LOWER BURMA RULINGS

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA.

VOLUME III

1905-1906

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LOWER BURMA RULINGS.

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

Criminal Appeal No. 43 of 1905.

February 27th 1905.

EBRAHIM DAWOODJI BABI BAWA *v.* KING-EMPEROR.

Messrs. *Agabeg* and *Maung Kin*—for appellant.

Arms Act, section 5—definition of "Arms"—dagger-shaped clasp knives.

Dagger-shaped knives, of the kind produced in this case, must be held to be intended primarily as weapons of offence, and to fall within the definition of "arms" in the Indian Arms Act, 1878, although they might be called clasp-knives.

Crown v. *Nga Hmat Kyan*, (1902) 1 L. B. R., 271, referred to.

Fox, J.—The appellant was convicted of having kept arms for sale in contravention of the provisions of section 5 of the Indian Arms Act.

The only question in the case is whether the implements seized by the Police officer at the accused's stall are "arms" within the meaning of the Act.

The implements are of three kinds: in one kind the steel blade is 5 inches and $\frac{1}{8}$th of an inch long and $\frac{6}{11}$ths of an inch broad, it is shaped and pointed as a dagger is usually shaped and pointed, but instead of being immoveably fixed to a handle as daggers usually are, it is fitted to a long handle in the way in which the ordinary pen and pocket knife is fitted, that is to say, it turns over into the handle, and when open and shut it is held by a spring.

The second kind is very like the first kind, but the steel blade is shorter, and it is slightly more curved on one side towards the point.

The third kind has a steel blade 4 $\frac{3}{11}$ths of an inch long and $\frac{3}{5}$ths of an inch broad, projecting beyond the handle, into which it slips and is held by a spring. In each kind the steel is ground away from the centre line of the breadth towards the sides.

In *Crown* v. *Nga Hmat Kyan* (1) I said that in my opinion the purpose for which an implement is primarily intended regulates whether it would in ordinary parlance be spoken of as an arm. Applying this test to the implements now in question, I do not think that there can be any doubt that the intention of the manufacturers of these implements was to supply weapons to persons who want efficient stabbing instruments. I cannot imagine any domestic purpose for which they would be necessary or useful, nor has the learned Counse

(1) (1902) 1 L. B. R., 271.

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who argued the appeal suggested any such purpose for which they may have been intended. No doubt they might be used for cutting, but for cutting small articles they must be unwieldy, and for cutting large things they cannot be of convenient shape or weight.

When open they are like the ordinary dagger and the persons making and selling them must know that they are likely to be bought by persons who want weapons of offence of the shape of a dagger. Under the circumstances they must be taken to intend to make and sell them as weapons of offence, although they may be called clasp-knives.

In my opinion all the instruments which were produced before the Court in this case are "arms" within the meaning of the Arms Act, and I would dismiss the appeal.

Thirkell White, C. J.—I am of the same opinion.

Criminal Revision No. 1514 of 1904.

January 19th, 1905.

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

KING-EMPEROR *v.* TUN GAUNG, SHWE LE AND NGA PE.

Section 562, Code of Criminal Procedure—Procedure if person ordered to give security is unable to do so.

There is no authority for the view that if an accused person is ordered to give security under section 562 of the Code of Criminal Procedure and fails to do so, he should be detained in prison till the expiration of the period for which security is to be furnished. The proper course is for the Magistrate to ascertain, before passing an order under section 562, whether the accused is likely to be able to give security immediately or within a reasonable time. If he fails to give security within a reasonable time, the Magistrate should pass sentence.

On 12th September, 1904, Shwe Lè and Tun Gaung were convicted of theft and very rightly, I think, ordered to be released under section 562 of the Code of Criminal Procedure on moderate security to be of good behaviour for six months and to appear for sentence, if required. In the circumstances of the case, the order was just and appropriate. Neither of the accused was in a position to give security immediately and the Magistrate committed them both to prison for six months or till, within that period, they furnished security. On the 30th September 1904, Shwe Lè furnished security, his sureties signing a bond in the form provided for securing the appearance of an accused person in a Magisterial enquiry. Tun Gaung has not yet furnished security and has undergone simple imprisonment for more than four months.

The Magistrate's view was that if an accused person was ordered to give security under section 562 of the Code of Criminal Procedure and failed to do so, he should be detained in prison till the expiration of the period for which security was to be furnished. This view is not in accordance with any provision of the law. The proper course is for the Magistrate to ascertain, before passing an order under section 562, whether the accused is likely to be able to give security immediately or within a reasonable time. If he fails to give

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security within a reasonable time, the Magistrate should pass sentence.

The Magistrate is directed to dispose of Tun Gaung's case in this way. If he has not already furnished security, the sentence should be nominal.

In these cases the security bond should be in Form Criminal No. 132.

Before Mr. Justice Birks.

Criminal Revision No. 59 of 1905. January 25th, 1905.

KUCHI *v.* KING-EMPEROR.

Mr. *McDonnell*—for the applicant.

Summary trial—Record must show ingredients of offence charged—Method of recording evidence—Section 355, Code of Criminal Procedure, not applicable.

The Magistrate's record in summary trials, however brief, must show the necessary ingredients of the offence charged.

In re Panjab Singh, (1881) I. L. R., 6 Cal. 579; *Queen-Empress* v. *Shidgauda*, (1893) I. L. R., 18 Bom., 97; *Queen-Empress* v. *Mukundi Lal*, (1899) I. L. R., 21 All. 189, followed.

It is not necessary for a record of evidence to be made in summary trials even where an appeal lies but section 264 provides that the substance of the evidence must be embodied in a judgment as well as the particulars in section 263. Section 355 merely prescribes a briefer record in summons cases and other cases which may be tried summarily when they are as a matter of fact tried regularly.

The petitioner, Kuchi, was tried jointly with Rammu and Kupe under sections 380-109 and 411 Indian Penal Code. The accused were tried summarily, the 1st and 2nd were acquitted and the petitioner was convicted of being in possession of the stolen bundle of clothing identified by the complainants and was sentenced to 45 days' rigorous imprisonment. From the examination of the first accused it would appear that his defence was that the complainants had told him to place the bundle of clothing in the petitioner's house which he did. The second accused stated that he had seen the first accused throw the bundle into the house occupied by himself and the third accused while the petitioner stated that he knew nothing about the matter till he was arrested. The Magistrate has found that because the bundle was found in third accused's house he must necessarily have a guilty knowledge. If the first accused's statement was true he either abetted the fabrication of a false charge against the third accused or he himself stole the bundle. On the merits the conviction cannot be supported as there is no clear indication that the petitioner had any guilty knowledge. Mr. McDonnell is correct in saying that the Magistrate's record in summary trials, however brief, must show the necessary ingredients of the offence charged, *vide In re Panjab Singh*, (1) *Queen-Empress* v. *Shidgauda*(2) *Queen-Empress* v. *Mukundi Lal*, (3) Mr. McDonnell however argues further that the provisions of section 355 Code of Criminal Procedure apply to summary trials and that the Magistrate is bound to make a

(1) (1881) I. L. R., 6 Cal., 579.
(2) (1893) I. L. R., 18 Bom. 97.
(3) (1899) I. L. R., 21 All. 189.

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brief note of the evidence of each witness under that section even in cases coming under section 263 Code of Criminal Procedure which expressly provides that "in cases where no appeal lies the Magistrate or Bench of Magistrates need not record the evidence of the witnesses." Section 355 Code of Criminal Procedure occurs in Chapter XXV and must be read with section 354 which describes the method of recording evidence in enquiries and trials "other than summary trials." It is not necessary for a record of evidence to be made in summary trials even where an appeal lies but section 264 provides that the substance of the evidence must be embodied in a judgment as well as the particulars in section 263. Section 355 merely prescribes a briefer record in summons cases and other cases which may be tried summarily when they are as a matter of fact tried regularly. In the present case the proceedings do not disclose that the petitioner has committed any offence.

The conviction will be set aside and the petitioner's bail bond will be cancelled.

(Civil Reference).

Civil Reference No. 7 of 1904. December 22nd, 1904.

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

LU THA *v.* MA SHWE ME.

Award—suit to set aside an —made otherwise than on a reference under Chapter XXXVII of the Code of Civil Procedure.

A suit to set aside an award made otherwise than on a reference under Chapter XXXVII of the Code of Civil Procedure is entertainable by a Civil Court in Lower Burma under section 39, Specific Relief Act.

Ma Tha Hmwe v. *Ma Ein Tha*, (1898) P. J. L. B., 480, overruled.

Story's Equity Jurisprudence, section 1451 and Russell on Awards, Chapter IX, section 1, cited.

The following reference was made to a Bench by Mr. Justice Fox under section 11 of the Lower Burma Courts Act, 1900:—

The Lower Appellate Court rightly followed the ruling in *Ma Tha Hmwe* v. *Ma Ein Tha*, (1) in which it was held that a suit to set aside an award made without the intervention of a Court would not lie.

In my opinion the correctness of that ruling is open to doubt. Under section 11 of the Lower Burma Courts Act, 1900, I refer to a Bench the question "Is a suit to set aside an award made otherwise than on a reference under Chapter XXXVII of the Code of Civil Procedure entertainable by a Civil Court in Lower Burma.

The opinion of the Bench was delivered by—

Fox, J.—The decision in *Ma Tha Hmwe* v. *Ma Ein Tha* (1), was based upon the ground that neither under the common law nor under any special enactment did a suit lie to set aside an award made without the intervention of a Court.

(1) (1898) P. J. L. B., 480.

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It appears to have been overlooked that Courts of Equity interfered to set aside awards in cases of fraud, mistake, accident, or otherwise good grounds for impeaching them—Story's Equity Jurisprudence, section 1451.

In the English Courts where an award could not be set aside on the somewhat summary procedure by motion, the remedy was by bill in equity—Russell on Awards, Chapter IX, section 1.

Section 39 of the Specific Relief Act appears to us to cover the case of a person who desires to have an invalid written award against him set aside.

There does not appear to be any strong reason for holding that such person must wait until the opposite party seeks to enforce the award before he can contest it.

In our judgment the answer to the question referred should be in the affirmative.

Before Mr. Justice Birks.

MA DAN DA *v.* KYAW ZAN.

Civil Second Appeal. No. 209 of 1904. February, 1st. 1905.

Messrs. *Burjorji* and *Dantra*—for appellant (defendant).

Mr. *Villa*—for respondent (plaintiff).

Mortgage or sale—burden of proof.

Plaintiff-respondent sued defendant-appellant for the recovery of a piece of land which he had mortgaged to her 13 years before. Defendant admitted the mortgage, but contended that it had been converted into a sale one year afterwards. Of this she produced no evidence except a map showing her name as the owner.

Held,—following the ruling in *Maung Po Te* v. *Maung Kyaw*, 1 *L. B. R. 215*, that the burden of proof was on defendant and that she had failed to discharge it.

Ma U Yit v. *Po Su*, (1902) 8, B. L. R. 189, distinguished. *Ko Po Win* v. *U Pe*, Civil Regular Appeal No. 42 of 1901, (unreported) also referred to.

The plaintiff-respondent, Maung Kyaw Zan, sued to redeem holding No. 134 comprising 37.46 acres, which was mortgaged by his deceased mother, Ma Oh, and her second husband U San Bye, to U Mye Lu, deceased, and Ma Dan Da, the defendant, 13 years ago.

The defendant denied at first that this particular land was mortgaged, but it appears that she only objected to the boundaries which were amended for when examined on oath she admitted the mortgage for Rs. 260 about 14 years ago and pleaded that she had taken over the land outright the following year. Both the Courts below relying on the ruling in *Maung Po Te and another* v. *Maung Po Kyaw and another* (1) held that the defendant had failed to discharge the burden of proof that the original mortgage had been converted into a sale, and decreed the claim. Mr. Dantra for the appellant admits that this ruling is against him but contends that it has been overruled by two subsequent decisions of this Court. The first of these is published in *Ma U Yit and five others* v. *Maung Po Su and one* (2). It may be noted in that case that it was a Regular or 1st Appeal and it was necessary to go into the

(1) (1901) 1 L. B. R. 215 | (2) (1902) 8 B. L. R. 189

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evidence to shew whether the Court of First Instance was justified in its conclusions. In paragraph 14 of my judgment in that case it is stated that the burden of proof was admittedly on the plaintiff, who sued to recover by a contemporaneous oral agreement at the time of the transfer. The judgment was devoted to considering how far the entries in the Revenue Registers should be relied on and the case of Maung Po Te was not even referred to. It was there pointed out that pyatpaing entries were of more value than the hazy recollections of conversations that took place years ago. This ruling did not profess to deal with the question of the burden of proof and it certainly did not overrule the decision in Maung Po Te's case.

In the present case the appellant pleads an entirely fresh transaction one year after the original mortgage and not a contemporaneous oral agreement at the time of a transfer purporting to be an outright sale.

The other case referred to by Mr. Dantra is Civil Regular Appeal No. 42 of 1901, *Ko Po Win and others* v. *U Pe*. The case was not reported. The ruling in Po Te's case was referred to and *Copleston, C. J.* said "I am prepared to follow that ruling in any case to which it might be applicable" and *Fox, J.*, said: "The original relationship between the parties was that of mortgagor and mortgagee and no doubt it lay in the first instance upon the mortgagee to shew that that relationship had come to an end." *Fox, J.*, considered that the burden had been shifted to the plaintiff and the Chief Judge held that the defendant had discharged the burden. The case does not profess to override Po Te's case but to follow it. Mr. Dantra's contention really is that the Courts on the authority of these rulings should have given weight to the entries in the Revenue Registers which shew an outright sale. This is in fact the 4th ground of appeal.

The second ground of appeal is that the judgment of the Lower Appellate Court does not comply with section 574 Civil Procedure Code. I do not think this is the case and this ground has not been argued. It appears from Ma Dan Da's evidence that Ma Oh was a relation and it is more likely that the second transaction was a conversion of a simple into a usufructuary mortgage, as found by the Lower Appellate Court.

It does not appear to me that any question of law arises in this appeal. The defendant never produced any pyatpaing in Court and as the burden of proof was on her it was her duty to do so. If the pyatpaing had been tendered in evidence the question might arise as to whether the burden of proof did not shift to the plaintiff. The mere production of a map, which shews Ma Dan Da's name as the owner's, is not sufficient to shift the burden of proof and the map is not even proved or referred to by the witnesses. The appeal is dismissed with costs.

Before Mr. Justice Birks.

Special Civil Second Appeal No. 124 of 1904. February 1st, 1905.

MA KO U AND MA SEIN U *v.* TUN E.

Hla Baw—for appellants (plaintiffs) | *Maung Kyaw*—for respondent (defendant)

Buddhist Law—Inheritance—Sale of undivided estate by co-heir—suit to set aside limitation.

When a suit is brought to set aside a sale of undivided ancestral property by one of the co-heirs, the circumstances of the case should be examined with a view to determine whether the suit is one for pre-emption governed by Article 10 of Schedule II of the Indian Limitation Act, or one for possession governed by Article 142.

Nga Myaing v. *Mi Baw*, (1874) S. J. L. B. 39; *Ma Ngwe* v. *Lu Bu*, (1877) S. J. L. B. 76; *Ebrahim* v. *Arasi*, (1893) P. J. L. B. 20; *Maung Lâ Dok and Maung Pyin* v. *Ma Po*, (1900) 2 L. C. 127; cited.

The plaintiff-appellants in this case sued to recover 7.53 acres of inheritance property, which they say had been made over by Maung Yan Aung, their father, on his second marriage to his five children, Nga Myaing, Ma Lan (both deceased), Ma Sein, 2nd plaintiff, Ma Ko U, 1st plaintiff, and Nga Shwe Kyaw. The land was not partitioned, but remained in charge of Nga Myaing, the eldest son and husband of 1st defendant, Ma Ket Gyi. The plaint alleges that they sold the land to the 3rd defendant, Nga Tun E, for Rs. 100 without the consent of the other heirs. Nga Than, the son of Nga Myaing, who died in 1901, was joined as 2nd defendant.

The plaint was originally filed by Ma Ko U, the 4th plaintiff, but notice was sent to the other heirs and the parties have all been joined or had an opportunity of being joined. Nga Tun E defended the suit on the ground that he acted with the consent of all the heirs, who had given the purchase-money to their father, Maung Yan Aung. The Court of First Instance decreed the claim for four-fifths holding that Nga Myaing's sale was valid to the extent of his own share. The Lower Appellate Court has reversed this decree on the ground that the claim was one for pre-emption and that the plaintiffs were bound to sue within one year under Article 10 of Schedule II of the Limitation Act. It is not disputed that if this Article applies the suit will be time-barred.

Mr. Hla Baw for the appellants contends that the suit is not a suit for pre-emption but for recovery of immoveable property and that Article 144 of the 2nd Schedule will apply to the case. No authorities on either side have been cited. In *Nga Myaing* v. *Mi Baw* (1), Mr Sandford defined the term "pre-emption" by "the option of purchasing if one of the co-heirs of undivided ancestral property wishes to sell," and it was held that one of the co-heirs of undivided ancestral estate, should he wish to sell his share, is bound to offer it first to his co-heirs. This ruling does not say that the co-heir has any right to sell anything but his own interest, and he can only sell that after offering it to the other co-heirs. In the case of *Ma Ngwe* v. *Lu Bu* (2), the right of pre-emption was extended to the case of a divided share but neither of these cases contemplate that an heir has power to sell anything but his own share. In

(1) (1874) S. J. L. B 39. (2) (1877) S. J. L. B. 76.

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the case of *Ebrahim* v. *Arasi* (3), the plaintiffs alleged that certain land belonging to them and their brother, the defendant, Danai, was sold without their consent by Danai and their mother, Mi Ni, to Ebrahim. Mr. Hosking held that, as the plaintiffs were not parties to the sale, their own shares of the land in dispute did not pass to Ebrahim and that the plaintiffs as Karen Christians had no right to appeal to the Buddhist law and redeem the third share which Danai could sell. In the case of *Maung Lu Dok and Maung Pyin* v. *Ma Po* (4), the Judicial Commissioner, Upper Burma, held that the right of pre-emption is in the co-heirs collectively and that there is no law by which a single co-heir can enforce pre-emption unless the consent of the other co-heirs has been obtained.

The learned Judge in that case intimated a doubt as to whether in the case of undivided property a sale of it by one co-heir was not invalid "ab initio," the seller not having anything to sell except a right to obtain a share on partition, the share *ex hypothesi* not having been ascertained. The Lower Appellate Court has overlooked the fact that the Court of First Instance disallowed the plaintiff's claim to recover Nga Myaing's own share, which was one-fifth. The Article that seems to apply is 142 of 2nd Schedule of the Limitation Act, for it seems that Nga Myaing was in possession on behalf of the other co-heirs and his sale to Nga Tun E, if made without the consent of the co-heirs, would dispossess them. Now Nga Tun E, in his written statement, says that the land in dispute was first sold by Nga Yan Aung for Rs. 80 to his daughter, Mi Lon Ma, but as she could not pay, he took it back and then in 1897 he sold it jointly with Nga Myaing, his son, to defendant for Rs. 100. The suit is therefore within time so far as the interests of the plaintiffs are concerned. The Lower Appellate Court has not gone into the merits of the case or considered the defendant's plea that the plaintiffs and two of the other heirs really did consent to the sale. The decree of the Lower Appellate Court is set aside and the case will be remanded for a decision of the appeal on the merits under section 562 of the Code of Civil Procedure. The costs of this appeal will be costs in the case.

Civil 1st Appeal No. 36 of 1904.

January 10th, 1905.

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

MA KYI KYI AND MAUNG KYA NYOON *v.* MA THEIN, MAUNG HLA AUNG, MA SHWE HLA AND U SHWE PE.

Messrs. *Lowis and Giles*—for Appellants (defendants).

Messrs. *Agabeg and Maung Kin*—for Respondents.

Buddhist Law—Inheritance—Shares of children of the same parents dividing an inheritance after their parent's death.

Where children of the same parents divide an inheritance after their parent's death, no decisive, definite rule of unequal division can be extracted from the Dhammathats either by consensus of all or by definite weight of authority. In view of this fact and of sections 60 and 61 of the *Digest* which lay down a general principle that if all the children share equally in the work and responsibilities of the

(3) (1893) P. J. L. B. 26. (4) (1900) 2 L. C. 127.

family each is entitled to an equal share of the inheritance, the principle of equal division may be taken as an established rule of law.

Ma Saw Ngwe v. *Ma Thein Yin*, (1902) 1. L. B. R, 198; *Ma Po* v. *Ma Swe Mi*, (1897) 1 L. C., 418; *Ma E Mya* v. *Ma Kun*, (1892) 2 L. C., 107; *Maung Pan* v. *Ma Hnyi*, (1897) 1 L. C., 441; *Po Lat* v. *Mi Po Le*, (1883) 1 L. C., 238; *Ma Ba We* v. *Mi Sa U*, (1903) 2 L. B. R., 174; followed.

Thirkell White, C. J.—The question for consideration in this appeal is whether the Court of First Instance has rightly held that, among Burmese Buddhists, three daughters, inheriting the estate of their deceased parents are entitled each to an equal share.

The contention of the appellant is that the case is expressly provided for in sections 141 and 142 of the *Digest of Buddhist Law*, which purport to regulate the division of inheritance between three sons or three daughters. All the texts in section 141 prescribe an unequal division of the estate. The majority lay down the rule that the eldest son or daughter takes two shares, the second, one share and a half, the third, one share. But *Dhammasara*, *Kyetyo*, *Vinicchaya* and *Kyannet*, give different and inconsistent rules; *Vinicchaya* and *Kyannet*, indeed, each in two texts prescribe two entirely inconsistent rules of partition. Moreover, it is to be observed that in many of the texts it is explicitly stated that the rule applies only to unmarried children. In the present case, it is admitted that all the daughters were married in the life-time of their parents. It seems to me difficult to hold that this section of the *Digest* is an authority for one definite and consistent rule of partition in the case of three married daughters. It seems probable that the rule contained in the majority of the texts in this section was intended to apply to division among unmarried children, though in many of the texts this is not explicitly stated. This may explain the inconsistent rules in *Vinicchaya* and *Kyannet*, in each of which Dhammathats the rule contended for by the appellants is explicitly restricted to the case of unmarried children, while the conflicting rule is laid down without any restriction. It is to be observed, however, as opposed to this conjecture, that section 166 of the *Attasankhepa Vannana*, a late compilation of very high authority, states the rule as in the majority of the texts in section 141 of the *Digest* without limiting it to the case of unmarried children.

Apart from the consideration whether section 141 of the *Digest* provides a special and comparatively simple rule, applicable to the case of a division between three sons or three daughters in all conditions, a further examination of the *Digest* and of some of the Dhammathats from which it is compiled shews that, as regards the division of an inheritance among children of deceased parents, there is much diversity of authority. But before proceeding to consider these divergent rules, I may refer to the first sections of Chapter VIII of the *Digest* which seem to lay down a general principle, other sections containing rules of special application to concrete cases. The general principle enunciated in sections 60 and 61 of the *Digest*, the opening sections mentioned above, is that if all the children share equally in the work and responsibilities of the family, each is entitled to an equal share of the inheritance. The texts are on the whole consistent and they shew

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that the rule of Buddhist Law which has been held to give a preference to the eldest son or daughter is based, not so much on priority of birth as on the assumption that the eldest child takes a more prominent part than other children in the acquisition and preservation of the family estate. This principle is very clearly enunciated in section 12 of the *Dhammavilasa** where it is said that if all the children work equally for the family benefit, or if there is no work, the inheritance shall be equally divided.

In sections 151 and 152 of the *Digest* are general rules for the partition among several sons and daughters. Unless it is accepted that the rules laid down in sections 141 and 142 apply only to the case of unmarried children, the case stated in sections 151 and 152 includes the case stated in sections 141 and 142. It is not specifically limited to the case where there are more than three sons or daughters. The rules in these later sections which purport to regulate the division among several sons or daughters are of the most elaborate and conflicting nature. The eldest son or daughter takes a specific portion; the property is then divided into ten or twenty shares of which the eldest takes one, and so on. Whether the division should be into ten or twenty shares, and how often the division is to be repeated, are points on which the texts are irreconcilable. *Manugye X. 13* enunciates general rules similar to those in section 151 and section 152 of the *Digest* and is indeterminate inasmuch as it leaves undecided the question how many times the division is to be effected. It seems to me to be impossible to extract one uniform and consistent rule, supported by preponderant authority, from the texts in section 151 and 152 of the *Digest*, or to reconcile sections 151 and 152 with sections 141 and 142, except on the supposition that the latter applies to the case of unmarried daughters. In any view, it is difficult to believe that it was intended to lay down a special rule, to meet the isolated case of three sons or three daughters, which should be entirely different from the rule applicable to four or more sons or daughters.

Leaving for the present the examination of the texts, I turn to the authority of judicial decisions. The authority followed by the learned Judge of the Court of First Instance is that of a Bench of this Court in the case of *Ma Saw Ngwe* v. *Ma Thein Yin* (1) in which it was observed that, in Lower Burma, the custom had undoubtedly grown up of an equal division among co-heirs; and the decision was given on the basis of that principle. The case of *Ma Po* v. *Ma Swe Mi* (2) was cited as a precedent for a similar view in Upper Burma. In that case, it was held that the only rule of Buddhist Law shown to be operative in respect of the partition of inheritance between two sisters, on the same footing, except as regards age, was that of equality of partition. But I do not regard this case as in itself a very strong authority on the general principle. For the parties were given an opportunity of shewing what was the law or custom on the point in issue; evidence of local custom was adduced, and the decision was

* Sir John Jardine's Notes on Buddhist Law, VII. 4.

(1) (1902) 1 L. B. R., 198.

(2) (1897) 1 L. C., 418.

limited in terms to the particular case before the Court. But in a previous case, that of *Ma E Mya* v. *Ma Kun* (3) the learned Judicial Commissioner of Upper Burma, Mr. Burgess, had already remarked in general terms on the comparatively small regard paid to the technical rules of the Dhammathats and the tendency in favour of equality in the distribution of inheritance. In a later case in Upper Burma, *Maung Pan* v. *Ma Hnyi* (4) where the division was between two sons and two daughters, it was hardly disputed that the shares should be equal. Long before, in the case of *Po Lat* v. *Mi Po Le* (5), the learned Judicial Commissioner of Lower Burma, Mr. (now Sir John) Jardine, had incidentally recorded his general impression of the equality sought by Buddhist Law. In the Full Bench case of *Ma Ba We* v. *Mi Sa U* (6), of this Court, equality of division was assumed to be the rule But the point does not seem to have been explicitly raised. So far as I have been able to ascertain, these are the only cases in which the question has been dealt with, directly or indirectly, by the Superior Courts. Although the reported cases go back for more than 30 years, no case has been cited in which any rule other than that of equality of division among children of the same parents, dividing an inheritance after their parents' death, has been adopted.

Although the cases on the point are not many or very decisive, there can be no doubt that, in the opinion of learned Judges both in Lower and Upper Burma, the rule of equal division has been regarded as established or as tending to attain supremacy. The case seems to be one in which clearly no decisive, definite rule of unequal division can be extracted from the Dhammathats either by consensus of all or by definite weight of authority. The solution of the question, so far as the texts of the law are concerned, seems to be found in those sections of the *Digest*, which I have cited, which explained the reason of the later rules prescribing inequality of division. These sections seem to me to explain the tendency observed in the decisions which, but for this, might be regarded as contrary to the authority of the Dhammathats. In my opinion, especially in view of the impossibility of formulating an intelligible rule to any other effect, these sections are a sufficient authority for following the ruling of this Court which has been cited by the Court of First Instance and for holding it to be an established rule of law in Lower Burma that children of the same parents, dividing an inheritance after their parents' death, take each an equal share.

I would therefore affirm the decision of the Court of First Instance and dismiss this appeal with costs.

(3) (1892) 2 L. C., 107.
(4) (1897) 1 L. C., 441.
(5) (1883) 1 L. C., 238.
(6) (1903) 2 L. B. R., 174.

Civil 1st Appeal No. 42 of 1904, December 12th, 1904.

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

MAHOMED BHOY NANSEE KHAIRAZ AND HASSAN BHOY NANSEE KHAIRAZ } *v.* BENJAMIN MEYER.

Mr. *Giles*—for the appellants (defendants) | Mr. *Eddis*—for the respondent (plaintiff).

Contract, Breach of—Damages, Measure of—Interpretation of Indian Contract Act, section 73.

Goods which the buyer could not be compelled to accept may be a basis for the calculation of damages to which the buyer is entitled for breach of contract to deliver. The measure of damages is the difference between the contract price and the market price of similar, not necessarily identical, goods. Rice of the same market description as the rice, concerning which the suit for damages for breach of contract to deliver was brought, although milled at mills other than those specified in the contract is "similar" in this sense.

Mayne on Damages, 6th Edition, 183; *Bowes* v. *Shand*, (1877), L. R., 2 App. Ca. 455, cited.

Fox, J.—The plaintiff sued for damages for breach by the defendants of their contract to deliver to him within a specified time a quantity of a certain description of rice. The breach of contract was admitted, and the only matter in dispute was the amount of compensation to which the plaintiff was entitled. It was said and is admitted that the measure of damages is the difference between the cost of the quantity of rice at the contract price and its cost at the market rate for the description of rice contracted for at the end of January 1904.

One clause of the contract provided that the sellers should have the option of delivering rice of the milling of one or more of ten specified firms of rice-millers, whose mills have been referred to throughout the case as "the big mills." During the course of the trial the learned Judge refused to allow the advocate for the defendants to cross-examine as to the rate at which rice sold as of the same description, but said to be of as good or better quality, could have been obtained from "small mills" on the 30th January, which was the last working day of the month. He held that evidence as to sales of rice produced at small mills was irrelevant. In this judgment he gives his reasons for so holding at some length. He considered that the contract was for "big mill rice," that this was a totally distinct commodity from "small mill" rice, that the two were dealt with in different markets, and that the relative prices of the two not being in constant relation, the price of one at any given time afforded no criterion as to the price of the other.

I am unable to agree with the learned Judge in these views.

Admitting that the contract contemplated delivery of "Usual Straits Quality White Rice" milled by one or more of the "big mills," and admitting that the contract could not have been properly fulfilled except by delivery of such rice milled by one or more of such firms, the question before the Court was as to the amount of compensation to which the plaintiff was entitled in consequence of the defendants' breach of contract in not delivering such rice.

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On that question the principles laid down in section 73 of the Contract Act must be the foundation of decision, amongst them the rule that in estimating the loss or damage arising from a breach of contract the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The subject-matter of the contract is a marketable commodity in a place where there is a market for such commodity. Illustration (*a*) to the above section indicates that in such a case the buyer is entitled to receive the sum, if any, by which the contract price falls short of the price at which the buyer might have obtained rice of *like quality* when the rice contracted for should have been delivered.

Mr. Mayne in his Treatise on the Law of Damages* states the rule in the following words:—

"The measure (of damages) is the difference between the contract price and that which goods of a similar description and quality bore at the time when they ought to have been delivered."

The question then is whether "Usual Straits Quality White Rice" milled by "small mills" is of a similar description and of like quality to "Usual Straits Quality White Rice" milled by "big mills." It is admitted that "small mills" as well as "big mills" put upon the Rangoon rice market, which is the market we have to deal with, a description of milled rice which both classes of mills offer and sell as "Usual Straits Quality White Rice." It may be that heretofore there has been some difference between the rice turned out as such White rice by the two classes of mills, and that such difference is recognized not only in the Rangoon market but also in the Straits Settlements markets. It appears from the evidence that the rice turned out by the small mills has been considered somewhat better than that turned out by the big mills, and that the former has, as a rule, commanded a somewhat better price. It would appear, however, that differences in qualities exist between the outturns of the big mills also.

However this may be, the fact remains that both big and small mills put a certain description of rice on the market to meet the market description embodied in the terms "Usual Straits Quality White Rice." If the lots put on the market are not exactly alike, the terms must cover a description or class of rice milled as to degree or method up to and above some recognized minimum of degree or method or of both. Since the product of both classes of mills so milled is accepted in the market under the terms, it appears to me that the product of both classes of mills must be taken to be of the same description. Are both products also of like quality within the meaning of the rule of law? In the first place it is to be observed that the rule does not require that the basis of calculation shall be the price of goods of identical quality. The words of the contract "the grain to be *fair average* of the quality procurable at the time of milling" in themselves contemplate differences in the quality of grain in various lots being covered by the terms of description. No reference is made in the contract to differences in the degree or method of milling, but when a large num-

* Mayne on Damages, 6th Edition, 183.

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ber of firms mill rice to meet a demand for a comprehensive description, such as "Usual Straits Quality White Rice" is, and there is no further stipulation in the contract as to quality, it appears to me that for the purposes of the rule of law, all rice which would be accepted on the market as within those terms must be considered to be of like quality.

In estimating damages the Court is not precluded from taking into consideration any special circumstances connected with transactions in any particular lot or lots of the goods in question, and I am far from saying that the fact for instance, that any particular lot fetched a higher price on account of its being particularly well turned out, would not have to be taken into consideration.

