judge has, in my opinion, found the test which discloses the defect in the reasoning of the learned Judge whose decision I am considering in the distinction between a proposal and a contract, and I would refer to the definition of the former in section 2 of the Contract Act, namely: "When one person signifies to

(1) (1898) I.L.R., 20 All., 389.

another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence he is said to make a proposal." I do not think that I am straining words or using them other than in their strict grammatical signification when I say that the proposals as above defined which are inseparable from the establishment of contractual arrangements are attempts to complete an agreement or, in other words, to arrive at the mutually expressed view of two wills whereby the legal bond called a contract is constituted. That the contract which Nga Nyo sought to complete with the owner of the buffalo was an illegal one does not vitiate the reasoning. If it had been a legal one there would have been no offence, while the gist of the whole case is that he made an illegal proposal which he hoped would culminate in an equally illegal promise to pay him an unlawful gratification in order to restore property which he knew to be stolen. The learned Judge who decided the Allahabad case may be right that there must be a concurrence of wills between the giver and the taker as regards either taking or consent to take. But he has, I say with respect, failed to appreciate the distinction as regards an agreement to take, and I am of opinion that when once a proposal has been made for the payment of an illegal gratification, whether it fructifies into an agreement or not, the offence of an attempt to commit an offence under section 215 is complete and that therefore Nga Nyo was properly convicted.

Thirkell White, C.J.—I concur.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

KING-EMPEROR *v.* PO CHON.

Prosecution for encroachment on grazing grounds—Proper method of trial.

The report of a Revenue Surveyor is a complaint and not on the same footing as a Police Report. If the Magistrate proceeds under clause (a) of section 190, subsection (1), of the Code of Criminal Procedure, he must examine the complaint thoroughly. He can only proceed under clause (c) if specially empowered and is bound by the provisions of section 191. Before issuing process the Magistrate should endeavour to ascertain if the grazing ground has been finally demarcated under Rule 68 of the Rules under the Lower Burma Land and Revenue Act and whether its boundaries are defined by visible marks or are otherwise well-known. A plea that the accused did not know that the land which he cultivated was in a grazing ground is a good ground of defence, and although the burden of proving it is on the accused, it must be investigated.

This is a case which may usefully be taken as an example of the manner in which prosecutions for encroachments of grazing grounds are often conducted; and as the basis of explanation of the way in which these cases should be tried.

A Revenue Surveyor reported that the accused had cultivated to the extent of over two acres in a grazing ground. He was examined in the most superficial manner, and incidentally, it may be mentioned, he did not even sign the record of the examination. He repeated the substance of his report and was not questioned on any point.

When the accused appeared, the substance of the charge was stated to him, namely, that in the year 1903 he had cultivated in a grazing ground, having extended his cultivation thereinto.

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v.
NGA NYO.

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No. 1315 of
1904.
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 v.
 PO CHON.

The accused said that he had received the land as his share of inheritance from his father-in-law, who had cultivated it for twenty years, and that he had made no extension. He therefore considered that he should not be convicted.

The Revenue Surveyor was then examined as a witness. He merely repeated what he had said before; and admitted that he knew nothing of the state of the holdings in the Circle before the year 1903. On this, the accused was examined. He repeated his previous statement and added that he did not know whether grazing ground land was included in the holding or not. He called one witness who explicitly supported his allegations and declared that the land cultivated by the accused was the same as that cultivated for many years by the accused's father-in-law; and that there were no demarcation marks to indicate that part of the land was included in a grazing ground. That I take to be the meaning of his deposition.

On these materials the Magistrate proceeded to judgment and, although it is almost inconceivable that he should have done so, convicted the accused and fined him Rs. 50. He accepted all that the accused and his witness said and believed that the accused and his predecessor in title had been in peaceable enjoyment of the land for many years. He passed over in silence the allegation of the absence of any demarcation marks; and he decided to fine the accused in order to warn him not to cultivate again in the grazing ground.

The first point for notice in this case is that the Magistrate should not have issued process without properly examining the Revenue Surveyor. There seems to be an idea that on a report of this kind, process should issue as a matter of course. And I have seen cases in which the examination of the Surveyor was entirely omitted, presumably because it was regarded as a mere useless formality. If the examination is restricted to a formal repetition of the substance of the report or complaint, it is indeed hardly necessary to record it. But that is not the intention of the law. The Code of Criminal Procedure does not place the reports of Revenue Officers on the same footing as those of Police Officers. In taking cognizance of an offence on the report of a Revenue Surveyor, the Magistrate must proceed either under clause (a) or under clause (c) of section 190, sub-section (1), of the Code of Criminal Procedure. If he proceeds under clause (a), he must examine the complainant thoroughly and ascertain from him the full particulars of the complaint and all necessary details. The examination must not be perfunctory and superficial. It must be as full and detailed as it should be in the case of other complainants. The Magistrate can proceed under clause (c) only if he is specially empowered to do so and he is then bound by the imperative provisions of section 191 of the Code. In this case, not only the matter recorded but the omission to require the complainant to sign the examination indicated that the Magistrate regarded the examination as a mere form.

Next, may be considered the substantial questions of the offence charged, the manner of proving it, and the defence of the accused. The offence created by Rule 69 of the Rules under the (Lower) Burma Land

and Revenue Act (for the purposes of this case) is the occupation for other than grazing purposes of any part of a grazing ground which has been finally demarcated under Rule 68. Before issuing process in a case of this kind, the Magistrate should endeavour to ascertain whether the grazing ground has been finally demarcated and whether its boundaries are defined by visible marks or are otherwise well known.

If the accused denies the commission of the offence, it must be clearly proved; and I think that ordinarily something more than the allegation of the prosecutor should be required. The evidence of the Village Headman would usually be of value.

If, as in this case, the accused pleads that he did not know that the land which he cultivated was in a grazing ground, that is a good ground of defence. It is an allegation that within the meaning of section 79 of the Indian Penal Code, the accused did the act charged because by reason of a mistake of fact and not by reason of a mistake of law in good faith he believed himself to be justified by law in doing it. If that is true, he committed no offence. For section 79 of the Penal Code applies to things punishable under Special and Local Laws as well as to things punishable under the Penal Code (section 40 of the Penal Code). No doubt the burden of proving the existence of circumstances which bring the case within the general exception in section 79 of the Penal Code lies on the accused, as provided by section 105 of the Evidence Act. But in this case, what evidence there was supported the accused's plea of ignorance of fact and the Magistrate did not find that that plea was not made out. He simply disregarded it. Of course, the mere statement of the accused that he acted in ignorance is not sufficient. But the plea should be investigated.

In cases of this kind, when the plea of ignorance of fact is set up, the Magistrate should question the witnesses for the prosecution, in order to ascertain whether the grazing ground has really been demarcated, whether demarcation marks are in existence, whether the accused had means of knowing that he was cultivating in a grazing ground. Although the burden of proof is on the accused, the Magistrate's duty is to ascertain the truth and there is no object in postponing the examination of witnesses for the prosecution on these points, on which presumably they should have special knowledge. The Magistrate should also, instead of ignoring the plea as is usually done, make clear to the accused that he is at liberty to produce evidence to shew that he had no means of knowing, with the exercise of reasonable care, that he was cultivating within the limits of a grazing ground. If, however, the evidence for the prosecution clearly shews that the limits of the grazing ground are not visibly defined or demarcated or otherwise well known to the people of the neighbourhood, it is not necessary to require the accused to produce further evidence to the same effect.

In a word, these cases should be tried with the same care and regard for justice as other criminal cases and the Magistrate should avoid any appearance of being biased against the accused because he (the Magistrate) sometimes exercises revenue as well as judicial

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functions. When people break the law, wilfully, and encroach on grazing grounds which have been allotted in due form for the common benefit, they should receive adequate punishment; and when the encroachment is of a considerable extent substantial fines should be imposed. But the Revenue Rules must not be administered in an illegal or oppressive manner.

In the present case, the evidence, as I have said, supports the plea which was practically advanced by the accused that if he cultivated in the grazing ground he did so in ignorance and in good faith.

The conviction and sentence are therefore reversed and it is ordered that the fine, if paid, be refunded to the accused, Po Chon.

If it is really the case that he has cultivated in a finally demarcated grazing ground, he should be warned that this order does not authorize him to continue or resume cultivation of the land in question.

Criminal Revision
No. 1019 of 1904.
September 1st,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge.

KING-EMPEROR v. PO THEIN.

Criminal Procedure Code, section 562—Interpretation of.

The accused, whose age was 25, was convicted of the theft of property of some value in a house. There were no extenuating circumstances, and no evidence of the good character or antecedents of the accused. The Magistrate released him on probation on his executing a bond under section 562 of the Code of Criminal Procedure.

Held,—that section 562 of the Code, the effect of which has been explained in the case of *King-Emperor v. Ba Han* (2 L. B. R., 65), should be used freely in suitable cases, but should not be applied indiscriminately to the cases of all first offenders. Among the most important points for consideration are the character and antecedents of the accused.

King-Emperor v. Ba Han, (1903) 2 L. B. R., 65, referred to.

The accused, Po Thein, was convicted of theft of certain property in a house. The Magistrate released him on security under section 562 of the Code of Criminal Procedure as a first offender. It was then brought to his notice that proceedings against the accused under section 110 of the Code had been sanctioned. The District Magistrate has rightly brought the case to notice.

I observe that in dealing with the appeal of another accused in this case, the learned Additional Sessions Judge has remarked for the guidance of the Magistrate that "a first conviction of theft by a young man is not suitably dealt with by merely requiring a bond for good behaviour. A flogging is best." I think it right to say that this direction is too broadly stated and may be misunderstood. I take advantage of the opportunity to explain more fully the principles on which section 562 of the Code of Criminal Procedure should be applied.

The Legislature has explicitly given discretion to certain Magistrates to release on probation of good conduct first offenders convicted of certain offences, among which the offence of theft in a house is specified. It is not open to any Court to make this provision of the law a dead letter by saying that theft by a young man is not suitably dealt with under it. Nor do I suppose that the learned Additional Sessions Judge intended that his remark should be construed as of universal application.

The meaning of the section has been explained by the authoritative ruling of this Court in the case of *King-Emperor v. Ba Han* (1), and the Courts must be guided by that interpretation.

It is necessary, on the one hand, to give due effect to the section, which is a new departure in the administration of Criminal Justice in India introduced at the last revision of the Code of Criminal Procedure. On the other hand, Magistrates should be careful to apply the section only in cases to which its application is clearly suitable. Although it has been laid down that, in order to be dealt with under this section, the offender need not be young, the offence need not necessarily be trivial, there need not even be extenuating circumstances, yet it is not the meaning or intention of the section that Magistrates may apply it, indiscriminately and without due consideration, to all first offenders. The Court must have regard to the incidents specified, and some ground among those specified must be held to apply. One of the most important considerations is that of the character and antecedents of the accused; and before deciding to apply the section, Magistrates should invariably satisfy themselves on this point. It would hardly ever be right to release on probation an accused person who was shewn to be of bad character or the associate of persons of bad character; or indeed one who was not affirmatively shewn to be of good character. It is partly by disregard of this principle that the Magistrate has erred in the case under consideration.

But in the case of a person who is shewn to have borne a good character and to be of respectable antecedents, it may often be right to apply the section when the offender is young, though not technically a juvenile offender, even though the offence is not trivial. That was the principle applied by me in the case cited above. Again an offender, though not young, may rightly be released on probation if the offence is of a very trivial nature or if there are extenuating circumstances.

In practice, if those principles are borne in mind, I think there need be little doubt as to the proper application of the section. In passing an order under section 562 the Magistrate should record his reasons, with sufficient fullness to shew that he has some ground, within the scope of the section, for its application. The section should be freely applied in suitable cases and should not be allowed to fall into disuse. In releasing an accused under this section, it would ordinarily be the Magistrate's duty to convey such warning and admonition as may be appropriate.

In the present case, the accused was 25 years of age. The offence, that of deliberately stealing from a house objects of some value, cannot be regarded as a trivial one. There were no extenuating circumstances alleged. There is nothing on the record to shew that the accused was of good character and of respectable antecedents. There was no ground, except perhaps the comparative youth of the accused, on which the section would properly be applied.

The Magistrate's order releasing the accused on probation is therefore set aside and he is directed to cause the accused, Po Thein, to be

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brought before him and, after making such enquiry as may be necessary as to his character and antecedents, to pass a fresh order or sentence in accordance with law. It may be observed that the mere fact that proceedings under section 110, Code of Criminal Procedure, had been sanctioned does not necessarily shew that he is of bad character.

Criminal Appeal
No. 324 of 1904.
August 15th,
1904.

Before Mr. Justice Birks.

NGA PYE v. KING-EMPEROR.

Mr. Hamlyn—for appellants.

Mr. Giles, Assistant Government
Advocate.

Forgery of certificate purporting to be made by a public servant and use as genuine—Sections 466 and 471, Indian Penal Code—Inducement to confess—Section 24, Evidence Act.

Alteration of name and age in an Educational certificate and use thereof by the person altering to obtain an official appointment, which the officer appointing would have withheld if he had known of the alterations, constitute in the absence of satisfactory explanation offences under sections 466 and 471, Indian Penal Code.

The suggestion that it would be better to confess made by the accused's superior officer renders the confession inadmissible under section 24 of the Evidence Act.

Queen-Empress v. Nga Shwe The, (1893) P. J. L. B., 52, referred to.

The accused Nga Pye in this case was the Bailiff of the Deputy Commissioner's Court in Mergui and he has been convicted by the Sessions Judge of the Tenasserim Division, *firstly* for forging a certificate of having passed VIIIth Standard in the Prome Municipal High School, and *secondly* with having fraudulently used such certificate as genuine, offences punishable under sections 466 and 471 of the Penal Code.

On his trial before the Sessions Judge the accused adhered to what he had told the committing Magistrate when examined under the provisions of section 209, Code of Criminal Procedure. He then admitted that he had made certain alterations in the certificate which originally contained the name of Po Thit. He admitted erasing the name of Po Thit and substituting the name of "Pye." He also altered the age from 17 to 19, and the father's name, Maung U Tha U, was erased and the name of his adoptive father, Po Saing, inserted. He had no reason to offer for making these alterations and never reported them. He admitted that the document so altered was Exhibit A which bears Mr. Wedderspoon's signature, and the evidence of this witness shews clearly that no boy called Maung Pye, aged 19, ever passed the VIIIth Standard in November 1898.

The Deputy Commissioner's evidence shews that he obtained appointments both as Bench Clerk and as Bailiff as he held this certificate, and that officer swears that he would never have given him those appointments if he had known the certificate was altered. It appears that only a copy of the altered certificate was shewn at first. The Deputy Commissioner received information that the certificates of the employes in his office required verification. Exhibit D is the letter sent by him to the Registrar, Educational Syndicate, and it may be noted that two of the names in the margin are erased. The accused told the committing Magistrate that the Chief Clerk had done this.

The Deputy Commissioner finally called up the accused and told him that if the certificates were wrong there was no use in his denying it. The accused made then the statement of the 17th March which has been admitted under section 80 of the Evidence Act. I do not think this statement is admissible under section 24 of the Evidence Act as the Deputy Commissioner seems to have suggested to the appellant that it would be better to confess. The case is somewhat similar to that of *Queen-Empress v. Nga Shwe The* (1). Apart from this statement the evidence appears to me ample to justify the conviction. If the accused's age was really 19 he must have falsely stated his age when the certificate was issued. The evidence of the Chief Clerk shews that he offered him Rs. 100 and wanted him to save him. Some of the questions asked accused in his examination by the committing Magistrate seem improper. He should not have been asked whether he had been prosecuted, and the two preceding questions are based on the statement made to the Deputy Commissioner which I consider was inadmissible. The earlier questions were however put with the object of securing the accused's explanations of facts in evidence against him and there seems no reason to doubt that his story of the alterations made by him is true. What his object was is a matter of inference, but the accused's anxiety to keep the original certificate from inspection justifies the Court in making presumption against him under section 114 of the Evidence Act. The alterations made were such as to constitute making a false document under section 464, Penal Code, and in the absence of satisfactory explanation his motive may be presumed to be fraudulent or dishonest. The sentences passed seem appropriate. I dismiss the appeal.

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Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
 and Mr. Justice Bigge.

NGA WE v. KING-EMPOROR.

Confessions—Interpretation of section 533, Code of Criminal Procedure.

Criminal Appeal
 No. 586 of
 1904.
 November 11th,
 1904.

Section 533, Code of Criminal Procedure, requires evidence to be taken as to whether the Magistrate before recording the confession questioned the accused and, upon so questioning him, formed the belief that the confession was made voluntarily and whether the record made by the Magistrate contained a full and true account of the statement made by the accused. *Semble* even oral evidence of the terms of the confession would be admissible.

Section 533 has no reference to a confession alleged to have been made to a Magistrate but not recorded in any way.

Ta Pu v. King-Emperor, (1902) 2 L. B. R., 19, distinguished.

Thirkell White, C.J.— * * * * *
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Finally there is on the record a confession alleged to have been made to a Magistrate on 2nd August 1904. This confession purported to be recorded under section 164 of the Code of Criminal Procedure. The record of it was found to be inadmissible, not because it was recorded

(1) (1893) P. J. L. B., 52.

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on a wrong form, which was quite immaterial, but because it was not signed by the accused, because the Magistrate omitted to record the certificate prescribed by that section, and because, on the face of the record, it appeared that the Magistrate questioned the appellant, to ascertain whether he had reason to believe that the confession was made voluntarily, after and not before recording it. As he was bound to do by section 533 of the Code of Criminal Procedure, the learned Additional Sessions Judge rightly took evidence that the accused duly made the statement recorded. He examined the Magistrate who recorded the alleged confession. But the examination of the Magistrate was not directed to all the essential matters which required elucidation. The law on the subject, though not free from difficulty and ambiguity, seems to be as follows. If, in the case of a confession purporting to be recorded under section 164 of the Code of Criminal Procedure, it is found that any of the provisions of that section have not been complied with, the point on which section 533 of the Code requires the Court to take evidence is whether the confession was duly made, that is, made in accordance with the imperative requirements of section 164. The essential requirements of that section are that the Magistrate should, before recording the confession, question the accused and, upon so questioning him, form the belief that the confession to be recorded is made voluntarily, and that the record made by the Magistrate should contain a full and true account of the statement made by the accused. The Magistrate, when examined in the Sessions Court, merely said that the confession made by the accused was that recorded by him and marked Exhibit A. He also said that he repeatedly asked the accused if he had been forced or induced to confess. The latter statement shews that the record is very imperfect; for only one question to that effect is recorded at the end of the alleged confession. If the Magistrate had said that, before recording the confession, he questioned the accused and came to the conclusion that the confession was voluntarily made; and if he had also said that his record contained a full and true account of the accused's statement, the defects would have been cured and the confession would be admissible. From the terms of section 533, it seems that even oral evidence of the terms of the confession would be admissible. But I do not think this would be necessary, if it was sworn that the record, though formally imperfect, was a true and full account of the confession.