The inconstancy of the relationship in price of the big and small mills does not appear to me to affect the question any more than inconstancy between prices given for the produce of any two or more big mills would affect it. The variations in prices may add to the difficulties of coming to a decision but those difficulties may rise in any case.

I cannot find any evidence on the record showing that "big mill" rice and "small mill" rice are dealt with in different markets.

In my opinion the learned Judge erred in excluding cross-examination and evidence as to the transactions in "Usual Straits Quality White Rice" produced by small mills.

For these reasons I would remit the case to the Original Side of the Court under section 569 of the Code of Civil Procedure for the purpose of allowing the defendants to cross-examine the plaintiff's witnesses, and to call evidence as to the price of any rice offered, sold, or asked for under such description at or about the time when the rice should have been delivered under the contract.

On receipt of the additional evidence, if any, the appeal should be again fixed for hearing.

Thirkell White, C. J.—The contract out of which this suit arises was to deliver rice of a specified quality milled at certain specified mills or at one or some of those mills. For the sake of convenience they are called the big mills. In my opinion, the condition as to the specified mills at which the rice was to be milled must be taken as part of the description of the rice deliverable under the contract. If the sellers had tendered rice milled at other mills, the case of *Bowes* v. *Shand*, (1) on which the learned Counsel for the respondent mainly relied, is an authority for the position that this would not have been a good tender. Assuming this to be the law, the learned Counsel argued that something which the buyer could not be compelled to accept, if tendered, could not be a basis for the calculation of damages to which the buyer is entitled. If there were no authority on the subject, if we had to decide on first principles, there might be force in this contention. But we are not left without guidance in this matter; and it can be shown that the general proposition which I think I have correctly reproduced is not sound in law. The instance given in illustration (*g*) to section 73 of the Contract Act is precisely apposite. In the case therein imagined, the contract was to let a ship for a year,

(1) (1877) L. R., 2 App., Ca. 455.

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On the principle assumed above, the person who contracted to let the ship could not tender a similar ship and claim to have fulfilled his contract. But when there was a breach on his part, the measure of damages was the difference between the contract price and the price for which a similar ship could be hired. In the same way, when the contract in the present case was broken, the measure of damages is the difference between the contract price and the market price of similar, not necessarily of identical, rice at the time when the contract was broken. The illustration which I have cited seems to me to be sufficient authority for this view. I agree, therefore, that the market price of rice milled at small mills and otherwise of the same description and quality, may rightly be taken into consideration in assessing damages for breach of a big mills contract. The fact that rice of similar quality and description milled at small mills is, if it be the case, if anything superior to rice milled at big mills is an additional reason why the buyer should not object to taking into consideration the price of small mills rice.

For these reasons, I concur in the proposed order remanding the case for further evidence.

Before Mr. Justice Birks.

Special Civil Second Appeal No. 183 of 1904. March 1st, 1905.

MAUNG PE, MA DUN, MA BAING, MAUNG MYAING AND YA GYAW *v.* MA TAIK.

Mr. *Palit*—for appellants (defendants.) | Mr. *Villa*—for respondent (plaintiff).

Mortgage—suit for redemption—Buddhist Law—joinder of parties—Transfer of Property Act, s. 85—Code of Civil Procedure, s. 437.

Under Buddhist Law, a widow is entitled to an absolute disposing interest in her own share of the family property and to a life interest in the remainder. An only surviving daughter cannot, without joining the widow as a party, bring a suit on her own account for the redemption of property mortgaged by her deceased father.

The daughter is bound by an act of the widow extending the mortgage for a term of years.

Ma On v. *Ko Shwe O*, (1886) S. J. L. B. 378; *Ma Thin* v. *Ma Wa Yon*, (1904) 2. L. B. R. 255; *Ram Baksh Singh* v. *Mohunt Ram Lall Doss*, (1874) 21 W. R., 428; *Prannath Roy Chowdry* v. *Rookea Begum*, (1859) 7 Moore's I. A., 323, *Hall* v. *Heward*, (1886) 32 Ch. D. 430; cited.

The plaintiff-respondent in this case sued to redeem 7·95 acres of paddy-land mortgaged by her adoptive father Maung Cho and his first wife Ma Nyo, for various sums amounting in all to Rs. 250 in the year 1880 to Maung Ku, the grandfather of the first, second and third defendants.

The plaint sets out that Maung Cho died in 1883 and before his death married his third wife, Ma O Za, who is admittedly still alive though her whereabouts is not known. Maung Cho left no other heirs except Ma Taik and his widow Ma O Za. The plaint also alleges that the fourth and fifth defendants were in possession of the property in suit and the plaintiff claims to redeem them for Rs. 250. The first, second and third defendants admitted the totals of the original mortgage but alleged that Ma O Za had raised a further sum of Rs.

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300 on the same security and that there was the condition that the land should not be redeemed for 30 years from the year 1878. They also denied that Ma Taik was a *keiktima* daughter and pleaded that the suit was premature, as four years had still to run before the 30 years had expired. It is not disputed that portions of the land in dispute have been re-mortgaged by first, second and third defendants to fourth and fifth defendants.

The Court of First Instance dismissed the suit on the ground that, though Ma Taik had proved she was an adopted daughter, she should not have sued alone till a partition of the estate had been effected between her and Ma O Za. The Court also found that the subsequent mortgages alleged by the defendants were proved.

On first appeal plaintiff succeeded in obtaining a decree for redemption on payment of Rs. 550.

There are eight grounds of second appeal as follows:—

(1) That the decision is against the weight of evidence.
(2) That the suit should not have been maintained without the addition of Ma O Za as a party.
(3) That a written adoption having been pleaded, no oral evidence of it should have been admitted.
(4) That the adoption was not proved.
(5) That the Lower Appellate Court erred in holding that Ma O Za had no right to mortgage the land for 30 years without the consent of the plaintiff-respondent.
(6) That the 30 years not having expired the suit should have been held to be premature.
(7) That the plaintiff was estopped by her conduct from disputing the said mortgage.
(8) That the appellants being *bonâ fide* transferees for consideration, the plaintiff was not entitled to redeem before the expiry of the stipulated period.

The respondent has filed cross-objections on the ground that there was no evidence of the necessity for a further loan of Rs. 300 to Ma O Za, and that this alienation would only affect her share.

Now I think it is clear that on the death of Maung Cho his estate vested in his widow who had an absolute disposing right as far as her own interest was concerned and a life interest in the remainder – *vide* the judgment of the Special Court in *Ma Ôn* v. *Ko Shwè O* (1). It is not alleged that Ma O Za has sold any of the property and she had the right to mortgage it without reference to the wishes of her deceased husband's adopted daughter. No doubt on the authority of the ruling in *Ma Thin* v. *Ma Wa Yon* (2), Ma Taik could, as adopted daughter, have claimed one-fourth of the estate on the re-marriage of her adoptive father with Ma O Za and she would then have had an undisputed right to that one-fourth share. It is not alleged that there has been any division of the estate and it would seem that Ma O Za, as the surviving widow, has an absolute right as to three-fourths and a life interest as to the one-fourth share. As long as she did not effect

(1) (1886), S. J. L. B., 378. | (2) (1904), 2 L. B. R. 255.

an out right sale she would also have the right to mortgage the property.

Mr. Palit for the appellant relies on *Ram Baksh Singh* v. *Mohunt Ram Lall Doss* (3). This case was decided in April 1874 before the Transfer of Property Act of 1882 came into force. It was there held "That a suit for the redemption of mortgaged property cannot go on to a due determination till all the mortgagors are made parties." In that case the Privy Council Ruling in *Prannath Roy Chowdry* v. *Rookea Begum* (4) was cited where the Privy Council held that the tender must be made "with the consent and on behalf of all the mortgagors."

Mr. Villa relies on the case of *Hall* v. *Heward* (5) where it was held that if there is a person interested as heir who cannot be ascertained the Court does not refuse a decree for redemption. This case is not applicable for the owner's heir-at-law in that case was not known at all. It is true that the Transfer of Property Act had not been extended to Lower Burma generally except the Town of Rangoon when this case was decided but section 85 merely contains a general principle of law which existed before it came into force. This section provides, "that subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties under this Chapter in a suit relating to such mortgage: provided that the plaintiff has notice of such interest." Section 437 of the Code of Civil Procedure reads as follows :—

"In all suits concerning properties vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the parties so interested and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties."

From this it is clear that though Ma O Za as surviving widow might have brought the suit for redemption on account of the plaintiff as holding her one-fouth share in trust for her, she could maintain a suit for redemption without joining her unless the Court saw fit to make her a party. In the present case the person beneficially interested to the extent of only the one-fourth share is suing on her own account without the consent of her trustee and in my own opinion such a suit was not maintainable. The appellants must succeed on the second and fifth grounds stated in the Memorandum of Appeal and this renders it unnecessary to go into the other grounds. The plaintiff would apparently be bound by any agreement made by the widow that the land should not be redeemed for 30 years; but I am unable to agree with the remarks of the Court of First Instance that there is any risk of the suit brought by Ma O Za being barred, for the right to redeem will remain for 60 years from the date when the right to redeem accrues, under Article 148 of the 2nd Schedule of the Limitation Act of 1877. The decree of the Lower Appellate Court is reversed and the suit will be dismissed with costs throughout.

(3) (1874), 21 W. R. 428. (4) (1859), 7 Moore's I. A., 323.
(5) (1886), 32 Ch. D.: 430.

Special Civil 2nd Appeal No. 75 of 1904. February 2nd 1905.

Before Mr. Justice Birks.

NGWE GYI AND MYA SAN *v.* SHWE BO, PO ZEYA AND MA ON NGWE.

Mr. *Palit*—for the appellants (defendants.) | Messrs. *Das and Christopher*—for the respondents (plaintiffs).

Res judicata—Civil Procedure Code, s. 13—sale by benamidar.

In a suit for the recovery of a piece of land, plaintiff's case was that it had been mortgaged by his sister Ma Lon, whom he had left in charge of it, to one Mi Wi, (represented by the appellants in the present case) about twenty years before. Previous suits by Ma Lon against Mi Wi for the recovery of the land had been dismissed, Mi Wi pleading that the transaction was a sale and not a mortgage. It appeared that Ma Lon, who had no personal interest in the land, had brought these suits as a *benamidar* on behalf of plaintiff.

Held,—that plaintiff was bound by the decrees in the former suits, and could not recover on his secret title in the present case, which was barred by *res judicata*.

Khub Chand v. *Narain Singh*, (1881) I. L. R. 3 All., 812; *Nand Kishore Lal* v. *Ahmad Ata*, (1895), I. L. R. 18 All., 69; *Shangara* v. *Krishnan*, (1891), I. L. R., 15 Mad., 267; *Ravji* v. *Mahadev*, (1897), I. L. R., 22 Bom., 672; *Maung Sa* v. *Ma Kyok*, (1899), P. J. L. B., 512; cited.

The plaintiff-respondents, the legal representatives of U San Dwe, deceased, sued defendant-appellants, the legal representatives of Mi Wi, deceased, to recover possession of 10·96 acres of paddy land valued at Rs. 100. The plaint sets out that the land in dispute was left by U San Dwe's parents, who had six children, four of whom did not want their shares, twenty-five years ago; and that U San Dwe had acquired his sister Ma Lon's share for Rs. 50. He worked the land for one year and then moved to Kaman village, leaving Ma Lon in charge of the property, which he did not ask for till four years ago, when she told him that it had been mortgaged to Mi Wi. The plaint concludes with a prayer that the land may be made over by Ma Lon and Mi Wi. Ma Lon admitted the facts set out in the plaint, and said that her husband had mortgaged the land to Mi Wi for Rs. 100. Mi Wi pleaded an outright sale for Rs. 120 by Ma Lon and her husband twenty years ago. She says the land is now worth Rs. 300: that Ma Lon and her husband filed a suit to redeem the land, which was dismissed, and that the brother and sister were acting in collusion.

Five issues were framed by the Court of First Instance as follows:—

(1) Is the case barred by *res judicata* under section 13 of the Criminal Procedure Code?

(2) Did the plaint land belong to plaintiff (U San Dwe) or first defendant (Ma Lon) before its alleged mortgage to second defendant (Mi Wi)?

(3) Did plaintiff entrust the plaint land to first defendant as a temporary measure?

(4) Did first defendant mortgage or sell the plaint land to second defendant?

(5) What was the value of the land twenty-five years ago?

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The Court of First Instance held that as U San Dwe was not a party to the previous suits the present claim was not barred; that U San Dwe was the original owner and had entrusted the land to his sister Ma Lon; that he had asked her to redeem the land for him and that in consequence she had twice sued Mi Wi in the Thigwin Township Court. The learned Judge considered that the fact that U San Dwe did not claim the land for twenty years told against him, but was due to his ignorance of law. He also found that the land had been entrusted to the first defendant Ma Lon and that it was immaterial whether she sold or mortgaged the land to second defendant Mi Wi as she had no title to convey.

The chief point that was argued before the lower Appellate Court was that the suit was barred by limitation under Article 142 of the Second Schedule of the Act. The lower Appellate Court held that Mi Wi's possession became adverse on 15th December 1899, when Ma Lon's claim was finally dismissed. The decree was modified by directing redemption of the land on payment of Rs. 100. In this Court the main grounds of second appeal are that Ma Lon was *benamidar*, and she instituted these suits in the Thigwin Township Court at the instance of U San Dwe, who was the person with the beneficial interest and that therefore the present claim is barred under section 13 of the Code of Civil Procedure, and also that the Court of First Instance having found that plaintiff had slept over his rights for twenty years and taken no action, he is estopped now from bringing this claim.

Mr. Palit, for the appellants, relies on the following cases :—

Khub Chand v. *Narain Singh* (1).—In this case *Straight, C.J.* and *Tyrrell, J.*, held "That where G sold an estate nominally to the minor son of K but in reality to K, and K had brought a suit in his son's name against N for redemption, the decision was binding in a subsequent suit brought by N against K himself on the ground that K, though not a party in name in the former suit, was so in fact."

In Nand Kishore Lal v. *Ahmad Ata* (2) *Blair* and *Burkitt, JJ.* held that there a suit is instituted by a *benamidar* in his own name, it must he held to be instituted with the consent of the beneficiary against whom an adverse decision will have the effect of *res judicata*.

In Shangara v. *Krishnan* (3), *Parkes* and *Wilkinson, J.J.* held "That where the plaintiff's case was that land had been purchased *benami* in the name of his brother, who had sued to obtain possession and failed, the plaintiff was bound by that decree and could not recover on his secret title."

This case was followed in *Ravji Mahadev* (4), where the ruling in Nand Kishore Lal's case was approved.

(1) (1881) I. L. R. 3 All., 812.
(2) (1895) I. L. R. 18 All., 69.
(3) (1891) I. L. R. 15 Mad., 267.
(4) (1897) I. L. R. 22 Bom., 672.

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It is clear from the judgment, Ex. C, of the Thigwin Township Court, that an issue was raised as to whether the land was mortgaged for Rs. 100 in 1882 with a stipulation that it could be redeemed at any time and the judgment states that the defendant Mi Wi pleaded a sale. The Court found that the plaintiff Ma Lon had failed to prove the mortgage and dismissed the suit. It has been found by the Court of First Instance that this suit was brought at the instance of the present plaintiff and that Ma Lon had parted with her own interest in the land. It is clear therefore that Ma Lon was acting for the person who had a beneficial interest and the rulings cited will apply.

Apart from these rulings I think the principles laid down in *Maung Sa* v. *Ma Kyok* (5) will also apply for the plaintiff permitted his sister to deal with the property as her own and allowed the defendant to contest the suit on the understanding that Ma Lon was the real owner. The fact that he has stood by for twenty years is conclusive proof that Mi Wi had no notice of his secret title. The appeal is allowed and the plaintiffs' suit will be dismissed with costs throughout.

Criminal Revision No. 1663 of 1904. February 1st, 1905.

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

PAN NYUN, HMIN GE, THA HLA AND SHWE NGO *v.* MAUNG NYO.

Messrs. *Pennell* and *Maung Thin*—for applicants. | Mr. *Agabeg*—for respondent.

Criminal Procedure Code, s. 522—order restoring possession of immoveable property—certain conditions of validity.

Although there is no explicit provision of law to require that a Magistrate who passes an order under section 522 Code of Criminal Procedure should give the party against whom it is proposed to make the order an opportunity of shewing cause against it, he should do so as a matter of the due exercise of judicial discretion. Before an order can be passed under section 522 there must be conviction of an offence of which the use of criminal force is a material ingredient.

Mohunt Luchmi Dass v. *Pallat Lall*, (1875) 23 W. R. 54, followed.

The applicants were convicted of criminal trespass and on the 14th July, 1904, sentenced to pay fines. On the 30th July, 1904, the complainant, Maung Nyo, applied to be put in possession of the land in respect of which the trespass was committed. Without calling on the accused to shew cause, the Magistrate ordered the possession of the land to be restored to the complainant. He purported to be acting under section 522 of the Code of Criminal Procedure.

It is not necessary for me to decide whether an order under section 522 must be passed at the time of, or as an immediate sequence to, the conviction. For I am satisfied that the order must be set aside on other grounds.

Although there is no explicit provision of law to require it, I have no doubt that a Magistrate who passes an order under section 522 should, as a matter of the due exercise of judicial discretion, ordinarily

(5) (1899) P. J. L. B. 512.

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give the party against whom it is proposed to make the order an opportunity of shewing cause against it. This is especially necessary when the application for the order is made, rightly or wrongly, at some time after the conviction. A similar view has been taken in this Court and in other High Courts in respect of an order under section 437 of the Code of Criminal Procedure. In this case, I should be prepared to set aside the order on this ground alone.

But there are other grounds also. Before an order can be passed under section 522 of the Code of Criminal Procedure it is essential that a person should be convicted of an offence attended by criminal force. I can attach no other meaning to this provision than that attached to the similar provision in the Code of 1872 by the High Court at Calcutta in *Mohunt Luchmi Dass* v. *Pallat Lall* (1). The conviction must be of an offence of which the use of criminal force was a material ingredient. In the present case, there was no finding or allegation that criminal force had been used in the commission of criminal trespass. An order under section 522 could not therefore legally be passed.

These reasons are sufficient basis for the order in this case and I need not pursue the matter further. The only doubt that I have is whether I should pass any order, seeing that such delay was allowed to occur in presenting this application for revision. But though I am reluctant to interfere where there has been such undue delay, I think that the illegality of the order in this case is so obvious that I cannot abstain from correcting it.

The order of the Magistrate, dated 30th July, 1904, passed in Criminal Miscellaneous Case No. 66 of 1904, is set aside, and it is ordered that so far as that order is concerned the parties be restored to the position which they occupied immediately before it was passed.

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

Criminal Revision No. 108 of 1905.
February 15 1905.

TET PYA v. KING-EMPEROR.

Messrs. *Pennell and Maung Thin*—for applicant.

Gambling Act, section 17—Appeal lies from order requiring security passed with reference to.

An order requiring security from a person concerning whom information has been received and proceedings taken under section 17 of the Gambling Act is passed under section 118 Code of Criminal Procedure and an appeal therefore lies against the order in the manner provided by section 406 of the Code of Criminal Procedure.

Queen-Empress v. *Nga Myaing*, Criminal Revision No. 1028 of 1899 (unreported); [*Queen-Empress* v. *Kyauk Maw*, 1 U. B. R., (1897-1901) p. 227], followed.

The applicant for revision, Tet Pya, was ordered by the Subdivisional Magistrate to furnish security for his good behaviour for one year. The Magistrate found that the accused permanently "earned his livelihood entirely by gambling with cards which is unlawful." It is not therefore disputed that the order was passed with reference to section 17 of the Burma Gambling Act. The only question for decision at present is whether an appeal lies against the Magistrate's order. If an appeal lies against the order, as no appeal was brought

(1) (1875) 23 W. R., 54.

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this application for revision cannot be entertained (section 439 sub-section (5) of the Code of Criminal Procedure).

It has already been decided by the learned Judicial Commissioner of Lower Burma (Mr. Birks) in the case of *Queen-Empress* v. *Nga Myaing* (1), apparently unreported, that in a case of this kind an appeal lies under section 406 of the Code of Criminal Procedure. That case was not argued; and I have willingly heard the arguments of the learned Counsel for the applicant in support of the contrary opinion.

Section 17 of the Gambling Act does not, in explicit words, empower a Magistrate to demand security from any one. It empowers a competent Magistrate, who receives information that any person in his jurisdiction earns his livelihood, wholly or in part, by unlawful gaming, to deal with that person as nearly as may be as if the information were of the description mentioned in section 110 of the Code of Criminal Procedure. It is not denied that the intention is that if the information is found to be true, the accused should be required to give security for his good behaviour. What is it then that the Magistrate is empowered to do? If he receives information of the description mentioned in section 110, he may, in the manner provided in subsequent sections, require the accused to shew cause why he should not be ordered to execute a bond for his good behaviour for a period not exceeding three years. If he receives information of the kind mentioned in section 17 of the Gambling Act, he may deal with the accused as nearly as possible in the same manner. That is to say he must record an order under section 112; indeed, in this application it is explicitly objected to the procedure of the Magistrate that he failed to do this; and even the section is cited. He must then proceed as required by section 117 and must inquire into the truth of the information. Next comes section 118 which says that if, on such enquiry, it is proved to be necessary, the Magistrate shall order the accused to execute a bond for his good behaviour. It seems to me perfectly clear that, if the Magistrate is authorized to deal with the accused as if he had received information under section 110, he is authorized to make an order in respect of him under section 118. That is the intention of the law and, in my opinion, it is made clear by section 17 of the Gambling Act. One of the ways of dealing with a person in respect of whom information is received of the description mentioned in section 110 is, after the observance of the prescribed formalities, to make an order in respect of him under section 118 of the Code of Criminal Procedure. No other provision of law under which the order requiring security could be passed has been pointed out; nor have I been able to find any such provision. In my opinion the order is, and must be, passed actually under section 118 and not merely on the analogy of that section. That being so, there can be no doubt that there is an appeal against the order and that it lies to the District Magistrate as provided by section 406 of the Code.

(1) Criminal Revision No. 1028 of 1899.

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For these reasons, I have no hesitation in following the ruling of the learned Judicial Commissioner and holding that in this case an appeal lay and that therefore revision on the application of the accused is inadmissible.

The application for revision on behalf of Tet Pya is therefore dismissed.

Before Mr. Justice Birks.

THA E *v.* LÔÑ MA GALE.

Special Civil Second Appeal No. 93 of 1904.

August 22nd 1904.

Messrs. *Pennell and Maung Thin*—for appellant (plaintiff).

Mr. *Loo Nee*—for respondent (defendant).

Easements—Riparian proprietors—use of water.

Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, irrigating their land and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or their right of easement if any.

Perumal v. *Ramasami Chetty*, (1887) I.L.R., 11 Mad., 16, followed.

Debi Pershad Singh v. *Joynath Singh*, (1897) I.L.R. 24, Cal., 865, distinguished.

The plaintiff-appellant, Maung Tha E, sued Ma Lôn Ma Gale to recover possession of a water-channel, measuring ·04 acres. The plaint sets out that the plaintiff purchased holding No. 11, in which this channel is, in 1261, and that the channel runs through his holding; that in 1265 the defendant dug out the channel and that in consequence he brought a criminal proceeding, which was dismissed on the ground that it was a civil dispute and that he must take action in the Civil Court. The plaintiff admits the defendant's right to the water which flows through this channel, but he denies the defendant's right to deepen the channel. The plaint winds up with a prayer for possession of this land in order that defendant may not be able to dig and take the water.

The defendant denied that the channel belonged to the plaintiff, and alleged that the defendant had enjoyed this easement for the last thirty years. The Court of First Instance fixed two issues as follows:—

(1) Whether the part on which the present disputed drain is belonged to the plaintiff or the defendant?

(2) For how many years has defendant made use of the water from the said drain?

The Court of First Instance gave the plaintiff a decree for possession of the area sued for, coupled with certain directions that the plaintiff was not to dam up the drain, and must also allow the defendant to take the surplus water.

Defendant appealed and the Lower Appellate Court dismissed the suit, holding that the plaint disclosed no cause of action.

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The plaint is not very artistically worded, but I think it does disclose that the plaintiff objected to the defendant's entering on his land in order to clear the drain as a matter of right, and it is clear that the defendant asserted that he had a right to enter on plaintiff's land to clear this drain as he asserted that the subsoil of the drain was common property.

The Lower Appellate Court is in error in thinking that the defendant admitted that the possession of the stream was with the plaintiff; paragraph 2 of her written statement clearly denies this and in her evidence she says "that when she purchased her land from Myat Tha Dun, 30 years ago, the drain fell within her paddy land." The Court was probably referring to the statement of Ko Shwe Lôn, one of the defendant's witnesses, who says that the drain falls within the plaintiff's holding, who pays revenue. It would seem from the evidence of this witness that there was a previous lawsuit between plaintiff's predecessor in interest, Ma Dun Aung and defendant's husband, by which Ma Dun Aung was required to keep this channel open. It is clear, I think, that the defendant has a right to take the water that flows naturally through this channel, which is a natural one, and to prevent the plaintiff from damming it up; but this is a very different thing from claiming a right to enter on plaintiff's land to deepen the channel at his own pleasure. The rights of riparian owners were discussed in *Perumal* v. *Ramasami Chetty* (1), where it was held "that riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, irrigating their land, and for purposes of manufacture subject to the conditions, (first) that the use is reasonable, (second) that it is required for their purposes as owners of the land, and (third) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural rights or their right of easement, if any." It is not alleged that the plaintiff has dammed up the natural stream, or used more of the water than he was entitled to; in that case the defendant would have had a remedy as was pointed out by their Lordships of the Privy Council in *Debi Pershad Singh* v. *Joynath Singh* (2). In that case the plaintiffs who were riparian owners higher up the stream claimed a right to build a dam which diverted all the water from the riparian owners below. Their suit was dismissed as their claim was put much too high; and they failed to show what was a reasonable amount of water to take. As far as I can see the decree of the Court of First Instance sufficiently protects the rights of the defendant and I am unable to agree with the Lower Appellate Court that the plaint does not disclose a cause of action.

The appeal is allowed and the decree of the Court of First Instance will be restored with costs throughout.

(1). (1887) I.L.R. 11, Mad. 16.
(2). (1897) I.L.R. 24, Cal. 865.

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

Civil First Appeal No. 62 of 1904. February 13th 1505.

W. R. VANOOGOPAUL BY HIS GUARDIAN AND NEXT FRIEND P. A. MURUGASA MUDALIAR *v.* R. KRISTNASAWMY MUDALIAR *alias* MAUNG MAUNG, ADMINISTRATOR TO THE ESTATE OF W. V. RANGASAWMY MUDALIAR (DECEASED).

Mr. *Fagan*—for appellant (plaintiff) | Messrs. *Eddis, Connell* and *Lentaigne*—for respondent (defendant).

Marriage—presumption of validity—Hindu-Law.

The presumption of marriage arising from cohabitation with habit and repute can only be rebutted by clear and satisfactory evidence, especially where many years have elapsed since the death of one of the parties to the marriage.

The presumption applied to the union of a Hindu male with a female known by a Burmese name.

In re Shephard, George v. *Thyer,* (1904) 1. Ch. 456; *Sastry Velaider Aronogary* v. *Sembscutty Viagalie,* (1881) L. R. 6 App. 364; *Piers* v. *Piers,* (1849) 2. H. L. C. 331, *Morris* v. *Davies,* (1837) 5 Cl. and F. 163; cited.

Thirkell White, C. J.—This is a case of very considerable interest and importance. The suit was for the administration of the estate of W. V. Ramasawmy Mudaliar. The plaintiff is Ramasawmy Mudaliar's nephew. The defendant is the son of Ramasawmy Mudaliar by a woman named Ma Gun, who was the daughter of one Narainsawmy Naidoo by Ma Thu Za. The contention of the plaintiff is that Narainsawmy Naidoo was a Hindu and that Ma Thu Za was a Burmese Buddhist; that no valid marriage could be contracted between them and that their children, including Ma Gun, were therefore illegitimate and could not be Hindus or members of any Hindu caste, their status following that of their mother; that, therefore, no valid marriage could have been contracted between the deceased Ramasawmy Mudaliar, an orthodox Hindu, and Ma Gun; and that consequently the respondent, the son of the union between Ramasawmy Mudaliar and Ma Gun, is illegitimate and not entitled to inherit his father's estate. The case turns upon the question whether Narainsawmy Naidoo and Ma Thu Za were lawfully married.

Narainsawmy Naidoo died in 1857 and Ma Thu Za about 1875. They had several children, and it is not disputed that they lived together as man and wife for some years, up to Narainsawmy's death. The evidence produced shows that Ma Thu Za, who lived with Narainsawmy Naidoo as his wife, was regarded as a Hindu and their children were brought up as Hindus, and married to Hindus according to Hindu rites. There is no evidence of any value to shew that Ma Thu Za was anything but a Hindu. Such evidence as there is to the effect that she was a Burmese Buddhist who became a Hindu is clearly hearsay. There is no evidence whatever of her race and parentage by witnesses who speak from their own knowledge. Even if the statement made in a former suit by a member of the respondent's family, that Ma Thu Za was a Burmese Buddhist, is admissible in evidence, a point of some doubt, it does not carry the case much further, as the witness cannot have been speaking from his own personal knowledge.

VANOO-GOPAUL v. KRISHNA SWAMY MUDALIAR.

The learned Judge of the Court of First Instance refers to the strong presumption of the validity of a marriage arising from cohabitation and recognition for a number of years. The latest case that has been cited on the subject is *In re Shephard, George* v. *Thyer* (1), a very strong case in favour of the presumption. Reference has also been made to the judgment of the Lords of the Privy Council in *Sastry Velaider Aronogary* v. *Sembscutty Vaigalie* (2) a case on which reliance may well be placed as the parties were of Tamil race as presumably in the present case. The following passage from that judgment may be cited :—

> In the case of *Piers* v. *Piers* (3) it was laid down by the House of Lords that the presumption of marriage arising from cohabitation with habit and repute can only be rebutted by the clearest and most satisfactory evidence. The Lord Chancellor said :—" I have not found that the rule of law is any where laid down more to my satisfaction than it is by Lord *Lyndhurst* in the case of *Morris* v *Davies* (4) as determined in this House. It is not precisely the same presumption as exists in the present case ; but the principle is strictly applicable to the presumption which we are considering. He says :—
>
> 'The presumption of law is not lightly to be repelled, It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, conclusive."

No case has been cited to shew that the principle laid down in these judgments is inapplicable to alleged marriages between people who are or profess to be Hindus. The application of the principle is specially appropriate when the question concerns the validity of a union dissolved by death nearly 50 years ago. It seems to me that it would be contrary to all rules of justice and equity to declare such a union to be invalid, at this late stage, except on the most conclusive evidence. It cannot seriously be contended that there is evidence of any value to show that the union of Narainsawmy Naidoo and Ma Thu Za was not what it professed to be, a valid marriage between Hindus. In my opinion, therefore, the validity of the marriage should be presumed and the plaintiff appellant's suit must fail.

In this view, it is not necessary to enter upon a discussion of the various interesting points which would arise, if the fact that Ma Thu Za was by birth a Burmese Buddhist had been conclusively established.

I would dismiss this appeal with costs and order P. A. Murugasa Mudaliar, the guardian of the appellant, to pay the Court Fee payable on the memorandum of appeal and the respondent's costts.

Fox, J.—I concur.

(1) (1904) 1 Ch. 456
(2) (1881) L. R. 6 App. 364.
(3) (1849) 2 H. L. C, 331.
(4) (1837) 5 Cl. & F. 163.

Before Mr. Justice Birks.

Civil Second Appeal No. 105 of 1904. February 1905.

WA THA AND MIN YE *v.* PE HLAW.

Mr. *Bagram*—for appellants (plaintiffs). | Mr. *Higinbotham*—for respondent (defendant).

Suit to recover possession of immoveable property—Limitation—Specific Relief Act, s. 9.

By section 9 of the Specific Relief Act, 1877, a person dispossessed without his consent of immoveable property, otherwise than in due course of law, may institute a suit for its recovery within six months from the date of dispossession. The limitation of six months does not, however, apply to the case where a person, even although he cannot show a perfect title to the property, is dispossessed by a mere trespasser who can show no title at all. If plaintiff can show that, at the date of his dispossession by defendant, he had a better title than defendant, he is entitled to a final decree provided he has instituted his suit within a period of twelve years as required by Article 142 of the Second Schedule of the Indian Limitation Act, 1877.

Maung Ya Gyaw v. *Ma Ngwe*, (1903) 2 L. B. R. 56; *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*, (1888) I. L. R., 16 Cal., 473; *Phillips* v. *Phillips*, (1878) 4 Q. B. D. 127; *Wise* v. *Ameerunnissa Khatoon*, (1879) L. R., 7 I. A., 73; referred to.

Krishnarav Yashvant v. *Vasudev Apaji Ghotikar*, (1884) I. L. R., 8 Bom., 371 *Pemraj* v. *Narayan*, (1882) I. L. R., 6 Bom., 215; followed.

Purmeshur Chowdery v. *Brijo Lall*, (1889) I. L. R., 17 Cal., 256; dissented from.

The plaintiff-appellants in this case sued to recover possession of a house site, or an area of 228 square feet marked Exhibit A, *i.e.*, plot No. 277 = ·05 of an acre, on the plan filed, alleging that they purchased it at an auction sale, together with another piece of land resumed by Government, some 20 years ago. They claim to have been dispossessed by the defendant, Maung Pe Hlaw in March 1901, as he had built a pucca house on plot No. 277. Paragraph 2 of the plaint sets out that when the plaintiffs erected a small house on part of this area in January 1901 the defendant filed suit No. 114 which he lost. The defendant replied that he had built his house on his own land.

The Court of First Instance framed the single issue, "To whom does the land in suit marked A in Exhibit I belong?" Both Courts have agreed in finding that the plaintiffs failed to prove their title to the land and dismissed the suit.

There are four grounds of Second Appeal:—

(1) That the Court of First Instance should have framed an issue as to whether the appellants had been in uninterrupted possession for 12 years, as this was the real title on which the plaintiffs relied.

(2) That Exhibit I conclusively proved appellant's title to the land under section 83 of the Evidence Act.

(3) That the burden of proof was wrongly thrown on the plaintiff after he had shown a good title to the land previous to 1901.

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(4) That the Courts below wrongly held that appellant's possession dated from 1890 when it really dated from 1889.

The Court of First Instance found that plaintiffs had been in possession up till March 1901 as Exhibits II and III shewed they were in possession of house site No. 277, which included the land in suit, at the time of the settlement in 1890 (Exhibit II I may note bears the date 1889), but the Court held that the plaintiffs had failed to prove uninterrupted possession for twelve years prior to that period. The learned Judge was evidently referring to section 8 of the Lower Burma Town and Village Lands Act, 1898, clause (*b*). The land in dispute is situated in Myaungmya which is a Municipal town and therefore a town under section 4 (*3*) of the Act. It is not one of the 5 scheduled towns referred to in the Act, nor does it appear to be exempted by Revenue Department Notification No. 437, dated 8th November 1900. I think there is no doubt that, if the plaintiff could show continuous possession for 12 years prior to his dispossession, he would be able to rely on that title. Mr. Bagram has cited section 22 (*e*) of the Act as showing that plot A would not be liable to pay revenue; the clause that would apply would be clause (*d*).

The Lower Appellate Court dismissed the appeal holding that the issue as framed was quite wide enough for the plaintiff to prove his title by possession, for that was the only title he could shew.

The plaint was vague and bad, and it would have been desirable to examine the parties before issues were framed. The Court did, however, question the Advocates and remarked that they seemed to know more about the cases than the parties themselves. Mr. Bagram relies mainly on a remark by Mr. Justice Fox in *Maung Ya Gyaw* v. *Ma Ngwe* (1). The learned Judge observes,—

"If I did not think that the plaintiffs had offered evidence of title and of 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 to remand the case to the lower Courts for further evidence and decision, since the 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."

The Privy Council ruling cited by Mr. Justice Fox in that case, *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (2) was decided on a question of limitation. It was there held "not enough for the plaintiffs to shew that they had an anterior title; they must prove their possession prior to the time when they were admittedly dispossessed and at some time within 12 years before the commencement of the suit under Article 142 of the Act." Mr. Bagram also relies upon *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (3) where it was held that the plaintiff suing after six months from date of dispossession was entitled to rely on his previous possession as against a person who had no title. The case cited by Mr. Higinbotham, *Philipps* v. *Philipps* (4) does not apply for in that case the plaintiff

(1) (1903) 2 L. B. R., 56.
(2) (1888) I.L.R., 16 Cal., 473.
(3) (1884) I.L.R., 8 Bom. 371.
(4) (1878) 4 Q.B.D. 127.

had never been in possession. Mr. Higinbotham also relies on *Purmeshur Chowdery* v. *Brijo Lall Chowdery* (5). The head note says "Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under section 9 of the Specific Relief Act, 1877, which must be brought within six months from date of dispossession." The Judges there, *Rampini* and *Pigot*, seem to have expressed an opinion that the Judges of the Bombay High Court had taken a more correct view of the meaning of their Lordships of the Privy Council in the case of *Wise* v. *Ameerunnissa Khatoon* (6) than the recent cases in Calcutta, and one of the cases cited was *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (3) which purports to follow the Full Bench Ruling in *Pemraj* v. *Narayan* (7). In Krishnarav Yashvant's case it was pointed out that in the Privy Council case the plaintiffs had been evicted by persons deriving title from the real owners, and that the remarks of their Lordships that the plaintiffs could not rely on mere possession unless they brought a suit under the Specific Relief Act, would not apply where the trespassers had no title at all. In Krishnarav Yashvant's case the facts were that both parties claimed under Kowls, apparently a form of lease alleged to have been granted by an *inamdar*. The plaintiff's Kowl had not been registered but it had been granted by the proper person, while the defendant's was also not registered and had not been granted by any person entitled to make such a lease. It was therefore a worse title than plaintiffs. The court decided in favour of the plaintiff who had a better title than defendant at the time of his dispossession.

Now the facts as found by the Court of First Instance in the present case are very similar. The defendant did not deny the plaintiffs' original purchase, but merely said he had no knowledge of it, but admitted losing case No. 114 in which Exhibit 1 was filed. The Court of First Instance has found that he failed to prove that the maps were wrong or the settlement incorrectly carried out and that it must be presumed that the plaintiffs were the owners of the land A in Exhibit 1 in 1890. The finding should have been that they were owners in 1889. It is also clear from a perusal of the proceedings in Civil Regular No. 114 that the correctness of the Land Records' maps was made the basis of a former decision with respect to another portion of the same land, so that there was a decision of a Court that the present plaintiff had the best right to possess the land marked A in Exhibit 1 at the time of the subsequent dispossession.

On these facts it is clear that the plaintiff's title to the land is better than the defendant's and that he is not bound to prove a perfect title in order to recover possession as against this defendant. In my opinion the ruling in 8 Bombay 371 should be followed, and the result is that this appeal is allowed, the decrees of the Courts below dismissing plaintiff's suit are set aside and he will obtain the decree as prayed with costs in all Courts.

(5) (1889) I.L.R., 17 Cal. 256. | (6) (1879) L.R., 7 I.A. 73.
(7) (1882) I L.R., 6 Bom., 215.

Criminal Revision No. 275 of 1905. March 18th, 1905.

Before Mr. Justice Birks.

KING-EMPEROR *v.* HA TAW.

Reformatory Schools Act, s. 31.

Section 31 of the Reformatory Schools Act, 1897, cannot be applied when the accused is sentenced to a whipping.

The accused, Ha Taw, has been convicted of causing hurt with a dangerous weapon to Ali by stabbing him on the arm and as he is only 14 years of age, he was sentenced under section 5 of the Whipping Act to 15 stripes with a light rattan. His parents were also directed under section 31 of the Reformatory Schools Act, clause *(b)*, to give a bond for his good behaviour for one year. Section 31 of the Reformatory Schools Act enables the Court to make an order of discharge after due admonition or to deliver the youthful offender to his parents on their giving a bond "*instead of*" sentencing him to transportation or imprisonment or directing his detention in a Reformatory School. The section does not say that clauses (*a*) and (*b*) apply when the accaused is whipped. Whipping is inflicted in lieu of imprisonment and I do not think this section permits a bond being given after a whipping has been inflicted. The Magistrate's order should have been passed under section 106 Criminal Procedure Code read with the last clause of section 123. An offence under section 324 may be rightly said to involve a breach of the peace. The bond will therefore be treated as if made under section 106. The papers can be returned as I find this form of bond form 10 of Schedule 5 of Act V of 1898 has been used as a matter of fact.

Criminal Revision No. 1719 of 1904. February 2nd, 1905.

Before Mr. Justice Birks.

KING-EMPEROR *v.* KRA PRU AUNG.

Code of Criminal Procedure, section 562—Offences to which applicable.

When the offence is not one of those explicitly mentioned in the section, the term of imprisonment which can be awarded is the test for determining whether section 562 of the Code of Criminal Procedure can be applied.

Queen-Empress v. *Hori*, (1899) 1 L. R., 21 All., 391 ; *Crown* v. *Dawood Saib* (1901) 1 L. B. R., 68 ; *Nga Shew Thaw* v. *Queen-Empress*, (1900) 1 L. B. R., 57 referred to.

Crown v. *Tha Do Hla*, (1902) 1 L. B. R., 264 ; distinguished.

This case was called for to consider the legality of the Magistrate's order. The accused, Kra Pru Aung, is a boy of 18 and has been convicted by the Subdivisional 1st Class Magistrate of Akyab under sections 324—511 and has been ordered to execute a bond for Rs. 25 with one surety under section 562 of the Code of Criminal Procedure.

On the merits I think the accused was rightly convicted. The case is distinguishable from that of *Crown* v. *Tha Do Hla* (1) as the accused not only used a threatening gesture but actually stabbed twice at the complainant who dodged the blows. He was easily disarmed

(1) (1902) 1 L. B. R., 264.

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and his action was probably due to a drunken freak. The order passed seems appropriate if not illegal. Section 562 of the Code of Criminal Procedure runs as follows :—

" In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating, or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment before any Court, and no previous conviction is proved against him, if it appears to the Court before whom he is convicted, that regard being had 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 expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, and during such period (not exceeding one year) as the Court may direct, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour."

The maximum sentence under section 324 Indian Penal Code is three years, but an attempt to commit that offence is only punishable with one and half years, and the question for decision is whether the " nature of the offence," or the " term of imprisonment " is to be the test as to whether the section can be applied.

No doubt it is a general principle of law that penal statutes should be strictly interpreted, but the reason for this principle is that they interfere with the liberty of the subject. It would be easy to multiply instances where the Legislature has interfered and passed amended Acts in consequence of the strict interpretation of the existing law.

For instance, the Whipping Act of 1864 was amended by Act V of 1900 to enable the Courts to whip juvenile offenders who abetted or attempted to commit the offences for which they might have been convicted under section 5 of the Act before it was amended, and also to extend these powers to offences under other laws than the Penal Code.

Similarly section 30 of the Evidence Act was amended by Act III of 1891 which added an explanation so as to include " abetment or attempts to commit " in the definition of the " offence ".

On the other hand in considering section 16 of the Reformatory Schools Act of 1897 the Full Bench of the Allahabad High Court (1) did not feel themselves bound to adopt a too literal interpretation of that section. *Strachey, C. J.*, observed :—

> " It cannot be said that the section is unambiguous, and in such a case we are at liberty to put on it a construction in accordance with the intention of the Legislature."

He cited the opinion of Lord Selbourne, that " the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." This ruling was followed by *Fox*,

(1) Queen-Empress *v.* Hori, (1899) I. L. R. 21 All., 391.

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J., in *Crown* v. *Dawood Saib* (1). In Maxwell *On the Interpretation of Statutes*, 3rd edition, page 95, on the subject of beneficial construction, it is said to be the duty of the Judge "to make such a construction of a statute as shall suppress the mischief and advance the remedy," and again at page 379 "It has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not.".

I think it is clear that the object of section 562 Criminal Procedure Code was to provide a lesser and alternative remedy for a certain class of cases, and that if the language of a section enables a more favourable construction to be placed on the words, it is open to the Courts to follow that construction.

In the case of *Nga Shwe Thaw* v. *Queen-Empress* (2) I held that the maximum sentence that could be undergone in cases coming under section 35 Code of Criminal Procedure was the test as to where the appeal lay. This seems the most reasonable construction to place on the words, "any other offence under the Penal Code punishable with not more than two years' imprisonment." As the maximum sentence in this case was 18 months I think the order of the Magistrate was legal. The papers can be returned with these remarks.

Criminal Revision No. 1717 of 1904. February 7th, 1905.

Before Mr. Justice Birks.

KING-EMPEROR *v.* PAN AUNG AND KAN BAW.

Compensation to accused—frivolous accusation—mode of recovery—Criminal Procedure Code, s. 250.

An order awarding compensation to an accused person under section 250, Code of Criminal Procedure, should not provide for imprisonment in default of payment. Imprisonment should not be ordered until the amount has been found to be irrecoverable.

In re *Paryag Rai*, (1894) I. L. R., 22 Cal., 139, cited.

The Magistrate should not direct a complainant to pay compensation under section 250 Code of Criminal Procedure and at the same time make an order of imprisonment in default. The section provides that compensation shall be recoverable as if it were a fine. To make a frivolous complaint is not described as on offence though it might possibly come within the definition of "offences" in section 3 of Act X of 1897. Section 25 of that Act applies the provisions of sections 63-70 of the Indian Penal Code to all "fines" unless the Act contains an express provisions to the contrary. Section 67 Indian Penal Code will not apply as a term of 30 days is prescribed as a maximum in section 250 Code of Criminal Procedure. The proper procedure is to recover the fine in the first instance under sections 386 and 387 Code of Criminal Procedure and if it is not found to be recoverable the Magistrate can order imprisonment under the provisio to section 250. This view seems to have been adopted by the Calcutta High Court in the matter of *Paryag Rai* (3). The compensation in this case was paid. The papers can be returned.

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(1) (1901) 1 L. B. R. 68. | (2) (1900) 1 L. B. R. 57.
(3) (1894) I. L. R., 22 Cal., 139.

Full Bench—(Criminal Reference).

Criminal Reference No. 78 of 1904.

March 27th, 1905.

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

KING-EMPEROR *v.* { RAMIAH KISTEN AND KODENDAPANY.

Workman's Breach of Contract Act, 1859—Applicability of.

The Secretary of State for India in Council, or the Government of India, or the Local Government of any province of India is not a master or employer resident or carrying on business in any place to which the Workman's Breach of Contract Act, 1859, applies, within the meaning of section 1 of that Act.

Peninsular and Oriental Steam Navigation Company v. *The Secretary of State for India in Council*, (1861) Bourke's Reports, A. O. C., 166, and 5 Bom., H. C. R., App. A. p. 11; *Subbaraya Nudali* v *The Government*, (1863) 1 Mad., H. C. R. 286; *Rundle* v. *The Secretary of State for India in Council*, (1862) 1 Hyde's Reports, 37; *Ramasami* v. *Kandasami* (1885) I. L. R. 8 Mad. 379; *Doya Narain Tewary* v. *The Secretary of State for India in Council*, (1886) I. L. R. 14 Cal., 256; *Graham* v *Lewis*, (1888) L. R. 22 Q. B. D. 1; Ex-parte *Breull*, In re *Bowie*, (1880) L. R. 16 Ch. D., 484; *Attorney-General* v. *Winstanley*, (1831) 2 D. and C. 302; *Sussex Peerage case*, (1844) 11 Cl. and F., 143; referred to.

The following reference was made to a Full Bench by Mr. Justice Fox:—

Ramiah, Kisten and Kodendapani were proceeded against under the Workman's Breach of Contract Act, 1859, for having neglected to perform work which they had contracted to do under contracts entered into by them in Madras Town with the Secretary of State for India in Council represented by an Extra Assistant Conservator of Forests in Burma.

Several matters in the proceedings called for comment. The initial and principal one is of such importance that in my judgment it should be decided by a Bench of this Court. The preamble to the Act recites as the reasons for legislation (1) that much loss and inconvenience are sustained by *manufacturers*, tradesmen and others in the Presidency Towns and in other places from fraudulent breaches of contract on the part of artificers, workmen and labourers who have received money in advance on account of work which they have contracted to perform, (2) that the remedy by suit in the civil Courts for the recovery of damages in such cases is wholly insufficient, and (3) that it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment.

Section 1 of the Act says:—

"When an artificer, workman or labourer shall have received from any master or employer resident or carrying on business in any Presidency Town, or from any person acting on behalf of such master or employer an advance of money on account of any work he shall have contracted to perform, &c."

From this it appears to me to be clear that for the Act to apply there must be a contract under which the workman has received an advance of money on account of the work he has contracted to perform, and that the advance must have come from or have been the money of

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a master or employer resident or carrying on business in a place to which the Act extends.

The advance under the contracts in the present case having come from or been the monies of the Secretary of State for India in Council, otherwise the Government of India, the first question that arises is whether such Secretary of State or the Government of India is a master or employer who resides or carries on business in the place in which the contracts in question were made within the meaning of the Act. It appears to me to be clear that the Secretary of State cannot be said to be resident in the Town of Madras. As to whether he can be said to carry on business there, there may be some question.

In the case of the *Peninsular and Oriental Steam Navigation Company against the Secretary of State* (1) there are some expressions on and from page 184 of the report from which the learned Judges appear to have been of opinion that the Government did *carry on business* in India. The case, however, was decided on special considerations as to the liability of the Government for a tort committed by its servants.

In *Rundle* v. *The Secretary of State* (2) it was held that the Secretary of State did not "carry on business, and personally work for gain" in the Town of Calcutta within the meaning of the 12th Section of the Letters Patent of the Calcutta High Court so that such Court had no jurisdiction to try a suit against the Secretary of State on a cause of action not arising in the Town of Calcutta.

In *Subbaraya Mudali* v. *The Government* (3) a contrary decision was arrived at; the learned Judge considered that the words "carry on business" might reasonably be applied to the Government as a deliberative body and to the locality where its members meet and exercise all the functions of Government.

Doya Narain Tewary v. *The Secretary of State for India in Council* (4), was another case upon the meaning of "carry on business or personally work for gain" in section 12 of the High Court's Letters Patent. The words were held to be inapplicable to the Secretary of State as the representative of the Government.

This ground of decision appears to me to be equally applicable to the words "carry on business" in section 1 of Act XIII of 1859 in relation to the Government of India and the Local Governments of the various provinces.

Further, judging from the preamble, it can scarcely have been the intention of the framers of the Act, or within their contemplation, that it should be open to Government officers to avail themselves of its provisions.

Since it apparently is considered by Government officers that it is open to them to take proceedings under the Act, and this may be of considerable importance in the conduct of Government affairs, I refer to a Bench of the Court the following question for decision:—

(1) (1861) Bourke's Reports, A. O. C., 166; 5 Bom. H C. R., App. A., p. 11.
(2) (1862) 1 Hyde's Reports, 37.
(3) (1863) 1 Mad. H. C. R., 286.
(4) (1886) I. L. R. 14 Cal., 256.

Is the Secretary of State for India in Council or the Government of India or a Local Government of any Province of India a master or employer resident or carrying on business in any place to which the Workman's Breach of Contract Act, 1859, applies, within the meaning of section 1 of that Act?

The opinion of the Bench was as follows:—

Thirkell White, C. J.—The question which has been referred to us is whether the Secretary of State for India in Council or the Government of India, or a Local Government, is a master or employer resident or carrying on business in any place to which the Workman's Breach of Contract Act, 1869, applies, within the meaning of section 1 of that Act.

The question may be divided into two parts (1) whether the Government (to put it shortly) is a master or employer within the meaning of the section; (2) if so, whether it is resident or carries on business in a specified place to which the section applies.

As regards the first question if we refer to the preamble of the Act we find it recited in effect that the Act is for the protection of manufacturers, tradesmen and others, and by a well known rule of construction it might be said that the general term "others" must be restricted to mean others of the same class as the persons indicated by the particular terms "manufacturers" or "tradesmen." But it is also a well established rule of construction that, though the preamble of a Statute "may legitimately be consulted for the purpose of solving any ambiguity, or for fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt" (5). yet "the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt (6)." In the present case, the words used in the enacting part of the statute are of the widest meaning, "any master or employer". It is not, in my opinion, open to us, in construing these words, to limit them to masters or employers of the classes specified in the preamble. The fact that the Government cannot be considered as a person or entity of the same class as a manufacturer or tradesman does not therefore preclude it from being a master or employer within the meaning of the section under consideration.

This being so, it seems to me that in the circumstances of the case out of which this reference arises, the Government may rightly be said to be a master or employer. The contract in respect of breach of which the prosecution was instituted was for work in the rubber plantations at Mergui, a place to which the Workman's Breach of Contract Act has been extended. It is understood that these rubber plantations are worked by Government through an officer or officers of the Forest Department. The applicability of the Act to work on a rubber plantation is, I imagine, not more doubtful than its applicability to a work on

(5) Maxwell on the Interpretation of Statutes, 3rd edition, 59.
(6) *Ibid* 63.

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a coffee-estate, as in *Ramasami* v. *Kandasami* (7). It has been recognized in the case of *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India* (1), that "in a country like India, the Government is obliged to engage in undertakings partaking more of the character of private business than of affairs of State." In the same case it was said :—

"Now if the East India Company were allowed, for the purpose of Government, to engage in undertakings, such as the Bullock Train and the conveyance of goods and passengers for hire, it was only reasonable that they should do so, subject to the same liabilities as individuals." (8).

Again, in connection with a somewhat different point it was observed in *Doya Narain Tewary* v. *The Secretary of State for India in Council* (4) :—

"It has been said that supposing the business of governing the country is not business within the meaning of section 12 of the Letters Patent, still the Government in this country carries on various trades, such as the trades in opium and salt, and the principal places of business of these trades are located in Calcutta. These trades, if they can be properly called trades, are carried on in one sense by the Government officers in charge of them, but they are so carried on for the benefit of the Indian Exchequer."

In undertaking the working of a rubber plantation, as in other operations of the Forest Department, which is administered on commercial principles, it seems to me that the Government by its officers does carry on a business. As a matter of fact, it certainly employs labourers for the purposes of that business. If, as was said in the case already cited, with reference to the East India Company, in such circumstances it is subject to the same liabilities as individuals, there seems to be no valid reason why it should not exercise similar rights and have recourse to the remedies open to private employers.

I have had the advantage of reading the judgment of my learned colleague, Mr. Justice Fox, with whom I have the misfortune not to agree, and I have studied the two cases therein cited which were not cited at the argument of this case. In both these cases, the question was whether a clerk could be said to carry on business in the City of London when he did not live there but went there to do his work every day. In the earlier case, three Lords Justices held that the clerk was carrying on business in the City of London. *James, L. J.*, said (9) :—

"His business in life is that of a bank clerk, and it is not the less his business because he receives a fixed salary for it. He is really and truly, for all commercial purposes, carrying on business in the city of London."

In the later case, which purports to distinguish not to overrule the earlier decision, three Lords Justices held that the clerk did not carry on business. I observe that this conclusion was arrived at with special reference to the use of the phrase in the City of London; and it was

(7) (1885) I. L. R. 8 Mad., 379.
(8) P. 12.
(9) (1880) L. R. 16 Ch. D. 487.

only its meaning as used in the City of London that the Lords Justices professed to explain. So far as I can see the effect of the judgment in that case (*10*) is limited to the decision that a clerk does not carry on business within the meaning of the Statute under construction. I humbly think that this is not a very important aid to the decision of the question whether the Secretary of State for India in Council can be said to carry on business. For certainly, *ex hypothesi*, the Secretary of State exercises control and direction; and it was mainly, I think, on the ground that the clerk did not exercise control and direction that the question was decided.

It seems to me that in carrying on an industrial undertaking, the Government is an employer carrying on business within the meaning of the section under consideration; and in coming to this conclusion I do not think I am venturing to differ from the judgments of the Lords Justices in the case last cited. Even if it be held that the expression must connote some business carried on for gain, I still think that in carrying on an industrial undertaking the Secretary of State for India in Council satisfies this test also. It seems to me that in conducting a department on commercial principles, the Secretary of State is carrying on business for gain, not of course for his personal gain but for the pecuniary gain of the State which he represents and for which he is in some sense in the position of a Trustee.

If an analogy is to be sought in English Law, I would refer to the Workman's Compensation Act, 1897. That Act applies to any employment by or under the Crown to which it would apply if the employer were a private person. By another section, notice has to be served on the employer and may be served on him at his residence or place of business. I can find no special provision for service on the Crown; I infer that it is assumed that the Crown has a place of business; and if so, it is reasonable to hold that, in respect of the employments under reference, it carries on business.

There remains the question whether the Government can be said to be resident or carrying on business, to put the question in a concrete form, in Mergui. In the cases cited in the order of reference, the question whether the Secretary of State for India in Council or the Government could be said to reside or carry on business in a particular place, such as Calcutta or Madras, was considered with reference to the contention that the Government must be held to carry on business at the headquarters of Government. On this question, different opinions have been expressed. But they do not seem to me to affect the question now under discussion. In this case, there is a definite business or undertaking, carried on by Government officers in a place to which the Workman's Breach of Contract Act has been extended. It seems to me reasonable to hold that in these circumstances, the Government does carry on business through its officers, in that place. I do not think that a different view is indicated in *Doya Narain Tewary* v. *the Secretary of State for India in Council* (*4*) where such a case

(10) (1888) L.R. 22, Q. B. D. 1.

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as this is clearly distinguished from the case then under consideration. Although I do not think it could reasonably be said that the Secretary of State for India in Council was resident in Mergui, I think it is clear that by his agents and officers he does carry on business there, the business being, for the purpose of this case, the working of a rubber plantation.

I may add that I have no doubt that we are entitled to look at the Preamble of an Act for the purposes specified above. But we are agreed as to the meaning of the words "master or employer;" and it seems to me that the meaning of the phrase "carrying on business" can be sufficiently ascertained without reference to the Preamble. I also think that, in this case, the Preamble does not elucidate the meaning of the phrases under discussion, though it might, if it were necessary, throw light on the meaning of the words "master or employer."

In my opinion, the Secretary of State for India in Council is an employer carrying on business in a place to which the Workman's Breach of Contract Act applies and I would answer the reference in the affirmative.

Fox, J. The words to be construed in answering the question referred are "any master or employer resident or carrying on business in any Presidency Town"; to these words may be added the words "or in any place to which the Workman's Breach of Contract Act, 1859, has been extended under section 5 of the Act."

There is, in my opinion, no difficulty in connection with the words "master or employer." The Secretary of State for India in Council is without doubt a master or employer, and the Government of India and each Local Government in India is so also. The word "resident" presents no real difficulty. The Secretary of State is not resident any where in British India, and the word does not appear applicable to a body composed of several officers. The answer to the question referred must, in my opinion, depend upon whether the Secretary of State and each Government "carries on business" in a place to which the Act extends.

In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense (11). To use the words of Lord Tenterden in *Attorney-General* v. *Winstanley* (12) the words of an Act of Parliament, which are not applied to any particular science or art, are to be construed as they are understood in common language. What meaning then do the words "carry on business" convey in ordinary language?

It appears to me that if one were told that a person was "carrying on business" one would understand that such person was engaged in some trade or commercial business on his own account or jointly with others, with the object of acquiring gain or profit for himself, or for himself and those jointly concerned with him. Every one engaged in trade or commerce is not ordinarily spoken of as "carrying on business";

(11) Maxwell on Statutes, 3rd, edition, 77. | (12) (1831), 2 D. & C. 302.

for instance a clerk in a merchant's office, or in a shop, would scarcely be referred to ordinarily as "carrying on business." Again those words would not ordinarily be applied to persons managing an institution which might even buy and sell for profit, if the profit to be derived was not for their personal benefit, for instance, the words would scarcely be applied to the Board of Management of a charitable institution like an Asylum for the Blind, which sells the products of the labour of the inmates in order to help in meeting the costs of the upkeep of the institution.

The above stated view of the ordinary meaning of the words "carry on business" is strengthened by the decision and judgments of the Lords Justices in *Graham* v. *Lewis* (10) which is the latest case which I can find in which the words have received judicial interpretation in the English Courts. Lord *Esher*, Master of the Rolls, considered that the expression imported the meaning of a person carrying on his or her business. Lord Justice *Fry* considered that it imported that the person had control and direction with respect to a business and also that the business carried on was one for some pecuniary gain. Lord Justice *Lopes* agreed with the Master of the Rolls and adopted the view of Lord Justice *Fry* that the words imply some contract and direction with respect to the business as distinguished from mere service employment or occupation.

In the earlier case of *Ex-parte Breull, In re Bowie* (13) a different interpretation had been put upon the expression. The word "business" was said to be an elastic and ambiguous word susceptible of a wider or a narrower interpretation, and it was held that the expression must be construed in every case in accordance with the object and intent of the Act in which it occurs.

If the expression is ambiguous, then the preamble of the Act may be resorted to to ascertain the meaning of the words as used in the particular Act in which they occur.

In the words of Lord Coke in I Institutes 79a—"The preamble of the statute is a good mean to find out the meaning of the statute, and as it were a key to open the understanding thereof." In the *Sussex Peerage case* (14) the judges enunciated the rule as follows:

> "If any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which according to Chief Justice Dyer is 'a key to open the minds of the makers of the Act and the mischiefs which they intended to redress.'"

If the words "master or employer carrying on business" in the Workman's Breach of Contract Act, 1859, are to be construed in the popular and ordinary sense of a person carrying on business, I do not think that the Secretary of State for India in Council or any Government in India can be included within the words, for although the Secretary of State and Government may engage in undertakings which are also engaged in by commercial men, he and they do so not for his

(13) (1880), L. R. 16 Ch. D. 484.
(14) (1844), 11 Cl. & F., 143.

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or their personal gain, but for the benefit of the State and its revenues. The words "carry on business" may be compared with the words "engages in trade" in section 168 of the Indian Penal Code, and the word "trade" in section 76 of the Burma Forest Act. These expressions clearly import the meaning of trading for personal benefit, and I think the words "carry on business" import the same meaning. If however the words in question are ambiguous, then I think that the preamble to the Act clearly shows that the Act was never intended to apply to or to be for the benefit of the Government under any name or form.

It mentions the classes of persons who suffered loss and inconvenience and for whose benefit the Act was intended. It seems to me to be scarcely possible in view of the recitals in the preamble, that any one could ever have contemplated that Government officers should be at liberty to avail themselves of its provisions. It is also to be noted that in the first instance the application of the Act was confined to the Presidency Towns, a further circumstance which goes to show that Government was not thought of as a possible master or employer within the meaning of the first section.

In none of the reports of other superior Courts in India have I been able to discover a case in which a Government officer as such has ever been a complainant under the Act. If Government officers in other provinces have ever availed themselves or attempted to avail themselves of the provisions of the Act, it is curious that there should be no reported case in which they have done so. This leads to the belief that in other provinces it has not been considered that Government officers could avail themselves of the Act.

I would answer the question referred in the negative.

Birks, J. I was inclined to the opinion when this reference was argued that the Secretary of State for India in Council might be said to be an employer carrying on the business of a rubber plantation in Mergui and entitled to the benefit of the procedure laid down in Act XIII of 1859. The case of *Graham* v. *Lewis* (10) was not referred to when the case was argued. I concur with Mr. Justice Fox in thinking that we should be guided by the interpretation placed on the words "carrying on business" which the Lords Justices adopted in that case. The words in question occur in section 1 of the Act itself and we are therefore justified in referring to the preamble of the Act to ascertain the classes of persons who were to benefit by the Act and to explain any ambiguity in the Act itself. As I understand the judgment of the learned Chief Judge he thinks we are only entitled to look at the preamble to interpret the meaning of the word "employer" and not to look to it to interpret the meaning of the words "resident or carrying on business in any Presidency Town," which follow the words "master or employer" in section 1. I do not think we can separate one portion of the definition in section 1 from the other and that we are justified in looking to the preamble to interpret the whole definition. For these reasons I would answer the question referred in the negative.

Before Mr. Justice Fox.

Civil Revision No. 142 of 1904. March 2nd 1905.

MILLER *v.* MOHAMED CASSIM SHEERAZEE.

Mr. *Giles*—for applicant (defendant). | Mr. *Cowasjee* (junior)—for respondent (plaintiff).

Usage of Trade—in what circumstances Court may assume.

In order that an alleged trade usage may be imported into a contract, or applied to the relationship between parties, it must be shewn that it is invariable certain, reasonable, and general, and it must appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract or relationship.

Volkart Brothers v. *Vettivelu Nadan*, (1887) I. L. R., 11 Mad., 459, referred to.

The plaintiff, a broker, sued the defendant for brokerage upon the sale through him of certain house property in Rangoon. In his plaint the plaintiff stated that he had been employed by the defendant to effect the sale of the property and at the commencement of his evidence he said he was broker for the defendant in selling his three houses. His subsequent statements, however, showed what the actual facts had been. These were that he had gone to the defendant on behalf of the person who subsequently became the purchaser, to ask the defendant what price he wanted for the property. The defendant told him the price he wanted, and a sale at that price was effected. The plaintiff admitted that the defendant had not asked him to find a purchaser.

On this the suit as brought should have been dismissed, since not only was there no evidence of any employment of the plaintiff by the defendant, but the plaintiff's admission negatived the case set up in the plaint.

The Officiating Judge, however, allowed evidence as to there being a usage in Rangoon for the seller of immoveable property to pay brokerage to the broker who has negotiated the contract, and as far as I can understand his judgment, he based his decision upon there being such a usage, and upon the failure of the defendant to prove a special agreement that he should not pay brokerage.