In the present case, it does not seem to me that the Magistrate's evidence shewed that the confession was duly made within the meaning of section 533 of the Code of Criminal Procedure; and in my opinion it was inadmissible.

The case cited by the Additional Sessions Judge, namely, *Ta Pu v. King-Emperor* (1), has no bearing on the question under discussion. That ruling refers to a confession alleged to have been made to a Magistrate in the course of a police investigation and not recorded by him at all but merely deposed to by his oral testimony. Section 533 of the

(1) (1902) 7 L. B. R., 19.

Code of Criminal Procedure has no reference to such a confession. It is limited so far as confessions are concerned to the case of a confession recorded or purporting to be recorded under section 164 of the Code. The ruling cited has no reference to a confession so recorded or purporting to be so recorded.

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Bigge, J.—I concur.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Bigge.*

*Criminal Revision
No. 918 of
1904.
November 14th,
1904.*

PO KE v. KING-EMPEROR AND MAUNG MAUNG.*

Mr. Bland—for applicant.

Mr. Giles, Assistant Government
Advocate.

Criminal trespass—Penal Code, sections 441—447—Presumption of specific intent.

The real test whether a person accused of criminal trespass entered with the specific intent required by section 441, Indian Penal Code, is whether the accused has a *bona fide* belief that he has a right to enter. If he has not that belief, the Court will presume that he entered with intent to annoy the person in possession.

Thirkell White, C.J.—This is an application to revise the order of the Assistant Magistrate convicting the applicant, Po Ke, of the offence of criminal trespass.

The facts of the case are simple. One On Gaing, who is the father-in-law of the applicant, purported some years ago to sell to one Nga Kyin some land including the land which is the subject of the present dispute. In the years 1902-03 and 1903-04, Nga Kyin let the land in dispute to the applicant, Po Ke. This year, instead of letting it to Po Ke he let it to the complainant, Nga Maung. This man entered on the land as Nga Kyin's tenant and began to plough. Thereupon the applicant also entered and began to plough the land. Before the Magistrate, Po Ke asserted that he entered as the tenant of On Gaing, who claimed that the land was his and in his possession and not in the possession of Nga Kyin.

On these facts, the sole question that arises is whether the applicant has rightly been convicted of criminal trespass. In order that a conviction of criminal trespass may be maintained, it is necessary to shew that the accused has entered upon property in the possession of another with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of the property (section 441, Indian Penal Code). This is a sufficient citation of the law for the purpose of the present case. It will be observed that the section requires the Court to find that the accused entered with a specific intent; and in this respect it differs from other sections of the Indian Penal Code which render punishable acts done with the knowledge that they are likely to have certain consequences. No doubt, there is a reason for this distinction: as also for the distinction implied by section 298 between "intention" and "deliberate intention." But for the purpose of section 441 as of other sections

* Distinguished in *Po Lu v. Shwe Kyu*, 4 L.R.R., 242.

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in which intent is an essential element of an offence, all that the Courts can do is to judge of the intent with which an act is done by the circumstances and by the conduct of the doer. There seems to me to be nothing in the section to remove the question from the operation of the ordinary rule that a man is presumed to intend the ordinary and natural consequences of his actions. It seems to me that in cases of this kind, where the intention to commit an offence is not alleged, it is for the Courts to consider whether the circumstances indicate that the accused entered upon the property in good faith, believing that he had a right to do so or that he entered without such belief merely for the purpose of disturbing the peaceable possession of another person. If, without any *bona fide* belief that he has a right to do so, a man comes and ploughs land in the possession of another, I think that the natural and necessary result of his action is to cause annoyance to the person in possession; and that as a matter of law he may rightly be presumed to have acted with intent to annoy that person. The real test is whether the accused has a *bona fide* belief that he has a right to enter. If he has not that belief the Courts will presume that he entered with intent to annoy the person in possession.

In this case, the Magistrate has considered the matter from this point of view, although his chain of reasoning is incomplete and I think that the applicant was rightly convicted.

I would therefore dismiss this application for revision.

Bigge, J.—I concur.

Criminal Appeal
No. 645 of
1904.
November 25th,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge, and
Mr. Justice Irwin.

PO KIN v. KING-EMPEROR.

Mr. Dawson—for appellant.

Murder in sudden fight—Indian Penal Code, section 300, exception 4.

If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to take an undue advantage and not to be entitled to the benefit of exception 4 to section 300, Indian Penal Code.

Shan Gyi v. Queen-Empress, (1885) S. J. L. B., 371; *San Ya v. Queen-Empress*, (1889) S. J. I. B., 463; overruled.

Thirkell White, C.J.—The facts of this case are simple and practically undisputed. The deceased, who is called in the charge Mukbal Ali, was Serang of a launch plying between Myaungmya and Kangyi. Soon after the launch left Myaungmya one of the passengers, Po Chon, wanted to steer the launch and quarrelled on this account with the man at the wheel. Some other Burmans, including the appellant, interfered and separated them. The deceased then said he would return to Myaungmya and had the launch turned round. Thereupon the appellant, Po Kin, remonstrated and kicked the helmsman. The deceased Serang struck the appellant with his first; and the appellant stabbed him in the chest just below the collar bone. The deceased died soon afterwards. The two medical witnesses who were examined

had no doubt that death was caused by the wound. It is unfortunate that there was no *post mortem* examination. But I do not think there is any reasonable doubt that the deceased died from the effects of the wound. Although the accused was defended by a pleader, no suggestion seems to have been made at the trial that he died from any other cause.

In my opinion the appellant has been rightly convicted of murder. It is not argued that the act of the appellant would not amount to murder unless one or other of the Exceptions to section 300, Indian Penal Code, applies. And I think it is clear that when a man stabs another in the chest with a knife, he must be held to have intended to cause death or such bodily injury as he knew to be likely to cause death. It is admitted that the deceased struck the appellant; and the question arises whether the blow constituted grave and sudden provocation sufficient to deprive the appellant of the power of self-control. In my opinion, it cannot be held to do so. I have no doubt that the blow provoked the appellant to retaliate. But that it was sufficient to deprive him of the power of self-control is not established. It is then argued that the deceased's death was caused without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, and that the appellant took no undue advantage and did not act in a cruel or unusual manner. In support of this proposition, on which depends the applicability of Exception 4 of section 300 of the Indian Penal Code, two rulings of the Judicial Commissioner of Lower Burma are cited, namely, *Shan Gyi v. Queen-Empress* (1) and *San Ya v. Queen-Empress* (2). With all respect, I am unable to agree with these rulings. The case of *Shan Gyi* (1) is not unlike the present case. Two men were fighting with their hands, and one of them stabbed the other with a knife. Relying on English rulings, the learned Judicial Commissioner held that in so doing the accused had not taken an undue advantage or acted in a cruel and unusual manner. But the cases cited do not support this view. Both cases are to the effect that if, on provocation, a man at once retaliates with any instrument that may happen to be at hand, and causes death, the act is not murder but manslaughter. These rulings seem to me to apply more aptly to Exception 1 than to Exception 4 of section 300. But to whichever exception they apply they clearly go further than the wording of the Indian Law allows. As regards Exception 1, the Penal Code requires not only that there should be immediate provocation but that it should be sufficient to deprive the offender of the power of self-control. As regards Exception 4, there is nothing in the English rulings cited to shew that the proviso explicitly laid down in the Penal Code, that the offender has not taken undue advantage or acted in a cruel or unusual manner, has any place in the English law on the subject. In India, it is otherwise. It seems to me that if two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to take an undue advantage and not to be entitled to the benefit of Exception 4 to section 300, Indian Penal Code. I think this

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(1) (1885) S. J. L. B., 371. 1 (2) (1889) S. J. L. B., 463.

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should be laid down as the true construction of the Exception and that the decisions cited above to the contrary effect should be definitely overruled.

I think also that the Additional Sessions Judge was right in passing sentence of death. At the same time, considering all the circumstances of the occurrence, and that the act of the appellant was done without premeditation, in a sudden fight and in the heat of passion, I am disposed to think that, although the offence amounted to murder, the death penalty may properly be remitted. I would therefore maintain the conviction of Po Kin and reduce the sentence to one of transportation for life.

Irwin, J.—I concur.

Criminal Appeal
No. 466 of
1904.
August 26th,
1904.

Before Mr. Justice Birks.

PWA NYUN v. KING-EMPEROR.

Mr. Wilkins—for appellant.

Evidence—Administering oath to child witnesses—Indian Oaths Act, section 13.

The deposition of a girl aged 8 was objected to on the ground that the Magistrate had not administered an oath to her nor placed her on solemn affirmation.

Held,—that when a Judge or Magistrate has elected to take the statements of a person as evidence, he has no option but to administer either the oath or affirmation to such a person as the case may require.

Queen-Empress v. Maru and another, (1888) I. L. R., 10 All., 207, cited.

Queen v. Sewa Bhogta, (1874) 14 B. L. R., 294; *Queen-Empress v. Shava and another*, (1891) I. L. R., 16 Bom., 359; dissented from.

The appellant in this case is a girl of 15 years of age and she has been convicted under section 394, Indian Penal Code, of robbing another little girl aged 10 of jewellery worth Rs. 850 on the 24th June 1904. The facts are briefly as follows:—

Ma Ma Mi was wearing her nagats and bangles worth Rs 850 when she went to school on 24th June. The accused was her teacher in that school, and asked her to go with her to pick flowers in the middle of the day. They were to go out by different doors. It is not quite clear whether this arrangement was made at the school or at the little girl's own home. They met near a mosque and went on to Tun Myat's garden. On the way they passed Ma Paw, who spoke to them both. When they got to the garden, accused first asked, and then ordered, the complainant to take off her jewellery as it was unsafe to wear it. Complainant says she was afraid and gave them up. Complainant then took out Saya Han's loongyi, which she wore under her own, and wound it around her head like a gaungbaung. While doing this they saw Bee Bee, a little girl of 8, coming with a baby. Complainant says she also saw Ba Chit and Po Nyun as they passed the opium shop. They then went inside the Tasaung, and when they got behind the image, accused

said the jewels were now her property. Complainant protested and then accused caught her by the neck and squeezed her throat, pulled her down and sat upon her face. When she came to her senses she found accused had gone off with her jewellery. She met Shwe Baw and reported to him, and they went together to report to Maung Ba Shwe. Accused's house was searched immediately, but nothing found. She appeared to be more or less dishevelled. There is ample corroboration as to the fact that the two girls were together. Mi Paw corroborates Ma Mi, and so do Bee Bee and U Shwe Baw. This last witness says he saw marks on the child's neck of fingers and that her eyes were inflamed. The learned Additional Sessions Judge has gone very fully into the evidence, and I see no sufficient reason to doubt his conclusion. The appeal is on the facts, but there is one allegation which requires notice. Mr. Wilkins urges that the deposition of Bee Bee, a girl of 8, is inadmissible, as she was not sworn or placed on solemn affirmation but merely warned to tell the truth and he cites the case of *Queen Empress v. Maru and another* (1) in support of this proposition. That case was however tried by a single Judge, Mr. Justice Mahmood, who though he took a different view admitted that the High Court of Calcutta in the case of *Queen v. Sewa Bhogta* (2) had decided by a majority of four Judges to one "that the word 'omission' which occurs in section 3 of Act X of 1873, the Oaths Act, includes any omission, and is not limited to accidental or negligent omissions." This ruling has also been dissented from in the case of *Queen-Empress v. Shava and another* (3), by Mr. Justice Jardine, but that learned Judge expressed an opinion, in which I also concur, "that when a Judge or Magistrate has elected to take the statements of a person as evidence, he has no option but to administer either the oath or affirmation to such a person as the case may require." The proper course in such cases is to record the questions and answers put to the witness to ascertain whether he is competent to testify under section 118, and if the Court comes to the conclusion that he is competent an oath or affirmation should be administered. A child is generally competent if it is old enough to understand that it ought to speak the truth. I think the evidence of Bee Bee was admissible. The point is not very material to this case, for the evidence of the complainant herself strikes me as credible and truthful and it is corroborated by a good deal of other evidence. The learned Additional Judge would have liked to be able to send the girl to the Reformatory School. Section 31 of the Reformatory Schools Act, 1897, is the only one that refers to girls, and the Judge might have passed an order under that section if he had deemed it desirable. The sentence actually passed of two months' rigorous imprisonment and a fine of Rs. 900 seems appropriate, but the sentence in default of fine seems unduly long for so young a girl.

On the merits the appeal is dismissed, and the sentence, in default of payment of fine, is reduced to six months.

(1) (1888) I. L. R., 10 All., 207.

(2) (1874) 14 B. L. R., 294.

(3) (1891) I. L. R., 16 Bom., 359.

Civil 2nd Appeal
No. 65 of 1904.
August 24th,
1904.

Before Mr. Justice Birks.

SAN PE AND ONE v. MAUNG KYAN AND ONE.

Mr. Palit, vice Messrs. Pennell and Maung | Mr. Hamlyn—for respondents (plaintiffs).
Thin—for appellants (defendants).

Alteration of promissory note by insertion of date—Power of husband to sign on behalf of his wife—Negotiable Instruments Act, sections 87 and 27.

Insertion in a promissory note after execution of a date entered in the counter-foil and inadvertently omitted when the note was signed is an alteration made to carry out the common intention of the parties as contemplated in section 87 of the Negotiable Instruments Act.

Byles on Bills, 16th edition, 89, cited.

Any general authority that the husband may have, as lord of the household, to act on behalf of his wife does not include the right to sign promissory notes on her behalf (section 27, Negotiable Instruments Act).

Soobramonian Chetty v. Ma Hnin Ye, (1899) P. J. L. B., 568, and *Ma Thu v. Ma Bu*, (1891) S. J. L. B., 578; distinguished.

The plaintiffs-respondents in this case sued to recover Rs. 2,000 principal and interest due on a promissory note dated 12th June 1902. The plaintiff alleges that both the defendants signed the note in suit.

The defendants denied execution, and said that it was a false suit as Ma Hla Dun (2nd plaintiff) was a step-sister of Ma Ma (2nd defendant).

The Court of first instance found that Rs. 1,450 was owed by the defendants at the time of the execution of the note; that it was signed by the husband alone, who touched the pen before Ma An Gyi wrote his name; that the date was inserted after the execution of the note, but that this did not invalidate it under section 87 of the Negotiable Instruments Act; that though Ma Ma did not sign the note and it is alleged she was not even present, yet that she was bound by the acts of her husband who had implied authority to sign for her, and that the defendants' allegation that the claim was brought through spite was not made out or the *alibi* proved, which the defendants set up.

An appeal was preferred to the Divisional Court on the ground that the 2nd defendant could not be liable on a note she did not sign. The lower Appellate Court went into the case at some length and finally held that the wife was liable as her husband signed as her agent.

There are five grounds of second appeal, but they really amount to three: namely, that the 2nd defendant could not be liable as she did not sign the note, and that the rulings cited in support of this proposition only referred to immoveable property; that the Court of first instance should have required proof of the documents referred to in its judgment and that the lower Appellate Court having held these not properly proved or admitted should have rejected them; and that as the note was tampered with by the insertion of the date, strict proof of the alteration should have been required.

The Courts below have both found that this was not a false claim and that the money referred to in the note was an old debt. The Courts having both concurred in this finding I think the Court of first

instance was right in applying section 87 of Act 26 of 1881 to the alteration of the note in suit by the insertion of the date. The correct date was entered in the counterfoil, and seems to have been inadvertently omitted when the note was signed. The alteration was made to carry out the common intention of the parties as contemplated in this section.

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Mr. Hamlyn for the respondents has also cited the following passage from Byles on Bills, 16th edition, page 89:—"Neither is a date in general essential to the validity of a bill or note and if there is no date it will be considered to be dated as at the time at which it was made or rather issued; it may also be antedated, post-dated, or dated on Sunday or presumably other non-business day."

No objection seems to have been taken in the Court of first instance to the admission of the account books. Exhibit 2 was apparently shown to Ma Hla Dun, nor was this objection taken in the memorandum of appeal to the Court below.

The only question that remains to consider is whether the 2nd defendant can be held liable under the note which she admittedly did not sign. Section 27 of the Negotiable Instruments Act provides that a person may be bound "by a duly authorized agent acting in his name," but goes on to say "that a general authority to transact business and to rescind and discharge debts does not confer upon an agent the power of accepting or endorsing Bills of Exchange so as to bind his principal," and section 28 provides, "that an agent who signs his name to a promissory note, Bill of Exchange or cheque without indicating therein that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument except to those who induced him to sign upon the belief that the principal only would be held responsible."

There is nothing on the note in this case to show that the husband was acting as agent for his wife, and I do not think the rulings cited below are applicable. These cases, *Soobramonian Chetty v. Ma Hnin Ye* (1) and *Ma Thu v. Ma Bu* (2), are based on the relations between the husband and wife to deal with the joint property under Buddhist Law. The question in both these cases was whether a sale by the husband of the joint immoveable property belonging to both was valid without the wife's consent. The present case is covered by section 27 of the Negotiable Instruments Act already cited, and it is clear that any general authority that the husband may have as lord of the household, to act on behalf of his wife, does not include the right to sign promissory notes on her behalf. Ma Ma herself was never examined and in her written statement she denied the claim.

I therefore modify the decrees of the Courts below by directing that the name of the second defendant be struck out from the decree. I will make no order as to costs.

(1) (1899) P. J. L. B., 568. | (2) (1891) S. J. L. B., 578.