A right to brokerage by usage formed no part of the plaintiff's case as laid in the plaint, and therefore it should not have been considered. But even if it could be considered the evidence was altogether insufficient to establish a usage.

In order that an alleged usage may be imported into a contract or applied to the relationship between parties, it must be shewn that it is invariable, certain, reasonable and general, and it must appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract or relationship—*Volkart Brothers* v. *Vettivelu Nadan* (1).

The requirements of proof of a usage are not satisfied by persons expressing an opinion that it exists or by evidence of one or two persons that as sellers they have paid brokerage. Even if an alleged usage under which a person was obliged to pay another whom he had not employed had been proved, it would be questionable whether such a usage would be reasonable, and whether it could be given effect to.

(1) (1887) I. L. R., 11 Mad, 459.

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The decree of the Small Cause Court will be set aside, and the suit will be dismissed with costs. The plaintiff must also pay the costs of this application—two gold mohurs allowed as advocate's fee.

Before Mr. Justice Birks.

A. K. R. M. N. NAGAPPA CHETTY *v.* MA U.

Civil Revision No. 3 of 1905. March 22nd, 1905.

Messrs. *Cowasjee* & *Cowasjee*—for applicant (defendant).

Maung Kyaw—for respondent (plaintiff).

Contract—Agreement opposed to public policy—Indian Contract Act, section 23.

Where part of the consideration for an agreement was the abandonment of a prosecution for criminal breach of trust—

Held,—that the whole of the agreement was void under section 23 of the Indian Contract Act, 1872.

Srirangachariar v. *Ramasami Ayyangar*, (1894) I. L. R. 18 Mad., 189, followed.

The plaintiff-respondent, Ma U, sued to recover an iron box containing jewelry valued at Rs. 200 alleged to have been entrusted with the defendant Chetty in September 1903. The case was first heard *ex parte* but was re-opened. The defendant filed a written statement setting out that the plaintiff had waived her claim as per settlement, dated 28th March 1904.

The Court of First Instance framed two issues as follows :—

1. Whether the plaintiff entrusted the property in question to the defendant in September 1903.
2. Whether she waived her claims when Exhibit A was executed.

The Court of First Instance found on these issues that plaintiff had failed to prove the deposit of the box of jewelry and second, that if she had, she had agreed to waive her claim. The Lower Appellate Court found that the box was entrusted with the Chetty and that the agreement to waive the claim was void as opposed to public policy and unlawful within the meaning of section 23 of the Contract Act.

Mr. Cowasjee for the appellant urges that this issue was not raised by the parties themselves and that the Court of First Instance was correct in holding that this story of the deposit was merely a ruse on the part of the plaintiff to bring the defendant to terms.

The agreement in question is not on the face of it illegal, for it merely states that Ma U's debts to the Chetty amount to Rs. 4,800 in all and that he agrees to accept two out of her three cargo boats in full satisfaction of all these debts. The approximate value of the two cargo boats is not stated. I notice that when the plaintiff was examined *ex parte* she swore that she did not owe the defendant any money then. It is abundantly proved that she owed large sums of money to the Chetty when she signed Exhibit A and this remark can only mean that, though she considered this document binding on the defendant, it was not binding on her. I think it is clear from the evidence of the two Advocates that she did agree to forego her prosecution of the Chetty for criminal breach of trust in respect of the box when she executed Exhibit A. Whether the consideration received by the Chetty was the abandonment of this criminal prosecution or the making over of the two cargo boats is not so clear, but the Chetty seems to have insisted on her abandoning this prosecution

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and this was no doubt a part of the consideration for his giving up his suit. The Court of First Instance has, however, found that this claim as to the deposit of the box was a false claim and if that finding is correct the Court may have considered that section 23 of the Contract Act would not apply. I do not find, however, that the plaintiff ever admitted that this deposit of the box was a false claim. The fact that she now sues for it shews that she only abandoned the criminal prosecution. I concur with the Lower Appellate Court in thinking that the evidence of the entrusting of the box is worthy of credit.

The witness Maung Po Nyun is not related to Ma U and he corroborates the story told by Ma U, her relations Maung Kya Bo and Seya and her servant, Maung Tha Ni. The defendant admits he advanced Rs. 3,000 to Ma U to buy *tonkins* and that he has accepted two only of these as payment of this debt. I think it is, therefore, clear that part of the consideration was the abandonment of the criminal prosecution. The fact that this only formed part of the consideration is immaterial, *vide* ruling of the Madras High Court in *Srirangachariar* v. *Ramasami Ayyangar* (1). In that case *Collins, C.J.*, and *Davies, J.*, observed,—"There can be no doubt that part of the consideration for the agreement A was a withdrawal of a pending criminal charge of trespass and theft laid against the plaintiffs and others on the 14th February 1886, that is, two days before the execution of A * * * *. There is also no doubt of the law that a consideration that proceeds upon the withdrawal of the criminal proceedings that have been instituted is illegal as being opposed to public policy as it is held to be the 'stifling' of a prosecution. And even if this illegal consideration is only part of the consideration it renders the whole agreement void because there is no good and sufficient consideration."

I think also that this is a matter that the Court is bound to notice if brought to its knowledge. It is clear that the suit brought by the Chetty under this agreement would not be maintainable and the Court cannot give effect to it when pleaded for the defence. The Court has no jurisdiction either to decree the claim or to allow a defence which is based on an agreement which the law declares to be unlawful.

The application is dismissed with costs.

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

NGA HNAUNG *v.* KING-EMPEROR.

Criminal Revisi No. 437 of 1905. April 5th, 1905.

Criminal Procedure Code, section 123 sub-section (3)—notice to accused.

Before dealing with a reference under section 123, sub-section (2) of the Code of Criminal Procedure, 1898, the Sessions Judge is bound to fix a date for the hearing and to give reasonable notice to the person concerned and to hear him if he wishes to be heard either personally or by a pleader.

Nakhi Lal Jha v. *Queen-Empress*, (1900) I. L. R. 27 Cal., 656; *Emperor* v. *Girand*, (1903) I. L. R. 25 All., 375; followed.

I regret that it was not thought necessary to instruct the Government Advocate to appear at the hearing of this case.

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(1) (1894) I. L. R. 18 Mad., 189.

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On 24th December 1904, the District Magistrate passed an order requiring Nga Hnaung to furnish security in the sum of Rs. 1,000 with two sureties for his good behaviour for three years. On the diary there is an order that security must be tendered by 5th January 1905. This order may be regarded as, in effect, an order under section 120 sub-section (2) of the Code of Criminal Procedure fixing the later date as the date of the commencement of the period for which security was required. It would be better for the Magistrate to embody the order under section 120 sub-section (2) in the order demanding security.

As security was not furnished on the 5th January the District Magistrate passed the order required to be passed under section 123 sub-section (2) [though by a slip of the pen he cited sub-section (1)]. The proceedings reached the Sessions Court on 7th January and on 10th January the Sessions Judge after perusal of the proceedings passed orders. It is clear that no notice was issued to the accused, Nga Hnaung, and that he had no opportunity of being heard by the Sessions Judge.

So far as I have been able to ascertain, it has not yet been ruled in this Province that a person whose case has been submitted to the Sessions Judge under section 123 sub-section (2) of the Code of Criminal Procedure has the right to be heard before the Sessions Judge passes orders. But the matter has been considered by at least two High Courts in India. In *Nakhi Lal Jna* v. *Queen-Empress* (1) the High Court at Calcutta said:—

"We have no doubt that, on hearing such a reference [*i.e., one under section 123 sub-section* (2)], the Sessions Judge is bound to give notice to the person concerned and also to hear him by pleader, if he should be so represented."

In *Emperor* v. *Girand* (2) the High Court at Allahabad followed this ruling and observed:—

"It is expedient, and highly desirable for the ends of justice, that a date should be fixed for hearing and that notice of such date should be given to the person concerned."

The principle upon which these rulings are based is that it is inequitable to make an order to the prejudice of the accused person unless he has been given an opportunity of being heard. In the case under reference, it is specially desirable that this principle should be observed as there is no appeal from the order of the Sessions Judge. The only remedy available to the accused is to move this Court in revision, the course adopted by the accused in this case.

I hold, therefore, that before dealing with a reference under section 123 sub-section (2) of the Code of Criminal Procedure, the Sessions Judge is bound to fix a date for the hearing and to give reasonable notice to the person concerned and to hear him if he wishes to be heard either personally or by pleader.

Accordingly I set aside the order of the Sessions Judge in the case of Nga Hnaung and direct him to dispose of the reference in accordance with the direction given above.

(1) (1900) I. L. R. 27 Cal., 656. | (2) (1903) I. L. R. 25 All. 375.

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

Civil Second Appeal No. 128 of 1904. March 6th 1905.

PO SEIN AND BA TIN BY THEIR NEXT FRIEND SHWE KA *v.* PO MIN AND MA SHWE KYAW.

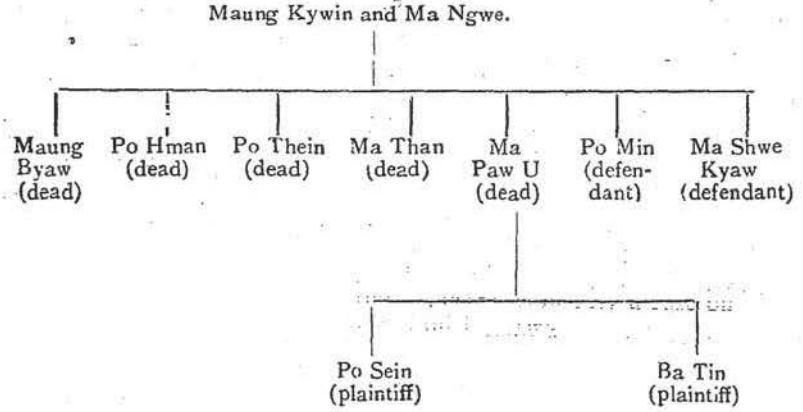
Mr. *Bland*—for appellants (plaintiffs). | Mr. *Bagram*—for respondents (defendants).

Buddhist Law: Inheritance—orasa child—eldest surviving child—grandchildren.

The rule, that if the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt, does not apply to the children of the eldest surviving son or daughter unless he or she is technically the *orasa*.

The children of younger sons or daughters who die before their parents receive one-fourth of the share to which their parents are entitled.

Thirkell White, C. J.—Po Sein and Ba Tin, the plaintiffs-appellants, are sons of Ma Paw U, who was the daughter of Maung Kywin and Ma Ngwe. The defendants-respondents are son and daughter of Maung Kywin and Ma Ngwe. The diagram below shews the family of Maung Kywin and Ma Ngwe, so far as it is relevant to this case.



The eldest three sons and the eldest daughter of Maung Kywin and Ma Ngwe predeceased their parents and have left no issue now surviving. Ma Paw U survived her father but died before her mother, leaving two children, the plaintiffs.

The plaintiffs' claim is that as children of the *orasa* daughter of Maung Kywin and Ma Ngwe, they are entitled to one-third of the estate of Maung Kywin and Ma Ngwe. The lower Courts have awarded them one-twelfth. The sole question for decision in this appeal is whether their share of the estate should be one-twelfth or one-third.

The claim was based on the ground that the deceased Ma Paw U was the *orasa* daughter. But it is clear that this position is untenable. She was neither the eldest child nor the eldest daughter. She was not even the eldest survivor among a family consisting only of daughters,

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for at the time of her mother's death she had an adult brother, Po Min. Whatever may be the rule, as to the devolution of the *status* of an *orasa* son, there is no authority for the suggestion that the second daughter who is also the fifth child can under any circumstances become an *orasa* child so long as there is a brother surviving and competent to assume the headship of the family.

The rules as to the shares of grandchildren in the estate of their grandparents, when their own parents have died before reaching the inheritance, are contained in sections 162, 163, and 164 of Volume I of the *Digest of Buddhist Law*. There is an unusual unanimity in the texts. If the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt. But this is strictly confined, in all the texts, to the children of the *orasa* or eldest son or daughter. In my opinion, the rule relates to the *orasa* son or daughter, strictly so called. There is no indication that it has any reference to the eldest surviving son or daughter, unless he or she is technically the *orasa*. Nor has any authority been cited which would give colour to that suggestion. As to the children of younger sons or daughters who die before their parents, they receive one-fourth of the shares to which their parents are entitled. (Section 164 of Volume I of the Digest). There is one solitary text of *Dhamma-vinicchaya* which gives such children one half of their parents' share. But the preponderant weight of authority is in favour of the share of one-fourth. In my opinion, this is an established rule and is applicable to the present case. Ma Paw U was not the *orasa* daughter; she was a younger daughter and as such her children come under the rule in section 164 of the *Digest*. The rule in sections 162 and 163 has no application to the surviving eldest son or daughter unless he or she was *orasa*.

For these reasons I would dismiss this appeal with costs.

Fox, J.—I concur.

Criminal Appeal No. 129 of 1905. April 27th, 1905.

Before Mr. Justice Birks.

SAN HLAING *v.* KING-EMPEROR.

Reformatory Schools Act, 1897, section 8 and rules.

The period of detention in a Reformatory School to which a youthful offender over 13 years of age should be sentenced should be such that he will not leave the school until he has attained the age of 18 years.

I admitted this appeal to consider the sentence. On the merits there seems no doubt that the accused was rightly convicted. He was caught in the actof walking off with a loongyi. The accused admitted a previous conviction and attempted no defence. He was born on the 1st October 1890, and will attain the age of 18 on the 1st October 1908. He has been sentenced to three years' detention in a Reformatory School in lieu of three months' rigorous imprisonment. This sentence was passed on the 6th March 1905. Section 8 of the Reformatory

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Schools Act, 1897, provides that the detention to be undergone in lieu of imprisonment shall not be less than three years and not more than seven years, subject to any rules made by the Local Government. These rules are published in Judicial Department Notification No. 237, dated 12th June 1897, and Rule I, clause (*iii*), provides that of the youthful offender is over 13 years of age he should be sent to a Reformatory School for such period as will bring him to the age of 18. The appeal is dismissed, but as the order of detention is less than that prescribed by rule, notice will issue to accused to show cause why he should not be detained in the Reformatory till the 1st October 1901.

(Civil Reference.) Ref. 13 R. 633. F.B.

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

Civil Reference No. 6 of 1904. December 19th, 1904.

SEIN THAUNG *v.* SHWE KUN.

Jurisdiction—Courts of Small Causes—Suit for agricultural rent—Provincial Small Cause Courts Act, 1887, section 15, Second Schedule, Article 8.

In the absence of a notification by Government under Article 8 of the Second Schedule of the Provincial Small Cause Courts Act, 1887, a suit for rent of paddy-land is not a suit of a nature cognizable by a Court of Small Causes. Consequently a second appeal is not barred by section 586 of the Code of Civil Procedure, nor by proviso (*a*) to section 30 of the Lower Burma Courts Act, 1900.

Maung Sit Le v. *Maung Shwe Thin*, (1901) 1 L. B. R., 69, overruled.

Ma Ka v. *Ma Win Byu*, (1902) 1 L. B. R., 335; *Soundaram Ayyar* v. *Sennia Naickan*, (1900) I. L. R., 23 Mad., 547; *Uma Churn Mandal* v. *Bijari Bewah*, (1887) I. L. R., 15 Cal., 174; referred to.

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

The suit was for Rs. 20 rent of paddy land. The only question for decision now is whether an appeal lay from the decree of the Township Court. Appellant says that the Township Court of Tavoy has Small Cause powers up to Rs. 50, and that the suit is of a nature cognizable by a Court of Small Causes. The authority cited in support of the latter proposition is the ruling of *Birks, J.*, in *Maung Sit Le* v. *Maung Shwe Thin* (1). That ruling was cited before me once before in *Ma Ka* v. *Ma Win Byu* (2) when I remarked in an *obiter dictum* that it was based on a decision of the High Court of Madras in *Soundaram Ayyar* v. *Sennia Naickan* (3) which was a decision on the meaning of section 586, Code of Civil Procedure. There was no question whether a suit for rent was cognizable by a Court of Small Causes or not. It was agreed on both sides that the suit would not have been so cognizable if the Madras Government had not issued a notification under Article 8 of Schedule II of the Provincial Small Cause Courts Act. I remarked that so far as I was aware no such notification had been issued in Burma, and I am still in the same case as regards Burma outside Rangoon. I am of opinion that a suit for rent of agricultural land is not cognizable by a Court of Small Causes

(1) (1901), 1 L. B. R., 69. (2) (1902), 1 L. B. R., 335.
(3) (1900), I. L. R., 23 Mad., 547.

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in Tavoy district, by reason of the terms of Article 8. As this view is contrary to the ruling of Mr. Justice Birks I refer to a Bench of two Judges, under section 11 of the Lower Burma Courts Act, the question—"Is a suit for rent of paddy-land a suit of a nature cognizable by a Court of Small Causes in Lower Burma, outside Rangoon?"

The opinion of the Bench was as follows:—

Fox, J.—If the question had been "Did an appeal lie to the District Court from the decree of the Township Court in this case?" I do not think there could be the slightest doubt about the proper answer.

Even though the Township Court had jurisdiction as a Court of Small Causes, the effect of section 15 and section 32, and Article 8 of the Second Schedule to the Provincial Small Cause Courts Act, 1887, is that any Court constituted under the Act, and any Court invested with the jurisdiction of Courts under the Act, is precluded from exercising jurisdiction in suits for the recovery of rent, other than house-rent, unless the Judge of the Court has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. The Judge of the Tavoy Township Court not having been so invested, and the suit having been one for rent other than house-rent, it follows that the Township Court could not have taken cognizance of the suit under its Small Cause Court jurisdiction. It did not profess to do so. The suit was dealt with in the exercise of its ordinary jurisdiction, consequently an appeal lay from its decree to the District Court. This answer to the concrete question arising in the case affords a guide to the question referred. I am clearly of opinion that a suit for rent of paddy-land is not a suit of a nature cognizable by a Court of Small Causes in Lower Burma, outside of Rangoon, since the Judge of the Rangoon Court of Small Causes is the only Judge in Lower Burma who has been expressly authorized to exercise jurisdiction in suits for rent other than house-rent.

The decision in *Maung Sit Le* v. *Maung Shwe Thin* (1) was in accord with the ruling of a majority of a Full Bench of the Madras High Court in *Soundaram Ayyar* v. *Sennia Naickan* (3). In the latter case much of the reasoning on which the conclusion was based turned upon the fact that the Local Government of Madras had invested all Subordinate Judges and District Munsifs in that Presidency with the authority indicated in Article 8 of the Second Schedule to the Provincial Small Cause Courts Act, 1887. No doubt the learned Judges did not base their conclusion entirely on this fact, and in the case of *Maung Sit Le* v. *Maung Shwe Thin* (1) some words of one of the learned Judges are quoted with approval which show that he considered that in any case suits for recovery of rent other than house-rent are of a nature cognizable by a Court of Small Causes.

I am unable to adopt this view. The effect of section 15 of the Act and Article 8 of the Second Schedule appears to me to be that the Supreme Legislative body made suits of the nature in question

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non-cognizable by Small Cause Courts, but it did what is often done in Indian Legislation: it delegated part of its powers to other authorities, and enabled those authorities to make such suits cognizable by Courts presided over by Judges expressly invested by such authorities with jurisdiction to try them.

I cannot find that the decision of the Madras High Court has as yet been adopted by any other High Court.

The decision in *Uma Churn Mandal* v. *Bijari Bewah* (4), which is still an authority in Bengal, conflicts with it.

I would answer the question referred in the negative.

Thirkell White, C. J.—I concur.

Before Mr. Justice Birks.

Special Civil Second Appeal No. 152 of 1904. March 29th, 1905.

THET SHE *v.* MAUNG BA.

Messrs. *Eddis, Connell* and *Lentaigne* for appellant (defendant.) | Messrs. *Cowasjee* and *Cowasjee* and *Palit* for respondent (plaintiff.)

Evidence – Copies of documents—Evidence Act, s. 64.

When a copy of a document has been produced and admitted in evidence without objection in a Court of First Instance, the objection that it is only a copy and not the original cannot be raised in the Appellate Court.

Akbur Ali v. *Bhyea Lal Jha*, (1880) I. L. R., 6 Cal., 666; *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*, (1886) I. L. R., 11 Bom., 320; cited.

* * * * *

The only question of law that seems to arise is that stated in the 2nd and 3rd grounds of appeal, that the Courts below erred in admitting a copy of the sale certificate in place of the original, which has not been proved to be lost. Mr. Connell also urges that the only other evidence as to the sale is that of Maung Kya Bo, the father of Maung Ba and husband of Ma Lon Ma Gale. His evidence shows that the rent was in arrears for fallow rate but the Myoôk said he would sell for the whole revenue due. The land was put up but there was no bidder. According to this witness, Maung Hmat did not pay the arrears but Maung Lu Gale, the agent of Ma Lon Ma Gale, did and the land was sold to him at the Myoôk's Court house but he, Maung Kya Bo, was not present. Exhibit 6, however, shows that this revenue sale has been accepted by the revenue authorities and the Courts below are correct in saying that the Civil Courts are barred from questioning a revenue sale under sections 55 and 56 of the Land Revenue Act.

Mr. Cowasjee for the respondent urges that, as the Courts below have admitted the copy of the sale certificate without objection taken it would be inequitable to raise the objection now and he cites the following cases:

(1) *Akbur Ali* v. *Bhyea Lal Jha* (1). In that case certain copies of Chakbunds and a Sanad were filed by defendant without objection taken, and these were admitted by the Court of First Instance. The Lower Appellate Court rejected them as inadmissible. *Garth, C. J.*,

(4) (1887), I. L. R., 15 Cal., 174.
(1) (1880) I. L. R., 6 Cal., 666.

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remarked: "It is clear that where copies of documents are admitted and read in the Court of First Instance without objection, no objection to their admission can afterwards be taken in a Court of Appeal." This case was referred to in two subsequent decisions (9 Cal., 813, and 12 Cal., 182) but the particular point now in question was not discussed.

(2) *Chimnaji Govind Godbole* v. *DinkarDhondev Godbole* (2). In this case a copy of a copy had been admitted in evidence in the Court of First Instance and was excluded on this ground by the Assistant Judge on appeal. *West, J.*, held that the Appellate Court had no right to raise the objection or recognize it on appeal as no objection to its admission had been taken in the Court below. The object of the rule is obvious for, if objection is taken, the party producing the copy can ask for an adjournment in order to get the original or else to give evidence justifying the admission of secondary evidence. I do not think the 2nd and 3rd grounds of appeal are maintainable.

* * * * *

There is no appeal on the facts for both the Courts concur.

The appeal is dismissed with costs.

Special Civil 2nd Appeal No. 174 of 1904. February 14th, 1905.

Before Mr. Justice Birks.

YON BYU *v.* SHWE TAIK AND MIN SU.

Messrs. *Burn* and *Burn*—for the appellant (defendant).

Messrs. *Agabeg* and *Maung Kin*—for the respondents (plaintiffs).

Claim to land in town—Lower Burma Town and Village Lands Act, 1898, sections 11, 15—bar to jurisdiction of Civil Court.

In a suit for recovery of a house site in a town to which the Lower Burma Town and Village Lands Act, 1898, applies, the question, whether plaintiff's right to the land has ceased under section 11 of the Act by reason of his abandonment of it for more than two years continuously, is one which must under clause (2) of section 15 of the Act be referred for determination to the Revenue Officer.

The plaintiff-respondent, Maung Shwe Taik, sued Maung Yon Byu to recover a house site in Pantanaw, worth Rs. 150.

The first plaintiff alleges that his parents had occupied this site for 30 years; it had come into plaintiff's possession by succession and that he had held it for 15 years; that his house had been destroyed by a cyclone in 1902 and that in 1904 he had put down posts in order to build a new house, that defendant had pulled down these posts while he was absent and had occupied the site.

A second plaint was filed, from which it appears that Ma Min Nu, the second plaintiff and mother-in-law of Maung Taik, was the real owner and she joined with him in the suit against defendant after an objection raised by him.

The defence was that defendant had received permission from the Revenue authorities to occupy the vacant sites. Ma Min Nu's former title was apparently admitted, but she was alleged to have abandoned the site and could not resume it as she paid no tax and had no potta.

(2) (1886) I. L. R., 11 Bom., 320.

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The Court of First Instance dismissed the suit, which was decreed by the Lower Appellate Court.

There are seven grounds of special appeal as follows:—

(1) That the plaintiff should have brought his claim before a Revenue Officer under the Burma Land and Revenue Act.

(2) That the evidence shows abandonment for more than two years.

(3) That no objections were made when notices were issued by the Township Officer.

(4) That his permit has never been cancelled.

(5) That appellant has built a house thereon costing Rs. 500.

(6) That respondent knew that appellant was building and remained quiet till he had spent Rs. 500.

With regard to these grounds it may be observed that as the site is in Pantanaw town the Lower Burma Land and Revenue Act, 1876, is not applicable under clauses *(d)* and *(e)* of section 4. The Act that applies will be the Lower Burma Town and Village Lands Act, 1898 (Act IV of 1898). Section 11 of that Act provides that "a landholder's right in respect of any land shall cease after he abandons possession for two years continuously." Section 15 provides that "Whenever a question arises in any proceeding before a Civil Court as to whether any person has acquired landholder's rights in respect of any land * * * * and whenever any question arises as to whether a landholder's right having been acquired has been subsequently lost, the Court shall refer such question to the Revenue Officer and shall give judgment in accordance with his decision thereon." In this case the Court of First Instance seems mistaken in thinking that Ma Min Nu, the second plaintiff, did not acquire a landholder's right merely because she did not pay revenue for 12 years. She appears to have acquired a good title under section 8, clause *(a)*. The only point in the case to determine was whether that landholder's right had ceased under section 11. This matter should have been referred to a Revenue Officer as arising under the last clause of section 15. Section 41 of the Act provides that no Civil Court shall have jurisdiction to determine *(a)* any matter which under this Act is to be determined by a Revenue Officer, *(b)* any claim to any right to land as against the Government. From some passages in the judgment of the Court of First Instance it would seem that the permission given by the Revenue authorities was given without proper enquiry, but the judgment in no way states that the question has been decided by the Revenue authorities and the proper course was to have referred the question before dismissing the suit altogether. The case will be remanded to the Lower Appellate Court for a finding on this issue—

Has the plaintiffs' right ceased under section 11 of Burma Act IV of 1898?

The decision of this issue must be referred to the proper Revenue Officer and the Revenue Officer's decision on the point must be certified to this Court to enable it to decide this appeal in accordance therewith.

The proceedings to be returned in three months' time.

Full Bench—(Criminal Reference.)

Criminal Reference No. 9 of 1905. May 8th, 1905.

Before the Hon'ble Harvey Adamson, C. S. I., Chief Judge, Mr. Justice Fox and Mr. Justice Birks.

KING-EMPEROR *v.* SAN DUN AND EIGHTEEN OTHERS.

Joinder of charges—joint trial of accused—summons cases—Criminal Procedure Code, sections 233, 242.

Section 233 of the Code of Criminal Procedure, 1898, and the sections therein referred to relating to joinder of charges and the joint trial of several accused, apply to the trial of summons cases under Chapter XX of the Code.

Queen-Empress v. *Abdul Kadir*, (1886) I. L. R. 9 All., 452, dissented from.

Subrahmania Ayyar v. *King-Emperor*, (1901) I. L. R. 25 Mad., 61; *Pulisanki Reddi* v. *The Queen*, (1882) I. L. R., 5 Mad., 20; *Queen-Empress* v. *Nga La Kyi*, (1888) S. J. L. B. 421; *King-Emperor* v. *Nga Po Thin*, (1903), 2 L. B. R. 72; referred to.

The following reference was made to a Full Bench by a Bench consisting of Sir Herbert Thirkell White, K.C.I.E., Chief Judge and Mr. Justice Birks, under section 11 of the Lower Burma Courts Act, 1900.

Thirkell White, C. J.—The accused have been tried together in a summary trial for separate offences and have been convicted and sentenced. There was no right of appeal. On the application of some of the accused the learned Sessions Judge of the Delta Division, a copy of whose order is attached, has reported the case to this Court for orders, under section 438 of the Code of Criminal Procedure.

The offences of which the accused have been convicted are under Rule 69 of the Rules made under the (Lower) Burma Land and Revenue Act, 1876, the act alleged to constitute the offence in each case being an encroachment on a grazing ground. It is to be regretted that the Government Advocate was not instructed to give us the benefit of his assistance in this case.

It is stated by the learned Sessions Judge that each of the accused cultivated a separate piece of land. They did not all join together to cultivate the same piece in common. From the record, this seems to be, generally at least, the case. The learned Sessions Judge is of opinion that the trial is bad for misjoinder as the accused did not commit the same offence or different offences in the same transaction within the meaning of section 239 of the Code of Criminal Procedure.

The offence punishable under Rule 69 of the Revenue Rules is triable in a summons case, and it is also triable in a summary way. The first observation that occurs to me is that section 233 of the Code of Criminal Procedure, which is the section that provides for the separate trial of distinct offences, occurs in the Chapter of the Code which treats of the charge. It seems to me that the rules in this Chapter (Chapter XIX) apply explicitly to cases in which a charge is framed, that is, to cases other than summons cases and summary trials. The leading case on the subject of misjoinder in criminal trials is that of *Subrahmania Ayyar* v. *King-Emperor*(1) in which the law was set forth and

(1) (1901) I. L. R. 25 Mad. 61.

explained by their Lordships of the Privy Council. Their Lordships' ruling that misjoinder is an illegality and not merely an irregularity is based on the position that there was a contravention of a positive enactment in the Code of Criminal Procedure. It does not seem to me that this ruling can apply to cases to which the rules in Chapter XIX of the Code do not apply.

I do not think that there is any provision of the Code, other than the provisions in Chapter XIX, which explicitly requires separate offences to be tried separately. But I find that in the case of *Pulisanki Reddi* v. *The Queen* (2) the High Court at Madras set aside convictions on the ground that the accused persons must undoubtedly have been prejudiced by the several charges having being disposed of in one trial. The offences in respect of which the accused were tried were under section 290 and section 291, Indian Penal Code; the case was therefore a summons case. The High Court explicitly mentions "charges" but it is not clear whether the word is used in its technical sense.

Some observations relevant to the matter under consideration may be found in the judgment of *Mahmood, J.*, in *Queen-Empress* v. *Abdul Kadir*(3) in which it was said :—

"It seems to me clear upon general principles, that each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case should be separately tried."

I find that in this case it was contended that section 239 of the Code of Criminal Procedure, 1882, (which is substantially the same and in the same part of the Code as the same section in the Code of 1898) is applicable to summons cases. And this view seems to have been accepted by the learned Judge. With all respect, it seems to me that the contrary is obviously the case. As I have observed, the section occurs in the Chapter treating of the charge, not in the Chapter of General Provisions as to inquiries and trials.

Some light may be thrown upon the subject by the fact that in the revised Code of Criminal Procedure, 1898, a new sub-section (*4*) was added to section 117, authorizing enquiries into the case of two or more persons in certain cases. It seems probable that the provision was inserted in view of the general principle stated by *Mahmood, J.*

In the absence, so far as I can ascertain, of any specific rule on the subject, I am disposed to think that the trial of several persons at the same trial, when the case is a summons case or is tried summarily, is permissible only when the joint trial cannot reasonably be held to prejudice the accused in their defence. Where a joint trial would or might prejudice the accused, they should be tried separately.

In the present case, I agree that the accused were prejudiced by being tried together. I also agree with the Sessions Judge in thinking that the trial should in any case have been held regularly, not summarily.

(2) (1882) I. L. R. 5 Mad., 20.
(3) (1886) I. L. R., 9 All., 452.

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I would therefore reverse the convictions and sentences and direct that the fines be refunded to the accused, namely, San Dun, Shwe Bok, Mutu Tha Han, Shwe Le, Po Lan, Ba Cho, Aung Myat, Ma Twe, Po Kin, Po Ka, Shwe Hla Gyi, Po Hla, Paw La, Shwe Ngo, Nga Nyo, Po Aung, Tun Baw and Tha U.

I would leave it to the discretion of the District Magistrate to direct further proceedings, if he thinks fit to do so.

A somewhat important point of law is involved in this case; and as we are diametrically opposed as to its proper determination, I think it should be referred to a Full Bench under section 11 of the Lower Burma Courts Act, 1900.

The question I would refer is whether Chapter XIX of the Code of Criminal Procedure and especially section 233 of the Code applies to this case, which is a summons case in which no formal charge need be framed (section 242, Code of Criminal Procedure).

Birks, J.—I concur with the learned Chief Judge in thinking that the accused have been prejudiced by being tried together and that the convictions should be set aside. I am clearly of opinion however that sections 233 to 239 inclusive Criminal Procedure Code, apply to all trials whether a formal charge is framed or not. It may be observed that section 242 Criminal Procedure Code seems to contemplate a "charge" though not a "formal charge" and Chapters XX—XXII of the Criminal Procedure Code deal with "trials" and not "enquiries." Though the word "trial" is not defined in section 4 as the words "enquiry," "investigation," and "judicial proceeding" are, it is, I think, clear from sections 5, 228, 229, 230, 231, and 232 that the old distinction between investigation by the Police, enquiries by Magistrates and trials by Magistrates or Judges as defined in the Code of 1872 is maintained. A trial begins when the conditions stated in section 221 (5) are fulfilled and accused is asked to plead either to a formal or informal charge. Chapter XIX ("of the Charge") immediately precedes Chapters XX to XXIII which deal with trials, as if the charge were an essential element in a "trial" as distinguished from a mere "inquiry" or "judicial proceeding". Section 233 would not find an appropriate place in Chapter XXIII which deals with "general provisions as to inquiries and trials" for it is not applicable to mere inquiries. Proceedings held under Chapter VIII for the prevention of offences are not described as "trials" but "inquiries" and clause 2 of section 117 says that such "inquiry" shall be made as nearly as may be practicable * * * in the manner prescribed for conducting "trials" in summons cases or warrant cases. The wording of the amendment in sub-section (4) of section 117 seems rather to overrule the opinion expressed by Mr. Meres in *Queen-Empress* v. *Nga La Kyi* (4) that two or more persons associated together in the matter under enquiry must be tried separately. Earlier in his judgment Mr. Meres said that section 239 Criminal Procedure Code had no application to the case under consideration. The wording of section 117 Criminal Procedure Code seems to support the finding of the majority of the

(4) (1888) S. J. L. B. 421.

Bench in the *King-Emperor* v. *Nga Po Thin* (5) that these inquiries do not end in "sentences." I understand my learned colleague would hold sections 233 to 239 not applicable to any summary trial, but many warrant cases are tried summarily and the illustrations to sections 233 to 239 refer to thefts. It does not seem to me that the procedure laid down in Chapters XX and XXI affects the provisions of Chapter XIX except as to the formality with which the charge is drawn up and the stage of the proceedings at which the trial commences. In summons cases the charge is stated in section 242 and in warrant cases under section 254 and section 262 provides that the procedure under these Chapters shall be followed in summary trials except that the record is briefer. As my learned colleague differs from me on this point I concur in the matter being referred to a Full Bench though it may be noted that the case can be decided without an answer to the reference.

The opinions of the Judges of the Full Bench were as follows:—

Fox, J.—The question referred is "Whether Chapter XIX of the Code of Criminal Procedure and especially section 233 of the Code applies to this case, which is a summons case in which no formal charge need be framed."

Section 233 of the Code enacts that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.

This is a comprehensive provision laying down a broad principle of procedure. The question is whether the trial of a summons case is excepted from such procedure by reason of section 242 enacting that in such a trial "*it shall not be necessary to frame a formal charge.*"

The word "charge" is not defined in the Code. In section 242 the word "accused" is used in connection with the particulars of the offence being stated to the accused person, but it is used in the same sense as the word "charged" in ordinary parlance. Possibly the explanation of the use of the former instead of the latter word is that it was considered that the former would emphasize the fact that no formal charge was necessary. The concluding words of the section appear to contemplate that in a summons trial there is a charge of an offence, although it is not necessary to embody it in writing in accordance with the provisions of sections 221, 222 and 223 of the Code.

I would say in answer to the question referred that section 233 of the Code of Criminal Procedure and the sections mentioned in it apply to trials of summons cases under Chapter XX of the Code.

Birks, J.—I concur in the view expressed by Mr. Justice Fox, that section 233 Criminal Procedure Code is of universal application. A charge seems to me to be an essential element in any trial and it may be noted that if the provisions as to joinder of charges do not apply to summons cases, there are no other provisions of law to guide Magistrates in dealing with such cases.

Adamson, C. J.—I concur.

(5) (1903) 2 L. B. R., 72.

(Civil Reference.)

Civil Reference No. 4 of 1905. May 9th, 1905

Before the Hon'ble Mr. Harvey Adamson, C. S. I., Chief Judge, and Mr. Justice Fox.

MA NYEIN AND PO LU *v.* MA KON.

Mr. *Giles*—for appellants (defendants.)

Mr. *McDonnell*—for respondent (plaintiff).

Frame of suit—joinder of claims—suit for mesne profits subsequent to suit for recovery of land—Civil Procedure Code, sections 42, 43, 44.

A suit for possession of immoveable property brought against persons claiming under a title which is found to be bad, and not including a claim for mesne profits, bars a subsequent suit for mesne profits accruing before the date of the filing of the first suit.

Oktama v. *Ma Bwa*, (1900) 1 L. B. R. 13, overruled in part.

Lalessor Babui v. *Janki Bibi*, (1891) I. L. R. 19, Cal., 615, dissented from.

Lalji Mal v. *Hulasi*, (1881) I, L. R. 3, All., 660; *Mewa Kuur* v. *Banarsi Prasad*, (1895) I. L. R. 17 All., 533, *Venkoba* v. *Subbanna*, (1887) I. L.R. 11 Mad., 151, followed.

Madan Mohan Lal v. *Lala Sheosanker Sahai*, (1885) I. L. R. 12 Cal., 482; *Maung Chit Le* v. *Maung Pan Nyo*, (1904) 10 B. L. R., 246; *Chand Kour* v. *Partab Singh*, (1888) I. L. R. 16 Cal., 98, *Cooke* v. *Gill*, (1873) L. R. 8 C. P. 107; referred to.

The following reference was made to a Bench by Mr. Justice Birks:—

The plaintiff-respondent filed suit No. 122 in the Subdivisional Court of Pyapôn, to recover 70·33 acres of paddy land alleged to have been wrongfully let out by the appellants, Ma Nyein and Maung Po Lu, to the third defendant, Maung Shwe Hman. It is admitted that the plaint did not contain a claim for mesne profits. The plaintiff obtained a decree for the land on the 24th October 1903, and a note is appended to the judgment that the land can be made over after the harvest, *i.e.*, on the 31st March 1904. The first and second defendants appealed, but the appeal was practically withdrawn and the decree of the Court of First Instance was only modified as to the boundaries set out in the decree. The plaintiff then filed suit No. 8 of 1904 in the same Court for Rs. 1,000 being the value of 1200 baskets of paddy due for rent for two years as mesne profits, after deducting Rs. 170 paid for revenue. The plaintiff obtained a decree for Rs 927-9-8. The Court of First Instance held that the suit was not barred and this decision was confirmed by the Court of First Appeal which cited the ruling of this Court in *Oktama* v. *Ma Bwa* (1).

Mr. Giles argues that this case is not applicable, as may be concluded from the last words in that judgment.—"There is no cross-appeal with regard to the claim for rent prior to the decree, so that it is not necessary to discuss the question whether that claim would be barred." I have referred to the pleadings and judgments in that case and I find that the claim for the first year's rent had accrued before the 9th August 1897, the date of the institution of the suit for recovery of the land, while the mesne profits were subsequent to the decree. I see that Mr. Palit then argued that the lower Appellate

(1) (1900) 1, L. B. R., 13.

Court was wrong in refusing to allow the first year's rent, quoting *Lalessor Babui* v. *Janki Bibi* (2) but he admitted he had filed no cross-appeal with regard to the first year's rent disallowed by the lower Appellate Court. Mr. Giles is, therefore, correct in saying that it was not necessary, to follow the ruling in the case of *Lalessor Babui* in order to determine the appeal and that the remark, "The Court of First Instance was wrong in holding that a suit for mesne profits alone was barred under section 43 Civil Procedure Code" was merely an *obiter dictum*.

The only question to determine in this appeal is whether a suit for possession of property in which mesne profits are not claimed is a bar to a subsequent suit for mesne profits which have accrued prior to the institution of the first suit. It is admitted that the Calcutta High Court has always held that such subsequent suit is not barred, while the Allahabad and Madras High Courts and more recently the Judicial Commissioner, Upper Burma, have held that it is.

Mr. Giles' argument is that the words "entitled to make" which were substituted for "arising out of the cause of action" in section 43 of Act X of 1877 shew that the Legislature adopted the views of *Straight* and *Spankie*, *J.J.*, who used these words in the Full Bench ruling of the Allahabad High Court in *Lalji Mal* v. *Hulasi* (3). This is clearly a mistake, for the words in question were substituted by Act XII of 1879, and the learned Judges were quoting the words of the existing law when they delivered judgment in March 1881. In that case the plaintiff sued for the specific performance of a contract of mortgage, but did not ask for compensation for the breach of it, the measure of which would have been reasonably estimated at the amount of mesne profits misappropriated. The case was decided under Act X of 1877 and the Court held that the claims for compensation and mesne profits were in respect of one and the same cause of action. *Spankie*, *J.*, cited sections 43, 44, clause (*a*), sections 211 and 244 as bearing out this view. The Calcutta High Court in *Lalessor Babui v. Janki Bibi* (2) held that this case was not in point, presumably as the cause of action in that case arose out of a mortgage bond and the suit was for specific performance. It appears, however, that the plaintiff obtained possession in his first suit and therefore the first suit was for recovery of immoveable property within the meaning of section 44, which is the same in the Act of 1877 and the Act of 1882.

In a later ruling *Mewa Kuar* v. *Banarsi Prasad* (4) decided in May 1895 under the present Code, *Edge*, *C. J.*, and *Banerji*, *J.*, held that this case and also that of *Venkoba* v. *Subbanna* (5) were applicable to a subsequent suit for mesne profits after the plaintiff had brought a suit for ejectment on a forfeiture. The learned Judges observed that in section 44 the words "cause of action" and "claim" were treated as synonymous. The Calcutta High Court in *Lalessor*

(2) (1891) I. L. R., 19 Calc., 615.
(3) (1881) I. L. R., 3 All., 660.
(4) (1895) I. L. R., 17 All., 533.
(5) (1887) I. L. R., 11 Mad., 151.

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Babui's case held that though the wording of the section was somewhat different from the Act of 1859, claims for possession and mesne profits were still distinct claims. They held that section 44 merely permitted the joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. I concur with Mr. Justice Irwin that the case of *Madan Mohan Lal* v. *Lala Sheosanker Sahai* (6) does not throw much light on the views taken by either the High Court of Calcutta or of Madras. It appears that in the case under appeal there had been a separate and subsequent suit for a portion of the mesne profits, after the plaintiff had sued for possession alone, and the judgment of the Calcutta High Court was confirmed which stated he could not have joined all his claims for mesne profits in one suit. The point was not before Their Lordships to determine whether the first suit for mesne profits was maintainable. They did not, however, express any opinion as to whether the practice in the mofussil in Bengal was wrong as to allowing such suits.

The matter is not free from difficulty for I concur with the Calcutta High Court in thinking section 44 of the Code of 1882 is permissive in character. It seems to lay down a general rule that no other cause of action shall be joined with a suit for recovery of immoveable property, unless with the leave of the Court, except claims for mesne profits and similar claims. Sections 7, 8, 9 and 10 of Act VIII of 1859 reads as follows:—

7. Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.

8. Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court.

9. If two or more causes of action be joined in one suit and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

10. A claim for the recovery of land and a claim for the mesne profits of such and shall be deemed to be distinct causes of action within the meaning of the two last preceding sections.

It may be noted that section 10 in this act is really an explanation of the two preceding sections for it expressly refers to them. In Act X of 1877, section 44, the corresponding section, appears in the same terms as in Act X of 1882 and appears to form a distinct provision of law aimed against multifariousness as section 43 is aimed against splitting the cause of action. If it is argued that the omission of the words "a claim for recovery of land and a claim for mesne profits shall be deemed to be distinct causes of action within the meaning of the last two preceding sections" in the later Codes indicates that a claim for recovery of land and recovery of mesne profits is only one cause of action, the omission of the reference to the preceding sections

(6) 1885, I. L. R., 12 Cal., 482.

seems also to indicate that the Calcutta practice was correct and that section 44 was not simply an explanation of section 43. In my opinion the illustration to section 43 shews the kind of claim which the Legislature considered the plaintiff was entitled to make in respect of the cause of action. It is obvious that if a man has three years' rent due to him at the time he sues for arrears of rent and he only sues for one year's rent his cause of action was simply for recovery of rent due and that he should have joined all his claims for arrears of rent. In comparing section 10 of Act VIII of 1889 with section 44 of Act X of 1877 which was not altered when the Code was amended in 1882 I think it is clear that the Legislature intended that suits for recovery of rent were of sufficient importance to be tried by themselves and that it is merely optional with the plaintiff to include a claim for mesne profits or rents when he brings such a suit. I think on the general principles of interpretation of statutes that where the provisions of a Code are susceptible of two interpretations, and the application of one of them will act as a bar to claims that are justly due, the interpretation most favourable to the person seeking the redress should be adopted. At the time the Code of 1882 was passed it would have been easy for the Legislature to add another illustration to section 43 which would set at rest the divergence of opinion between the Calcutta and the Allahabad High Courts. As the point is of some importance and the Judicial Commissioner of Upper Burma has taken a contrary view in *Maung Chit Le* v. *Maung Pan Nyo* (7) I will refer the question to a Bench.

The question to be referred is:—

Does a suit for possession brought by a plaintiff against persons claiming under a title found to be bad when mesne profits are not claimed at the time the suit is brought, bar a subsequent suit for mesne profits accruing before the date the first suit was filed?

The opinion of the Bench was as follows:—

Fox, J.—The question referred is "Does a suit for possession brought by plaintiff against persons claiming under a title found to be bad when mesne profits are not claimed at the time the suit is brought, bar a subsequent suit for mesne profits accruing before the date the first suit was filed?

In *Oktama* v. *Ma Bwa* (1) the learned Judge who has referred the case following the decision of the Calcutta High Court in *Lalessor Babui* v. *Janki Bibi* (2) held that such a suit for mesne profits is not barred by a previous suit for possession.

The answer to the question must in my judgment depend on the proper construction of section 43 of the present Code of Civil Procedure. This enacts (1) that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action: (2) that 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; and (3) that a

(7) (1904) 10 B. L. R. 246.

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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. The effect of these rules appears to me to be that a plaintiff must include in his claims in a suit all the remedies and reliefs open to him upon the cause of action on which he sues, and that if he omits (except with the leave of the Court) to claim any remedies or reliefs open to him, he cannot afterwards sue for such remedies or reliefs.

The term "cause of action" is not defined in the present Code. In English Law it means every fact which is material to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to traverse. Possibly a more exact definition would be "all the facts which it would be necessary for a party to allege, and if not admitted to prove, in order to support his claim to a decree, or to an order capable of execution."

In *Chand Kour* v. *Partab Singh* (8) Their Lordships of the Privy Council refer to the term as meaning the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

What then are the facts which a plaintiff must allege, and if necessary prove, in order to support a claim to possession? He must according to clause (*d*) of section 50 of the Code, state that at a certain time he was or became entitled to possession of the land he sues for, and that since that time and up to the date of filing his plaint the defendant has had and has withheld and still withholds such land from him. If he proves such facts, he is entitled to a decree for possession. Such facts would also entitle him to a decree for mesne profits, that is to say compensation for the withholding of possession, if he claimed them. Consequently on identical facts he is entitled to two remedies. If so, section 43 of the Code compels him to sue for both remedies in one suit at the risk of losing one if he does not do so.

This is in accordance with the view of a Full Bench of the Allahabad High Court in *Lalji Mal* v. *Hulasi* (3) which was followed in *Mewa Kuar* v. *Banarsi Prasad* (4) in the same Court. In the latter case, the learned Judges say that it is possible that there may be a case in which a party would be entitled to claim recovery of immoveable property and to claim mesne profits in respect of that property in which the cause of action might not be the same, but such a case did not present itself to their minds. I also am unable to think of any such case, and none has been suggested by counsel.

In *Venkoba* v. *Subbanna* (5) a Bench of the Madras High Court also held that a party suing for possession who does not also claim mesne profits due to him at the time is debarred by section 43 of the Code from afterwards suing for such mesne profits in a separate suit.

It has been argued that if section 43 has the above effect, Rule A of section 44 is unnecessary. The wording and position of section 44 in the Code present some difficulties. If the term "cause of action"

(8) (1888) I.L.R. 16 Cal. 98.

in that section is used in its ordinary meaning, the section would appear to have been intended to provide an exception to the rule in section 45 that a plaintiff may unite in the same suit several causes of action against the same defendant or defendants, and from the wording of section 45 this would appear to be the case.

The latter part of Rule A of section 44 however treats claims for remedies as "causes of action," which they are not. The confusion of language does not appear to me to be a sufficient ground for holding that the claims mentioned in clauses (*a*), (*b*) and (*c*) of Rule A are distinct causes of action from the cause of action in a suit for the recovery of immoveable property, or for departing from the plain rules given in section 43 of the Code.

I would answer the question referred in the affirmative.

Adamson, C. J.—In my view the Allahabad and Madras rulings are more consonant with the language of the Code than the Calcutta ruling. As stated in *Cooke* v. *Gill* (9) the words "cause of action" have been held from the earliest time to mean every fact which it is material to prove to entitle the plaintiff to succeed. The cause of action in a claim to recover possession of immoveable property is identical with the cause of action in a claim for the mesne profits of that property. Recovery of possession and mesne profits constitute the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and in accordance with the provisions of section 43 of the Code of Civil Procedure, if he omits to sue in respect of a portion of the claim he shall not afterwards sue in respect of the portion so omitted. If the words "cause of action" in Rule A of section 44 bear their ordinary meaning that clause would seem to imply that the cause of action in a claim for recovery of immoveable property may be different from the cause of action in a claim in respect of mesne profits of the same property. But I find myself in the same difficulty as my learned colleague and the learned Judges of the Allahabad High Court, and no such case presents itself to my mind. It appears to me that the words "cause of action" in Rule A of section 44 are not used in their ordinary sense, and are simply equivalent to "claim." Rule B it will be observed commences with the words "no claim" and though Rule A commences with the words "no cause of action" the remainder of the rule shows that their real meaning is simply "no claim." In this view sections 43 and 44 are quite consistent with each other. But however that may be I agree with my learned colleague in thinking that the obscurity of section 44 is no reason for disregarding the plain rules given in section 43 of the Code, and I would answer the question referred in the affirmative.

(9) (1873) L. R., 8 C. P., 107.

FULL BENCH—(Civil Reference).

Civil Reference No. 3 of 1905. May 4th, 1905.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Birks.

MAUNG KIN *v.* MAUNG SA.

Messrs. *Das* and *Christopher*—for appellant (plaintiff). | Messrs. *Agabeg* and *Maung Kin*—for respondent (defendant).

Limitation—appeal—decree signed after date of judgment—time requisite for obtaining copies—Indian Limitation Act, 1877, s. 12, Schedule II, Article 156.

Under section 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of the decree begins only when a step has been taken to obtain the copy.

A party may apply for a copy of a decree before it is drawn up and signed.

If at the time when an application for a copy is made the decree is not ready, a party appealing is entitled to allowance of the time during which the decree remains unsigned, but so long as he has made no application for a copy, the non-signature of the decree can have no effect on him, and the period between the date of judgment and the date on which the decree was actually signed cannot be claimed by him.

Bani Madhub Mitter v. *Matungini Dassi*, (1886) I.L.R. 13 Cal., 104; *Gopal Chandra Chakravarti* v. *Preonath Dutt*, (1904) I.L.R. 32 Cal., 175; dissented from.

Bechi v. *Ahsan-Ullah Khan*, (1890) I.L.R. 12 All., 462; *Yamaji* v. *Antaji*, (1898) I.L.R. 23 Bom., 442; followed.

Afzul Hossein v. *Mussummat Umda Bibi*, (1895) 1 C.W.N. 93; *Golam Gaffar Mandal* v. *Goljan Bibi*, (1897) I.L.R. 25 Cal., 109; referred to.

The following reference was made to a Full Bench by Mr. Justice Fox :—

On behalf of the respondent an objection has been taken that this appeal was barred by limitation, although it was admitted as being within time.

The decree appealed from is dated the 30th April 1904. The decree however was not actually signed by the District Judge until the 18th May 1904. The appellant applied for copies of the judgment and decree on the 6th May 1904. The copy of the judgment was ready and made over to the appellant on the 9th May 1904, and the copy of the decree was ready and made over on the 20th May 1904.

If the time allowable for an appeal to this Court is computed according to the method adopted by the Full Bench of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (1) the time up to the date on which the decree was actually signed is first of all to be allowed to the appellant, and he would also be allowed two days after that date, *i.e.*, up to the 20th May when the copy of decree was ready. The 18th August 1904 which was the day on which the appeal was presented is the 90th day after the 20th May, therefore on this method of computation the appeal is not time barred.

The Allahabad High Court however in *Bechi* v. *Ahsan-Ullah Khan* (2) dissented from the above decision, and in *Yamaji* v. *Antaji* (3) a Bench of the Bombay High Court adopted the ruling of the Allahabad High Court as correct.

(1) (1886) I. L. R. 13 Cal., 104. | (2) (1890) I. L R. 12 All., 461.
(3) (1898) I. L. R. 23 Bom., 442.

According to the method of computation laid down by these High Courts, the appeal was presented after the time allowed.

Article 156 of the 2nd Division of the 2nd Schedule to the Limitation Act allows 90 days from the date of the decree or order appealed against for an appeal to a High Court. Under the first paragraph of section 12 of the Act the day from which the period of 90 days is to be reckoned must be excluded. Reckoning from the 1st May the 90th day was the 30th July 1904.

Under the second paragraph of the same section the time requisite for obtaining a copy of the decree appealed against is also to be excluded. Such time in this case amounted to 14 days, *i.e.*, from the 6th to the 20th May. Consequently the 13th August was the last day for presenting an appeal within the time allowed. I incline to think that the method of computation adopted by the Allahabad and Bombay High Courts is strictly correct and in accordance with the Act, and that the method adopted by the Calcutta High Court is not wholly admissible, but in view of the difference of opinion on the matter, I refer to a Bench of the Court under section 11 of the Lower Burma Courts Act, the following question :—

"Was this appeal presented after the time allowed by the Limitation Act for an appeal to a High Court?"

The opinion of the Bench was as follows :—

Adamson, C. J.—The question referred is—

Was this appeal presented after the time allowed by the Limitation Act for an appeal to a High Court ?

The decree is dated 30th April 1904. It was actually signed on 18th May 1904. Application for a copy was made on 6th May 1904. The copy was ready for delivery and was actually delivered on 20th May 1904. The appeal was presented on 18th August 1904. If the period between 30th April and 6th May be excluded the appeal is not time barred. If that period be included the appeal is time barred. The question is whether the appellant is entitled to deduct the time between the delivery of judgment and the signing of the decree in computing the time taken in presenting his appeal.

In *Bani Madhub Mitter* v. *Matungini Dassi*(1) the Full Bench on the Calcutta High Court held that where a suitor is unable to obtaie a copy of a decree from which he desires to appeal, by reason of thf decree being unsigned, he is entitled under section 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal. The ground of that decision was that the decree was not in existence until it was signed, and could not be copied, and that therefore the time up to the actual date of signing the decree should be taken under the provisions of section 12 of the Limitation Act as time requisite for obtaining a copy of the decree.

The Full Bench of the Allahabad High Court dissented from this decision in *Bechi* v. *Ahsan-Ullah Khan* (2) and held that in computing the time to be excluded under section 12 of the Limitation Act from

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a period of limitation the "time requisite for obtaining a copy" does not begin until an application for copy has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copy having been made, the applicant is actually and necessarily delayed, through the decree not having been signed.

In *Yamaji* v. *Antaji* (3) a Bench of the Bombay High Court after commenting on these two cases took the same view as the Allahabad Court, and held that the time requisite for obtaining a copy must be confined to the action of the party who wishes to obtain a copy, and must be taken to commence only when he does something in order to obtain a copy.

Three other rulings have been referred to in the argument. In *Afzul Hossain* v. *Mussummat Umda Bibi* (4) and *Golam Gaffar Mandal* v. *Goljan Bibi* (5) it was held that in an application for execution of a decree limitation should be calculated from the date of the decree and not from the date on which it was actually signed. In those cases there was no question as to the time requisite for obtaining copies, and consequently they have no concern with the present case. In *Gopal Chandra Chakravarti* v. *Preonath Dutt* (6) a Bench of the Calcutta High Court merely reiterated the fact that in accordance with the practice and precedents in Bengal the appellant was entitled in counting the period of limitation to a deduction of the period from the date of the decree to the date on which it was actually signed, thus following the Full Bench ruling of that Court which has already been referred to.

In my opinion the question has been exhaustively argued in the decisions of the Allahabad and Bombay Courts which have been quoted. The Limitation Act prescribes that the time for presenting an appeal shall run from the date of the decree appealed against. In accordance with the provisions of section 205 of the Civil Procedure Code, the date of the decree must be taken to be the date on which the judgment was pronounced. I think that the words "time requisite for obtaining a copy of the decree" in section 12 of the Limitation Act, must bear the construction that has been put on them by the Allahabad and Bombay High Courts. The time begins only when a step has been taken in order to obtain a copy. I am unable to agree with the argument of the learned advocate for appellant that an application cannot be made for a copy of a decree that is not actually in existence. A party is at liberty to ask for a copy whether the decree is signed or not. Knowing, as he does, that under the law the decree must bear date the day on which the judgment was pronounced, it is necessary that he should time his application for copy on the assumption that the date of the judgment is the date of the decree. If at the time when the application for copy is made, the decree is not ready, he will of course be entitled to the allowance of the time during which the decree remains unsigned, but

(4) (1895) I. C. W. N. 93. | (5) (1897) I. L. R., 25 Cal., 109.
(6) (1904) I. L. R., 32 Cal., 175.

so long as he has made no application, the non-signature of the decree can have no effect upon him.

On these grounds I would answer the question referred in the affirmative.

I may add that in the arguments something was said as to the effect of section 5A of the Limitation Act on the present case. That appears to me to be a question for the consideration of the Judge who will pass final orders in the matter, which is not included in the reference.

Birks J.—I concur with the learned Chief Judge in thinking the question must be answered in the affirmative. It seems to me that the view taken by the Calcutta High Court might give a very unfair, advantage to an appellant in cases where a decree, though made out; was not signed for a considerable time by oversight. In 99 per cent. of the decrees that are passed in the mofussil the decree can be made out within 24 hours after the judgment is delivered, and a party has no right to count on undue delay in preparing decrees. The law does not require that a party should ascertain that the decree is made out and signed before applying for a copy, and I am unable to accept Mr. Das' view that a party cannot apply for a thing which is not in existence. Section 205 of the Civil Procedure Code seems to have been purposely passed so as to avoid undue delay in the preparation or decrees. Allusion has been made to the order of this Court now published in paragraph 522 of the Lower Burma Courts Manual that Judges are required to note on each decree the date on which the decree is actually signed, as well as the date of his decree. These orders seem necessary with reference to section 12 of the Limitation Act whether the time prior to the application for a copy of the decree be excluded or not. I understand that Mr. Das is correct in saying that this Court has in some instances followed the Calcutta practice, but I am not aware that the question has ever been argued. In my opinion advocates are far too ready to wait till the period of limitation has nearly expired before they apply for copies. For these reasons, I think that the practice of the Allahabad and Bombay Courts should be followed in future as being more in accordance with law.

Fox, J.—But for the judgment of the Full Bench of the Calcutta High Court in *Bani Madhub Mitter* v. *Matungini Dassi* (1) I should have thought that the question referred was free from doubt. With all respect to the learned Judges who composed the Bench, it seems to me that their decision made law rather than declared it.

The provisions of Limitation Act are to my mind clear. The period of ninety days allowed for an appeal to a High Court is to be reckoned from the date of the decree. That date must under the Civil Procedure Code be the same as the date on which judgment was delivered. Section 12 of Limitation Act allows an appellant a further period of time taken in obtaining copies of the judgment and decree. In calculating what that time amounts to, it appears to me that all that can be considered is when was an effetive application

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for copies made, and when were they ready for delivery. There is nothing to prevent a party from appyling for a copy of a decree immediately after judgment has been delivered. He knows that a decree must follow upon a final judgment in the suit as a matter of course, and that it may possibly be drawn up and signed on the day on which judgment has been delivered.

He has only himself to blame if he does not take the precaution of applying at once for a copy in case he may wish to appeal.

I concur in answering the question referred in the affirmative.

Full Bench—(Civil Reference).

Civil Reference No. 8 of 1904.

February 6th, 1905.

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

MA SHWE U *v.* MA KYU.

Messrs. *Agabeg and Maung Kin*—for appellant (defendant). | Mr. *Wilkins*—for respondent (plaintiff).

Buddhist law: Husband and wife—power of husband to alienate joint-property.

Subject to the reservation noted below, a Burmese Buddhist husband cannot sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will.

Ma Thu v. *Ma Bu*, (1891) S. J. L. B., 578, followed.

Maung Ko v. *Ma Me*, (1874) S. J. L. B., 19; *Maung Twe* v. *Ramen Chetty*, (1900) 1 L. B. R., 11; *On Sin* v. *Ma O Net*, 2 U. B. R., 1892–96, page 303, referred to.

A sale by a Burmese Buddhist husband of the *hnapazor* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold.

Maung Weik v. *Shwe Lu*, (1902), 1 L. B. R., 184, overruled.

Ma Me v. *Maung Gyi*, (1893) 2 U. B. R., 1892-95, 45; *Guna* v. *Kyaw Gaung*, (1895) 2 U. B. R. 1892-96, 204; *Ma Thaing* v. *Tha Gywe*, (1902) 2 U. B. R. Ex: of Decree, 1; *Maung Hmon* v. *Maung Meik*, (1904) 2 U. B. R. Buddhist law—Divorce, 1; *Ma Po* v. *Ma Shwe Mi*, Chan Toon's L. C. I., 418; *Ma Saw Ngwe* v. *Ma Thein Yin*, (1902) 1 L. B R., 198; *Ma Kyi Kyi* v. *Ma Thein* (1905) 3 L. B. R., 8; *Soobramonian Chetty* v. *Ma Hnin Ye*, (1899), P. J. L. B., 568; *Maung Tha Nu* v *Maung Kya Zan*, (1903) 2 L. B. R. 167; referred to.

The following reference was made to a Full Bench by Mr. Justice Fox:—

The plaintiff-respondent, Ma Kyu, is the wife of Maung Kya Gaing. They jointly owned the land which is the subject matter of the suit. In 1900, Maung Kya Gaing mortgaged the land to Ma Shwe U, the defendant-appellant, and another for Rs. 500.

In 1902, Maung Kya Gaing executed a deed of sale of the land to the defendant-appellant, which was duly registered.

In suit No. 37 of 1903, Maung Kya Gaing sued the defendant-appellant for redemption of the land, alleging that in spite of the form of deed, the mortgagees had promised to allow him to redeem.

The suit was dismissed, and Maung Kya Gaing preferred no appeal.

In suit No. 50 of 1003, out of which the present appeal arises, Ma Kyu sued to redeem the land on payment of Rs. 500. She did not dispute the validity of the mortgage by Maung Kya Gaing, but she did dispute the validity of the sale, and alleged that Maung Kya Gaing had made it without her knowledge and consent. The defendant set up the previous suit by Maung Kya Gaing as a bar to Ma Kyu's suit. Both Courts have, I think, rightly found that it was not a bar. She also set up that Ma Kyu was aware, at the time, of the sale by Kya Gaing. Both Courts have held that it had not been proved that Ma Kyu was aware of or that she had consented to the sale. I agree in this view. Further it is quite clear that the defendant knew that Ma Kyu was interested in the land, and if she has to suffer by taking a conveyance from only one of the persons who owned the land, she has only herself to blame.

The Subdivisional Court gave the plaintiff a decree allowing redemption of half of the land for Rs. 250. Both parties appealed to the Divisional Court, and that Court gave a decree allowing the plaintiff to redeem the whole of the land for Rs. 500.

The defendant has appealed to this Court on the whole case.

Notwithstanding the ruling of *Fulton, J. C.*, in *Ma Thu* v. *Ma Bu* (1), it has been contended that a Burmese Buddhist husband has a right to alienate the *hnapazon* property of himself and his wife without her consent or against her will. Mr. Fulton based his ruling upon his interpretation of one section of the Manugye *Dhammathat* Since the time when the decision was given many more *Dhammathats* have become available to the Courts than were then available, and the texts given in sections 251 and 252 of the ex-Kinwun Mingyi's Digest appear to me to throw some doubt on the correctness of the above decision It was accepted as correct by this Court in *Maung Twe* v. *Ramen Chetty* (2), but I am not aware that any question as to its correctness was raised or argued in that case, which turned upon the question of whether the wife's consent had been proved or not.

In the present case a further question arises which was expressly not dealt with by Mr. Fulton in the case of *Ma Thu* v. *Ma Bu* (1). The Divisional Court having given a decree for redemption of the whole of the property, a claim has been put forward on behalf of the defendant for retention of half of the property on the ground that the sale to her by Maung Kya Gaing put her in his shoes as regards his share in the equity of redemption. It is therefore according to Mr. Fulton's judgment necessary to consider whether the husband could sell his own share in *hnapazon* property without his wife's consent, and whether his sale, although possibly ineffectual as a transfer of the whole property, is to be held effectual as a transfer of his share and interest in it.