Civil 1st Appeal
No. 27 of
1904.
August 22nd,
1904.

Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Bigge.

ISAAC ABRAHAM SOFAER v. R. P. WILCOX AND
T. N. J. CATCHATOOR.

Messrs. Eddis, Connell and Lentaigne— | Mr. Giles—for respondents (defend-
for appellant (plaintiff). | ants).

Contract—Absence of a formally signed contract—Conduct of parties supplying
the want of it.

Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.

W and C entered into an agreement with S, in or about February 1903, to perform certain building work for S in Rangoon. The work was commenced at once, in anticipation of the execution of a written agreement between the parties. Several draft agreements then passed between W and C and S. One of these (Exhibit D), which was that finally approved, although it was never signed by the parties, provided for the execution by W and C of all the brickwork, including cornices, projections, etc. In the course of the work W and C ordered a quantity of bricks sufficient for the construction of the whole building; obtained from S a promise to increase the "through rate" when the plinth was finished, if the rate agreed upon was then found to be insufficient; stated in evidence in another case that they had taken up the contract to erect S's new building; and generally acted and spoke as if they had undertaken to do so. In April, S wrote to W and C complaining of the delay in the performance of the work, and they replied, explaining the cause of it. In May further disputes occurred between the parties, and at length, on 1st July, S demanded the formal execution of the written agreement, with the addition of a clause providing a penalty if the work was not finished by a given date. W and C replied that they would complete the work to plinth level and would carry it no further. S then sued them for damages for breach of contract, and relied on the draft agreement D. W and C denied that they were bound by it, and maintained that they were within their rights in stopping at plinth level.

Held,—that the facts, and the actual conduct of the parties, established the existence of a contract in the terms of the document D; and there having been a clear breach of it, W and C must be held liable in damages.

Alexander Brogden and others v. The Directors, etc., of the Metropolitan Railway Company, (1877) L. R. 2 A. C., 666, referred to.

Bigge, J.—This appeal arises out of Civil Regular No. 30 of 1904 on the Original Side of this Court, in which the plaintiff-appellant sued the respondent to recover Rs. 7,210 as damages for the alleged breach of an agreement whereby the respondents undertook to erect for the appellant the brickwork of a new house at the corner of Phayre Street and Dalhousie Street, Rangoon, at the rates and on the terms set out in an agreement and specification which were prepared by the respondents and to which the appellant assented.

The appellant in his plaint was unable to give the exact date of the alleged agreement as he had not a copy of it, the original being, he said, in the possession of the respondents, but he stated that the agreement and specification were engrossed but had never actually been signed, that the respondents had proceeded with the work and had done a portion of it and had been paid certain sums to account. He further alleged that the respondents after working four months were not able in that time to complete the foundations up to plinth level and that in consequence he had constantly to find fault with them for the way in which they were carrying on the work, both

in respect of delay and also in respect of the quality of the work, and that they, on the 2nd July 1903, wrote to him declining to complete the work, in consequence of which he was compelled to employ another firm of contractors to do it at a higher rate than that payable to the respondents.

The respondents in their written statements denied the making of the agreement charged in the plaint, and alleged that in or about February 1903, there were negotiations between the parties for the erection by the respondents of the house referred to in the plaint, and that the rates had been agreed to, whereupon they began to work on the house, but that it was still uncertain whether they were to have the contract for the whole building, and that about the middle of March the respondents, who were at that time willing to take the contract for the whole building, submitted to the appellant in succession several drafts of a contract to that effect; that the plaintiff left the matter open until on or about the 12th July 1903, when differences having arisen between the parties, the appellant called upon the respondents to execute the agreement which had been drafted and claimed to add certain fresh terms thereto, with which demand respondents refused to comply and refused to continue the work beyond plinth level and they maintained that they were within their rights in so doing. They do not admit that the appellant had suffered the loss alleged in the plaint. The following issues were settled:—

- (1) What was the agreement between the parties?
- (2) Whether defendants were justified in refusing to carry on the work beyond plinth level?
- (3) Whether there was any breach of contract on the part of defendants?
- (4) If so, whether the plaintiff is entitled to any and what damages?

The suit, by consent, was treated as a cross-suit to Civil Regular No. 200 of 1903 and it was heard immediately after it, the evidence in Civil Regular No. 200 being by consent recorded as evidence in this suit so far as the first three issues were concerned. The learned Judge found in Civil Regular No. 200 that there was no such contract as that sued upon by the appellant and that it followed that there was no breach of contract on the respondents' part, and it was therefore unnecessary to consider the question of damages, and the suit was dismissed with costs.

The appellant appealed on the following grounds:—

- (1) That the learned Judge erred in finding that there was no contract between the appellant and the respondents to complete the whole house.
- (2) That he misconstrued the evidence.
- (3) That he erred in holding that the correspondence and evidence showed that there was no such agreement.
- (4) That he should have held that the correspondence and evidence conclusively proved that there was such a contract.

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(5) That he erred in holding that the appellant was not entitled to damages.

(6) That he should have directed an enquiry into the damages to which the appellant was entitled.

It is evident from the various draft agreements, as well as from the correspondence, and it has also been admitted by the respondents in their written statement, that the negotiations at the outset were for the erection by the respondents of the whole house, and that rates having been agreed to, work commenced. So that I would say at the outset that Mr. Bland was misinstructed when he wrote in his letter of the 8th of July 1903 (Exhibits 18), that "the verbal agreement was that my clients should build the foundations only up to the plinth level, and then if no sale was effected the agreement was to be finally approved and a new contract was to be entered into for the whole building." The draft agreements (Exhibits A, B, C, and D) all contemplate the erection of the house as a whole, and it is perfectly clear from the evidence, both oral and documentary, that the understanding was, that the respondents were to do the whole of the work at a through rate of Rs. 36. I need only refer to the provisions of Exhibit D, which is the final product of the negotiations between the parties as to the execution by the respondents of all brickwork, including projections, cornices, etc., of the building to be erected in Phayre Street, and the provisions for payment as the work progressed.

In the letter of the 24th April 1903, the appellant, after calling the attention of the respondents to the fact that the work was stopped again, asked them whether they were in a position to do the work according to the arrangements, to which they replied that they were in a position to do the work and would do it, and stated that the delay was due to their not being able to get the brand of bricks of which the appellant approved; so that at that date, at all events, there was no question that both parties considered that the work, as a whole, was to be done by the respondents. On the 25th May the appellant wrote to the second respondent complaining as to the maistry in charge of the work and calling his attention to the promise to change him as soon as the foundations were completed but asking him to do so at once so as to remove all friction, so it is perfectly clear that when the appellant wrote that letter there was no idea in his mind that all that the respondents had contracted to do was to build up to plinth level only; nor is there a hint of that in the reply of the respondents, dated the 24th May, but obviously written on the 25th, in which, after complaining of the number of persons who gave orders as to his house, they stated that as soon as one person was nominated to give instructions they were prepared to go on with the work and carry it to completion without delay, but till that one person was appointed they were unable to accept any responsibility as regards the delay and said that the stoppage of the work was entirely due to the contradictory orders issued by the appellant and his architect and the absence of some responsible person to give orders.

On the 26th May the appellant wrote that in accordance with respondents' letter of previous date he had gone up to the works early

but had failed to find the Burman clerk who, the respondents had stated, would be there with a book to take instructions, and again complaining that the maistry to whom he objected had not been removed, and no letters appear to have passed until the first of July, when the appellant wrote saying that it was time that the draft agreement of the building contract was signed and asking that it should be sent to him for perusal and that as the foundations were completed he would ask to fix a time for its completion and for a penalty in case of non-completion in time, say Rs. 100 per day.

So that in the face of this letter it is difficult to believe that the terms had been finally agreed on in Exhibit D and that the appellant had accepted those terms and returned the draft finally approved. At any rate, if he had done so it is clear that he resiled from his position and required a very important clause to be inserted in it, though somewhat late in the day. On the 2nd July 1903 the respondents informed the appellant that they had no intention whatever of signing the draft agreement referred to by him and intimated that having learned from experience that it was impossible to continue to work for him, they would finish the work up to plinth level and they would decline to do anything more. Here is what I am inclined to believe the truth of the whole matter: that there had been an agreement, incomplete, it is true, as far as writing is concerned, but clearly understood and acted on by the parties, that the respondents were to do the whole of the work and the appellant was to pay for it at the through rate of Rs. 36, and that it was only after receiving the somewhat injudicious letter from the appellant of the 1st July that they determined to throw over what had at all events been considered between them as a working agreement and refused to do more than finish the work up to plinth level. That being the true state of the case it is much to be regretted that the real issue should have been obscured by the importation into the case of an imaginary contract to do the work only up to plinth level which, as I have said, first appears in Mr. Bland's letter of the 8th of July.

That this was the true state of affairs seems to me to be corroborated by the admitted fact that a through rate was agreed upon. The first respondent, Mr. Wilcox, said that they had discussed the through rate of Rs. 36 with the appellant in their office and he said that "if when we got to plinth level we found we could not do it for that rate he would be willing to give us one or two rupees more." The learned Judge in dealing with this part of the case says that the "plaintiffs (1) say that they relied on the defendant's (2) generosity to enhance that rate if they found they could not erect the superstructure profitably at that figure. In so doing they no doubt made a mistake, but I do not therefore consider their story is improbable." But, surely if it is admitted that the respondents believed in and relied on the appellant's generosity in this connection, it must follow that they had made an

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(1) *I.e.*, the defendants in Civil Regular 30 of 1904.
 (2) *I.e.*, the plaintiff in Civil Regular 30 of 1904.

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agreement with him to do the whole of the work at Rs. 36; otherwise there was no place for generosity or the reverse, in that nothing existed in reference to which the appellant would be in a position to do this generous act. That the agreement between the parties was what I have already stated seems further corroborated by the fact that the respondents had made forward arrangements to buy bricks to the extent of 8½ lacs, which would represent nearly three times the number required if their obligations began and ended with the erection of the building to the plinth level. Mr. Catchatoor has said that the foundations would take only 3½ lacs, while, as I have said, agreements for the supply of 8½ lacs were made by the respondents, and the fact that they were paid for by the appellant does not seem to me to militate against the view that I have taken in reference to the purchase of so large a quantity of bricks. Further evidence on this point is to be found in the records of Civil Regular No. 2089 of 1903, *Goolab Khan v. R. P. Wilcox and J. Catchatoor*, in the Small Cause Court in Rangoon. In this suit they were sued for Rs. 660-13, the price of bricks, and they admitted, in their written statement, that about the 18th March 1903 they had agreed to take 8 lacs of bricks from the plaintiff at the rate mentioned in the plaint for the appellant's building at the corner of Dalhousie Street and Phayre Street, which is the house in question. But their statement, in the plaint which they filed in Civil Regular No. 2674 of 1903 in the same Court against Goolab Khan, is much more important, for they say distinctly that in or about the month of March 1903, at Rangoon, they, as contractors, took up the contract to erect Mr. Sofaer's new brick building at the corner of Dalhousie Street and Phayre Street. The learned Judge has disposed of this matter by saying it was a misstatement; but I do not think it can be got rid of by so easy a method as that. The respondents are men of business and presumably truthful persons. Their plaint was prepared by a pleader of the greatest experience, and it would be most disastrous if this Court should even entertain the suggestion that litigants are not to be strictly held to the terms of their pleadings in any of the Courts. A mistake has been made by the appellant's advisers in defining the date on which the agreement between the parties was finally made as the uncertain date on which Exhibit D was finally approved, for it seems to be certain from the evidence which I have just detailed that the actual date was much earlier, and I will take it in the words of the respondents in their plaint, to which I have just referred and by which they must be bound, that it was in or about the month of March 1903. I need hardly observe that although it is convenient, and in a matter of any importance eminently desirable, that the terms of a contract should be reduced to writing, it is not necessary that this should be done, for the Statute of Frauds, which has so far-reaching an effect in the direction of making written contracts in many cases necessary in England, has no force in India. At the same time, a written contract is after all but evidence of the terms which have been arrived at between the parties, though, in many well-defined cases, the law has declared that the written document and the written document only can be looked to, to

ascertain as between the parties what the actual terms of the contract are.

The case of *Alexander Brogden and others v. The Directors, etc., of the Metropolitan Railway Company* (3) may be usefully referred to. This case was first tried at the Surrey Spring Assizes of 1873 before Mr. Justice Brett, when a verdict was found for the plaintiffs, subject to a special case. The special case was argued before the Court of Common Pleas and judgment was ordered to be entered for the plaintiffs. The case was then carried to the Court of Appeal, where two of the Lords Justices were for affirming the judgment and Cockburn, C.J., thought that it ought to be reviewed, and the case was finally twice argued before the House of Lords. The head note says:—

“Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.”

The circumstances of the case were these:—

That Brogden had for some time supplied the Metropolitan Railway Company with coals and at last it was suggested by Brogden that a contract should be entered into between them. After agents of the parties had met together the terms of agreement were drawn up by the agent of the Metropolitan Company and sent to Brogden, who filled in certain parts which had been left blank and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties and wrote “approved” at the end of the paper, and signed his name. His agent sent back the paper to the agent of the Railway Company, who put it in his desk and nothing further was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the Railway Company, there were explanations and excuses given by Brogden and the “contract” was mentioned in the correspondence and matters went on as before. Finally disagreements arose and Brogden denied that there was any contract which bound him in the matter. It was held that these facts and the actual conduct of the parties established the existence of such a contract, and there having been a clear breach of it Brogden must be held liable upon it; that a mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon these terms by sending coals in the quantities and at the prices mentioned in it amounted to sufficient to shew the adoption of the writing previously altered and sent, and to constitute it a valid contract. The Lord Chancellor, at the commencement of his judgment, said:—

“There are no cases upon which difference of opinion may more readily be entertained or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn

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agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form."

At page 679, the Lord Chancellor, after saying that he had read the whole of the correspondence with great care, said:—

"There appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order. If it had not been so, I cannot conceive how when there were these repeated complaints against the Messrs. Brogden for short or irregular supplies, and when they say more than once that the prices they were receiving from the Metropolitan Company did not make their bargain a good one, or did not make the Metropolitan Company good customers, how it was that if they did not feel that there was a contract somewhere or other entitling the Metropolitan Company to a supply, and binding them (the Brogdens) to supply coal, they did not say, 'If you do not like the mode in which we are supplying, or the extent to which we are supplying, it is quite easy for you to get your supplies elsewhere, and we are under no obligation to supply you.'"

Mutatis mutandis I think these words might be applied with great exactitude to the correspondence that I have already considered. And the learned Lord Chancellor referring to the correspondence said that these were the grounds which led him to think that, there having been clearly a *consensus* between those parties, arrived at and expressed by the document signed by Mr. Brogden, subject only to approbation, on the part of the Company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the Company commenced a course of dealing which was referable in his mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. Brogden & Co, in the supply of coals.

Lord Blackburn, at page 693 of the Report, said:—

"I agree, and I think every Judge who has considered the case does agree, certainly Lord Chief Justice Cockburn does, that though the parties may have gone no farther than an offer on the one side, saying 'Here is the draft'—for that I think is really what this case comes to—and the draft so offered by the one side is approved by the other, everything being agreed to except the name of the arbitrator, which the one side has filled in and the other has not yet assented to—if both parties have acted upon that draft and treated it as binding, they will be bound by it. When they had come so near as I have said, still it remained to execute formal agreements, and the parties evidently contemplated that they were to exchange agreements, so that each side should be perfectly safe and secure, knowing that the other side was bound. But, although that was what each party contemplated, still I agree (I think the Lord Chief Justice Cockburn states it clearly enough) that if a draft having been prepared and agreed upon as the basis of a deed or contract to be executed between two parties, the parties, without waiting for the execution of the more formal instrument, proceed to act upon the draft, and treat it as binding upon them, both parties will be bound by it. But it

must be clear that the parties both waived the execution of the formal instrument and have agreed expressly, or as shown by their conduct, to act on the informal one."

In this case no doubt Brogden had formally approved of the draft which was a strong fact against him and which is not present in the case before us, but notwithstanding I think it is a strong authority to guide us to a right conclusion. These parties having arrived at a rough arrangement as to the terms between them, proceeded, without doubt, to work upon those terms, and at intervals submitted drafts which were returned with suggestions by the other side, the work meanwhile going on. When Exhibit D was ready, it would appear that the terms had been finally settled, though appellant subsequently tried to add to them, and although it was never executed, the parties, in my opinion, long before that, had so completely arrived at a working agreement, that it would be almost unreasonable to say, at this late hour of the day, that no agreement of any kind existed between them, because the appellant is unable to prove the exact date on which such agreement was concluded. As I have said before, I do not think that that date was the date on which the final draft was returned as approved; but that from the conduct of the parties it is clear that it was an earlier date. Be that as it may, the conduct of the parties shows that there was a contract that the respondents should erect the whole house, and in breaking that contract the respondents have rendered themselves liable to a claim for damages.

I would allow this appeal and reverse the order and decree of the lower Court and remand the case to that Court for an enquiry as to damages. I would order the respondents to pay the costs of this appeal.

Thirkell White, C.J.—I am of the same opinion.

*Before Sir Herbert Thirkell White, K.C.I.E., Chief Judge,
and Mr. Justice Birks.*

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Mr. Sen—for respondents.

Code of Civil Procedure, section 622—Power of High Court in revision—Order under section 409 on application to sue as a pauper.

The District Court rejected an application to sue as a pauper, on the ground that the suit which it was desired to bring was barred by limitation. The Court did not find that applicant was not a pauper. Applicant applied to the Chief Court for revision of the order of the District Court, under section 622 of the Code of Civil Procedure. Respondent contended that the Chief Court had no power to revise, and relied on the ruling of the Privy Council in the leading case of *Amir Hassan Khan v. Sheo Baksh Singh*, (I. L. R., 11 Cal., 6).

Held,—after consideration of the ruling of the Privy Council in the light of subsequent decisions of the High Courts, that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous, the error cannot be corrected on revision; but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised.

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Thirkell White, C.F.—This is an application to revise the order of the District Court of Akyab refusing to allow the applicant, Zeya, to sue as a pauper.