The questions raised are important, and I have doubts as to the correct decision of them.

(1) (1891) S. J. L. B., 578. (2) (1900) 1 L. B. R., 11.

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I accordingly refer to a Bench of the Court the following questions:—

(1) Whether a Burmese Buddhist husbandc an validlysell or alienate the *hnapazon* property of himself and his wife without her consent or against her will?

(2) Whether a sale by a Burmese Buddhist husband of the *hnapazon* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold?

The opinion of the Bench was as follows:—

Thirkell White, C. J.—The questions referred to the Full Bench are:—

(1) Whether a Burmese Buddhist husband can validly sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will.

(2) Whether a sale by a Burmese Buddhist husband of the *hnapazon* property of himself and his wife made without her consent, constitutes a valid transfer of his share and interest in the property sold.

The first question was considered so long ago as the year 1874 by the Special Court and the conclusion drawn by the learned Judges (*Sandford* and *Wilkinson, JJ.*) was that both husband and wife have each a certain power over their joint *hnapazon* or *lettetpwa* property, *i.e.*, each may lend it, but neither may permanently alienate it (*Maung Ko* v. *Ma Me*) (3). The point was also fully considered by the Judicial Commissioner of Lower Burma, Mr. Fulton, in the case of *Ma Thu* v. *Ma Bu* (1) decided in the year 1891. His decision was that a husband cannot sell the joint property without his wife's assent, express or implied. This ruling has been followed up to the present time. But it is now sought to have it reconsidered on the ground that in later decisions, Mr. Fulton's ruling has been accepted without discussion and that there are now available authorities which were not accessible when the case last cited was decided. It is no doubt true that Mr. Fulton's ruling has been accepted and followed from time to time without discussion. The fact that its validity has not hitherto been seriously questioned either here or in Upper Burma, is an indication that it is not contrary to the law as generally accepted.

No doubt there are texts which indicate the view of the Buddhist law that the husband is the lord of the wife and has control over the joint property; and this view has been upheld by our Courts. But the analysis of the law made by Mr. Fulton shews that this control does not extend to the permanent alienation of the whole of the joint property. Even in the *Attasankhepa Vannana*, compiled by the Kinwun Mingyi who advised against the view taken by Mr. Fulton, it is laid down that the power of disposal of a husband or wife over his or her own separate property does not extend to the alienation of the whole of it, but only of a reasonable quantity (section 406).

(3) (1874) S. J. L. B., 19.

A fortiori, an even stricter rule, might be expected to apply to the case of joint property. The passage from the *Manugye Dhammathat* (VI. 43) on which Mr. Fulton mainly relied is clear and explicit against the power of the husband to alienate joint property.

So far as I can see the only authority which was not available when Mr. Fulton's judgment was pronounced and which we are now asked to regard as an authority for superseding that judgment is that of the texts collected in section 251 of Volume II of the *Digest of Buddhist Law*. The only one of these texts which explicitly declares the power of the husband to alienate joint property is the text from *Dhamma Vinicchaya:*

"The husband has the right to repudiate the alienation of joint-property made by the wife if such alienation is without his knowledge, but the wife shall not have the same right as against her husband."

The substance of *Manugye* VI. 43 seems to have been overlooked by the compilers of the *Digest*. It has not been traced in section 251 or elsewhere. *Dhamma Vinicchaya* and *Manugye* are said both to be of about the same age, having been it is understood compiled in the reign of Alaungpaya. There seems no reason to prefer the authority of *Dhamma Vinicchaya* to that of *Manugye*. Again, the texts in this section cannot be regarded as conclusive. For the rule laid down in general terms in *Dhammathatkyaw* (section 251) is diametrically opposed to the rule on the same subject cited from *Panami* in section 252. If the latter text is regarded as authoritative, it is remarkable that the husband's power of alienation is declared only in respect of his separate property. It is improbable that his power over joint property is exactly the same as his power over his own *payin*. Moreover the texts in section 251 go too far. They declare the control of the husband, not only over the wife's property but also over her person; and they lay down rules which cannot possibly be applied in the present stage of civilization.

In my opinion the texts cited in section 251 of Volume II of the *Digest* are not sufficient authority to overrule the authorities on which is based the ruling in *Ma Thu* and *Ma Bu* (1). Apart from the texts in section 251, in so far as the matter is governed by Buddhist Law, I am prepared to adopt Mr. Fulton's judgment without modification or reserve. I am particularly impressed by the fact which is a matter of common knowledge, that as a matter of practice husbands and wives do usually join in the execution of the documents alienating joint property.

In a case decided in Upper Burma (*O.1 Sin* v. *Ma ONet*) (4) it was held that the validity of a sale of joint property by one joint owner was a question to be decided by the law of contract, not by Buddhist Law. If that view is adopted, it is clear that a husband has no power to alienate his wife's share in joint property, unless he has her authority, express or implied. The contrary position has not been suggested as tenable. I am, however, disposed to think that the question under

(4) (1894) 2 U. B. R., 1892-96, 303.

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reference is really one concerning marriage, and that it should be decided by Buddhist Law.

Whichever of these views is accepted, my answer to the first question in the reference is that, subject to the reservations stated in the case of *Ma Thu* v. *Ma Bu* (1) a Burmese Buddhist husband cannot sell or allienate the *hnapazon* property of himself and his wife, without her consent or against her will.

The second question under reference was answered in the negative by the late learned Chief Judge of this Court in *Maung Weik* v. *Shwe Lu* (5). But in so far as that decision purported to be based on the authority of *Ma Thu* v. *Ma Bu* (1) it must be regarded as open to reconsideration. For in the case last cited, as is pointed out in the present order of reference, the question was explicitly reserved.

The ruling in *Ma Me* v. *Maung Gyi* (6) is a distinct authority for the position that a Burmese Buddhist husband can alienate his share in joint property of himself and his wife. So is the decision in *Guna* v. *Kyaw Gaung* (7) and the latter ruling in *Ma Thaing* v. *Tha Gywe* (8) is to the same effect. That the wife's share in joint property can be attached is assumed in the latest Upper Burma case of *Maung Hmon* v. *Maung Meik* (9). No authority except that of *Maung Weik* v. *Shwe Lu* (5) has been cited to the contrary; and no text of Buddhist Law precisely applicable can be traced. The nearest analogy is that of a gift by a husband of joint property to a person whom he wishes to take as a lesser wife or concubine. In that case, the gift is declared valid to the extent of the half which is said to be the husband's property. If the matter is to be decided on general principles and not by Buddhist Law, I think there can be no doubt that the transfer would be valid. Section 44 of the Transfer of Property Act states the general principle in the case of immoveable property.

My answer therefore to the second question in the order of reference is that a sale by a Burmese Buddhist husband of the *hnapazon* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold.

Fox, J.—I adopt the views of the learned Chief Judge, and concur in the answers to the questions referred.

Birks, J.—The questions referred to us by Mr. Justice Fox involve a reconsideration, not only of the ruling in *Ma Thu* v. *Ma Bu* (1) but also of two rulings of this Court in the cases of *Maung Twe* v. *Ramen Chetty* (2) where that ruling was expressly followed, and *Maung Weik* v. *Shwe Lu* (5) decided by the late Chief Judge of this Court in which the doctrine laid down in Ma Thu's case was still further extended to limit the right of the husband to alienate even his own share

(5) (1902) 1 L. B. R., 184.
(6) (1893) 2 U. B. R. 1892-96, 45.
(7) (1895) 2 U. B. R., 1892-96, 204.
(8) (1902) 2 U. B. R. Ex. of decree, 1.
(9) (1904) 2 U. B. R., Budd. Law—Divorce 1.

in the joint property without the consent of his wife. It is conceded that this ruling of Mr. Justice Fulton's has never been questioned till now, and that it is in conformity with the previous ruling of the special Court in *Maung Ko* v. *Ma Me* (3).

Maung Kin for the appellant argues that as Ma Thu's case was decided in February 1891, and the *Kinwun Mingyi's Digest* was not published till November 26th, 1896, sections 251 and 252 of that work were not brought to Mr. Fulton's notice; nor was the 2nd Volume on marriage, translated in June 1900, when Mr. Fulton's ruling was followed by a Bench of this Court in Maung Twe's case. These two sections read as follows:—

"*Section 251.*—The husband has control over the wife and joint property while the wife is entitled only to what has been given her by the husband.

Manussika.—The husband has control over the wife's property, but she has none over his. It is only with his permission that she has any control over his property .. ..The husband has control over his wife and joint property, she is entitled only to what is given her by him, and her expenditure is regulated by his wishes.

Vilasa.—The husband has control over the property of his wife but the wife has none over that of her husband. She holds property with his permission because the husband is the lord and master of his wife. Even in performing works of charity she has to obtain his consent. Therefore the wife should be guided by her husband and she should respect and obey him.

Myingun.—The husband has control over his wife's property, the parents over their children's. The wife shall not without her husband's knowledge give away to anoher even the property which she has acquired separately by her own personal skill and labour. He has control even over her person.

Dhammathatkyaw.—The husband has control even over the property brought by his wife to the marriage, and she cannot alienate it at her pleasure without his consent. Because the husband has control over her very person.

Dhamma.—The husband has the right to repudiate the alienation of joint property made by the wife if such alienation is without his knowledge but the wife shall not have the same right as against her husband.

Manugye.—The wife has not the right to give away property in charity without the knowledge of her husband, on the ground that she is of the same class and rank as the husband. Great benefit does not accrue from such gifts of property in charity. She should perform charitable works only with his knowledge, for then only would she obtain the merit arising out of her love and respect for her husband and her confidence in him. The husband, however, has the right to give away property in charity or to make a gift of property to one through affection without his wife's knowledge and she enjoys the merit all the same. The wife has no right to object to the alienation of property made by her husband, but he may object to that made by her because the husband is the lord of his wife. When both husband and wife jointly give away property in charity, the benefits which accrue are very great. But if neither of them is virtuous or charitable, they must have transmigrated from the animal world, and will on their death, be re-born in the four infernal worlds. So says Rishi Manu.

Vannana.—In a married couple the husband has control over the wife's property. She holds property only with his permission. Even when she desires to perform charitable works she has to obtain his permission. She should always respect and obey him.

Rasi.—The husband has control over his wife's property but the wife has none over her husband's. She holds property with his permission because the husband is the lord and master of the wife. Even in performing works of charity she has to obtain his consent. Therefore a wife should be guided by her husband and she should respect and obey him.

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The teachings of the Buddha contain the following story which supports the rule of the *Dhammathat*. One day King Vessentra gave away his Queen Maddi Devi, having already given away his children the day previous. She did not show the least sign of anger, sorrow, or injured feeling, but with a natural and serene countenance looked at her lord and expressed herself thus:

'My Lord and King! You have every right to give me away to whomsoever you please. The person to whom I am given away may make me a slave, or sell me to another or kill me. I am your first married wife and you have complete control over me, and in giving away your wife, of whom you have an absolute right of disposal, I shall not in any way be provoked. So do with me as you please.'

Sonda.—(The same as the second extract from *Manussika.*)

Manu.—In a couple in which the husband and wife belong to the same class and rank, the husband has the right to object to the wife giving away property in charity, but she has not the same right against him.

Section 252.—Whether in the case of a husband and wife who have both been married previously each has the right of absolute disposal over the property brought by him or her to the marriage.

Manussika.—The wife shall not alienate even her own property without her husband's knowledge.

Panami.—In the case of a couple who have each been married previous to their present union, the husband has the right to alienate to whomsoever he pleases the property brought by him to the marriage; but except as herein provided he shall not alienate the property brought by the wife to the marriage; over such property she alone has the right to alienate as she pleases. Provided that the husband may utilize his wife's property in payment of a criminal fine without previously obtaining her permission. If the husband find any property belonging to the wife in the possession of her paramour to whom she has given it secretly, he has the right to recover it."

I think there can be no question that these passages do seem to give the husband an unfettered control over the whole property of the wife on the ground that he is the lord and master of the wife. Mr. Fulton relied on section 43 of Book VI of the *Manugye*. I have examined the 2nd Volume of the *Digest* but have been unable to find this passage quoted. It is possible that it was omitted from the Digest as bad Law, for I notice that the Kinwun Mingyi, the compiler of the *Digest*, who was one of those consulted by Mr. Fulton, insisted most strongly on the absolute rights of the husband to dispose of his wife's property. The texts of the *Manugye* which deal with the question of marriage and its incidents are scattered through several books: sections 29, 30, 31, 32, 46, 48, and 71 of Book III on the subject of debts; sections 11 to 21 of section 24 of Book V; sections 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 32, 33, and 43 of Book VI; section 3 of Book IX, besides Books X and XII which deal with Inheritance and Partition. It is therefore quite possible that an isolated text like section 43 of Book VI was overlooked in the compilation of the *Digest*. The whole of the 34 *Dhammathats*, of which Volume II professes to be a *Digest* on the subject of marriage, have not been completely translated; and until this is done it is impossible to say whether passages similar to section 43 of Book VI of the *Manugye* would not be found. The law is thus stated in Spark's Code, which professes to be based on the *Manugye*. Section 16 of Chapter I reads as follows:—

"Either the husband or the wife might lend any joint property without the other's knowledge, but neither may sell or give away any portion of it without the

other's consent. Neither has any power whatever over the separate property of the other."

I may observe that this Code was the only authority cited by the Bar in Moulmein when I was Judge there in 1881 and 1882. The rules laid down in Major Spark's Code have no doubt been modified in several particulurs, for instance he takes no account of the rights of the *orasa* son, but the general principle of equity laid down in sections 64 and 65 of his work have been recognized both in Upper and Lower Burma. In the case of *Ma Po* v. *Ma Shwe Mi* (10) where the question was what was the proper division of property between two sisters, Mr. Burgess decided in favour of an equal partition after considering a number of *Dhammathats* which all agreed in this that some form of graduated division should be made. This ruling was present to my mind, as well as the general principles of Spark's Code, when I held in the case of *Ma Saw Ngwe* v. *Ma Thein Yin* (11) that "the custom here has undoubtedly grown up of an equal division among the co-heirs." I notice that this ruling has been followed in the case of *Ma Kyi Kyi* v. *Ma Thein* (12). I mention these cases to show that the Courts in this Province have not felt bound to follow the rules laid down in the *Dhammathats*, where they are not clear, or where they are opposed to equitable principles which can be adduced from other passages of the *Dhammathats*.

There are also passages in Volume II of the *Digest* which seem inconsistent with the absolute rights claimed for the husband in sections 251 and 252. Mr. Fulton in Ma Thu's case referred to section 3 of Book XII as shewing that the husband is only lord of the wife in a limited sense. In section 255 of Volume II of the *Digest Dhammathats* are nearly unanimous in holding that when the husband desires divorce from a wife against whom no fault can be imputed, he forfeits the whole of the property. Out of 25 *Dhammathats* the *Manussika* and *Pyu* alone give the husband an absolute right of divorce without any conditions; the *Warulinga* and *Dhammasara* divide the property equally, the others give the party not wishing a divorce the whole of the property, the same principle being applied equally to the man and the woman. In section 208 of the *Digest* the 5 duties of the husband to his wife are set out. The second duty is not to treat her as a slave or servant and the 4th is entrusting to her keeping the whole of the acquired property. Of the 3 *Dhammathats* here cited the *Rasi* says that the husband should give her a free hand in the control and management of the house; the *Dhammagara* of the property acquired; while the *Cittara* refers to the 4th duty as placing her in entire charge of the whole of his property. In section 212 it may be noted that the *Manussika*, which as above noted, gives the husband an absolute right of divorcing his wife, speaks of it being a great merit for the husband to place his wife in entire charge of the whole of the property, and section 213 seems to

(10) Chan Toon's L. C. I., 418.
(11) (1902) 1. L. B., R., 198.
(12) (1905) 3 L. B. R., 8.

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treat both the husband and wife as entitled to precedence according to their possession in greater degree of the 5 qualities of stature, good looks, wealth, age, and rank. Section 274 of the *Digest* prohibits the husband though lord of the wife and her property, from conveying the property of the chief wife to the lesser wife and he is also liable for his wife's debts on the ground that she is his heir.

Maung Kin's chief argument has been that Mr. Fulton's judgment draws a distinction between charitable gifts made by the husband without his wife's consent and sales of the joint property. It is argued that in the former case the property is lost to the joint family while in the latter the proceeds of sale remain and will benefit the wife on her husband's death. It is only in the case of gifts for religious purposes that the Courts are bound to follow the Buddhist Law of gift and the case mentioned in Book VIII, page 238, 2nd edition of the *Manugye*, would have to be considered subject to the general considerations of equity. It may be noted that the same passage denies the right of the husband to give away the separate property of his wife while section 251 of the *Digest* seems to give the husband control over the separate property of the wife.

I am of opinion, therefore, that no grounds have been made out for disturbing Mr. Fulton's decision in Ma Thu's case, though I still adhere to the opinion I expressed in *Soobramonian Chetty* v. *Ma Hnin Ye* (13) that these provisions as to the husband being the lord and master of the wife and her property raise the presumption that when they are living together and the husband acts alone in dealing with the joint property he is acting as his wife's agent in respect of her interest as well as his own. This is, however, purely a question of fact, which will depend upon the circumstances of each case. I would answer the first question referred to us in the negative.

With regard to the second question the late Chief Judge's opinion in Maung Weik's case was probably based on his construction of section 43 of Book VI of the *Manugye*, which seems to treat the interests of the teacher and scholar and husband and wife over each other's property as joint and indivisible and this seems also to be the view taken in section 16 of Spark's Code. In neither passage is anything said about the right of the husband or wife to alienate his own or her own interest in the joint property.

The rule laid down in section 43 is that the receiver has no right to buy the joint property if sold by one only of the joint proprietors and must restore it but this would be inequitable unless he had notice that the husband or wife was acting without the authority of the other. I do not think this ruling of the late Chief Judge has been generally followed, and as pointed out by my learned colleague it is not the law in Upper Burma. The only reported case I can find in Lower Burma since this decision, is *Maung Tha Nu* v. *Maung Kya Zan* (14) where *Mr. Justice Fox* held that the widow had a right to alienate her own

(13) (1899) P. J. L. B., 568.
(14) (1903) 2 L. B. R., 167.

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share in the joint property of herself and husband after the death of her husband and before it was divided.

I agree in the observations my learned colleague has made on this head and may note that the late learned Chief Judge admitted that the matter had not been argued. I would answer the second question in the reference in the affirmative.

Full Bench—(Criminal Revision).

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Irwin.

Criminal Revision No. 726 of 1905.

July 5th - 1905.

HLA GYI *v.* KING-EMPEROR.

Mr. *Eddis*—for applicant. | Mr. *McDonnell*, Assistant Government Advocate.

Trial by jury—misdirection in charge—ambiguous verdict—conviction on irregular second verdict—review by Bench under section 12, Lower Burma Courts Act, 1900—Letters Patent, section 26—Criminal Procedure Code, sections 299 (a), *302, 303, 426, 434, 439, 537* (d).

In a trial on a charge of murder at a Criminal Sessions of the Chief Court, the Judge presiding omitted to explain to the jury the distinction between murder and culpable homicide, or upon what views of the facts the accused had committed the one offence or the other. The charge to the jury also suggested that a strong inference should be drawn against the accused from the fact that he had failed to take steps to bring to justice a person who, it had been suggested, was the real offender.

Held per curiam.—That in both respects the charge to the jury contained material misdirections.

In the same trial, the jury after retiring returned the ambiguous verdict "Guilty of stabbing, but without the intention of committing murder." The learned Judge presiding, instead of questioning the jury under the provisions of section 303 of the Code of Criminal Procedure, read to them certain parts of sections 299 and 300 of the Indian Penal Code and sent them back to consider further, with instructions to return a verdict of "Guilty" or "Not Guilty of murder." The jury after retiring returned a verdict of "Guilty," and accused was convicted and sentenced to death.

Held per Adamson, *C. J., and* Fox, *J.*—That the procedure followed was illegal, and that the conviction and sentence should be set aside. In the absence of express authority for the ordering of a re-trial, it seemed proper to leave to the executive authorities the question of the institution of fresh proceedings against the accused.

Per Irwin, *J.*—The error was an irregularity to which section 537 of the Code of Criminal Procedure applies. The conviction and sentence being set aside, without the accused being acquitted, it would be proper to order the re-trial of the accused.

Per Adamson, *C. J., and* Fox, *J.*—In a case in which there has been an illegal verdict and sentence, section 12 of the Lower Burma Courts Act, 1900, does not empower the Bench to go into the facts and decide the case on the evidence.

Queen-Empress v. *Shib Chunder Mitter*, (1884) I. L. R., 10 Cal., 1079; *Queen-Empress* v. *O'Hara*, (1890) I. L. R., 17 Cal., 642; *Emperor* v. *Jotindra Nath Gui*, (1903) 8 C. W. N., xlviii; *Emperor* v. *Khagendra Nath Bannerji*, (1898) 2 C. W. N., 481; *Subrahmania Ayyar* v. *King-Emperor*, (1901) I. L. R., 25 Mad., 61; *Makin* v. *The Attorney-General for New South Wales*, (1894) A. C., 57; *Queen-Empress* v. *Appa Subhana Mendre*, (1884) I. L. R., 8 Bom., 200, referred to.

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Adamson, C. J.—This is an application under section 12 of the Lower Burma Courts Act, 1900, for review of a case tried by Mr. Justice Irwin and a jury at the Chief Court Criminal Sessions, a certificate having been granted by the Government Advocate that in his opinion the decision should be further considered.

The grounds on which review is sought are—

(1) Various misdirections in the charge to the jury.
(2) Illegality in dealing with the verdict.

The first point to be determined is whether these are questions of law falling within the scope of section 12 of the Lower Burma Courts Act. As regards the misdirections, we have been referred to *Queen-Empress* v. *Shib Chunder Mitter*(1) and *Queen-Empress* v. *O'Hara* (2), cases in which action was taken by the High Court of Calcutta under section 26 of the Letters Patent, and misdirection was treated as a question of law falling within the purview of that section. Sections 25 and 26 of the Letters Patent are very similar to sections 11 and 12 of the Lower Burma Courts Act. If there be any difference, the latter are rather wider than the former. I therefore entertain no doubt that misdirection is a question of law as specified in sections 11 and 12 of the Lower Burma Courts Act. As regards the second of the grounds, *viz.*, illegality in dealing with the verdict, there can I think be no doubt that it also is a question of law to which the provisions of these sections are applicable.

I will first deal with the alleged misdirections. One of these, *viz.*, that the learned Judge said in the charge that Houk Kan was suffering and possibly could not give his evidence in a very connected way, is not in my opinion a misdirection. But it is unnecessary to discuss all the points that have been raised under the head of misdirection. It will suffice to refer to two.

The first of these is that the learned Judge in his charge failed to explain the law of the case properly to the jury. The accused was tried on a charge of murder. The learned Judge did not explain to the jury the distinction between murder and culpable homicide, or tell them under what views of the facts the accused ought to be convicted of murder or culpable homicide, or to be acquitted. I think that this omission amounts to a vital misdirection.

The second alleged misdirection to which I will refer consists of the following extract from the charge:—

"I think you should consider especially this fact, that the deceased Houk Kan was examined in the hospital, and among the questions asked in cross examination by the accused's pleader was, 'Did you strike San Wa? Did you struggle with San Wa?' He denied both. This seems to suggest distinctly that Houk Kan had had a row with San Wa, and apparently that San Wa was the person who stabbed Houk Kan. It is not explained why in all the evidence before you, San Wa is not mentioned, and no attempt has been made to bring San Wa to justice. The accused Hla Gyi, you observe, was not a helpless prisoner at that time. He had engaged a pleader for his defence, and if it is true that he kicked San Wa, and San Wa stabbed him, you naturally would expect that his pleader would have made the most strenuous efforts to bring San Wa to justice, in order to clear his client. He was not dependent on the police. The pleader could have gone to the Magistrate and laid a complaint that San Wa was really the person who to accused's knowledge had stabbed Houk Kan."

(1) (1884) I. L. R., 10 Cal., 1079. | (2) (1890) I. L. R., 17 Cal., 642.

This passage suggests that it is the duty of the accused not only to meet the charge against himself, but to take steps to bring the real offender to justice. It suggests that a strong inference should be drawn against the accused because he failed to do so. It comes near the end of the charge and the jury were asked to give special attention to it. It is reasonable to suppose that it carried great weight with the jury. The inference which they were asked to draw is not justifiable and in my opinion the passage quoted is a vital misdirection that might well have led to an erroneous verdict.

I am of opinion that the misdirections which I have discussed afford sufficient ground for review of the case.

I now turn to the alleged illegality in dealing with the verdict. The jury unanimously returned a verdict of "guilty of stabbing but without the intention of committing murder." The learned Judge thereupon read to them parts of sections 299 and 300 of the Indian Penal Code, and sent them back to consider further, with instructions to return a verdict of either "guilty" or "not guilty of murder." The jury retired, and after a time returned a verdict of guilty, and sentence of death was passed. Section 302 of the Code of Criminal Procedure declares under what circumstances a Judge may require a jury to retire for further consideration, that is to say, when the jury are not unanimous. If the jury are unanimous the verdict must be received, unless it is no verdict at all. If the verdict is ambiguous, the Judge may under the provisions of section 303 ask them such questions as are necessary to ascertain what their verdict is, and he must record the questions and answers. The law does not prescribe any specific form in which the jury are to give their verdict. They may give it in any form which they think fit, and if it is not exhaustive, it is the duty of the Judge to put such questions to them as will elicit a complete finding. In the present case the verdict, "Guilty of stabbing, but without the intention of committing murder" is a verdict, and it is not contrary to law, but it is ambiguous, and in my opinion the learned Judge erred in law in sending the jury back to consider further, instead of asking such questions as were necessary to remove the ambiguity and recording the questions and answers. The accused has been prejudiced by this error, for it cannot be doubted that an accused is prejudiced when a lawful verdict, which *primâ facie* amounts to some thing less than "guilty of murder" is replaced by an unlawful verdict of "guilty of murder." This error in law also in my view affords ground for review of the case.

There remains the question, what remedy can be applied. Applicant's learned Counsel urges that every thing that occurred after the first verdict of the jury is illegal and void, that the trial is incomplete, and that, the jury having been discharged, it cannot now be completed. He argues that an uncompleted trial before a High Court and a jury is a final disposal of the charge, that accused cannot be retried, and that the old trial cannot be mended. Mr. Eddis has the courage of his convictions, and even asserts that if a trial for murder before a High Court and a jury were brought to an abrupt conclusion by the escape of the accused, or by the accused assaulting and incapacitating the

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Judge, the accused would thereby be purged of all consequences in respect of the murder. In support of this contention we are referred to *Emperor* v. *Jotindra Nath Gui* (3) and *Emperor* v. *Khagendra Nath Bannerji* (4).

In the first of these cases the accused was charged with murder and was put on his trial at the Calcutta High Court Sessions before a Judge and a special jury. The jury informed the Court that they were divided in their verdict in the proportion of 6 to 3, and that there was no possibility of their being unanimous. The Judge thereupon discharged the jury and ordered a re-trial. The Chief Justice appointed another Judge to preside over the re-trial, and on the accused appearing before the latter Judge and a fresh jury objection was taken that the former Judge erred in not ascertaining the verdict of the jury, that his discharge of the jury was an improper discharge, that the former Judge and jury had seisin of the case, that the Court which had seisin being no longer in existence no other Court had power to try the case, and that the Chief Justice had no power to make the transfer. The Advocate-General intervened, and said that after reading the deposition of the witnesses, he considered that it was a case in which a *nolle prosequi* should be entered. The Judge remarked that if the Advocate-General had not taken this course, he would have referred the case to a Full Bench, and he discharged the accused, and ordered that the discharge should amount to an acquittal.

The second case was one in which a Judge of the Calcutta High Court after partly hearing a case at the Criminal Sessions retired because he was personally interested in the case. The jury was not discharged, and the Chief Justice appointed another Judge to take his place. It was objected that the latter Judge could not proceed with the trial, because the former Judge had seisin of the case, and because the Chief Justice had no power to transfer a case already begun. The Advocate-General in this case also entered a *nolle prosequi*. The accused stood discharged but was not acquitted.

The cases are not altogether on the same parallel as the present one. They merely assert that a Judge appointed to take a particular Sessions has the control of the cases on the calendar, and that after a Judge has been appointed to take a Sessions, the Chief Justice has no further power in the matter. In such a case apparently the easiest way to escape from the dilemma is to enter a *nolle prosequi*, to discharge the accused, and to leave it to the executive authorities to prosecute him again if it is worth their while, for it is to be observed that under the provisions of section 333 of the Code of Criminal Procedure, a *nolle prosequi* does not ordinarily amount to an acquittal. In the latter of those cases it is admitted in the arguments that the result would have been different if the High Court had been acting under section 26 of the Letters Patent, in which case it would have had powers of revision. This is exactly the position in the present case. A Full Bench of this Court is exercising its authority under section 12 of the Lower Burma Courts Act, which is equivalent to section 26 of

(3) (1903) 8 C. W. N., xlviii.
(4) (1898) 2 C. W. N., 481.

the Letters Patent, and holding that position, it has full power to exercise the complete authority given by that section. In the words of the section it may review the case and finally determine the question of law, and thereupon alter the judgment, order, or sentence passed by the Judge, and pass such judgment, order, or sentence as it thinks right.

If the error of law had been confined to misdirection, the first duty of the Court would have been to examine the evidence and ascertain whether in fact the misdirection had caused a failure of justice, that is to say, whether the evidence on the record was sufficient to support the verdict. For without doing so it would be impossible to comply with clause (*d*) of section 537 of the Code of Criminal Procedure. But this procedure would afford no solution to the present case where there is no intelligible verdict. The second verdict is illegal and void. The first verdict may be a verdict of murder, or of culpable homicide, or of grievous hurt, or of hurt, or even of no offence at all. In the form in which it was returned it is meaningless. The conviction and sentence which followed the illegal verdict are illegal, and it is clear that the first thing to be done is to set aside the conviction and sentence.

The question remains whether more than this can be done. Obviously the most appropriate course would be to order a re-trial. But I am unable to find any instance in which a High Court in India has ordered a re-taial of a case tried by itself. It has never been done under section 26 of the Letters Patent. Section 12 of the Lower Burma Courts Act corresponds so nearly with section 26 of the Letters Patent that I find myself unable to hold that the former contains a power of ordering a re-trial which is not included in the latter. The language of section 12 of the Lower Burma Courts Act is somewhat wider than that of section 26 of the Letters Patent, but is not nearly so wide as the language of section 423 of the Code of Criminal Procedure, which read with section 439 specifies the powers of an Appellate or Revisional Court, and which besides including all the powers that are mentioned in section 12 of the Lower Burma Courts Act, includes also by special mention the power of ordering a re-trial. Moreover section 423 applies only to re-trial by a Court subordinate to the High Court. *Subrahmania Ayyar* v. *King-Emperor* (5) is a case in which it would apparently have been appropriate for the Privy Council to order a re-trial by the High Court, but no such order was passed. The cases quoted above, namely, *Emperor* v. *Jotindra Nath Gui* (3) and *Emperor* v. *Khagendra Nath Bannerji* (4) so far as they go appear to indicate that when a case has failed in the High Court owing to an irremediable error in law, the only course open is to annul the trial.

I am therefore of opinion that in the present case we should confine our order to setting aside the conviction and sentence.

Fox, J.—I agree with the learned Chief Judge in holding that there were misdirections in the learned Judge's charge to the jury, and that there was illegality in dealing with the verdict.

(5) (1901) I. L. R., 25 Mad., 61.

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The latter is a ground on which, in my opinion, the judgment and sentence recorded must be set aside, and I propose to deal with the case on that ground alone, and not to consider the effect or consequences of the misdirections.

It is clear that this Bench has power under section 12 of the Lower Burma Courts Act, 1900, to set aside the judgment and sentence on the ground of their illegality.

Whether it has power to do more, and whether, if it has power to do more, it should do anything more, are difficult questions.

The learned advocate for the prisoner has urged that upon the first expression of the jury's verdict, the prisoner is entitled to be acquitted of the charge on which he was tried.

I cannot accede to the argument. The verdict was "guilty of stabbing without the intention of committing murder." It does not explicitly acquit him of the offence of murder, and it is evident that the jury thought that the prisoner had been guilty of some offence. Reading it in one light, it may be said that it amounts to an acquittal of murder by an act done with the intention of causing death, which is the first set of circumstances set out in section 300 of the Indian Penal Code under which culpable homicide amounts to murder It leaves untouched however the other circumstances set out in the section under which culpable homicide amounts to murder. Consequently the verdict was incomplete, and there is no verdict of acquittal, or one which amounts to an acquittal, on the charge with reference to those sets of circumstances.

Further this verdict was not, in my opinion, according to law. Section 299 of the Code of Criminal Procedure enacts—"It is the duty of the jury (*a*) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned."