There has been, after some delay, a proper enquiry and hearing under section 409 of the Code of Civil Procedure; and the application has been refused on the ground that the applicant's allegations do not shew a right to sue in the District Court because the suit is barred by limitation.

It is to be regretted that this application, which involves more than one point of very great importance, was not fully argued on both sides. For the applicant, there was no appearance; but for the respondents we have had the advantage of hearing argument by Mr. Sen.

The first point taken in opposition to the application is that this Court has no power to revise the order of the District Court as the matter does not fall within the scope of section 622 of the Code of Civil Procedure. This objection is based on the ruling of the Privy Council in the leading case of *Amir Hassan Khan v. Sheo Baksh Singh* (1). The material part of their Lordships' judgment is as follows:—

"The question then is, did the Judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The meaning, effect, and extent of this decision have been discussed by all the High Courts in many subsequent cases. There are also cases of the Judicial Commissioner of Lower Burma which bear upon these points. It may be convenient to consider the authorities, up to the present time, of a date subsequent to the ruling cited above.

(1) (1884) I. L. R., 11 Cal., 6.

In *Har Prasad v. Jafar Ali* (2), it was held that when a Court in contravention of the law of Limitation has admitted an application to set aside an *ex-parte* judgment, it must be held to have acted in the exercise of its jurisdiction illegally. It was said that the Judge erred in his application of the law of Limitation, and the High Court revised the order of the Judge under section 622 of the Code of Civil Procedure.

In *Sew Bux Bogla v. Shib Chunder Sen* (3), it was said that it was not easy always to draw a clear line between an illegal exercise of jurisdiction and a mistake of law; and the learned Judge held that the application of a section of the Code to a case to which it does not apply justified the exercise of revisional power.

In *Badami Kuar v. Dinu Rai* (4), it was suggested by Straight, J., that the word "illegally" in section 622 of the Code of Civil Procedure should be interpreted by section 584, clauses (a) and (b), of the Code; and he pointed to the supreme importance of the exercise of revisional powers to correct grave illegalities.

In *Venkubai v. Lakshman Venkoba Khot* (5), the question was whether the lower Court had wrongly decided that the claim was barred by time. The following passages from the judgment of the Court may be extracted:—

"There can be no question that where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs in law or in fact in its decision of any such questions with which it has jurisdiction to deal, its error can only be corrected in due course of appeal * * * and where no appeal is permissible, there would be no remedy under section 622 of the Code. * * * But it would be otherwise in any case where the Court, having a mistaken and wrong apprehension of the question at issue, proceeded to determine an issue, which did not really arise in the case, and based its decision of the case on the determination of that issue * * *. In the present case, the Subordinate Judge's decision on the question of limitation would be perfectly right and within his jurisdiction if the facts of the case were as he supposed them to be. It is a wrong and illegal decision, not as a bare determination of a question under the Limitation Act, but because the Subordinate Judge has misstated or misunderstood the obvious facts of the case and has so been led to decide an issue which he ought never to have raised."

In *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (6), it was held that when the lower Court had erroneously based its decision on the application of a certain section, which the High Court held not to apply to the case, there was ground for revision under section 622 of the Code of Civil Procedure.

In *Chenbasapa v. Lakshman Ramchandra* (7), the Bombay High Court revised a decision granting a decree on the defendant's admission in respect of a *hundi* inadmissible in evidence for want of an impressed stamp. The power to revise was not questioned in this case.

(2) (1885) I. L. R., 7 All., 345.
 (3) (1886) I. L. R., 13 Cal., 225.
 (4) (1886) I. L. R., 8 All., 111.

(5) (1887) I. L. R., 12 Bom., 617.
 (6) (1887) I. L. R., 15 Cal., 47.
 (7) (1893) I. L. R., 18 Bom., 369.

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In three cases of 1896-97, the question was considered by a Bench of the High Court of Bengal. In *Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi* (8), in reviewing the authorities, the learned Judges observed that *Amir Hassan Khan's* (1) case merely settled that it was not every decision on a point of law that comes within the scope of section 622; and they found it difficult to deduce any other clear rule. Their conclusion was that the clause of section 622 which enables the High Court to interfere where the lower Court has acted illegally, though in the exercise of its jurisdiction, was evidently "intended to authorize the High Court to interfere and correct gross and palpable errors of Subordinate Courts, so as to prevent grave injustice in non-appealable cases." They added:—

"The question whether any case comes under the clause has in our opinion to be determined with reference to the grossness and palpableness of the error complained of, and to the gravity of the injustice resulting from it."

In *Mathura Nath Sarkar v. Umesh Chandra Sarkar* (9) and *Raghu Nath Gujrati v. Rai Chatraput Singh* (10), Banerjee, J., repeated and adhered to the conclusion stated above.

In *Debo Das v. Mohunt Ram Charn Dass Chella* (11), where the lower Court had rejected an application for leave to sue as a pauper, on the ground that the petitioner's allegations did not shew a right to sue, the High Court interfered. The learned Judges said:—

"Referring to the judgment of the Subordinate Judge in this particular case, it seems to us quite clear that he has not directed his mind to the particular matter which he was called upon by section 407, clause (c), to investigate. He addresses himself to the merits of the case, to the rights of the parties, and to matters which are entirely foreign to the enquiry that he had to make. * * * * *

If he had confined his enquiry to the allegations as made in the plaint, and if he had said that those allegations do not show a right to sue, it is extremely doubtful whether this Court could interfere with his order under section 622, however wrong that order might be. But he does not do so; rather he introduces considerations which are entirely foreign to the enquiry which he was called upon to make; and upon those considerations, he holds that the allegations in the plaint do not shew a right to sue. We think, having regard to the law and the authorities on the subject, as we understand them, that the Subordinate Judge has, in the exercise of his jurisdiction, acted illegally in this matter."

In *Enat Mondul v. Baloram Dey* (12), Banerjee, J., adhered to his previously expressed opinion, and held that in rejecting a document in contravention of section 24 of the Stamp Act, an Appellate Court acted with material irregularity and that revision was admissible.

In *Ross Alston v. Pitambar Das* (13), the Court of first instance rightly held that there was no cause of action. In holding, in despite of the authorities, that there was a cause of action, it was decided by a majority of the High Court that the Appellate Court acted in the exercise of its jurisdiction illegally within the meaning of section 622; or that it acted in excess of its jurisdiction.

These are the cases of Indian High Courts which place, if I may so express it, a liberal construction on the terms of section 622 of the

(8) (1896) 1 C. W. N., 617.
 (9) (1897) 1 C. W. N., 626.
 (10) (1897) 1 C. W. N., 633.

(11) (1898) 2 C. W. N., 474.
 (12) (1899) 3 C. W. N., 581.
 (13) (1903) I. L. R., 25 All., 509.

Code of Civil Procedure, as interpreted by their Lordships of the Privy Council. On the other hand, there are many cases in which a narrower construction has been adopted.

In *Magni Ram v. Jiwa Lal* (14), a Full Bench of the High Court at Allahabad held that "the Privy Council has decided in *Amir Hassan Khan v. Sheo Baksh Singh* (1), that only questions relating to the jurisdiction of the Court can be entertained under section 622."

In *Chattarpal Singh v. Raja Ram* (15), the question was more fully considered. The case was one in which the lower Court had dismissed an application for leave to sue as a pauper on the ground that the claim was barred by limitation and therefore the applicant had no right to sue. It was held by the majority of the High Court that as the lower Court had jurisdiction to decide the question, the High Court could not interfere. Mahmood, J., in coming to the same conclusion, based his opinion on the facts that the Judge of the lower Court had observed all the rules of law provided for the matter and had considered the merits of the claim. He did not resile from the opinion expressed by him in *Har Prasad v. Jafar Ali* (2), already cited.

In *Manisha Eradi v. Siyali Koya* (16), the decision went on the question whether the lower Court had jurisdiction to entertain the suit and, except in so far as it seems to limit the scope of section 622 to questions connected with jurisdiction, the ruling is not illuminative as regards the question for consideration in this case.

Kristamma Naidu v. Chapa Naidu (17), the majority of the Full Bench held that a Court can be considered to have exercised its jurisdiction illegally only when its view is obviously perverse. The opinion expressed in the case last cited was not adhered to. Sir T. Muthusami Ayyar, J., remarked on the ruling in *Amir Hassan Khan's* (1) case:—

"It is clear that where the Subordinate Court applies its mind to a question of law or procedure and arrives at an erroneous conclusion in the exercise of its jurisdiction it is not a ground for interference under section 622."

In *Sundar Singh v. Doru Shankar* (18), the High Court held that an erroneous decision on a question of limitation was not a ground for revision. A similar ruling was given by the same High Court in *Kamrakh Nath v. Sundar Natt* (19), where the lower Court had rejected an application for leave to sue as a pauper on the ground that there was not a reasonable cause of action. In that case, it was observed that the Judge addressed himself to the question whether or not the applicant had shown grounds from which it might be inferred that he had a probable cause of action.

In *Krishna Mohini Dossee v. Kedarnath Chuckerbutty* (20), it was broadly stated that "whenever a Court has jurisdiction to decide a question, whether it is a question of law or a question of fact, its decision on that question is not revisable" by the High Court.

(14) (1885) I. L. R., 7 All., 336.

(15) (1885) I. L. R., 7 All., 661.

(16) (1887) I. L. R., 11 Mad., 220.

(20) (1888) I. L. R., 15 Cal., 446.

(17) (1893) I. L. R., 17 Mac., 410.

(18) (1897) I. L. R., 20 All., 78.

(19) (1898) I. L. R., 20 All., 299.

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In *Raghu Nuth Sahai v. Official Liquidator of the Himalaya Bank* (21), the opinion was expressed that an application under section 622 founded only on a question of limitation could not be entertained. It is to be observed that, in this case, it is expressly stated that the question was fully considered by the Court below and decided against the applicant.

In the cases already cited of *Mathura Nath Sarkar v. Umesh Chandra Sarkar* (9) and *Raghu Nath Gujrati v. Rai Chatraput Singh* (10), the power to revise was denied. The decision in the former case was limited to the particular matter under consideration. In the latter case, Maclean, C.J., declined to distinguish it from *Amir Hassan Khan v. Sheo Baksh Singh* (1).

In *Enat Mondul v. Baloram Dey* (12), Maclean, C.J., observed that "an error of law is not acting, in the exercise of his jurisdiction, illegally or with material irregularity within the meaning of section 622." He said:—

"Here the Judge had undoubted jurisdiction to decide the case, and if he decided it wrongly, by failing to admit some evidence which he ought to have admitted, he did not exercise his jurisdiction illegally or with material irregularity."

He dissented from the suggestion in a previous case that the High Court could interfere to correct gross and palpable errors; and adhered to the literal interpretation of the Privy Council Ruling.

In *Madhavrao Ganeshpant Ose v. Gulabbhai Lallubhai* (22), Farran, C.J., said:—

"I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under section 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in final decision. A mere error of law is not, I think, an illegality or a material irregularity within the meaning of section 622 of the Code."

In *Ross Alston v. Pitambar Das* (13), Banerjee, J., who was in a minority in the Full Bench; held on the authority of the cases that revision was not allowable.

Turning to the cases decided in this province, I find that the meaning of section 622 of the Code of Civil Procedure was considered by Mr. Hosking Judicial Commissioner, in *Meyappa Chetty v. Chokalingam Chetty* (23); but no definite opinion was expressed. The same point was considered by my learned colleague on this Bench, when Judicial Commissioner of Lower Burma, in *Ma Taw U v. Ma Ngwe* (24). It was pointed out that the learned Judge of the Court below had given his full attention to the point under argument. It was said:—

"The fact that a Court may have arrived at a wrong decision is not necessarily a material irregularity or a failure to exercise jurisdiction. In the present case the Court gave its full attention to the points in issue and decided that no sufficient grounds were made out for disturbing the award."

(21) (1893) I. L. R., 15 All., 139.
 (22) (1898) I. L. R., 23 Bom., 177.

(23) (1894) P. J. L. B., 61.
 (24) (1899) P. J. L. B., 548.

The learned Judicial Commissioner declined to interfere. And I think that the principle underlying his decision is that the point had been duly considered by the Court below and that even if its conclusion was erroneous, the error was not a good ground for revision under section 622.

A recent case, that of *Ma Shwe Thaw v. Ma Shwe Ywet* (25), decided by Fox, Officiating C.J., has accidentally come to my notice. The learned Judge set aside an order rejecting an application to sue as a pauper, on the ground, among others, that the reasons for rejecting the petitioner's application were for the most part beyond the scope of section 407 of the Code; and that the belief expressed by the lower Court that there was an objection under clause (d) was in the face of the evidence. The learned Judge does not seem to have entertained any doubt as to the power of the Court to intervene under section 622.

The question for determination in this case is whether the Judge of the District Court has acted in the exercise of his jurisdiction illegally or with material irregularity, within the meaning of section 622 of the Code of Civil Procedure, as interpreted by their Lordships of the Privy Council, that interpretation being considered in the light of the cases which have been cited. What may be termed the first two clauses of section 622 are not under consideration. There is no question of the exercise of a jurisdiction with which the Court was not invested or of the failure to exercise a jurisdiction which it possessed. The District Court had jurisdiction to allow or refuse the application for leave to sue as a pauper.

I am strongly of opinion that the effect of the authoritative ruling in *Amir Hassan Khan's* case (1) is as stated by Banerjee, J., in *Enat Mondul v. Baloram Dey* (12):—

“What that case must be taken to have settled is that it is not every error of law that will come within the scope of section 622; but it does not follow that no error of law unless it is also an error of jurisdiction can come within the operation of that section.”

That this is the extent of the ruling seems clear from the necessity of attaching some meaning to the words in section 622, “or to have acted in the exercise of its jurisdiction illegally or with material irregularity.” I do not think that there is anything in the section, or in the ruling by which we are bound, to limit the meaning of the words “acted illegally” to the case of a perverse decision; nor does it seem to me that we are empowered to interfere to correct an error merely because it is gross and palpable, or because no other remedy is available. The terms of the Privy Council ruling seem also to throw doubt on the proposition that any ground which is a good ground of second appeal under section 584 is a good ground for revision under section 622. There are many instances in which there can be no doubt as to the power to revise. Where there is a patent illegality or material irregularity of procedure, the application of the section cannot be doubted. For example, if a Court were to reject an application for

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leave to sue as a pauper explicitly on some ground not specified in section 407, it could not be doubted that it would be "acting illegally." Or if it decided a case on a question of fact after refusing to hear witnesses on either side, it could not be denied that it had acted with "material irregularity." But where there is no illegality of so crude and obvious a kind, and where the proper procedure has been observed, in cases, that is to say, where the application of the section is doubtful owing to the difficulty in distinguishing between an error of law and illegal action, I think that the test is whether the lower Court has applied its mind to the law and the facts and come to a decision after due consideration; or whether it has failed to take into account some proposition of law or some fact in evidence which ought to affect its decision. If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. This seems to me to be the principle underlying the decision in many of the cases which have been considered and it does not appear to conflict with the binding authority of the case of *Amir Hassan Khan* (1).

Applying this principle I am of opinion that the present case is one which may and should be considered in revision. According to the allegation in the plaint, the plaintiff Zeya is the adopted son of one Saw Re Pru and his wife Mi Aung Ma. Saw Re Pru died in 1887 leaving a widow, Mi Hla She, who died in 1894. He sues for three-fourths of the estate of the deceased Saw Re Pru. It is understood that the alleged adoptive mother, Mi Aung Ma, was divorced by Saw Re Pru and is still alive.

The District Court has held that the suit is barred by limitation and that the plaintiff has therefore no right to sue. The basis of this decision is that time began to run against him on the death of Saw Re Pru and that he has no right to deduct any of the period intervening between that date and the date of the institution of the suit. But it is not by any means clear and obvious that the period of limitation of this suit should be calculated from the date of Saw Re Pru's death. It may be argued that, on Saw Re Pru's death, all that the plaintiff could have done was to sue the surviving widow, Mi Hla She, for the share (one-fourth) due to the *orasa* son. But the *orasa* son need not claim this share. If he does not do so, the whole of the estate vests in the surviving widow. In that case, it is open to argument whether the plaintiff had not a right to sue for his share of the estate on the death of Mi Hla She. It is not obvious that the divorce of Mi Aung Ma or the fact that Mi Hla She was not the plaintiff's adoptive mother affects the plaintiff's right to sue on Mi Hla She's death. I do not wish to express any decided opinion on the point, which has not been fully argued. But I think that this aspect of the case has not been properly considered. The point is one of some difficulty and importance and I think it most desirable that it should, if necessary, be considered

by the Court of first instance in such a manner as to give the plaintiff or defendants a right of appeal. It is not a point which should be decided off-hand in a miscellaneous proceeding.

It has not been found that the appellant is not a pauper or that any other of the grounds specified in section 407 of the Code of Civil Procedure applies.

I would therefore set aside the order of the District Court dismissing Zeya's application to sue as a pauper; and I would direct the District Court to allow the application and to proceed with the trial of the suit.

Birks, J.—I concur.

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— <i>Suit instituted by wrong person</i> — <i>Civil Procedure Code</i> , s. 21. It appeared that the plaintiff, who instituted the suit, had no right to sue, that right belonging to her children. The Court allowed the addition of the children as plaintiffs, and a consequential amendment in the prayer of the plaint, and proceeded with the suit.	