The learned Judge directed the jury that if they found that the prisoner stabbed the deceased person, and if the stab was the cause of thel atter's death, they should find the prisoner guilty of murder. Although the learned Judge's direction may have been wrong, it was the duty of the jury to bring in a verdict of murder if they found the above to have been the facts. It has been held by the High Courts in India that juries are not confined to bringing in general verdicts, that is to say, verdicts of "guilty" or "not guilty," but they may give their verdicts in any form they choose, or in other words they may give special verdicts; but I take it that special verdicts must be complete or capable of being completed by questions from the Judge under section 303 of the Code of Criminal Procedure, and that the final result must be in accordance with the law as set out in clause (*a*) of section 299 of that Code.

Passing to the question of what action this Bench can take in the proceeding under section 12 of the Lower Burma Courts Act, it appears to me clear that it can do what a High Court can do under section 26 of the Letters Patent constituting it. Whether it can do more owing to somewhat wider terms, need not be considered in this case, for the case does not call for such question to be decided.

All the High Courts of India have held that it is open to a Bench dealing with a case under section 26 of the Letters Patent, and finding

that there has been an error of law, to go into the facts and evidence, and itself to decide the guilt or innocence of the accused. All the cases, except one, in which it has been so held, were decided previous to the ruling of Their Lordships of the Privy Council in *Makin* v. *The Attorney-General for New South Wales.*(6) That case and the subsequent ruling of Their Lordships in *Subramania Ayyar* v. *King-Emperor* (5) appear to me to call for consideration whether the rulings of the Indian High Courts above referred to are under all circumstances correct in law. Under section 26 of the Letters Patent, the Advocate-General, and under section 12 of the Lower Burma Courts Act, the Government Advocate may certify that any point or question of law in a case should be further considered, and on this question coming before a Bench, the Bench may review the case, or such part of it as may be necessary, and finally determine the question, and may thereupon alter the judgment, order or sentence (the last word is the only one used in section 26 of the Letters Patent) and may pass such judgment, order or sentence as it thinks right. The power of a Bench when a Judge has himself reserved a question of law under section 434 of the Code of Criminal Procedure is identical.

In *Makin* v. *The Attorney-General for New South Wales* (6) the learned Judge who presided at the trial of the prisoners reserved points of law as to the admissibility of certain evidence. The case came before a Bench of the Supreme Court on a case stated by him, and under the law of New South Wales the Bench had power to determine the questions of law and to "affirm, amend, or reverse the judgment "given or avoid or arrest the same, or to order any entry to be made "on the record that the person convicted ought not to have been con- "victed, or to make such other order as justice requires, *provided that* "*no conviction or judgment made thereon shall be reversed arrested* "*or avoided on any case so stated unless for some substantial wrong* "*or other miscarriage of justice.*"

An appeal was made to the Privy Council against the decision of the Bench of the Supreme Court which held the evidence admissible and sustained the conviction of the prisoners. Although Their Lordships of the Privy Council upheld the ruling of the Bench on the questions as to the admissibility of evidence, they saw fit to give their opinions also upon another question which had been referred by the learned Judge who tried the case, which was whether, if the evidence was not admissible, the prisoners were rightly convicted. Their Lordships gave their opinion on this point because of its importance. They say:—

"The point of law involved is, whether, where the Judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment, if it is of opinion that there was sufficient evidence to support the conviction independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged."

(6) (1894) A. C., 57.

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It was admitted that it would not be competent to take this course at common law, but it was argued that the law of the Colony which I have quoted authorized the Court to take such course.

Their Lordships say in regard to this :—

"It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed on him is made to depend not on the finding of the jury, but on the decision of the Court. The Judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses, and weighing the evidence with the assistance which this affords. It is impossible to deny that such a charge of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. * * * * These are startling consequences which strongly tend in Their Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration * * * In Their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence."

These remarks appear to me to be apposite in considering whether by section 26 of the Letters Patent the Legislature intended to alter the common law which had prevailed in the Presidency Towns, and to bring about what Their Lordships term startling consequences.

In *Subrahmania Ayyar* v. *King-Emperor* (5) the Chief Justice of the Madras High Court distinguished the case before the Bench from *Makin* v. *The Attorney-General for New South Wales* (6) by saying that under section 26 of the Letters Patent, the Bench had power to "review the case," whereas the New South Wales Act did not give such power to the tribunal to which a question of law is referred. The case of *Subrahmania Ayyar* v. *King-Emperor* (5) was fully argued before Their Lordships of the Privy Council, and the argument was amongst other points directed to the question whether the Bench of the Madras High Court had had power to go into the facts of the case itself, and to decide it as it had done. The case was one of an illegal trial by reason of mis-joinder of charges. The Bench of the Madras High Court held that there had been mis-joinder, and that the first count on which the prisoner had been tried should have been struck out of the indictment, but it reviewed the case on the evidence relating to two other counts of the indictment. Eventually the Bench modified the verdict of the jury and sentenced the accused.

In dealing with the question whether the course adopted by the Bench of the Madras High Court had been right, the Lord Chancellor who delivered the judgment of Their Lordships of the Privy Council used language which plainly shows that in Their Lordships' opinion there could be no question as to that course having been plainly wrong

and inadmissible. The judgment says:—

"Upon the assumption that the trial was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried."

Amongst the objections to the course, the judgment states:—

"It would in the first place leave to the Court the functions of the jury."

So that when a case dealt with under section 26 of the Letters Patent came before Their Lordships, they reiterated their opinion that in a case in which the accused had a right to have the facts on which he was charged decided upon by a jury, a Bench, before which questions of law came up for decision, could not assume the functions of a jury.

This last case is direct authority for holding that where there has been illegality in the trial, other than improper admission or rejection of evidence and misdirection in the charge, the Bench cannot itself decide the case on the evidence and, in my opinion, the ruling is applicable to the present case. The case we now have to deal with brings the objections to doing so into great prominence, for if we as a Bench dealt with the evidence, and tried and decided the guilt or innocence of the accused, we should be trying him for the greatest offence known to the law, and it would be open to us to sentence him to death, not only without having seen the witnesses and their demeanour, but on mere memoranda of the substance of the evidence, the rule of this Court under section 365 of the Code of Criminal Procedure requiring only the substance of the evidence to be taken down by a Judge presiding at a Sessions trial in its original Criminal Jurisdiction.

I desire to emphasize my intention of confining my remarks as to a Bench not dealing with the facts and evidence in a case before it, to a case in which there has been an illegal verdict and sentence.

The learned Counsel for the accused has questioned the right of the Bench to order the re-trial of the accused. It appears to me to be unnecessary to decide whether section 12 of the Lower Burma Courts Act gives a Bench such power or not.

In my opinion the safest course to adopt is that adopted by Their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (5). They merely set aside the conviction. They did not expressly acquit the accused.

If it is said that such a course would cause a failure of justice as a result of mere error in procedure, I would answer that this is not necessarily so. After an order merely setting aside the judgment of conviction and the sentence it will, in my view, be open to the authorities, if they are so minded, to prosecute the accused again for the same offence and upon the same facts as those on which he has already been tried. Under section 403 of the Code of Criminal Procedure the only bar to a second prosecution on the same facts for the same offence is a previous conviction or acquittal. The accused was convicted at his trial, but if this Bench sets aside the conviction, it will no longer remain in force, and cannot consequently be a bar to a fresh prosecution. Again if the order I contemplate is made, it would not expressly be an acquittal nor do I think that it could be said to amount to an acquittal there-

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fore the accused could not validly contend that a previous acquittal was a bar to his further prosecution and trial.

On the above grounds I would set aside the judgment of conviction of murder entered up on the trial under section 305 of the Code of Criminal Procedure and the sentence of death passed upon the accused.

Irwin, J.—I agree that the extract from the charge which is set out in the judgment of the learned Chief Judge, was a misdirection. I think it was quite correct to tell the jury that they might draw an inference from the fact that the accused's pleader suggested that a certain person named by him had been struck by Houk Kan while none of the witnesses to the alleged striking could tell the name of the person who had been struck, but I laid too much emphasis on this fact, and that part of my remarks which referred to the accused and his pleader not having attempted to bring San Wa to justice was likely to mislead the jury on a material and important point.

I also agree that I failed to explain the law fully to the jury. In particular I did not leave to the jury the question whether the accused knew his act to be so imminently dangerous that it must in all probability cause such injury as was likely to cause death.

When the jury returned an ambiguous verdict I have no doubt now that the proper course would have been to question them under section 303 of the Code of Criminal Procedure, but I do doubt whether the course I took, of sending the jury back after further explaining the law to them, is a positive illegality and vitiates the subsequent verdict. What was required was to ascertain the opinion of the jury on a question of fact the law bearing on which had not been properly explained to them before they first retired. I attained this object by explaining the law to them and giving them time to think it over instead of asking cut and dry questions which they would have to answer without leaving the box. I am conscious of the fact that in criticising my own procedure it is difficult if not impossible completely to eliminate personal considerations, but I am not prepared to say that the error now under consideration is a positive illegality. If it is no more than an irregularity, section 537 of the Code of Criminal Procedure will apply. Section 12 of the Lower Burma Courts Act, 1900, gives this Court the power of review, similar in nature to the power conferred by section 434 of the Code of Criminal Procedure. In *Queen-Empress* v. *Appa Subhana Mendre* (7) it was held that section 537 applies to proceedings under section 434, one of the reasons given being that the power of review is conferred by section 431. I do not think that ruling has ever been dissented from, and I do not doubt that section 537 applies to proceedings under section 12 of the Lower Burma Courts Act. That section reads "subject to the provisions hereinbefore contained" (sections 529 to 536) "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered in revision on account of any error or irregularity in the proceedings during trial, unless such error or irregularity has in fact occasioned a failure of justice." It cannot be said off hand that the irregularity now in question has occasioned a failure of justice; it might be said perhaps after examination of the evidence.

(7) (1884) I. L. R., 8 Bom., 200.

The proposition that sending back the jury was not illegal and does not vitiate the subsequent verdict has some support in the Bombay case which I have just quoted. Two prisoners were charged with murder, and each of them with abetment of murder committed by the other, The jury returned a verdict of guilty, which on their being questioned was found to mean abetment of murder by some person unknown. The Judge said he could not accept this verdict because it was not a verdict on the indictment. The Advocate-General then applied to be allowed to add a charge which would fit the verdict. A charge was framed but it was not specially explained to the prisoner, and the jury were sent back, and after deliberation returned the same verdict as before. The Judge referred under section 434 the questions whether he had power to add the third charge and whether the verdict returned on the third charge was a valid one in presence of the fact that the prisoner was not specially arraigned on it. The Bench by a majority held that the Judge had no power to alter the charge, and unanimously held that the verdict returned on the third charge was valid. The last ground which the Bench gave for their decision was that the first verdict might have been accepted under section 237 of the Code of Criminal Procedure although there was no charge, but if that paragraph of the judgment had never been written the result would have been the same. In the case stated it is recorded that after the Judge had refused to receive the first verdict he said, "it was necessary for him to explain the law to the jury, and then he should ask them to consider their verdict." Then follows the new charge. On this the learned Judges observed:—

"It was further urged that the jury had returned their verdict when the new charge was framed, and that the learned Judge acted without jurisdiction. We think however that by 'verdict' must be understood the final verdict which the Judge would be bound to record. No such verdict had been returned when the Judge proceeded to frame the new charge."

This is an unmistakeable pronouncement that the second verdict was valid, and it follows that refusing to accept the first verdict and sending back the jury was not an incurable illegality. The fact that the second verdict was identical with the first makes no difference. The jury might have made their second verdict "Not guilty" and if they had done so the Judge would have been bound to accept it. Even in the last paragraph of their judgment the Bench say that the fact that the Judge might have accepted the first verdict did not affect the legality of the second verdict. They never suggested that the sentence should be passed on the first verdict. They found that the second verdict was valid and they directed that sentence should be passed.

As both my learned colleagues hold that there was illegality in dealing with the verdict, and that the second verdict and the sentence must be set aside, it is not necessary to express a definite opinion on the question whether, if there had been no error of law except misdirection, our duty would have been to examine the evidence and see whether there was sufficient to support the verdict. I would only say that the New South Wales case of *Makin* does not seem to bind us here. It was a decision on a case of improper admission of evidence, which is

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not quite the same thing as misdirection, and it decided a question of amendment of the common law by statute. Here we are not concerned with the law of New South Wales. In *Subrahmania Ayyar's* case there was no question of either misdirection or improper admission of evidence, and I do not think the remarks of Their Lordships of the Privy Council can properly be held to prohibit this Court from examining the evidence and deciding questions of fact in case of misdirection only when the case comes before it under section 12 of the Lower Burma Courts Act.

I agree that as a majority of this Bench finds that it was illegal to send back the jury instead of questioning them under section 303 of the Code of Criminal Procedure, the conviction and sentence must be set aside, but the accused should not be acquitted. I think there is no doubt at all that we ought to direct a new trial if we have authority to do so. The question whether we can do so is a difficult one. No case has been found in which an Indian High Court has made such an order under section 26 of the Letters Patent, but on the other hand no case has been found in which it was said that such an order could not be passed. I cannot agree with the learned Chief Judge that the case of *Subrahmania Ayyar* is one in which it would have been appropriate on the part of the Privy Council to pass such an order. The offence was a far less serious one than murder, the judgment of the Privy Council was delivered about 18 months after the trial in the High Court, and there might be many local facts about which a Court sitting in England would know nothing, which would make it inexpedient to order a new trial. A sufficient reason for the High Court not passing such an order would be that they held that the error was not an illegality. I have searched, and failed to find any case under section 26 of the Letters Patent, in which an order for a new trial would seem to be appropriate.

If section 12 of the Lower Burma Courts Act stood alone it might be thought that the words "may pass such judgment, order or sentence" corresponding exactly to the preceding "may alter the judgment, order or sentence passed by the Judge" limited the orders which the Bench could pass to orders of a nature akin to the order passed by the Judge; but this view must be modified by comparing section 12 with the two enactments of earlier date, the Letters Patent section 26, and the Code of Criminal Procedure section 434.

The Letters Patent empower the Court only to alter the sentence and to pass judgment or sentence. Section 434 empowers the Court to alter the sentence and pass such judgment or order as the Court thinks fit. I think this gives the Court very wide powers and the word "order" is clearly not limited by reference to any order passed by the Court of original jurisdiction. I cannot think that the powers of this Court under section 12 of the Lower Burma Courts Act are less than its powers under section 434 of the Code of Criminal Procedure. The addition of the words "judgment, order or" in one place and of "sentence" in another place cannot reasonably be held so to limit its meaning.

If we set aside the conviction and sentence and discharge the prisoner the executive authorities cannot properly let the matter rest

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there. A fresh prosecution must be instituted. It seems unreasonable that the Magistrate should be required to record the evidence again and make a fresh commitment.

The learned Advocate for the petitioner expressly admitted that a new trial could be ordered if there were no error except misdirection. If that be so where an alternative course is possible, namely examining the evidence and deciding on it, *a fortiori* it is possible when there is no alternative but discharging the prisoner and leaving the executive authorities to take further action if they think fit.

I would therefore order a new trial.

The final order in the case was as follows:—

In accordance with the finding of the majority of the Full Bench, the order is that the conviction and sentence be set aside and that the accused be released from custody.

Full Bench—(Criminal Revision).

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Irwin.

Criminal Revisio No. 923 of 1905.

July 20th, 1905.

HLA GYI *v.* KING-EMPEROR.

Mr. *Eddis*—for the applicant.

Mr. *McDonnell*, Assistant Government Advocate.

Retrial of accused—conviction and sentence by Judge of High Court set side by a Bench—Criminal Procedure Code, ss. 403, 423, 434, 439, 273, 333—Lower Burma Courts Act, 1900, s. 12.

The accused was convicted at a Criminal Sessions before a Judge of the Chief Court and sentenced to death. In a proceeding under section 12 of the Lower Burma Courts Act, 1900, the conviction and sentence were set aside by a Bench on the ground that the verdict had not been arrived at in due course of law; but the accused was not acquitted. The District Magistrate then took cognizance of the case against the accused and transferred it to a subordinate Magistrate for inquiry with a view to the recommitment of the accused.

In an application for revision on behalf of the accused, it was argued that the District Magistrate's order was illegal, inasmuch as the original commitment was still valid and subsisting, and the trial upon that commitment had not been completed.

Held—after reference to sections 423, 434, and 439 of the Code of Criminal Procedure, and in view of the provisions of sections 403 read with 273 and 333, that the District Magistrate's order was legal.

This is an application to revise and set aside an order of the District Magistrate, Rangoon, by which he ordered the arrest of the applicant and his production before the Western Subdivisional Magistrate, with the view to the latter proceeding under Chapter XVIII of the Code to inquire into an offence of murder, and to the applicant's committal on a charge of such offence to this Court for trial.

The grounds on which the present application is made are as follows:—

(1) There is still a valid subsisting commitment of your petitioner on the same charge, the trial under which is pending before this Court and is still uncompleted.

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(2) There is no provision of the law by which two trials can proceed simultaneously against an accused on the same charge.

(3) Until the first commitment is set aside or the trial thereon brought to a legal conclusion, no other Court has jurisdiction or power to deal with the case except this Court.

(4) The circumstances under which alone a further enquiry can be ordered have not arisen, and the District Magistrate has no power or jurisdiction to order a further enquiry.

(5) That when a case has been committed to Sessions the subordinate Courts have no power or jurisdiction to take further evidence except under the provisions of section 219 of the Code of Criminal Procedure.

(6) That the order of the District Magistrate is not justified by section 204 of the Code of Criminal Procedure.

(7) That your petitioner having been released by order of this Court, no Court subordinate thereto can arrest your petitioner in respect of the same offence in the course of his trial for which (*sic*) he was released.

(8) That no Court but this Court has any jurisdiction to deal with this case, nor with the trial of the charge against your petitioner.

These grounds originate from a misapprehension of the real effect of the Magistrate's order. He has not ordered a further inquiry under section 437 of the Code, but he has taken cognizance of the offence alleged against the accused under section 190 of the Code, and has taken action under sections 65 and 192.

The question is whether he had jurisdiction to do so.

All the grounds are based on the contention set forth in the first ground to the effect that proceedings against the petitioner on the same charge as that on which the District Magistrate made the order complained of, are still pending before this Court.

The facts stated in the first paragraph of the petition themselves controvert this ground.

It is stated that the petitioner on the commitment of the Western Subdivisional Magistrate was tried at the last Criminal Sessions of this Court and was convicted and sentenced.

On a proceeding under section 12 of the Lower Burma Courts Act, 1900, the conviction and sentence were set aside, but the accused was not acquitted of the offence charged against him.

Upon the order of committal there was a trial which ended in a recorded verdict of guilty of murder, on which judgment of guilty of that offence was recorded, and sentence was passed.

The Bench of this Court in the proceeding under section 12 of the Lower Burma Courts Act held that such verdict had not been arrived at in due course of law, and set the judgment and sentence aside.

The contention put forward on behalf of the applicant is that the proceedings were regular up to a certain point, and that the proceedings up to that point not having been set aside, the trial is still before this

Court. Especially it is said that the original commitment is still in force.

We were strongly urged to keep from our minds what it is open to a High Court to do under sections 423 and 439 of the Code in a case which comes before it on appeal or revision from a Divisional Sessions Court, on the ground that a trial by a High Court is quite distinct from a trial by such Court, and section 12 of the Lower Burma Courts Act, and presumably also section 26 of the Letters Patent of the High Courts, and section 434 of the Code of Criminal Procedure, are self contained. Yet it was argued that the power given by section 423 of the Code to order a retrial showed that an order of commitment was valid and subsisting until there had been a trial which had ended in a finding of conviction or acquittal or in a discharge of the accused.

The argument is somewhat inconsequent. It is sufficient to say that in the present case there was a trial on the order of commitment, and that that trial ended in a conviction and sentence. The order of commitment was thus satisfied, and nothing more remains to be done on it. The fact that in cases from a Divisional Sessions Court the Code gives power to a High Court to order a retrial upon an original commitment cannot affect the question of whether that order has been complied with by the first trial. *Prima facie* and but for the provisions of the Code in cases arising in Divisional Sessions Courts the commitment order is exhausted by a completed trial following upon it.

Assuming that section 12 of the Lower Burma Courts Act, section 26 of the High Courts Charters, and section 434 of the Code of Criminal Procedure do not contemplate an order for a new trial being made, when a Court acting under one of those sections merely sets aside a conviction and sentence pronounced in a completed trial, which is the present case, the accused is in the position in which he originally was. The Code itself in section 273 and section 333 contemplates that after commitment an accused may be placed in the position of being liable to be proceeded against *de novo* upon a fresh commitment order, for under section 403 an entry on the charge under section 273, and under section 333 a stay of proceedings, does not amount to an acquittal, unless in the latter case the Judge otherwise directs.

That being so, it is clear that a Magistrate who for any reason considers it proper that an accused should be further prosecuted, would have to take cognizance of the case under section 190. There is no means of his bringing the case before the High Court again unless he does so. If he could not do so the provisions of section 403 regarding an entry under section 273 and those of section 333 regarding a stay of proceedings without the order of the Judge not being an acquittal would be futile.

These considerations emphasize the fact that even when there has not been a trial the commitment order may no longer be subsisting.

The main provisions however by which a Magistrate must be guided in considering whether he has power to take cognizance of or to proceed with a case are those contained in section 403 of the Code of Criminal Procedure.

If an accused has been convicted or acquitted of an offence charged, or which might have been charged on the same facts, and such conviction

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or acquittal remains in force, the accused is not liable to be tried again for any such offence; but if the case cannot be brought within that section there is nothing to prevent a District Magistrate taking cognizance of an offence under section 190 and taking action under section 192 or section 204 of the Code.

Although the Magistrate's order does not show that he clearly apprehended what his powers were, and under what sections his action was justified, it was in fact justified, and there is no ground for interfering with it in revision.

The application is dismissed.

Civil Revision No. 28 of 1905.

June 22nd, 1905.

Before Mr. Justice Fox.

HOSSAIN ISMAIL ATCHA AND ANOTHER *v.* EBRAHIM MAHOMED MAKDA AND ANOTHER.

Mr. *Agabeg*—for applicants (plaintiffs) | Mr. *Ginwala*—for respondents (defendants).

Landlord and tenant—suit for rent against sub-lessor.

When a lessee assigns the remainder of the term of his lease, the original lessor may sue either the original lessee or the assignee for the rent of the period for which the sub-lease is made.

Kunhanujan v. *Ahjelu*, (1889) I. L. R. 17 Mad. 296, followed.

By a registered deed the plaintiff-applicants leased a room in a house to one Mahomed Ebrahim Mamsa for five years ending on the 31st October 1904.

By a document dated the 17th March 1904, the latter purported to sub-let the room to the defendant-respondents from the 1st April 1904 for seven months ending on the 31st October 1904.

The plaintiffs sued the defendants for rent for the seven months.

In law a sub-lease for the whole of the remainder of a term is held to be equivalent to an assignment of the term—Woodfall on Landlord and Tenant, Chapter VII, section 5 (*a*),—and the original lessor may sue the sub-lessee or assignee on covenants running with the land. As pointed out by Mr. Justice Muttusami Ayyar in *Kunhanujan* v. *Ahjelu*, (1), in such a case the original lessor may sue the original lessee upon his express covenant, and also the assignee upon the privity of estate, though he can have execution against one only.

In the present case the original lessors sued the assignees only.

In my judgment the plaintiffs were in law entitled to recover the rents sued for. The decree of the Small Cause Court is reversed, and there will be a decree for the plaintiffs for the amount claimed with costs.

Civil 2nd Appeal No. 5 of 1905.

May 17th 1905.

Before Mr. Justice Irwin.

KAUNG HLA PRU *v.* SAN PAW.

Mr. *Palit*—for the appellant (plaintiff). | Mr. *Lambert*—for the respondent (defendant).

"Land suit"—suit for rent of land—second appeal—Lower Burma Courts Act, 1900, ss. 2 (b), 30.

Evidence—claim to rent of land met by allegation that the land is defendant's—issues—Evidence Act, ss. 2, 11, 116.

(1) (1889) I. L. R. 17 Mad., 296.

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A right to rent of land is a right or interest in immoveable property, and a suit for such rent is a land suit as defined in clause (*b*) of section 2 of the Lower Burma Courts Act, 1900. A second appeal lies in such a case under section 30 of the Lower Burma Courts Act, 1900.

Maung Sein Thaung v. *Maung Shwe Kun*, (1904) 3 L.B.R. 47; *Ma Dun* v. *Ma Pa U*, (1903) 2 L.B.R. 124; referred to.

Where a plaintiff, alleging a sale of certain land to him by defendant followed by a lease from him to the defendant, claims rent of the land from defendant, and the defence is a denial of the sale and lease, the lease is the fact in issue. The sale is not a fact in issue, but it is a relevant fact.

Appellant sued for 257 baskets of paddy, or its value Rs. 92-8-0, as rent of paddy land due on a written lease for one season. The Township Court gave plaintiff a decree, which was reversed on appeal by the District Court. Plaintiff appeals both on points of law and on facts.

Respondent takes a preliminary objection that no second appeal lies. It has not been seriously argued that a suit for rent is cognizable by a Court of Small Causes outside Rangoon and that point was disposed of in *Maung Sein Thaung* v. *Maung Shwe Kun* (1). A second appeal therefore lies under section 584, Civil Procedure Code.

But respondent says that a suit for rent is not a land suit as defined in section 2, clause (*b*), of the Lower Burma Courts Act, 1900. If this be so, there is no second appeal on questions of fact. No authority was cited on either side, but I find that in *Ma Dun* v. *Ma Pa U* (2) Mr. Justice Fox held that a suit for a declaration of title to paddy as rent of land on which the paddy was grown was a land suit. I agree with that and I think that a right to rent of land is a right or interest in immoveable property. A second appeal on facts is therefore allowed by section 30 of the Lower Burma Courts Act, 1900.

Appellant says that the Court of first appeal went beyond the issues and erred in introducing a question of title. It is admitted that the land formerly belonged to the respondent. Appellant alleges that he bought the land from respondent for Rs. 300 in 1897, and thereafter let it year by year to the respondent. Respondent totally denies the sale and the lease and says he mortgaged the land to appellant for Rs. 150 at 4 per cent. *per mensem* interest. The only issues framed by the Township Court were whether respondent signed the lease and what is the price of paddy. The Additional Judge of the District Court says in his judgment that the points in issue were (1) whether the land was sold to plaintiff by defendant, and (2) whether it was rented by defendant from plaintiff. Here the learned Judge was wrong. No question of title arose on the pleadings because if the lease were proved the defendant would be estopped by section 116 of the Evidence Act from denying his landlord's title. The issues framed by the Township Court were quite correct, though the first might have been more tersely worded.

But when the appellant goes on to argue that the District Court erred in considering the question of the sale at all, I cannot agree with him. The fact in issue is the lease, but evidence may be given not

(1) (1904) 3 L. B. R., 47.
(2) (1903) 2 L. B. R., 124.

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only of facts in issue but also of relevant facts. Both are defined in section 2 of the Evidence Act. If appellant can prove the sale to him he makes the fact of the lease highly probable, and the evidence of the sale is relevant under section 11 (2). If respondent can prove that he did not sell the land, the fact that he did not sell it is inconsistent with the fact of the lease, and is therefore relevant under section 11 (1). In every day terms, the fact of the sale is corroborative of the fact of the lease. Therefore evidence relating to the sale was rightly admitted (though the sale was not a fact in issue) and was rightly considered by the District Court, though there is some ground for thinking that the appellant was prejudiced by the error of the District Court in regarding the sale as a fact in issue.

It remains to consider whether the District Court was right in reversing the finding of fact of the Township Court that respondent signed the lease Exhibit A. It is more properly a counterpart of a lease, as it is an acknowledgment by the tenant that he rents the land and a promise to pay the rent. It is not alleged that any written lease signed by the appellant exists.

One reason the Additional Judge gives for discrediting the revenue Surveyor's evidence is that the parties did not sign the foil of Register IX, (Headman's Register of Mutations), though they signed the counterfoil. This is a surprising remark for such an experienced officer to make. There is a place for the cultivator's signature on the counterfoil but not on the foil; and the reason is obvious. The counterfoil is the cultivator's report to the *thugyi* and is therefore naturally signed by him. The foil is the *thugyi's* certificate that the cultivator has madea report to him. There is no reason why this should be signed by the cultivator.

Another fact which in the opinion of the Additional Judge "discredits the transaction" is that the revenue has all along been paid by the defendant. I cannot find the plaintiff's statement to this effect, but assuming it to be so, it is a very common arrangement that the tenant should pay the revenue. The learned Judge omits to notice respondent's admission that he knew for the last five years that the tax receipts were in the appellant's name. He must have known that a change of name in the tax receipts is usually the result of a report in Register IX. If he did not sign the entry in Register IX he ought to have exposed the forgery five years ago.

Exhibit B bears evident marks of fraudulent alterations, but the fraud seems to have been aimed at the stamp revenue alone, by the use of the lease of 1901 again in 1903 as a lease to another person. I think the Township Judge's opinion that it served its purpose as a specimen of San Paw's signature is reasonable. San Paw acknowledged one genuine signature, that on the back of the summons for 8th January. This has one very marked characteristic in common with the signatures on Exhibits A, B, C.

The allegation that the sale was oral, while the yearly leases were written, is not in my opinion sufficient to discredit plaintiff's story. As the leases commenced immediately after the sale the plaintiff may naturally have thought one document sufficient to safeguard his title against

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his brother-in-law's possession. The learned Judge remarked on the absence of evidence of payment of rent. There is no question but that payments were made to plaintiff; the defendant adduced evidence of them himself, as payments of interest. The only question is whether they were interest or rent. The evidence for defendant seems to me very sketchy and I am not inclined to place much reliance on it.

On the whole I think the Judge who examined the witnesses took a reasonable view of the evidence, and I do not think the District Court was justified in interfering with his finding.

I reverse the decree of the District Court and restore that of the Township Court, with costs in all Courts.

Before the Hon'ble Mr. H. Adamson, C.S.I., Chief Judge.

Criminal Revision No. 1045 of 1905.

KING-EMPEROR *v.* CHAN E AND OTHERS.

August 21st, 1905.

Foot-race—pwè—Lower Burma Village Act, 1889, s. 13A.

In the absence of a Notification by the Local Government under sub-section (3) of section 13A of the Lower Burma Village Act, 1889, a foot-race is not a *pwè* for the purposes of that section.

This case has been submitted for revision by the Sessions Judge of the Delta Division.

Two men ran a foot-race for a stake of Rs 5-8. Two umpires were appointed. A crowd assembled to watch the race, and there was much betting on the result. The two umpires, one of the competitors (the other absconded), and 17 of the spectators were prosecuted for holding an unlicensed *pwè* under section 13A of the Lower Burma Village Act, as amended by Burma Act, II of 1904. With the exception of one of the spectators, all were convicted and sentenced to fine.

The learned Sessions Judge has referred the case with a recommendation that the convictions should be reversed in all the cases except those of the competitors and the two umpires.

There can be no doubt that the recommendation so far as it goes is based on good grounds. The spectators, even though they betted on the result, did not hold, promote, take part in or assist the race. The umpires and the competitors did, and they only can come within the provisions of section 13A.

But a further question arises, namely, whether a foot-race is a *pwè* as defined in clause (3) of section 13A, which reads as follows :—

"For the purposes of this section *pwè* ordinarily means a puppet show or other theatrical or dramatic performance, or a native cart, pony, boat, or other like race held for public entertainment, whether on public or private property."

The remainder of the subsection need not be considered, because the Local Government have not by notification declared foot-races to be *pwès*. Now if a foot-race falls within the definition of *pwè* it must fall within the general expression, "other like race." It is difficult to see what likeness there exists between a foot-race and a boat-race, that would not be found between any two races whatever. But it is clear that the words cannot be intended to embrace all races, without any exclusion. It may be said however that the likeness consists in the

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fact that the race congregates crowds and renders desirable previous police arrangements. Even assuming this view, I do not think that a foot-race in Burma can be said to be of a like kind to a pony-race or a boat-race, or a cart-race. Races of those three kinds have from time immemorial been recognized public entertainments in Burma, at which village often competes against village, and even township against township. Custom has attached special publicity to them. They are notoriously public gatherings, at which it may be expected that large crowds will assemble. The legislature with the view of regulating such gatherings, has included them in the definition of *pwè*, and has required that they should not be held without license. But a foot-race is an entirely different matter. It is not, so far as I am aware, a recognized form of public entertainment in Burma. I must confess that until the present case I have never heard of a foot-race as a Burma entertainment, except in the way of school sports. In standard works descriptive of Burma and its people, cart-races, pony-races, and boat-races, are described among the entertainments of the people, but there is never a word about a foot-race. So that even if publicity be taken as the test of likeness, it cannot be said that a foot race in Burma is like to a cart-race or a pony-race or a boat-race. On these grounds I must hold that a foot-race does not fall within the definition of a *pwè*.