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<i>Held</i> ,—that in the circumstances this course was equitable, and not at variance with any provision of law; and that if there was any error, it was covered by section 578 of the Code of Civil Procedure.	
<i>Taqi Jan v. Obaidulla</i> , (1894) I.L.R., 21 Cal., 866; <i>Chunder Coomar Roy v. Gocool Chunder Bhu Hacharjee</i> , I.L.R., 6 Cal., 370; <i>Mohina Chundra Roy v. Atul Chundra</i> , I.L.R., 24 Cal., 540; <i>Shorania v. Bharal Singh</i> , I.L.R., 20 All., 90; referred to.	
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ADDITION OF PARTIES — <i>party added in appeal who was not a party to the suit</i> —Civil Procedure Code, ss. 32, 559, 562, 564.	
When a Court hearing an appeal is of opinion that a person not a party to the suit, and not entitled to be brought on the record in a representative capacity, should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.	
<i>Mihin Lall v. Imtiaz Ali</i> , (1896) I.L.R., 18 All., 332; <i>Habib Bakhsh v. Baldeo Prasad</i> , (1901) I.L.R., 23 All., 167; <i>Ma Gyi v. Ma Yeik</i> , (1903) 2 L.B.R., 245; cited.	
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An advocate is bound to use his judgment, experience and discretion in the presentation of his client's case and, whatever be his instructions, to exclude all topics and observations of which the case does not properly admit.	
An advocate cannot shelter himself behind his clients, when he allows himself to be made the medium of reckless imputations on a Court of Justice.	
The publication of a libel on a Court of Justice is an aggravated misdemeanour.	
(1871) Bom. H.C.R., 116; <i>Sullivan v. Norton</i> , (1887) I.L.R., 10 Mad., 28; <i>In the matter of Mr. R. Cruise</i> , (1870) 14 W.R., 53; <i>R. v. Watson</i> , Roscoe's Crim. Evidence, 12th Ed., p. 597; <i>R. v. White</i> , Archbold's Crim. Pleading, 22nd Ed., p. 1040; <i>Gunesh Chunder Gangoly</i> , (1870) 13 W.R., 456; cited.	
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<i>Maung Shwe Sin v. Ma Le</i> , 2 L.B.R., 4, referred to.	
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APPEAL—against decree in suit not brought in proper Court of first instance
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Civil Procedure Code, s. 542—question of limitation not raised on first appeal—Limitation Act, s. 4.
 If a question of limitation is not included in the grounds of appeal, the appellant is not entitled to be heard on it without the leave of the Court granted under section 542 of the Code of Civil Procedure. The statement, as a ground of appeal, that "the judgment of the lower Court is contrary to law," does not indicate that a question of limitation was raised in the lower Court, or is intended to be raised in the Appellate Court.
 A Court of Appeal is not bound by section 4 of the Limitation Act to inquire into a question of limitation which has not been raised in the lower Court, but is raised for the first time orally before it.
Dutta v. Kasai, I.L.R., 8 Bom., 53; Ahmed Ali v. Wavri Hussein, I.L.R., 15 All., 312; Maung Shwe Sa v. Maung Shwe Gon, P.J., L.B., p. 539; cited.
Maung Kyin Baw v. Maung Lon 237
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APPEAL BY LOCAL GOVERNMENT FROM JUDGMENT OF ACQUITTAL.
 Under the Code of Criminal Procedure, the Local Government has the same right of appeal against an acquittal as a person convicted has of appealing against his conviction and sentence, and there is no distinction between the mode of procedure and the principles upon which both classes of appeals are to be decided.
Empress of India v. Gayadin, (1831) I.L.R., 4 All., 148; Queen-Empress v. Robinson, (1864) I.L.R., 16 All., 212; dissent from.
Queen-Empress v. Bibhuti Bhusan Bit, (1890) I.L.R., 17 Cal., 485; Queen-Empress v. Prag Dat, (1898) I.L.R., 20 All., 459; Queen-Empress v. Karigowda, (1894) I.L.R., 19 Bom., 51; followed.
King-Empress v. Po Saing 303

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 The power conferred by section 437 of the Code of Criminal Procedure, to order further inquiry into the case of an accused person who has been discharged, is exercised by the Sessions Judge and District Magistrate concurrently with the Chief Court, and the Chief Court will not ordinarily admit applications for the exercise of that power, except in cases where what is sought is not really further enquiry but a reconsideration of the evidence on the record, unless the applicant has in the first instance moved the Sessions Judge or District Magistrate.
Crown v. Po Ka, (1901) I.L.B.R., 100; Po Win v. Crown, (1902) I.L.B.R., 311; referred to.
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ARBITRATION—*arbitrators appointed without intervention of Court—disagreement—appeal from order of Court filing award—Code of Civil Procedure, ss. 525, 526, 522.*

When parties have agreed to refer a matter to arbitrators appointed without the intervention of a Court, and the agreement makes no provision for difference of opinion, it must be presumed, in the absence of evidence to the contrary, that unanimity was intended.

Sections 526 and 522 do not operate to bar an appeal from an order filing such an award, when the objection is that by reason of want of unanimity the award is void.

Maung Kun v. Ma Hmwe Chon, (1892—1896) 2 U.B.R. 18; *Kali Prosanno Ghose v. Rajani Kant Chatterjee*, (1898) I.L.R., 25 Cal., 141; and *Ma Me Hmyin v. Nanda Myizu*, (1898) 2 U.B.R., 5; followed.

Bindessuri v. Fankee, (1889) I.L.R., 16 Cal., 482, referred to.

Maung Tha Aung and others v. Maung Tha Shun

ARMS ACT, s. 19 (F)—*See* s. 20.

s. 20.

The appellant was convicted by the Subdivisional Magistrate under section 19 (f) of the Arms Act and sentenced to one year's rigorous imprisonment. The District Magistrate had not sanctioned the prosecution under section 29 of the Act. The Sessions Judge held that he intended to convict under section 20 as he quoted certain circulars, but allowed the conviction to stand, although an offence under section 20 would not be triable by a first class Magistrate.

Conviction and sentence set aside.

Shunshanisa v. King-Emperor

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AWARD OF ARBITRATORS—*appeal from order of Court to file under s. 525—See* ARBITRATION

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BAIL-BONDS—*liability of sureties—See* SECURITY.

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BUDDHIST LAW: ADOPTION—*Keiktima and apatittha children—evidence.*

An alternative claim to the status of adoption either by the *keiktima* or by the *apatittha* mode may be made.

Evidence in the case considered, and kind of evidence necessary to prove adoption discussed with reference to previous rulings.

Maung Aing v. Ma Kin, 1 L.C., 157; *Ma Sa Yi v. Ma Me Gale*, 2 L.C., 181; *Ma Gun v. Ma Gun*, 1 L.C. 147; *Ma Bwin v. Ma Yin*, 1 L.C., 151; *Ma Mein Gale v. Ma Kin*, 1 L.C., 168; *Ma Gyan v. Maung Kywin*, 1 L.C., 393; *Ma Thine (Thaing) v. Ba Pe*, 2 L.C., 53; *Ma Tin Shwe v. Kan Gyi*, 2 U.B.R., (1897—1901) 142; cited.

Ma Mya Me v. Ba Dun

—INHERITANCE—*See* BUDDHIST LAW: MARRIAGE AND DIVORCE

—INHERITANCE—*estate of Chinese Buddhist—See* INHERITANCE

—INHERITANCE—*illegitimate step-son.*

In the absence of legitimate children or step-children, a step-son though illegitimate may inherit from a step-mother to the exclusion of collateral heirs.

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<i>Ma Sein Hla v. Maung Sein Hnan</i>	54
BUDDHIST LAW: INHERITANCE—shares of widow and of children by former marriages.	
The plaintiff-appellant, who was the third wife of her deceased husband and who was childless, sued his children by the two former wives for her share in the estate left at his death. There was no evidence regarding the estate of the deceased at the time of, or during the subsistence of, either of the former marriages.	
<i>Held</i> ,—on reference to a Full Bench—	
(1) That appellant was entitled to a one-fourth share of her husband's <i>payin</i> property possessed by him at the time of her marriage, and to a seven-eighths share of the <i>lettetpwa</i> property jointly acquired during her marriage.	
(2) That in the absence of evidence of deceased's estate before his third marriage, his children by the first two marriages shared equally <i>per capita</i> in the <i>payin</i> and <i>lettetpwa</i> property remaining after the widow had taken her share.	
(3) That in cases like the present one, when <i>payin</i> property changes its character during a marriage, the presumption is that it has become the <i>lettetpwa</i> of that marriage.	
<i>Ma Ba We v. Mi Sa U</i>	174
INHERITANCE—suit by eldest son for one-fourth share—Limitation Act.	
The Burmese law of inheritance, where it conflicts with the Limitation Act, cannot be enforced in the Courts.	
Article 123 of schedule II of the Limitation Act applies to a suit by an eldest son for one-fourth share of the estate of his father and mother, on the mother's death. In such a case, limitation begins to run from the date of the mother's death.	
<i>Mi Paing v. Mi Tu</i> , S.J., L.B., 51; <i>Ma Min Ku v. Tha Nyun</i> , 2 U.B.R., (1892—1896), p. 9; <i>Aung Ge v. Ma Hla Win</i> , P.J., L.B., 415; <i>Ma Nyein Aung v. Ma So</i> , S.J., L.B., 530; <i>Anleathan v. Mi Tha Ta U</i> , P.J., L.B., 625; <i>Ma On v. Shwe Oh</i> , S.J., L.B., 378; <i>Seik Kaung v. Po Nyein</i> , 1 L.B.R., 23; referred to.	
<i>Maung Po Min v. Shwe Lu and another</i>	110
INHERITANCE: PARTITION—right of grandson to claim a share on re-marriage of grandfather.	
A had two minor sons, and a minor grandson D, whose father E, the <i>orasa</i> son of A, predeceased E's mother, A's first wife. On A remarrying after his first wife's death, D sued A for a share in his grandparents' estate, joining his uncles, A's two minor sons, as defendants.	
<i>Held</i> ,—that the eldest born son is the <i>orasa</i> by right, but he does not attain the complete status as such till he attains his majority and becomes fit to assume his father's duties and responsibilities. If he dies before he attains his majority, or if he is incompetent to fulfil the prescribed conditions, his next younger brother, subject to the same conditions, succeeds to his position as <i>orasa</i> . If the eldest son attains his majority, and fulfils the prescribed conditions and then dies before his parents, his position as <i>orasa</i> remains unfilled and the next brother does not succeed to it.	
<i>Held also</i> ,—after consideration of the texts and rulings relating to <i>orasa</i> sons and grandchildren, that as there were surviving sons, the grandson could not sue.	
<i>Ma On and others v. Shwe O and others</i> , (1886) 1 I.C., 258; <i>Ma Mya Thu v. Po Thein</i> , (1899) 2 L.C., 61; <i>San Dwa v. Ma Min Tha and others</i> , (1901) 2 L.C., 207; <i>Ma Gun Bon v. Po Kywe and another</i> , (1897) 1 L.C., 406; <i>Ma Saw Ngwe and others v. Ma Thein Yin</i> , (1902)	

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2 L.C., 210, and (1902) 1 L.B.R., 198; <i>Maung Hmaw v. Ma On Bwin and others</i> , (1901) 2 L.C., 124, and (1901) 1 L.B.R., 104; cited.	
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<i>Tun Myaing v. Ba Tun</i>	292
BUDDHIST LAW: INHERITANCE: PARTITION—right of single daughter on death of father.	
A daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter re-marries after the father's death.	
<i>Ma On and others v. Ko Shwe O and others</i> , (1886) S.J., L.B., 378, at p. 385; <i>Maung Seik Kaung v. Maung Po Nyein</i> , (1900) 1 L.B.R., 23, and Vol. II, Chantoon's Leading Cases, 67; <i>Ma Me v. Ma Myit</i> , (1893) P.J., L.B., 48; <i>Mi Saung and others v. Mi Kun and another</i> , (1882) S.J., L.B., 115, at p. 120; referred to.	
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MARRIAGE AND DIVORCE—rights of child of wife who has left her husband—form of suits for share of inheritance.	
Under Buddhist Law, a divorce may be effected by the voluntary departure of the wife from the husband for a period of one year. If such departure is without good and sufficient reason, the wife loses all claim on the joint estate.	
The right of a child of the defaulting wife to inherit her father's estate depends on the special circumstances of the case.	
A suit for a share of an inheritance should ordinarily contain a prayer for the taking of accounts and for administration of the estate and all interested parties shall be joined.	
<i>Mi Thaik v. Mi Tu</i> , S.J., L.B., 184; <i>Ma Pon v. Po Chan</i> , 2 U.B.R. (1897-01), 116; and Chan Toon, L.C., Vol. II, p. 220; referred to.	
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A Magistrate who has charged an accused with the view of committing him cannot discharge him without recording further evidence.	
Where credible witnesses make statements which, if believed, would sustain a conviction, the Magistrate ought to convict.	

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<i>Srimuta Prosonmog Devi v. Beni Madhab Rai</i> , I.L.R., 5 All., 556, at p. 561; <i>Sidesevari Dabi v. Abhogesevari Dabi</i> , I.L.R., 15 Cal., 818, at p. 822; <i>Chandidal Jha v. Padmanand Singh Bahadur</i> , I.L.R., 22 Cal., 459; referred to.	
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A claim for use and occupation only arises where it is shown that the occupation was by the permission or sufferance of the plaintiff.	
<i>Gibson v. Kirk</i> , 1 Q.B., 850; <i>Hellier v. Silcox</i> , 19 L.J.Q.B., 295; <i>Marquis of Camden v. Batterbury</i> , 5 C.B.N.S., 808; and <i>Churchward v. Ford</i> , 2 H. & N., 446; referred to.	
<i>Ramrick Dass v. Mahomed Yacubji Dudah</i>	122
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CLAIMS TO ATTACHED PROPERTY— <i>Civil Procedure Code</i> , ss. 278, 279, 280, 283.	
In an investigation under section 279 of the Code of Civil Procedure, if a claimant to property which has been attached proves that at the date of attachment he was possessed of the property, the burden of proof that he is not the owner, or that he holds in trust for the judgment-debtor, is on the decree-holder, and if he fails to discharge it the Court should remove the attachment.	
Similarly in a suit under section 283 the plaintiff is entitled to succeed upon proof of possession by him at the time of the attachment, if the decree-holder does not prove that he held in trust for the judgment-debtor or that the attached property is the property of the judgment-debtor liable to present seizure and sale in execution of his decree.	
The words "in trust for" should be construed in the sense that the claimant held the property as servant of or agent for or otherwise on behalf of the judgment-debtor and that he had no right to the possession of it on his own account if the judgment-debtor claimed it.	
Rights of hirers of cattle in Burma noticed.	
<i>Nga Tha Ya v. F. N. Burn</i> , (1868) 2 B.L.R., 91; <i>Radha Pyari Debi Chowdhraim v. Nabin Chandra Chowdry</i> , (1870) 5 B.L.R., 708; <i>Penraj Bhavaniram v. Narayan Shivaram Khisti</i> , (1882) I.L.R., 6 Bom., 215; <i>Govind Atmaram v. Santai</i> , (1888) I.L.R., 12 Bom. 270; <i>Ram Nath v. Bindrabam</i> , (1896) I.L.R., 18 All., 369; <i>Chokalingum Chetty v. Maung Yeik</i> , (1899) 2 U.B.R., 270; <i>Brijo Kishore Nag v. Ram Dyal Bhudra</i> , (1874) 21 W.R., 133; noticed.	
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<i>improper inducement—Evidence Act, ss. 24–27.</i>	
In consequence of a confession made by the accused to a village headman, certain property which had been taken in a robbery was found in the jungle. The Additional Sessions Judge excluded this evidence on the ground that the confession had been obtained by improper inducement, and in the absence of other sufficient evidence acquitted the accused. The point for decision was whether section 27 of the Evidence Act was a proviso to section 24.	
<i>Held</i> ,—that section 27 is not a proviso to section 24 of the Evidence Act, but that evidence of the fact that the accused pointed out certain property was admissible.	
<i>Per Thirkell White, C.J.</i> —No part of a confession caused in the manner described in section 24 of the Evidence Act can be relevant except in the circumstances provided for by section 28.	
<i>Per Birks, J.</i> —Statements that are irrelevant under one section of the Evidence Act may be relevant under other sections of the Act. The word “irrelevant” is advisedly retained in section 24 and is contrasted with “shall not be proved” in the two subsequent sections.	
<i>Queen v. Dhurum Dutt Ojha</i> , (1867) 8 W.R., 13; <i>Empress v. Rama Birapa</i> , (1878) I.L.R., 3 Bom. 12; <i>Empress v. Pancham</i> , (1882) I.L.R., 4 All., 18; <i>Queen-Empress v. Babu Lal</i> , (1884) I.L.R., 6 All., 509; <i>Queen-Empress v. Nana</i> , (1890) I.L.R., 14 Bom., 260; referred to.	
<i>King-Emperor v. Nga Fo Min</i>	168
<i>inducement to make a—s. 24, Evidence Act.</i>	
The suggestion that it would be better to confess made by the accused's superior officer renders the confession inadmissible under section 24 of the Evidence Act.	
<i>Queen-Empress v. Nga Shwe The</i> , (1893) P.J., L.B., 52, referred to.	
<i>Nga Pye v. King-Emperor</i>	316
<i>interpretation of s. 533, Code of Criminal Procedure.</i>	
Section 533, Code of Criminal Procedure, requires evidence to be taken as to whether the Magistrate, before recording the confession, questioned the accused, and upon so questioning him, formed the belief that the confession was made voluntarily, and whether the record made by the Magistrate contained a full and true account of the statement made by the accused. <i>Semble</i> even oral evidence of the terms of the confession would be admissible.	
Section 533 has no reference to a confession alleged to have been made to a Magistrate but not recorded in any way.	
<i>Ta Pu v. King-Emperor</i> , (1902) 2 L.B.R., 19, distinguished.	
<i>Nga We v. King-Emperor</i>	317
CONFESSION MADE TO MAGISTRATE, EVIDENCE OF— <i>Criminal Procedure Code</i> , s. 164— <i>Indian Evidence Act</i> , s. 91.	
Section 164 of the Code of Criminal Procedure requires that a confession made to a Magistrate in the course of an investigation shall be recorded, and, if not recorded, no evidence of it can be received.	
<i>Bishnu Banwar v. The Empress</i> , 1 C.W.N., 35, dissented from. <i>Fai Narayan Rai v. Queen-Empress</i> , I.L.R., 17 Cal., 862, followed in part.	
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CONTRACT — <i>absence of a formally signed contract—conduct of parties supplying the want of it:</i>	
Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.	
W and C entered into an agreement with S in or about February 1903, to perform certain building work for S in Rangoon. The work was commenced at once in anticipation of the execution of a written agreement between the parties. Several draft agreements then passed between W and C and S . One of these (Exhibit D), which was that finally approved, although it was never signed by the parties, provided for the execution by W and C of all the brick-work, including cornices, projections, etc. In the course of the work W ordered a quantity of bricks sufficient for the construction of the whole building; obtained from S a promise to increase the "through rate" when the plinth was finished, if the rate agreed upon was then found to be insufficient; stated in evidence in another case that they had taken up the contract to erect S 's new building; and generally acted and spoke as if they had undertaken to do so. In April, S wrote to W and C complaining of the delay in the performance of the work, and they replied, explaining the cause of it. In May further disputes occurred between the parties, and at length, on 1st July, S demanded the formal execution of the written agreement, with the addition of a clause providing a penalty if the work was not finished by a given date. W and C replied that they would complete the work to plinth level and would carry it no further. S then sued them for damages for breach of contract, and relied on the draft agreement, D . W and C denied that they were bound by it, and maintained that they were within their rights in stopping at plinth level.	
<i>Held</i> ,—that the facts, and the actual conduct of the parties, established the existence of a contract in the terms of the document D ; and there having been a clear breach of it, W and C must be held liable in damages.	
<i>Alexander Brogden and others v. The Directors, etc., of the Metropolitan Railway Co.</i> , (1877) L.R., 2 A.C., 666; referred to.	
<i>Sofaer v. Wilcox and Catchatoor</i>	326
—breach of warranty—"acceptance" distinguished from "receipt" of goods— <i>Indian Contract Act</i> , s. 118.	
<i>Vyraven Chetty v. Oung Zay</i> , C.R., 51 of 1890; <i>Mitchell Reid & Co. v. Buldeo Doss Khettry</i> , I.L.R., 15 Cal., 1; <i>Heilbutt v. Hickson</i> , L.R. 7 C.P., 438, and Addison on Contracts, 10th Edition, 519; referred to.	
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CONTRACT WITH PROVISION AS TO TIME — <i>Construction of, by Court—Indian Contract Act</i> , s. 55.	
In the case of a written contract of the kind described in section 55 of the Indian Contract Act, the question whether or not it was the intention of the parties that time should be of the essence of the contract must be determined from consideration of the terms of the written instrument and of surrounding circumstances. Oral evidence is not admissible to show the intention of the parties.	
<i>Hipwell v. Knight</i> , 1 Y. and C. Ex., 401; <i>Seton v. Slade</i> , Tudor's L.C. in Equity, Vol. II, p. 468; <i>Reuter v. Sala</i> , L.R. 4 C.P. Div., 239; <i>Re. Poole Fire Brick & Blue Glay Co.</i> , 43 L.J., Ch. 447; <i>Balkishen Das</i>	

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Fry on Specific Performance, s. 1042.	
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COURT-FEE IN SUIT TO SET ASIDE DOCUMENT— <i>Court-fees Act</i> , s. 7 (iv) (c), schedule II, article 17 (c).	
The cancellation of a document involves consequential relief, and the plaintiff in a suit for cancellation must be stamped, under section 7, sub-section (iv), clause (c), of the Court-fees Act, 1870, according to the amount at which the relief sought is valued.	
<i>Tacoordin Tewarry v. Nawab Syed Ali Hossein Khan and others</i> , (1874) 21 W.R., 340; <i>Jog Narain Giree v. Grish Chunder Mytee and others</i> , (1874) 24 W.R., 438; <i>Samiya Mavalu v. Minammal</i> , (1500) I.L.R., 23 Mad., 490; followed.	
<i>Shrimant Sagajirao Khanderao Naik Nimbalkar v. Smith</i> , (1896) I.L.R., 20 Bom., 736; <i>Karam Kham v. Daryai Singh</i> , (1883) I.L.R., 5 All., 331; dissented from.	
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<i>Shri Maji Rajbai v. Narotam</i> , (1885) I.L.R., 13 Bom., 672; <i>Amir Zama v. Nathu</i> , 8 All., 396; <i>Chennappa v. Raghunatha</i> , (1892) 15 Mad., 29; dissented from.	
<i>Nagu v. Yekanath</i> , (1881) I.L.R., 5 Bom., 400; <i>Cheraj Ali v. Nadir Mahomed</i> , I.L.R., 12 Cal., 367; <i>Attorney-General v. Carlton</i> , 2 Q.B., 158; referred to.	
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CRIMINAL BREACH OF TRUST— <i>stakeholder misappropriating stakes—Indian Penal Code</i> , s. 406.	
A stakeholder who misappropriates to his own use the stakes deposited with him for a wager, is liable to prosecution for criminal breach of trust under section 406 of the Indian Penal Code.	
Meaning of "dishonestly," "unlawful means," considered.	
<i>Queen-Empress v. Po Twe</i> , (1831) S.J., L.B., 130 <i>pro tanto</i> , over-ruled.	
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----- s. 556.	
The District Magistrate, without obtaining the permission of the Court to which an appeal lay from his Court, committed to Sessions a case in the investigation of which he had taken an active part as District Superintendent of Police.	
Commitment quashed by the Chief Court on revision, after reference to sections 215 and 532 of the Code of Criminal Procedure.	
<i>King-Emperor v. Maung Lat</i>	209
----- s. 556—accused making false charge against Magistrate—See TRANSFER OF CASE	220
----- s. 562.	
A formal conviction must be recorded before a bond can be required under section 562 of the Code of Criminal Procedure.	
A minor should not be required to give a bond personally under this section.	
<i>King-Emperor v. Nga Pan Tin</i>	137
----- s. 562.	
The accused, whose age was 25, was convicted of the theft of property of some value in a house. There were no extenuating circumstances, and no evidence of the good character or antecedents of the accused. The Magistrate released him on probation on his executing a bond under section 562 of the Code of Criminal Procedure.	
<i>Held</i> ,—that section 562 of the Code, the effect of which has been explained in the case of <i>King-Emperor v. Ba Han</i> (2 L.B.R., p. 65), should be used freely in suitable cases, but should not be applied indiscriminately to the cases of all first offenders. Among the most important points for consideration are the character and antecedents of the accused.	
<i>King-Emperor v. Ba Han</i> , (1903) 2 L.B.R., 65, referred to.	
<i>King-Emperor v. Po Thein</i>	314
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In order to enable a Court to exercise the power conferred by section 562 of the Code of Criminal Procedure, it is not necessary that the offender should be young, that the offence should be trivial, and that there should be extenuating circumstances. The mention of these conditions and of the character and antecedents of the offender merely indicates generally consideration with regard to which the discretion of the Court should be exercised in dealing with first offenders who are convicted of any of the offences specified in the section.	
<i>Queen-Empress v. Nga Po Hman</i> , 1 L.B.R., 41, overruled.	
<i>Queen-Empress v. Nga San Chein</i> , (1898) 1 U.B.R., 137, dissented from.	
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CRIMINAL TRESPASS—presumption of specific intent.	
The real test whether a person accused of criminal trespass entered with the specific intent required by section 441, Penal Code, is whether the accused has a <i>bona fide</i> belief that he has a right to enter. If he has not that belief, the Courts will presume that he entered with intent to annoy the person in possession.	
<i>Po Ke v. King-Emperor and Maung Maung</i>	319
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A conviction by a Criminal Court, though afterwards reversed on appeal, is evidence that the complainant had reasonable and probable cause of prosecuting the accused; and when there has been such a conviction a suit for damages for malicious prosecution will not lie save in very exceptional circumstances.		
<i>Kasee Koibutoollah v. Motee Peshakur</i> , 13 W.R., 276; <i>Farimi Bellamkonda</i> , 3 Mad. H.C., 238; <i>Reynolds v. Kennedy</i> , 1 Wilson, 232; <i>Fadubar Singh v. Sheo Saran Singh</i> , I.L.R., 21 All., 26; referred to.		
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—Criminal Procedure Code, s. 259.		
It is only in cases of non-compoundable offences that an accused can be discharged under section 259 in the absence of the complainant on the day fixed for the inquiry.		
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DISMISSAL OF COMPLAINT OR DISCHARGE OF ACCUSED, POWER OF MAGISTRATE TO REOPEN CASE AFTER—Code of Criminal Procedure, s. 403 (explanation).		
The discharge of an accused or the dismissal of a complaint is no bar to the institution of fresh proceedings otherwise than under section 437, Code of Criminal Procedure.		
<i>Mir Ahmed Hossein v. Mahomed Askari</i> , I.L.R., 29 Cal., 726; <i>Queen-Empress v. Nga O Bok</i> , P.J. L.B., 169; and others followed.		
<i>Niratan Sen v. Jogesh Chundra Bhattacharjee</i> , I.L.R., 23 Cal., 983; <i>Queen-Empress v. Adam Khan</i> , I.L.R., 22 All., 106; <i>Queen-Empress v. Nga Po Nyein</i> , (1895) 1 U.B.R., 48; and others dissented from.		
<i>Empress v. Donnelly</i> , I.L.R., 2 Cal., 405; <i>Opoorba Kumar Sett v. Sreemutty Pyobod Kumary Dassi</i> , (1893) 1 C.W.N. 49; and others referred to.		
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EVIDENCE OF ACCOMPLICE— <i>Criminal Procedure Code, s. 288.</i>	
One of the accused in a dacoity case confessed, retracted his confession, and subsequently confirmed it. He was tendered a pardon and gave evidence as an approver before the committing Magistrate. In the Sessions Court he withdrew his confession and went back upon his evidence. The Additional Sessions Judge admitted his evidence before the committing Magistrate.	
<i>Held</i> ,—that the action of the Additional Sessions Judge was justified by the terms of section 283 of the Code of Criminal Procedure. In view of the corroborative evidence, conviction upheld and appeal dismissed.	
<i>Queen-Empress v Sonejee</i> , I.L.R., 21 All., 175	
<i>Queen-Empress v. Nirmal Das and others</i> , I.L.R., 22 All., 445, referred to.	
<i>Shwe Hnit v. King-Emperor</i>	214
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—OF IDENTIFICATION.	
It is seldom safe to convict on the evidence of a single witness as to identification, when the identification has been made after dark and the witness has at first professed to be unable to identify any one.	
<i>Tha Zan v. Crown</i> , 1 L.B.R., 292, referred to.	
<i>Tha Hmu v. King-Emperor</i>	206
—OF ORAL AGREEMENT VARYING TERMS OF DOCUMENT— <i>Evidence Act, s. 92 (5).</i>	
A advanced certain money to B and C on a bond. On the face of the bond, B and C were jointly and severally liable for the amount. Subsequently A sued C for the amount, foregoing in his plaint his claim on B on the ground that the latter could not be found. The Judge of the Court of first instance admitted oral evidence to prove that, by the custom of the trade, B was the principal debtor and C merely the surety, and holding that the abandonment of the claim against B had the effect of releasing C, dismissed the suit.	
<i>Held</i> ,—that the learned Judge had erred in admitting oral evidence of a condition which was repugnant to and inconsistent with the express terms of the bond.	
<i>Harek Chand Babu and others v. Bishun Chandra Banerjee and another</i> , (1903) 8 C.W.N., 101, referred to.	
<i>Lu Gale and one v. Maung Mo</i>	268
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EXAMINATION OF ACCUSED— <i>Criminal Procedure Code, ss. 244, 342, 537.</i>	
The examination of the accused, prescribed by section 342 of the Code of Criminal Procedure, is imperative in all cases.	

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In a summons case, where the Magistrate did not examine the accused under section 342, nor hear him and take the evidence for the defence under section 244, <i>Held</i> ,—that the trial was invalidated by these omissions. Conviction set aside and retrial ordered. <i>Nga Thet U v. King-Emperor</i> ; 2 L.B.R., 115, referred to.	
<i>King-Emperor v. Kyan Baw</i>	239
EXAMINATION OF ACCUSED AND CALLING ON ACCUSED TO ENTER ON HIS DEFENCE— <i>Criminal Procedure Code</i> , ss. 342, 289. The accused was convicted of murder and sentenced to death by the Sessions Court. The record did not show that he had been examined or called on to enter on his defence. <i>Held</i> ,—that the omissions were not cured by section 537 of the Code of Criminal Procedure. <i>Po Sein v. The Crown</i> , C.A. No. 214 of 1902 (unreported), and <i>Queen-Empress v. Imam Alli Khan</i> , I.L.R., 23 Cal., 252, referred to.	
<i>Nga Thet U v. King-Emperor</i>	115
EXCISE ACT, s. 51. A <i>bond fide</i> custodian of liquor is not liable to be convicted of unlawful possession under section 51 of the Excise Act. <i>Emperor v. Gajadhar</i> , (1907) I.L.R., 25 All., 262, referred to.	
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FALSE EVIDENCE— <i>statement before Revenue Officer</i> . In order that a person making a statement to a Revenue Officer may be legally bound to speak the truth, it is necessary that the Revenue Officer should be acting in the discharge of some duty or in the exercise of some power imposed or conferred on him by law. A Revenue Officer to whom an application for a grant of land is made and who enquires into matters not specified in Rule 3 or Rule 40 of the Rules under the (Lower) Burma Land and Revenue Act; or a Revenue Officer enquiring into an objection to the issue of an order of eviction under Rule 52 of these Rules, is not proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law; and a charge of giving false evidence in respect of statements made in such enquiries will therefore not lie. Meaning of "witness," "evidence," considered with reference to section 3 of the Indian Evidence Act and section 5 of the Indian Oaths Act. "Rules" and "Directions" under the (Lower) Burma Land and Revenue Act distinguished.	
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G

GAMBLING ACT, ss. 3 (A), 5, 10—Village headman—coins. A village headman is not empowered to arrest people whom he finds gambling in a public place, nor can the police take cognizance of such a case on a headman's report. Coins found on the persons of gamblers are not necessarily instruments of gaming.	
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SS. 6 (4), 14—Meaning of term "report"—duty of Police under s. 6. The expression "report" in section 14 of the Gambling Act includes any report of a Police officer, and not only the report prescribed by section 6, sub-section (4), in cases where a house has been searched under a warrant. Duty of Police in proceedings under section 6 of the Gambling Act explained.	
<i>King-Emperor v. Po Thin</i> , 2 L.B.R., 146, referred to.	
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GAMBLING IN LICENSED TODDY-SHOP. A licensed toddy-shop is not a "place to which the public have access" within the meaning of sections 5 and 10 of the Burma Gambling Act (1 of 1899). <i>Maluba Mariah and others v. Queen-Empress</i> , 4 B.L.R., 99; <i>Ex-parte Freeston</i> , L.J. 25 Exch., p. 120; <i>Queen-Empress v. Nga Hmat Gyi</i> , S.J., L.B., 317; <i>Langrish v. Archer</i> , L.R., (1882), 10 Q.B.D., 44; <i>Powell v. Kempton Park Race Course Company</i> , (1897) 2 Q.B., 242, and (1899) A.C. 143; referred to.	
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GRAZING GROUNDS—Prosecution for encroachment on—proper method of trial. The report of a Revenue Surveyor is a complaint and not on the same footing as a Police Report. If the Magistrate proceeds under clause (a) of section 190, sub-section (1), of the Code of Criminal Procedure, he must examine the complainant thoroughly. He can only proceed under clause (c) if specially empowered and is bound by the provisions of section 191. Before issuing process the Magistrate should endeavour to ascertain if the grazing ground has been finally demarcated under Rule 68 of the Rules under the Lower Burma Land and Revenue Act, and whether its boundaries are defined by visible marks or are otherwise well-known. A plea that the accused did not know that the land which he cultivated was in a grazing ground is a good ground of defence and although the burden of proving it is on the accused, it must be investigated.	
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A High Court not appointed by Royal Charter is barred by sub-section (3) of section 435 of the Code of Criminal Procedure from interfering in proceedings taken under Chapter XII of the Code.	
<i>Pandurang v. Govind</i> , (1900) I.L.R., 24 Bom., 527; <i>Laldhari Singh and others v. Sukdeo Narain Singh</i> , (1900) I.L.R., 27 Cal., 892; <i>Krishna Kamini v. Abdul Jabbar</i> , 6 C.W.N., 737; <i>Hurbullubh Narain Singh v. Luchmeswar Prasad Singh</i> , (1899) I.L.R., 26 Cal., 188; <i>Sri Mohan Thakur v. Narsing Mohan Thakur</i> , (1900) I.L.R., 27 Cal., 259; <i>Krishna Kamini v. Abdul Jabbar</i> , (1903) I.L.R., 30 Cal., 155; <i>Dewan Chand v. Queen-Empress</i> , (1899) 34 P.R. Cr., 5; <i>Dhani Ram v. Bhola Nath</i> , (1902) 37 P.R. Cr., 59; <i>Pandurang Govind Pujari</i> , (1901) I.L.R., 25 Bom., 179; cited.	
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Sub-section (5) of section 439, Criminal Procedure Code, does not debar the Chief Court from dealing with a case on revision reported by the Sessions Judge or District Magistrate of his own motion and not on the application of the accused who could have appealed but did not do so.	
<i>King-Emperor v. Appulsawmy</i> ...	209
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The District Court rejected an application to sue as a pauper, on the ground that the suit which it was desired to bring was barred by limitation. The Court did not find that applicant was not a pauper. Applicant applied to the Chief Court for revision of the order of the District Court, under section 622 of the Code of Civil Procedure. Respondent contended that the Chief Court had no power to revise, and relied on the ruling of the Privy Council in the leading case of <i>Amir Hassan Khan v. Sheo Baksh Singh</i> , (I.L.R., 11 Cal., 6).	
<i>Held</i> ,—after consideration of the ruling of the Privy Council in the light of subsequent decisions of the High Courts that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous, the error cannot be corrected on revision; but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised.	
<i>Amir Hassan Khan v. Sheo Baksh Singh</i> , (1884) I.L.R., 11 Cal., 6; <i>Har Prasad v. Jafar Ali</i> , (1885) I.L.R., 7 All., 345; <i>Sew Bux Bogla v. Shib Chunder Sen</i> , (1886) I.L.R., 13 Cal., 225; <i>Badami Kuar v. Dinu Rai</i> , (1886) I.L.R., 8 All., 111; <i>Venkubai v. Lakshman Venkoba Khot</i> , (1887) I.L.R., 12 Bom., 617; <i>Jugobundhu Pattack v. Jadu Ghose Alkushi</i> , (1887) I.L.R., 15 Cal., 47; <i>Chenbasapa v. Lakshman Ramchandra</i> , (1893) I.L.R., 18 Bom., 369; <i>Mohun Bhagwan Ramanuj Das v. Khetter Moni Dassi</i> , (1896) 1 C.W.N., 617; <i>Mathura Nath Sarkar v. Umesh Chandra Sarkar</i> , (1897) 1 C.W.N., 626; <i>Raghu Nath Gujrati v. Rai Chatraput Singh</i> , (1897) 1 C.W.N., 633; <i>Debo Das v. Mehunt Ram Charn Das Chella</i> , (1898) 2 C.W.N., 474; <i>Enat Mondul v. Boloram Dey</i> , (1899) 3 C.W.N., 581; <i>Ross Alston v. Pitambar Das</i> , (1903) I.L.R., 25 All., 509; <i>Magni Ram v. Firwa Lal</i> , (1885) I.L.R., 7 All., 336; <i>Chattarpal Singh v. Raja Ram</i> , (1885) I.L.R., 7 All., 661; <i>Manisha Eradi v. Siyali Koya</i> , (1887) I.L.R., 11 Mad., 20; <i>Kristamma Naidu v. Chapa Naidu</i> , (1893) I.L.R., 17 Mad., 410; <i>Sundar Singh v. Doru Sankar</i> , (1897) I.L.R., 20 All., 78; <i>Kamvrakh Nath v. Sundar Nott</i> , (1898) I.L.R., 20 All., 299; <i>Krishna Mohini Dossee v. Kedarnath Chuckerbutty</i> , (1888) I.L.R., 15 Cal., 446; <i>Raghu Nath</i>	

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<i>Sahai v. Official Liquidator of the Himalaya Bank</i> , (1893) I.L.R., 15 All., 139; <i>Madhavrao Ganeshpant Ose v. Gulabbhai Lallubhai</i> , (1898) I.L.R., 23 Bom., 177; <i>Meyappa Chetty v. Chokalingam Chetty</i> , (1894) P.J., L.B., 61; <i>Ma Taw U v. Ma Ngwe</i> , (1899) P.J., L.B., 548; <i>Ma Shwe Thaw v. Ma Shwe Ywet</i> , (Civil Revision No. 53 of 1903 unreported); considered.	
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IMPRISONMENT IN DEFAULT OF SECURITY, S. 123, CRIMINAL PROCEDURE CODE. “Sentence of imprisonment.” The word “sentence” in section 396 or section 397, Code of Criminal Procedure, does not include an order of committal or detention under section 123, Code of Criminal Procedure. <i>Queen-Empress v. Diwan Chand</i> , (1895) P.R. Cr. No. 14; <i>Queen-Empress v. Tulshya Bahiru</i> , (1898) Ratanlal, p. 970; <i>Queen-Empress v. Shwe Byo</i> , S.J., L.B., 364; followed. <i>Queen-Empress v. Nga Kyon</i> , 1 L.B.R., 14, referred to. <i>Queen-Empress v. Pandu Khandu</i> , (1895) Ratanlal, p. 774, dissented from. <i>King-Emperor v. Nga Po Thin</i>	72 53
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INHERITANCE—See BUDDHIST LAW. ————— <i>estate of Chinese Buddhist dying in Burma—law applicable.</i> In a suit for a share in the estate of a Chinese subject professing the Buddhist faith who dies in Burma after having acquired a domicile there, the plaintiff must show that he is entitled to share under the customary law applicable to Chinese Buddhists. Section 13, <i>Burma Laws Act</i> , 1898, discussed. <i>Hong Ku v. Ma Thin</i> , S.J., L.B., 135; <i>Ma Tin v. Doop Raj Burna</i> , Chan Toon, L.C., Vol. 1, p. 370; <i>Pirthee Singh v. Mussamut Sheo Soonduree</i> , 8 W.R., 261; <i>Surendra Nath Roy v. Hiramani Barmuni</i> , 1 Beng. L.R. (P.C.), 26; <i>Ma Sa Yi v. Ma Me Gale</i> , 7 Agabeg's Reports, 295, and <i>Ma Mein Gale v. Ma Kin</i> ; referred to. <i>Fone Lan v. Ma Gyi and others</i>	95
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J

JOINDER OF CHARGES— <i>Code of Criminal Procedure, ss. 233, 234, 235, 236.</i> <i>Per curiam.</i> —Misjoinder (<i>i.e.</i> , illegal joinder) of charges invalidates a trial, and is not curable under section 537, Code of Criminal Procedure. The joinder at one trial of charges of forgery and criminal misappropriation committed in the course of one transaction with another forgery or another criminal misappropriation committed in the course of another transaction is illegal, because there is no section of the Code of Criminal Procedure under which the forgery in the one case could be joined with the misappropriation in the other case. <i>Per Irwin, J.</i> —If three or more charges are such that every combination of two of them is justified by some section of the Code, the joinder is legal. <i>Per Fox, J.</i> —No joinder is legal unless every combination of two of the charges is justified by one and the same section of the Code. <i>Queen-Empress v. Mulua, (1892) I.L.R., 14 All., 502</i> , referred to. <i>Subrahmanya Ayyar v. King-Emperor, (1902) I.L.R., 25 Mad., 61</i> , followed. <i>Maung Lun Maung v. King-Emperor</i>	10
— <i>Indian Penal Code, ss. 379, 215—Code of Criminal Procedure, s. 235 (1).</i> The accused, for a gratification, brought and returned stolen cattle two days after the theft. <i>Held.</i> —that joinder of charges and separate convictions under sections 379, 215, were legal and proper. <i>Crown v. Nga Shein, 1 L.B.R., 203</i> , dissented from. <i>King-Emperor v. Nga To</i>	23
— <i>joint trial of accused—theft and receiving or disposing of stolen property—Indian Penal Code, ss. 379, 411, 414—Criminal Procedure Code, ss. 233, 239.</i> As proximity of time between two acts does not necessarily constitute them parts of the same transaction, so an appreciable interval of time between two acts otherwise connected does not prevent them from continuing to be parts of the same series of connected events. While therefore it is legitimate to regard theft and the disposal of the proceeds ordinarily as parts of the same transaction, the propriety of trying the actual thief and the dishonest receiver in one trial should depend upon the circumstances of each case. <i>Queen-Empress v. Sakharan, Ratanlal, 449; In re A. David, 6 C.L.R., Henderson, 245</i> ; followed. <i>Nga Ta Pu and others v. King-Emperor</i>	19
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The terms "joint family property" in article 127 of the second schedule do not apply to property held jointly by members of a Burmese Buddhist family.

Ma Nyein Aung v. Ma So, P.J., L.B., 530; *Issur Chunder Doss v. Juggut Chunder Shaha*, (1882) I.L.R., 9 Cal., 79; *Keshav Jagannath v. Narayan*, (1889) I.L.R., 14 Bom., 236; *Sheikh Asud Ali Khan v. Sheikh Akbar Ali Khan*, (1877) 1 C.L.R., 364; referred to.

Ma Ye v. Maung Hlaw and others 184

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"Same transaction"—Code of Criminal Procedure,

s. 239.

The police sent up two accused, A and B, separately, A charged under section 324 with causing hurt to B, and B under section 326 with causing grievous hurt to A. The Magistrate enquired into the case against both accused jointly, and finding that the evidence against B was insufficient discharged him and examined him as a witness against A, who was convicted.

Held,—that since it was proper to take the evidence of A against B, as well as that of B against A, the different offences were not committed in the same transaction, and separate inquiries should have been held against each accused.

Queen-Empress v. Nga Aung Aun, 1 L.B.R., 56; *Queen-Empress v. Chandra Bhinya*, I.L.R., 20 Cal., 537.

In the matter of David, 5 C.L.R., 574, and *Nga Aung Bwin v. Queen-Empress*, P.J., L.B., 536; referred to.

Nga Tha Dun Aung v. King-Emperor 106

JUDGE OR MAGISTRATE PERSONALLY INTERESTED.

A Judge who has directed a prosecution should not hear the appeal of the accused when convicted, even although it is not against the conviction but only against the severity of the sentence.

Mussamat Sharina v. The Empress, (1884) F.R. Crim., 92; *Queen-Empress v. Fa Lwe Wa*, (1896) 1 U.B.R., 2; referred to.

King-Emperor v. Htuktalwe 302

JUDGE PERSONALLY INTERESTED IN SUIT IN HIS COURT.

When a Judge feels himself to be personally interested in a case in his Court, the procedure prescribed by section 33 of the Lower Burma Courts Act, 1900, should be observed.

Loburi Domini and others v. Assam Railway, (1884) I.L.R., 10 Cal., 915; *Aloo Nathu v. Gagubha Dipsangji*, (1895) I.L.R., 19 Bom., 608; referred to.

Maung Mo v. Po Min 281

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JURISDICTION—case tried by Court of higher grade than that ordinarily having jurisdiction—Court in which appeal should be brought—Civil Procedure Code, ss. 15, 25, 578—remand by Appellate Court for further evidence, ss. 566, 569.

A suit of value less than Rs. 500 was, with consent of parties, transferred to the Subdivisional Court, which gave judgment for plaintiff. Appeal was made to the Divisional Court, which framed certain issues and directed the Township Court to take evidence and record findings on them. On the evidence so recorded, the successor of the former Judge of the Divisional Court dismissed the plaint.

Held,—on second appeal, that the first appeal was rightly brought in the Divisional Court and that the remand of the case to the Township Court, if irregular, was not such a material irregularity as to justify interference.

Pachani v. Ilahi Bakhsh, I.L.R., 4 All., 478; *Peary Lall v. Komal*, I.L.R., 6 Cal., 30; *Ledgard v. Bull*, I.L.R., 9 All., 191; *Matra Mondal v. Hari Mohun*, I.L.R., 17 Cal., 155; *Ram Narain v. Parmeswar*, I.L.R., 25 Cal., 39; *Velayudam v. Arunachala*, I.L.R., 13 Mad., 273; *Chandulal v. Awad*, I.L.R., 21 Bom., 351; referred to.

Maung Hme Bu v. Maung Shwe Hmvin and others 117

JURISDICTION—Lower Burma Courts Act (VI of 1900), s. 25—Civil Procedure Code, s. 11—suit of which it is not possible to estimate the money value—Guardians and Wards Act, VIII of 1890.

Under section 25 of the Lower Burma Courts Act, 1900, the Township Court has jurisdiction to hear and determine any suit of a value not exceeding Rs. 500. It is not possible to estimate the money value of a suit for the custody of a child. Such a suit cannot therefore be regarded as beyond the pecuniary jurisdiction of a Township Court and will lie in that Court, except where it would have the effect of contesting an order made under section 25 of the Guardians and Wards Act.

Krishna v. Reade, (1886) I.L.R., 9 Mad., 31; *Sharifa v. Munkhan*, (1901) I.L.R., 25 Bom., 574; *Mussamat Harasundari Baistabi v. Mussamat Fayadurga Baistabi*, (1870) 4 B.L.R., Appendix 36; *Kristo Chunder Acharjee v. Kashee Thakooranee*, (1875) 23 W.R., 340; *Ghasita v. Wasira*, (1897) 32 P.R., F.B. No. 10; referred to.
Ma Shwe Ge v. Maung Shwe Pan 140

—value of suit—Court of lowest grade.

A District Court has jurisdiction to try any suit, however great or small its value. Section 15 of the Code of Civil Procedure, which requires that a suit shall be instituted in the Court of lowest grade competent to try it, is merely directory, and if a District Court tries a case which should have been tried by a Township Court, the decree is not liable to be reversed for want of jurisdiction.

Suffeollah Sircar v. Begum Bibi, (1876) 25 W.R., 219; *Nidhi Lall v. Mashar Hussain*, (1884) I.L.R., 7 All., 230; *Ramayya v. Subarayudu*, (1890) I.L.R., 13 Mad., 25; *Velayuddan v. Arunachala*, (1890) I.L.R., 13 Mad., 273; *Krishnasami v. Ranakasabai*, (1891) I.L.R., 14 Mad., 183; *Augustine v. Medlycott*, (1892) I.L.R., 15 Mad., 241; *Gomachundra Patnikudu v. Vikiama*, (1900) I.L.R., 23 Mad., 367; *Maitra Mondal v. Hari Mohum Mullick*, (1890) I.L.R., 17 Cal., 155; *Maung Hme Bu v. Maung Shwe Hnyin*, 2 L.B.R., 117; referred to.
Shwe Ye v. Maung Hla Gyaw 192

—OF CIVIL COURTS IN SUITS AGAINST ABSENT FOREIGNERS—Civil Procedure Code, ss. 17, 89, 90, Chap. XXVIII.

The Code of Civil Procedure makes provision for suit against foreigners not resident in British India, and a Court is bound to entertain such a suit if the cause of action has arisen within the local limits of its jurisdiction.

English and Indian law distinguished, and effect of decree in such a suit discussed.

Rambhat v. Shanka Baswant, I.L.R., 25 Bom., 528; *Moazzin Hossain Khan v. Raphael Robinson*, I.L.R., 28 Cal., 641; *Whaley v. Busfield*, L.R., 32 Ch. D., 123; followed. *Kassim Mamoojee v. Isuf Mahomed Sulliman*, I.L.R., 29 Cal., 509; *Gurdial Singh v. Raja of Faridkot*, I.L.R., 22 Cal., 222; *Dacey's Conflict of Laws*; *Story's Conflict of Laws*; referred to.

Cooverjee Ladha v. Suleman Ismail & Co. 47

JURISDICTION OF COURT—to entertain regular suit not barred by provision of special remedy.

The provision of a special remedy (as in section 25 of the Guardians and Wards Act) does not bar the jurisdiction of the Courts to entertain a regular suit.

Ramjiwan Mal v. Chand Mal, (1885) I.L.R., 7 All., 227; and *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal*, (1887) I.L.R., 14 Cal., 644; referred to.

Ma Shwe Ge v. Maung Shwe Pan 140

—PASSING FORMER JUDGMENT, POWER TO INQUIRE INTO—See RES JUDICATA, PLEA OF— 24

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LAND ACQUISITION ACT (I OF 1894), ss. 18, 19.
When a reference is made to the Court under section 19 of the Land Acquisition Act (I of 1894), the proceedings in the Court are intended to constitute a separate inquiry and must terminate with a specific award. A mere dismissal of the application is not contemplated by the Act.

S. T. Macintyre v. The Secretary of State in Council 208

LAND AND REVENUE ACT, 1876—"Rules" and "Directions" distinguished—
false statements before Revenue Officer—See FALSE EVIDENCE 272
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LAND, SEPARATE OWNERSHIP OF, AND OF THINGS ON LAND—See SEPARATE OWNERSHIP OF LAND AND OF THINGS ON LAND 56

LAND SUIT, LOWER BURMA COURTS ACT, s. 2.
A suit in respect of standing crops on land may be a "land suit" for the purposes of section 2 of the Lower Burma Courts Act.

Ma Dun v. Ma U 124

LANDLORD AND TENANT—See CLAIM FOR USE AND OCCUPATION 122

LEGAL PRACTITIONERS' ACT, s. 41—See ADVOCATE 130

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LIMITATION—suit for injunction to restrain from infringement of trade marks—See TRADE MARKS 113
suit by co-heirs for share of land—Limitation Act, second
schedule, articles 123, 127, 142, 144.
Plaintiff, defendant, and other co-heirs became entitled 13 years previous to the suit to share between them certain land inherited from their parents. Throughout the thirteen years and up to the time of the suit defendant and her husband (deceased before the suit), remained in possession of the land. Plaintiffs received no benefit from it and there was no evidence of any agreement between them and defendants touching the occupation of it.
Held,—that plaintiffs' suit for a share was barred by limitation under article 144 of the second schedule of the Limitation Act.

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LIMITATION ACT—See BUDDHIST LAW: INHERITANCE 110
s. 4—See APPEALS 237
s. 5 (PROVISO)—"Sufficient cause."
An erroneous assumption that a suit is one of a kind in which no second appeal lies is not "sufficient cause," in the sense of the proviso to section 5 of the Indian Limitation Act, for extending the period within which the second appeal may be presented.
In re Manchester Economic Building Society, (1883) L.R., 24 Ch. D. 488; *Huro Chunder Roy v. Surnamoyi*, (1886) I.L.R., 13 Cal., 266; cited.
Krishna v. Chathappan, (1890) I.L.R., 13 Mad., 260; *Corporation of the Town of Calcutta v. Anderson*, (1884) I.L.R., 10 Cal., 445; followed.
Bechi v. Ahsan Ullah Khan and others, (1890) I.L.R., 12 All., 461, dissented from.

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MAHOMMEDAN LAW—power of widow to alienate estate—rights of attaching creditor.	
A, a Mahomedan widow with minor children, who was sued by B for a debt due to him by her deceased husband, sold the estate remaining at her husband's death to C. B obtained a decree, and sought to attach the property.	
Held,—that as a Mahomedan widow has power to alienate only her own share, <i>i. e.</i> , one-eighth of the estate remaining at her husband's death, B had the right to attach seven-eighths of the estate in C's hands.	
<i>Sircar, Mahomedan Law Lectures, 1873, pp. 477, 478; Land Mortgage Bank, Limited v. Roy Lutchmiput Singh, 8 C.L.R., 417; Land Mortgage Bank v. Bidyadhari Dasi, 7 C.L.R., 460; Syud Bazayet Hossein v. Dooli Chund, I.R., 5 I.A., 211; referred to.</i>	
<i>Mohindra Kumer Chakravati v. Kyaw Za Pru ...</i>	144
widow with minor children—guardianship of property.	
A Mahomedan mother has no right to the guardianship of the property of her minor children unless she has been appointed by the Court.	
<i>Mohindra Kumer Chakravati v. Kyaw Za Pru ...</i>	144
MAINTENANCE—wife refusing to live with husband—father's obligation to maintain children—Criminal Procedure Code, s. 488.	
The obligation to maintain a child unable to maintain itself is a statutory obligation, and the father is not released from it by the fact that the mother refuses to live with him.	
<i>Maung Kin v. Hnin Yi, S.J., L.B., 114; Lal Das v. Nikunjo Bhaishani; I.L.R., 4 Cal., 374; Kariyadan Pokkar v. Kayat Beran Kuti, I.L.R., 19 Mad., 461; Ma Gyi v. Maung Pe, 1 L.B.R., 126; Ma Hnin Byu v. Maung Myat Pu, 8 Bur. L.B., 96; referred to.</i>	
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MARRIAGE, DISSOLUTION OF—application for confirmation of decree—Indian Divorce Act, s. 17 (1st clause)—ss. 12, 14.	
An application for confirmation of decree for dissolution of marriage is not necessary in order to enable the High Court to take action under section 17, Indian Divorce Act.	

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A decree for dissolution of marriage cannot be passed without enquiry into, and evidence to prove the facts alleged by the petitioner.	
<i>Simmonds v. Simmonds and one</i> , Civil Reference No. 2 of 1890; <i>Powell v. Powell and one</i> , Civil Reference No. 2 of 1898; <i>Culley v. Culley</i> , I.L.R., 10 All., 559, and <i>Bai Kanku v. Shiva Trya</i> , I.L.R., 17 Bom., 624; referred to.	
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MINOR CHILDREN—Property of—under Mahomedan Law—See MAHOMMEDAN LAW	144
MISCHIEF— <i>Indian Penal Code</i> , s. 425—cattle damaging crops.	
The owner of cattle which stray on another person's paddy land does not commit the offence of mischief unless he caused them to stray with the intention that they should damage, or with the knowledge that they would be likely to damage the crop.	
<i>King-Emperor v. Nga Luin and another</i>	158
MISJOINDER—See JOINDER OF CHARGES	10
MORTGAGE—of share of undivided joint property.	
A sharer in undivided joint property may mortgage his share without prejudice to the rights of his co-sharers.	
<i>Ma On and others v. Ko Shwe O and others</i> , S.J., L.B., 378; <i>Maung Hlaing v. Maung Tha Ka Do</i> , P.J., L.B., 65; <i>Byjnath v. Ramodeen</i> , (1874) L.R., 1 I.A., 106, and <i>Lakshman v. Gopal</i> , (1899) I.L.R., 24 Bom., 385; referred to.	
<i>Maung Tha Nu and another v. Maung Kya Zan and others</i>	167
MORTGAGE DECREE—Application for attachment and sale of property under —common error of Courts—claim to such property under s. 278, <i>Civil Procedure Code</i> .	
It is not necessary for the holder of a mortgage-decree to apply for the attachment and sale of the mortgage property. The decree contains, or ought to contain, a direction for sale; and it only remains for the decree-holder to apply for the sale to be proclaimed. If he unnecessarily applies for an attachment, which is granted, a claim to the property cannot be brought under section 278.	
<i>Deefholts v. Peters</i> , (1887) I.L.R., 14 Cal., 631; <i>Himatavan v. Khushal</i> , (1894) I.L.R., 18 Bom., 98; <i>Dayachand Nemchand v. Hemchand Dharamchand</i> , (1880) I.L.R., 4 Bom., 515; referred to.	
<i>S. R. M. A. N. Muthappa Chetty v. S. A. R. M. Sallathappa Chetty</i>	138
MORTGAGE OR SALE—oral evidence—procedure— <i>Evidence Act</i> , s. 92.	
Rules of evidence should be construed so as to give effect to the real intentions of the parties.	
A case may not be started by offering direct oral evidence that an apparent sale was really a mortgage, but if it appears clearly from the conduct of the parties that they treated it as a mortgage, the Court will give effect to it as such, and thereupon will, if necessary, allow oral evidence of the original agreement.	
<i>Balkishen Das v. Legge</i> , 4 C.W.N., 153, referred to.	
<i>Baksu Lakshman v. Govinda Kanji</i> , I.L.R., 4 Bom., 594; <i>Kashinath Dass v. Hurrihur Mookerjee</i> , I.L.R., 9 Cal., 898; <i>Mi Zainabi v. Cassim Alli</i> , P.J., L.B., 154; followed.	
<i>Romesh Chandra Pal v. Nga Saung</i>	E
MORTGAGE WITH RIGHT OF PRE-EMPTION—suit by third part for specific performance of contract to sell— <i>Specific Relief Act</i> , s. 27 (b).	
A condition in or at the time of a mortgage that the mortgagee shall have a right of pre-emption if the mortgagor wishes to sell the property, is valid, if nothing fraudulent, oppressive, or unfair appears in the agreement. If the mortgagee obtains a conveyance of the property before a third party who has contracted with the mortgagor for the purchase of it, the	

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third party cannot enforce the contract against the mortgagee even although the latter knew of the mortgagor's agreement to sell to such party.	
Fisher on Mortgages, 4th edition, section 1150.— <i>Haris Paik v. Jahurudigasi</i> , 2 C.W.N., 575; and <i>Bimal Jati v. Biranja Kuar</i> , (1900) I.L.R., 22 All., 238; referred to.	
<i>Maung San Nyein v. Maung Tun U</i>	168
MUNICIPAL ACT, SS. 133, 160— <i>construction of terms.</i>	
The accused who used a house as a depôt for the storage of deal boxes was convicted under section 160 of the Burma Municipal Act, for storing wood without registration or license as required by section 133 (r) of the Act.	
<i>Held</i> ,—that the word "wood" as used in section 133 includes wood in the form of boxes, and is not to be restricted to the sense of "firewood" or wood in an unmanufactured state.	
<i>Nagore Meera v. Rangoon Municipality</i>	70
—s. 195— <i>prosecution.</i>	
A prosecution under the Municipal Act cannot be instituted except by some person duly authorized under the Act.	
<i>King-Emperor v. Abdul Mawsit</i>	124
MURDER— <i>blows on the head—intention—Indian Penal Code, s. 300.</i>	
The accused, in a scuffle, struck the deceased two blows on the head with a pint bottle of brandy. Deceased fell at the second blow, and remained unconscious till his death, thirteen hours afterwards.	
<i>Held</i> ,—after consideration of the question of intention in such cases, that the repetition of the blow brought the case within the definition of murder in the third clause of section 300 of the Indian Penal Code.	
<i>Chevers' Medical Jurisprudence</i> , and <i>Taylor's Medical Jurisprudence</i> ; referred to.	
<i>Shwe Hla U v. King-Emperor</i>	125
— <i>provocation.</i>	
The fact that the accused, who was convicted of murder, was intoxicated does not affect the presumption as to his intention and cannot relieve him of responsibility for his action. But it may be considered in estimating the probable effect on his mind of the words or actions of others, and in determining whether provocation given was grave and sudden.	
<i>King-Emperor v. Nga Tha-Sin</i> , 1 L.B.R., 216, referred to.	
<i>Nga San v. King-Emperor</i>	204
— <i>stabbing in vital part—intention—Indian Penal Code, s. 300 (3).</i>	
The accused inflicted a stab with a sharp pointed weapon which entered the upper part of deceased's stomach, causing rupture of it and of the peritoneum.	
<i>Held</i> ,—that such acts fall <i>prima facie</i> within the third clause of section 300, Indian Penal Code.	
<i>Ma Ni v. Queen-Empress</i> , S.J., L.B., 300, partly dissented from.	
<i>Nga Po Aung v. Queen-Empress</i> , S.J., L.B., 459, referred to.	
<i>Hamid v. King-Emperor</i>	63
MURDER IN SUDDEN FIGHT— <i>Indian Penal Code, s. 300, exception 4.</i>	
If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to take an undue advantage and not to be entitled to the benefit of Exception 4 to section 300, Indian Penal Code.	
<i>Shan Gyi v. Queen-Empress</i> , (1885) S.J., L.B., 371, and <i>San Ya v. Queen-Empress</i> , (1889) 1 S.J., L.B., 463; over-ruled.	
<i>Po Kin v. King-Emperor</i>	320
MUTATION OF NAMES IN A REVENUE REGISTER— <i>declaration of title—amendment of prayer of plaint—High Court, Power and discretion of, in second appeal.</i>	
The High Court has power on second appeal to allow in its discretion the addition to a plaint of a prayer for a declaration of the plaintiff's right to the property involved although in such plaint mutation of names in a Revenue Register is all that has been asked for, and it has	

also power in its discretion to make a declaration of the plaintiff's right in or to the land without an amendment of the plaint.

Maung Ba v. Maung Mo, 1 L.B.R., 124; and *Ma Hnin Hmwe and others v. Maung Po Aung*, 2 L.B.R., 3; followed in part.

Raja Rup Singh v. Rani Baisini, I.L.R., 7 All., 1; *Eshen Chunder Singh v. Shama Churn Bhutto*, 11 Moore's I.A., 7; *Mylapore Iyasawmy Vyapooray Moodliar v. Yeo Kay*, I.L.R., 14 Cal., 801; *Kasinath Dass v. Sadasiv Patnaik*, I.L.R., 20 Cal., 808; *Saral Chand Mitter v. Sreemutty Mohun Bibi*, 2 C.W.N., 201; *Bai Shri Majirajaba v. Maganlal Bha Ishankar*, I.L.R., 19 Bom., 303; *Lingammal v. Chinna Venkatammal*, I.L.R., 6 Mad., 239; *Shyam Chand Koondoo v. Land Mortgage Bank of India*, I.L.R., 9 Cal., 695; *Narasimma v. Suryanarayana*, I.L.R., 12 Mad., 481; *Seshamma v. Chennappa*, I.L.R., 20 Mad., 467; *Mohummud Zahoore Ali Khan v. Musummat Thakooraanee Rutta Koer*, 11 Moore's I.A., 468; *Sri Mahant Govind Rao v. Sita Ram Kesho*, I.L.R., 21 All., 53; *Gunga Narain Gupta v. Tiluckram Choudhry*, I.L.R., 15 Cal., 533; *Rajah Peary Mohan Mukherjee v. Narendra Krishna Mukherjee*, 5 C.W.N., 273; *Sukhdeo Prasad v. Lachman Singh*, I.L.R., 24 All., 456; followed.

Maung Shwe Lin v. Ma Le 4

MUTATION OF NAMES IN REVENUE REGISTER OF HOLDINGS—*suit for declaratory decree—consequential relief.*

A suit for mutation of names in a Revenue Register does not lie in a Civil Court. A comprehensive prayer "for such further or other relief as the nature of the case may require" commonly contained in plaints covers only relief consequential on the main relief prayed for and cannot cover relief of a totally different nature as a substitute for the relief prayed for.

Maung Ba v. Maung Mo, 1 L.B.R., 124, followed.

Ma Hnin Hmwe v. Maung Po Aung 3

... .. amendment of prayer of plaint—declaration of title.

Although a suit for mutation of names in a Revenue Register of holdings cannot lie, the Court may allow the prayer of the plaint in such a suit to be altered to a prayer for possession.

Maung Shwe Lin v. Ma Le, 2 L.B.R., 4, referred to.

Maung Tha Chu v. Maung Po Kauk 243

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NEGOTIABLE INSTRUMENTS ACT, s. 27—*See* HUSBAND 324

... .. s. 87—*See* PROMISSORY NOTE 324

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OATH—*Administering of, to child-witness—Indian Oaths Act, s. 13.*

The deposition of a girl aged 8 was objected to on the ground that the Magistrate had not administered an oath to her nor placed her on solemn affirmation.

Held,—that when a Judge or Magistrate has elected to take the statements of a person as evidence, he has no option but to administer either the oath or affirmation to such a person as the case may require.

Queen-Empress v. Maru and another, (1888) I.L.R., 10 All., 207, cited.

Queen v. Sewa Bhogta, (1874) 14 B.L.R., 294; *Queen-Empress v. Shava and another*, (1891) I.L.R., 16 Bom., 359; dissented from.

Pwa Nyun v. King-Empress 322

OATHS ACT, 1873, s. 4—*See* FALSE EVIDENCE 272

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PART-HEARD TRIAL— <i>one Magistrate succeeding another—procedure—Criminal Procedure Code s. 350.</i>	
When one Magistrate succeeds another Magistrate and acts under section 350, Code of Criminal Procedure, he must either take up the case at the point at which his predecessor ceased to exercise jurisdiction, or he may re-summon the witnesses and recommence the inquiry or trial.	
When an accused demands that all the witnesses be re-summoned and re-heard the second Magistrate must adopt the second alternative course and re-commence the inquiry or trial. But when all the witnesses already examined are not re-called and re-heard, then the second Magistrate takes up the case from the point at which his predecessor left it and he is bound by his predecessor's acts up to that point.	
<i>King-Emperor v. Nga Pe</i>	17
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————— s. 215— <i>attempt to commit an offence under—when complete.</i>	
In order to constitute an attempt to commit an offence under section 215, Indian Penal Code, it is not necessary that the person who is willing to take and the person who is willing to give the illegal gratification should agree both as to the object for which the gratification is to be given and also as to the shape or form the gratification is to take. When once a proposal has been made for the payment of an illegal gratification, whether it is completed by an agreement or not, the offence of an attempt to commit an offence under section 215 is complete.	
<i>Queen-Empress v. Chittar and another</i> , (1898) I.L.R., 20 All., 389, dis-ent from.	
<i>King-Emperor v. Nga Nyo</i>	310
————— s. 300— <i>See</i> MURDER.	
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<i>Roy Dhunput Singh Bahadoor v. Fhoomuck Khawas</i> , 3 C.L.R., 579; <i>Kastolino v. Rustomji</i> , I.L.R., 4 Bom., 468; distinguished.	
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<i>Per curiam</i> .—The words "Report of a Police officer" and "Police report" respectively in sections 4 (1) (h) and 190 (1) (b) of the Code of Criminal Procedure do not refer exclusively to reports under Chapter XIV of the Code. They refer to and include any report by a Police officer whether in a cognizable or non-cognizable case; and it is not necessary for a Magistrate receiving such a report to treat the reporting officer as a complainant under section 200 of the Code.	
<i>Per Fox, J.</i> —The term "Police report" in section 190 (1) (b) includes even a verbal report by a Police officer.	
<i>Per Birks, J.</i> —The terms "Police report" in sections 4 and 190 include any written information given by a Police officer in the performance of his duty as a public servant and not in his capacity as a private individual.	
<i>Queen-Empress v. Ma Min Me</i> , 1 U.B.R., (1892—96), p. 28; <i>Queen-Empress v. Nga Shwe Lin</i> , 1 L.B.R., 18; <i>Queen-Empress v. Nga Shwe E</i> , 1 L.B.R., 58; <i>Queen-Empress v. Nga Saw</i> , 1 L.B.R., 59; dissented from.	
<i>Reg. v. Jafar Ali</i> , (1871) 8 B.H.C.R., Cr. Ca. 113; <i>Queen v. Surrendro Nath Roy</i> , (1870) 13 W.R. Cr., 27; <i>Reg. v. Lala Shambhu</i> , (1873) 10 B.H.C.R., Cr. Ca. 70; referred to.	
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The meaning of the terms "acknowledged" and "acknowledgment" used in section 2, sub-section (23), of the Stamp Act must be limited to documents given to or issued for the benefit of the debtor, acknowledging to him the payment of money, etc.; or delivery of goods, in discharge or satisfaction of his debt or the demand upon him.

Accordingly a certificate to the effect that a premium on an insurance policy has been paid, issued for the purpose of supporting a claim to exemption from income-tax on the amount paid and not primarily intended for use as evidence of payment between the policy-holder and the Insurance Company is not a receipt, and is therefore exempt from stamp duty.

Rex v. James Harvey, (1812) Russell and Ryan, 227; *In the matter of* (Act XVIII of 1869) *the Uncovenanted Service Bank*, (1879) I.L.R., 4 Cal., 829; *Queen-Empress v. Juggernath*, (1885) I.L.R., 11 Cal., 267; referred to.

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It is not illegal or irregular for a Magistrate of the 2nd or 3rd class to frame a charge against an accused person, in a case which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Subdivisional Magistrate to pass sentence. Section 254 of the Code of Criminal Procedure must be read as subject to the general provision in section 349.

Queen-Empress v. Fakira, Ratanlal's Unrep. Cases, 499, dissented from. *Imperatrix v. Abdulla*, (1880) I.L.R., 4 Bom., 240; *Queen-Empress v. Havia Tellapa*, (1886) I.L.R., 10 Bom., 196; *Chinnimarigadu*, (1876) I.L.R., 1 Mad., 289; *Queen-Empress v. Welayudam*, (1882) I.L.R., 4 Mad., 233; *Queen-Empress v. Viranna*, (1886) I.L.R., 9 Mad., 377; *Abdul Wahab v. Chandia*, (1886) I.L.R., 13 Cal., 305; *Queen-Empress v. Chandu Gowala*, (1887) I.L.R., 14 Cal., 355; *Empress v. Kallu*, (1882) I.L.R., 4 All., 66; *Queen-Empress v. Tha Dun*, (1892) S.J., L.B., 574; *Nga Pan E v. Queen-Empress*, (1896) P.J., L.B., 258; *Crown v. Nga San E*, (1901) I.L.B.R., 141; cited.

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<i>Held</i> ,—that the action of the District Magistrate and Subdivisional Magistrate was illegal, and ordered that the order of the District Magistrate and Subdivisional Magistrate be set aside, and the case disposed of by the District Magistrate under section 9, sub-section (2), of the Reformatory Schools Act.	
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A Court in which the plea of <i>res judicata</i> is urged can inquire into the jurisdiction of the Court which passed the former judgment so far as to see whether that judgment is, on the facts on record, not void on the ground of want of jurisdiction.	
<i>Gunnesh Pattro v. Ram Nidhee Koondoo</i> , (1874) 22 W.R., 361; <i>Cokul Mander v. Pudmanund Singh</i> , 6 C.W.N., 825; followed.	
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An advocate, who was engaged in several cases on the same day before different Judges, expected that one of his cases would not be called before a certain hour. It was however called earlier, when he was engaged elsewhere, and was dismissed for default under section 556 of the Code of Civil Procedure.	
<i>Held</i> ,—on an application for review of the order of dismissal, that the advocate had not been "prevented by sufficient cause from appearing," in the sense of section 629 of the Code.	
<i>Oriental Finance Corporation, Limited v. The Mercantile Credit and Finance Corporation, Limited</i> , (1866) Bom. H.C.R., II, 267; <i>Hardatrai Shrikisandas v. Bullion Association</i> , (1866) Bom. H.C.R., III, 00; <i>Raj Navain Burdhun and another v. Akroor Chunder Roy Chowdhry</i> , (1876) 24 W.R., 141; cited.	
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