It may be that in certain local areas foot-races are coming into fashion, and that control over them is as necessary as in the case of cart, pony or boat races. If so, it is open to the executive under the last portion of clause (*3*) of section 13 A to declare them by notification to be *pwès* in such local areas. But in the absence of such a declaration it cannot be held that they are *pwès* as defined in the Village Act.

The convictions of all the accused are reversed, and the fines will be refunded.

Criminal Revision No. 722 of 1905.

July 17th, 1905.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge.

KING-EMPEROR *v.* KYAW DUN.

Mr. *McDonnell*, Assistant Government Advocate.

Burma Gambling Act, 1899, section 17—evidence—arrest—procedure—Criminal Procedure Code, sections 55, 112, 114, 115.

Section 55 of the Code of Criminal Procedure, 1898, does not empower the Police to arrest persons who are suspected of earning their livelihood by unlawful gaming.

King-Emperor v. *Nga Shwe U*, (1903) 2 L.B.R., 166, referred to.

There is a considerable amount of irrelevant hearsay evidence in this case, but there is some evidence that accused earned his livelihood by unlawful gambling, and there is some evidence of repute. As the accused has not exercised his right of appeal, I will not interfere in revision with the Magistrate's order.

I think that the witnesses would have given more relevant evidence if they had been properly questioned. The Magistrate's attention is directed to *King-Emperor* v. *Nga Shwe U* (1) in which it is shown

(1) (1903) 2 L. B. R., 166.

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how evidence of repute should be elicited. The arrest of the accused was illegal. Apparently the Magistrate gave executive sanction to the institution of proceedings, and the Police, armed with this sanction, arrested the accused under the provisions of section 55 of the Code of Criminal Procedure, and sent him up for trial.

Section 55 of the Code of Criminal Procedure does not empower the police to arrest persons who are suspected of earning their livelihood by unlawful gaming.

The Magistrate should have acted under the provisions of sections 112, 114 and 115 of the Code. That is to say, he should have made an order in writing setting forth the particulars required by section 112 and summoned the accused to appear in accordance with section 114, at the same time attaching to the summons a copy of the order under section 112, as required by section 115.

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Criminal Reference No. 18 of 1905.

June 20th, 1905.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge, and Mr. Justice Fox.

KING-EMPEROR *v.* NGA PYI.

Criminal Procedure Code, section 562—offences to which applicable.

The words "theft," "dishonest misappropriation," and "cheating" as used in section 562 of the Code of Criminal Procedure, 1898, include only the offences punishable under sections 379, 403, and 417 respectively of the Indian Penal Code and not those punishable under sections 381 and 382, 404 and 405, and 418 to 420.

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

The finding is not recorded with the precision required by section 367 (2) of the Code of Criminal Procedure but comparing the judgments with the charge it is clear that accused was convicted of an offence punishable under section 420, Indian Penal Code.

It seems to me not very clear whether section 562 of the Code of Criminal Procedure applies to the aggravated form of cheating made punishable by section 420.

The section applies generally to offences punishable under the Penal Code with not more than two years' imprisonment. Besides these, four offences are specially mentioned. Of these four, theft and theft in a house are punishable with more than two years' rigorous imprisonment, and that seems to be the reason why they are specially named. Dishonest misappropriation in its simplest form is punishable only with two years under section 403, an aggravated form of it under section 404 with more than two years. Cheating is punishable with only one year under section 417, aggravated forms of cheating under sections 418, 419 and 420 with more than two years. Thus there seems to be no reason for mentioning dishonest misappropriation and cheating by name in this section unless the aggravated forms are intended to be included, the simple forms of both offences are included in the general description of offences punishable with not more than two years' imprisonment. There would be no difficulty about the interpretation of the section but for the mention of one, and only one of the

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aggravated forms of theft from which the natural inference is that the word "theft" in the section, where it first occurs, means only simple theft punishable under section 379. If "theft" be construed in this way, why should "dishonest misappropriation" and "cheating" be construed in a different way?

Under section 11 of the Lower Burma Courts Act I refer to a Bench the question whether section 562 of the Code of Criminal Procedure applies to the offence of cheating and thereby dishonestly inducing the person deceived to deliver property, under section 420 of the Penal Code.

The opinion of the Bench was as follows:—

Adamson, C. J.—It is not easy to understand why the offences of theft, theft in a building, dishonest misappropriation, and cheating have been grouped together at the commencement of section 562 of the Code of Criminal Procedure, and followed by a clause embracing all offences under the Indian Penal Code punishable with not more than two years' imprisonment. Dishonest misappropriation in its simple form is punishable with two years' imprisonment, and cheating in its simple form is punishable with one year's imprisonment, and both of these offences would have been provided for by the section even if their special mention had been omitted. It is, however, clear that "theft" can only mean simple theft, otherwise it would not have been followed by "theft in a building." And if theft cannot be regarded as including aggravated forms of theft, it seems to me that there can be no warrant for regarding dishonest misappropriation and cheating as including aggravated forms of these offences. I think that especially after the guide that is afforded by the words "theft" and "theft in a building" we are obliged to construe the words that follow in accordance with the strict meaning that is given to them in the Indian Penal Code, and that we are not at liberty to speculate on the intention of the Legislature, and to construe the words according to our own notions or what ought to have been enacted. I would therefore say that "cheating" only includes the offence punishable under section 417 of the Indian Penal Code, and I would answer the question referred in the negative.

Fox, J.—I concur in answering the question referred in the negative.

Criminal Revision No. 792 of 1905.

June 22nd, 1905

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge.

KING-EMPEROR *v.* PAN ZI.

Lower Burma Village Act, 1889, section 9 (2).

A breach of rules made by the Commissioner under section 6 (*l*) of the Lower Burma Village Act, 1889, does not justify a conviction under section 9 (*2*) of the Act. To support such a conviction, it must be proved that the headman made a certain requisition to the accused, and that the accused refused or neglected to comply with it.

The accused has been convicted under section 9 (*2*) of the Lower Burma Village Act, of eating the flesh of a bullock that died of small-pox, and has been fined Rs. 10. The proceedings show an utter misconception of the provisions of that section.

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In referring the case the learned Sessions Judge has remarked :—

"I would suggest that Magistrates be instructed by a printed judgment as to the interpretation of section 9 (2) of the Village Act. Magistrates are inclined to act as if section 9 (2) attached a penalty to the breach of any rules made by the Commissioner under section 6 (*l*) of the Act, whereas it only does so indirectly and incidentally, in cases where in breaking any of these rules, the person in fault also fails to comply with a requisition duly made by the headman under section 9 of the Act."

This is a correct exposition of the law. The essence of an offence under section 9 (2) of the Village Act, is refusal or neglect to comply with the requisition of a headman. Certain rules have been issued by competent authority prescribing the duties of headmen. But they cannot be treated as a Penal Code, for the breach of which any villager can be convicted. It must be proved to support a conviction under section 9 (2) of the Village Act that the headman made a certain requisition to the accused, and that the accused refused or neglected to comply with it.

The conviction is set aside and the fine must be refunded.

Full Bench—(Criminal Reference).

Criminal Reference No. 37 of 1905.

July 4th, 1905.

Before the Hon'ble Mr. H. Adamson, C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Irwin.

KING-EMPEROR *v.* PO YIN.

Mr. *McDonnell*, Assistant Government Advocate.

Discharge of accused—power of District Magistrate to order further inquiry—Criminal Procedure Code, s. 437.

Under the provisions of section 437 of the Code of Criminal Procedure, 1898, the District Magistrate is competent to direct further inquiry after the discharge of an accused even when no further evidence is forthcoming, and the further inquiry entails merely a rehearing on the same materials.

Hari Dass Sanyal v. *Saritulla*, (1888) I. L. R., 15 Cal., 608, dissented from in part.

Crown v. *Po Ka*, (1901) 1 L. B. R. 100, over-ruled.

King-Emperor v. *Pyu Di*, (1903) 2 L. B. R. 27, followed.

The following reference was made to a Full Bench by *Adamson, C. J.* :—

The accused was discharged by the Senior Magistrate, and the case came before the District Magistrate of Pegu in revision. The District Magistrate considered that the accused was improperly discharged, that on the evidence taken there was a *primâ facie* case for charging and trying the accused and that there was no further evidence available. Instead of exercising the power conferred on him by section 437 of the Code of Criminal Procedure, and either himself making or directing a subordinate Magistrate to make further enquiry, the District Magistrate has referred the case to this Court. The accused had

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an opportunity of showing cause before the District Magistrate, and it is unnecessary to serve him with a fresh notice.

The District Magistrate in referring the case has followed the ruling in *Hari Dass Sanyal* v. *Saritulla* (1). He need not have gone so far for his authority, but might have quoted *Crown* v. *Nga Po Ka* (2) in which it was held by this Court that in the case of an accused being improperly discharged by a Magistrate when there is really no further inquiry that can be properly directed, the proper course is to refer to the High Court.

I am referring this case to a Full Bench because I doubt whether the ruling in *Crown* v. *Nga Po Ka* (2) is in accordance with law.

The ruling is based on the case quoted by the District Magistrate, *Hari Dass Sanyal* v. *Saritulla* (1). In that case the majority of a Full Bench of the Calcutta High Court held that the District Magistrate had jurisdiction on sufficient ground to set aside an order of discharge, and direct either an additional investigation of the facts, or a reconsideration of the evidence by the Magistrate whose order is set aside, or a new inquiry before another Magistrate, and that among such sufficient grounds are the omission to take evidence which ought to have been taken, the discovery of fresh evidence, mistakes of law, illegality or irregularity in the proceedings and the incorrectness of the first finding. But they modified this general finding by adding that the discretion thus conferred on the District Magistrate is a judicial one, and they proceeded to point out instances of its proper application. The learned Judges appeared to consider that the process required two steps:—

(1) Setting aside the order of discharge, and

(2) Passing an order in its stead. They considered that if in a case triable only by the Sessions Court in which further evidence was not available, the District Magistrate was satisfied that on the evidence there was a clear case for committal, he would be exercising a proper discretion in directing a committal as empowered by section 436, but that in a case of the same kind not triable only by the Court of Session and falling within section 437 it was ordinarily the duty of the District Magistrate to refer the case to the High Court, which could make a suitable order.

Prinsep, J., dissented in part. He agreed with the enlarged interpretation put on section 437, but was of opinion that the terms of the section should bear a still larger interpretation, and that it was competent for the District Magistrate to set aside an order of discharge passed against the weight of the evidence, and to order a further inquiry. He pointed out what he considered to be the error in the decision of his colleagues. "It was sought" he said "to make an order of discharge of the same force as an order of acquittal and to declare that it can be set aside only by the High Court." It appears to me that *Prinsep, J.*, in these words indicated the real reason for the

(1) (1888) I. L. R. 15 Cal., 608.
(2) (1901) I L. B. R., 100.

decision of the majority of the Full Bench. They thought that in a case where no further evidence was forthcoming, the District Magistrate would exercise a wrong discretion in ordering a further inquiry, because his order would include the setting aside of an order of discharge, a function which appertained only to the High Court.

The Lower Burma Ruling which I have quoted, *Crown* v. *Nga Po Ka* (2), merely followed the Calcutta ruling.

But there has been a subsequent Full Bench Ruling of this Court in *King-Emperor* v. *Nga Pyu Di* (3) in which the effect of an order of discharge is clearly defined. It was held that there was no provision in the Code for setting aside an order of discharge, the reason being that such an order does not operate as an acquittal, and that its existence is no bar to further proceedings. It is not necessary, it was said in the judgment of the late learned Chief Judge, for an order of discharge to be set aside before further inquiry can be ordered.

I think that this ruling altogether cuts away the ground on which it was held in *Crown* v. *Nga Po Ka* (2) that the proper course for the District Magistrate to take in cases in which further evidence is not forthcoming is to refer the case to the High Court. Section 437 of the Code of Criminal Procedure confers a certain power on the District Magistrate and as it has now been ruled that in the particular instance in which the District Magistrate has hitherto been debarred from exercising that power he is competent to exercise that power in accordance with law, it is not for the High Court to say that he is exercising a wrong discretion, when he makes use of a power that is conferred on him by law.

The questions that I refer to a Full Bench are:—

(1) Is the District Magistrate competent under the provisions of section 437 of the Code of Criminal Procedure to direct further inquiry, after the discharge of an accused, when the further inquiry entails only a rehearing on the same materials, that is to say, when no further evidence is forthcoming?

(2) In the event of this question being answered in the affirmative, would the District Magistrate, in making use of this power, be exercising a sound discretion?

The opinion of the Bench was as follows:—

Fox, J.—The questions referred appear to me to be practically answered by the decision of the Full Bench of this Court in *King-Emperor* v. *Nga Pyu Di* (3). The question of the liability of an accused person to be proceeded against again after a complaint against him had been dismissed, or after he had been discharged, was so fully gone into, that it appears unnecessary to add any further remarks on the subject.

It was pointed out that there is no provision in the Code of Criminal Procedure for setting aside an order of discharge. That being so, a reference to this Court by a District Magistrate to have an order of

(3) (1903) 2 L. B. R., 27.

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discharge set aside, before he makes an order for further inquiry under section 437 of the Code, must be an unnecessary and uncalled-for proceeding. In *Hari Dass Sanyal* v. *Saritulla* (1) six Judges out of eight held that a District Magistrate has jurisdiction under that section to order a further inquiry upon the same materials which were before the subordinate Magistrate. This proposition has been accepted by this Court, and there is no reason to doubt its correctness. In so far as the further proposition adopted by the majority of the Judges laid down that in a case not triable only by the Court of Session it would ordinarily be the duty of a District Magistrate to refer the case to the High Court instead of making an order himself, I think that the decision of this Court in *King-Emperor* v. *Nga Pyu Di* (3), conflicts with that proposition, and it is not binding on the Courts of this province.

The section gives a District Magistrate authority to order a further inquiry and such authority is unfettered by any other provision of law.

I would answer both the questions referred in the affirmative.

Adamson, C. J.—I concur.

Irwin, J.—I concur.

Full Bench—(Civil Reference).

Civil Reference No. 5 of 1905.

June 12th, 1905.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Irwin.

MAUNG BIN *v.* MA HLAING AND OTHERS.

Mr. *Higinbotham*—for the appellant (plaintiff). | Mr. *Das*—for the respondents (defendants).

Mortgage or sale—evidence of oral agreement varying terms of deed of sale—Evidence Act, s. 92.

Plaintiff, who had executed a deed of sale of land to defendant, afterwards brought a suit for a declaration that the transaction was a mortgage and not an outright sale, and for an order that the land should be re-conveyed on plaintiff's paying the mortgage money. Plaintiff brought evidence of an oral agreement between the parties at the time of the execution of the deed of sale, that plaintiff should have the right to redeem the land; and also evidence of the conduct of the parties as showing that such was the agreement between them.

Held,—that such evidence was not admissible, being excluded by the terms of section 92 of the Indian Evidence Act, 1872.

Balkishen Das v. *Legge*, (Privy Council) (1899) I.L.R., 22 All., 149; *Banapa* v. *Sundardas Jogjivandas*, (1876) I.L.R., 1 Bom., 333; *Achutaramaraju* v. *Subbaraju*, (1901) I.L.R., 25 Mad. 7; followed.

Ramesh Chandra Pal v. *Nga Saung*, (1902) 2 L. B. R., 1, overruled.

Paksu Lakshman v. *Govinda Kanji*, (1880) I. L. R., 4 Bom., 594; *Preonath Shaha* v. *Madhu Sudan Bhuiya*, (1898) I. L. R., 25 Cal., 603; *Khankar Abdur Rahman* v. *Ali Hafez*, (1900) I. L. R., 28 Cal., 256; *Mahomed Ali Hossein* v. *Nazar Ali* (1901) I. L. R., 28 Cal., 289; dissented from.

Lincoln v. *Wright*, (1859) 4 Deg. and J., 16; *Alderson* v. *White*, (1858) 2 Deg. and J., 97; *Gunga Narain Gupta* v. *Tiluckram Chowdry*, (1888) I. L. R., 15 Cal., 533; *Beni Madhab Dass* v. *Sadasook Kotary*, (1905) I. L. R. 32 Cal., 437; *Lyndsay* v. *Lynch*, Ghose's Law of Mortgage, 3rd edn., p. 223; referred to.

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The following reference was made to a Full Bench by Mr. Justice Fox:—

In February 1897 the plaintiff admittedly mortgaged his lands to the original defendant in this case for Rs. 300. On 27th August 1897 (1st waxing of Tawthalin 1259 B. E.) he admittedly executed a deed of sale of these lands and of some cattle and a cart to the original defendant, the consideration stated being the debt on the previous advance including interest, and a further payment of Rs. 300. In 1903 the plaintiff brought the suit out of which this appeal arises. He asked for a declaration that the transaction of the 27th August 1897 was a mortgage and not an out-and-out sale, and for judgment ordering the defendant to re-convey the property to him on his paying into Court the sum of Rs. 750.

The document of the 27th August 1897 is in form an absolute and unconditional conveyance. The plaintiff stated however in his evidence that it was entered into as a temporary sale to enable the defendant to raise money for him, and on the understanding that he was to be allowed to redeem the property whenever he could do so. There was other evidence that the defendant had agreed during the negotiations and when the deed of sale was executed to allow the plaintiff to redeem. Shortly after the execution of the deed of sale, probably on the day following, a document was admittedly drawn up under which the plaintiff was to have the right to redeem if he paid principal and interest within the year 1260 B. E., but if he did not, the sale deed was to hold good. This document, however, was not signed either by the plaintiff or the defendant. The plaintiff admittedly remained in possession of the property for a year after the execution of the deed of sale without payment of rent, but after the expiration of the year he either gave up possession or was ejected.

The Subdivisional Court by its decree allowed the plaintiff to redeem the property. The Divisional Court reversed this decision on the ground that the evidence to shew that the transaction of the 27th August 1897 was a mortgage or conditional sale, and not an outright sale, as it purported to be, was inadmissible.

The Divisional Judge based his decision on section 92 of the Evidence Act, and on the judgment of their Lordships of the Privy Council in *Balkishen Das* v. *Legge* (1). He was aware that there have been rulings by the late Court of the Judicial Commissioner, Lower Burma, and by this Court as well as by High Courts in India to the effect that under certain circumstances evidence may be received to shew that a transaction recorded in a document as an outright sale was really intended by the parties to be a mortgage, and that effect has been given to such intention.

In my opinion he should have followed these rulings especially that of Mr. Justice Irwin in *Ramesh Chandra Pal* v. *Nga Saung* (2) for in that case the learned Judge considered the decision in *Balkishen Das* v. *Legge* (1), and held it was no bar to admitting evidence to shew the real intention of the parties. The question however is a difficult

(1) (1899) I.L.R., 22 All., 149. | (2) (1902) 2 L.B.R., 1.

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one, and one which the judgment of their Lordships may or may not have set at rest. Conflicting views have been taken by the Calcutta and the Madras High Courts of the effect of Their Lordships' judgment.

In my opinion the question is one which might well be considered by a Bench of this Court.

I therefore refer to a Bench of the Court the following questions:—

(1) Is evidence of a contemporaneous oral agreement, or of conduct of the parties, admissible to shew that a transaction reduced to the form of a deed of unconditional sale was in fact, or was intended to be, a conditional sale or mortgage, unless the party tendering the evidence alieges matter contemplated and covered by one or more of the provisoes to section 92 of the Evidence Act?

(2) Was the evidence rejected by the Divisional Judge in this case admissible?

The opinion of the Bench was as follows:—

Fox, J.—The evidence for the plaintiff to show that the transaction between him and the original defendant was a mortgage or conditional sale, and not an absolute sale as stated in the registered deed executed by him on the 27th August 1897, was to the following effect. He had previously mortgaged the two pieces of land to the defendant in February of the same year to secure a loan of Rs. 300 with interest at Rs. 3 per cent. per mensem. On that occasion Exhibit I, an unregistered mortgage document, had been executed.

He subsequently wanted more money to pay to his first wife in consequence of her separating from him. The pleader whom he consulted advised him to borrow the further amount required from the defendant. The pleader gave evidence that the defendant agreed to lend the money if the properties were transferred to his name because he would then mortgage them himself, and so raise money. The plaintiff said the properties were very valuable but the defendant said he would allow the plaintiff to work them, and to redeem the land. The pleader advised the plaintiff to transfer the land on this understanding and the deed of sale was then drawn up. The pleader says he warned the plaintiff to obtain a document from the defendant to the effect that the latter would allow redemption. There was also evidence that at the time of execution of the deed of sale, the defendant agreed to allow the plaintiff to redeem the property whenever he could do so. Subsequently and apparently on the day following the date of the deed of sale a writing (Exhibit B) was drawn up but it was not executed by either the plaintiff or the defendant. The object of it was to show that the defendant had agreed to allow the plaintiff to redeem the properties covered by the deed of sale, if he paid the amount mentioned in that deed with interest at 4 per cent. per mensem within the Burmese year next following the year in which the deed of sale was executed, but if he did not pay the principal and interest within the time mentioned the deed of sale was to have full effect.

The defence admitted that this document, although not executed, represented what had been agreed upon by the parties and alleged that, as the plaintiff was unable to repay the principal and interest

within the year, he had voluntarily given up the properties. The plaintiff admittedly remained in possession of them for a year and then he says the defendant turned him out. He brought his suit for redemption nearly six years after the date of the deed of sale. Further evidence in support of his claim was to the effect that the value of the properties mentioned in the deed of sale was very much larger than the consideration money mentioned in it. Apart from this, the evidence upon which he relied was (1) evidence of a contemporaneous oral agreement that notwithstanding the absolute transfer evidenced by the deed of sale both parties had agreed that he should have a right to redeem the properties, and (2) conduct of the parties showing that such was the agreement between them.

But for the judgment of their Lordships of the Privy Council in *Balkishen Das* v. *Legge* (1), I do not think there could be any doubt that both of the above classes of evidence would have been admissible, under the rulings of High Courts in India followed by the Court of the Judicial Commissioner of Lower Burma and by this Court, provided the rule adopted by those decisions had been followed.

In *Ramesh Chandra Pal* v. *Nga Saung* (2) Mr. Justice Irwin stated the rule derivable from those decisions, of which the most notable is *Paksu Lahshman* v. *Govinda Kanji* (3). In that case Mr. Justice Melvill referred to the grounds upon which English Courts of Equity admitted oral evidence to show that an absolute transfer was intended to be nothing more than a security for a debt. He adopted as the safe ground on which Indian Courts should admit such evidence, the ground stated by Lord Justice Turner in *Lincoln* v. *Wright* (4) *viz.*, that of fraud, the fraud being the insistence on the transaction having been what the document showed it to be when as a fact it had been a transfer by way of security only.

Mr. Justice Melvill held that it was not quite clear that the words of the proviso of section 92 of the Evidence Act were not wide enough to embrace evidence of fraud subsequent to the transaction in question, but he based his decision chiefly upon the duty of the Courts in India to prevent fraud. His decision has been commented on with approval and followed by the Calcutta and the Madras High Courts. In *Balkishen Dass* v. *Legge* (1) on appeal to the Allahabad High Court, the learned Judges adopted the principle of *Lincoln and Wright*, and of another case *Alderson* v. *White* (5), as ground for the admissibility of oral evidence to show what the intention of parties to documents had been. When the case came before Their Lordships of the Privy Council, the latter remarked :—

"Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. 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 Indian 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

(3) (1880) I.L.R., 4 Bom., 594. | (4) (1859) 4 Deg. and J. 16.
(5) (1858) 2 Deg. and J. 97.

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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. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

This ruling appears to me to cut away entirely the ground on which Mr. Justice Melvill based his decision in *Paksu Lakshman* v. *Govinda Kanji* (3) and to be a ruling binding on all Courts in India, that in cases in which it is attempted to show by oral evidence that a transaction reduced to the form of a document and purporting by that document to be an absolute sale was in reality a mortgage or conditional sale, the Courts cannot admit any such evidence unless the evidence is admissible under one of the provisoes to section 92 of the Evidence Act.

If this is so, the first class of evidence on which the plaintiff relied in this case must be held to be inadmissible unless it can be brought under one of such provisoes.

There remains the other class of evidence on which he relied, namely, that of the conduct of the parties.

There is a conflict of opinion between the Calcutta High Courts and the Madras High Courts as to whether such evidence is affected by the decision of Their Lordships of the Privy Council. In *Khankar Abdur Rahman* v. *Ali Hafez* (6) and in *Mahomed Ali Hossein* v. *Nazar Ali* (7), learned Judges of the Calcutta High Court have held that evidence of the acts and conduct of the parties is admissible to show that an absolute conveyance was intended by the parties to operate as a mortgage or conditional sale only. The ground of decision appears to have been that neither section 92 of the Evidence Act nor the decision of their Lordships expressly excludes such evidence from admission.

In *Achutaramaraju* v. *Subbaraju* (8), however, a Bench of the Madras High Court held that even such evidence was not admissible. The learned Judges say that evidence of such conduct could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale deed was to operate only as a mortgage and not as a sale, but section 92 of the Evidence Act enacts that no evidence of any oral agreement shall be admitted to vary the terms of the contract or grant, and no exception is made in the provisoes in favour of evidence which consists of the acts and conduct of the parties from which an inference might be drawn that there was such an oral agreement.

(6) (1900) I.L.R., 28 Cal., 256. | (7) (1901) I.L.R., 28 Cal., 289.
(8) (1901) I.L.R., 25 Mad., 7.

This argument appears to me to be irresistible and conclusive, and although I fear that great hardship to poor and needy people in this province may result from so deciding, I think the first question referred in this case should be answered in the negative.

Upon the second question referred the learned Counsel for the plaintiff has urged that fraud was alleged in the plaint. The paragraph relied on as containing the allegation is as follows: "That defendant at first agreed to re-convey the said property to plaintiff but subsequently refused to do so, and claimed that the transaction was not a mortgage but an out-and-out sale to him."

This scarcely complies with the rule that a plaint charging fraud must set forth the particulars of the fraud (see *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (9). But even if it were a sufficient compliance with the rule, the fraud relied on was fraud subsequent to the execution of the deed of sale. Notwithstanding the remarks of Melvill, J. in *Foksu Lakshman* v. *Govinda Kanji* (3) the wording of section 92 of the Evidence Act appears to me to make it quite clear that it is only fraud in connection with the entering into and execution of the document which is contested that can be proved by oral evidence. The first proviso to the section says that any fact may be proved *which would invalidate any document* or *which would entitle any person to any decree* or order relating thereto. As recently pointed out by Mr. Justice Woodroffe in *Beni Madhab Dass* v. *Sadasook Kotary* (10) what follows in the proviso is illustrative merely and not exhaustive.

In the present case the plaintiff did not say that he was unaware of what he was doing when he signed the sale deed. He admitted that he knew the deed was an absolute transfer, but he relied on the defendant's verbal promise to allow redemption. He did not set up that the defendant induced him to sign such a deed by a promise which the defendant never intended to perform, a state of circumstances given in section 17 of the Contract Act as constituting fraud. Even if Exhibit B had been executed and registered the most that could be said was that the sale deed did not truly represent the real agreement between the parties. There was nothing amounting to fraud in connection with it as far as I can see, and there was nothing on which the plaintiff could have obtained a decree declaring it to be invalid. Chapters III, IV and V of the Specific Relief Act show what decrees may be obtained in connection with documents. They may be rectified, rescinded or cancelled. When a document does not truly express the intention of the parties it may be rectified, but only when the result has been due to fraud or mutual mistake of the parties. The mutual mistake must be as to a matter of fact. A mistake as to law in force in British India is not a ground for holding an agreement to be void—see section 21 of the Indian Contract Act, 1872. Consequently even if both the plaintiff and the defendant believed that by reason of the sale deed and an oral agreement or by reason of the sale deed and an unregistered agreement which they intended to execute the plaintiff

(9) (1888) I.L.R., 15 Cal., 533. (10) (1905) I.L.R., 32 Cal., 437.

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would have the right to redeem the property, that would not be sufficient ground for rectifying the sale deed. I cannot think of any other grounds than fraud or mutual mistake under which the sale deed in this case could possibly have been rectified, rescinded or cancelled, and since there was neither fraud nor mutual mistake in the case, I would answer the second question referred in the negative.

The learned Divisional Judge held that the conduct of the parties leading up to and including the writing out of Exhibit B was admissible under proviso (3) to section 92, since it went to show that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the deed of sale. I cannot agree in this view.

It appears to me that in any view of the case it must be held that the parties intended the sale deed to operate from the time of its execution, although they may have intended it to operate as a conditional and not as an absolute sale.

Adamson, C. J.—The question whether any evidence, and if so what evidence, is admissible to show that a mortgage was really intended, although on the face of the instrument the transaction was an absolute sale, must be answered in India with reference to the provisions of section 92 of the Evidence Act. If any fact be imputed which would invalidate the instrument, or which would entitle any party to a decree relating thereto, the terms of the first proviso of that section admit in proof of such fact evidence of all kinds, whether direct or circumstantial. But the language of the proviso, and especially the specific examples given in it as an aid to construction, *viz.*, fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, mistake in law, show that the proviso refers only to cases in which a transaction is from its outset invalidated, and not to cases in which the fraud imputed is, that subsequent to the execution of the document, one party to it endeavoured, notwithstanding an agreement to the contrary, to hold the other party to the strict terms of the document. Such is the ruling in *Banapa* v. *Sundardas Jagjivandas* (11). It is true that in *Paksu Lakshman* v. *Govinda Kanji* (3) a doubt was expressed as to whether the words of the proviso were not wide enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud. But I am unable to find that this view has been accepted by Indian Courts, and in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (12), the principle that the fraud referred to in proviso (1) of section 92 must be contemporaneous and not subsequent fraud, was mentioned with approval. In my opinion there can be no doubt that the words "Any fact which would invalidate any document, or which would entitle any person to any decree or order relating thereto" must refer to contemporaneous and not to subsequent facts. For, if the opposite view be taken, it is clear that when one party asserts that there was a contemporaneous oral agreement varying a document, and

(11) (1876) I.L.R., 1 Bom., 333.
(12) (1898) I.L.R., 25 Cal., 603.

the other party denies it, the first party *ipso facto* asserts either that by the denial a fraud is being committed on him, or that, in consequence of the oral agreement which he desires to prove he will be entitled to a certain decree or order, and the result is that there is no conceivable case in which the terms of proviso (1) do not exclude from the provisions of section 92 evidence of a contemporaneous oral agreement, which is denied by the opposite party. This is a *reductio ad absurdum*. The provisions of the section would in all cases be rendered nugatory by the provisions of the proviso.

But the decisions of the Calcutta High Court in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (12), *Khankar* v. *Ali Hafez* (5) and *Mahomed Ali Hossein* v. *Nazar Ali* (7) to the effect that oral evidence of the acts and conduct of the parties, such as evidence of the repayment of the money, the return of the deed, and the exercise of acts of possession by the vendor, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale, are not founded on the allegation of fraud or in anything contained in proviso (1). They are founded on the following words of section 92, *viz.*, "No evidence of any oral agreement or statement shall be admitted." In the view of the Calcutta High Court these words do not exclude the evidence of acts and conduct of the parties. Their Lordships of the Privy Council had held in *Ralkishen Das* v. *Legge* (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deed was not admissible and that decisions of the English Court of Chancery were not applicable to the law of Evidence in India, and the learned Judges of the Calcutta High Court, after considering that judgment, held that their former ruling to the effect that evidence of the acts and conduct of the parties is admissible, did not contravene the rule laid down in the Privy Council judgment, the reason given being that though oral evidence of intention was clearly excluded by section 92, evidence of acts and conduct to prove that intention was not excluded. A Bench of the Madras High Court discussed the question in *Achutaramaraju* v. *Subbaraju* (8) and dissented from the Calcutta High Court. The reasons for dissent have been stated at length in the judgment of my learned colleague Mr. Justice Fox, and I need not repeat them here. Those reasons are to my mind very convincing, and I will venture to add two other grounds which lead me to the same conclusion. The first is based on the words of the section, which as I have stated are, "No evidence of any oral agreement or statement shall be admitted." The learned Judges of the Calcutta High Court have, in my view, imported into the section words for which there is no warrant, and have construed it as if it read, "No evidence *except circumstantial evidence* of any oral agreement or statement shall be admitted." It appears to me that evidence of acts and conduct given with a view to proving an agreement, is evidence of that agreement, and that the rule expressed in section 92 is no less infringed, when an agreement inconsistent with the terms of an instrument, is proved by evidence of acts and conduct than it is when such agreement is proved by direct evidence. My second ground is that I find it difficult to conceive that

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the Legislature could possibly have intended, in respect of any fact of which proof is allowed, to lay down a rule that such fact may be proved by circumstantial but not by direct evidence.

The intention of section 92 is to my mind perfectly clear. The object of the section is to discourage perjury. If a written agreement can be contradicted or varied by a contemporaneous oral agreement a wide opening is given to perjury. It is therefore enacted that when the terms of a contract or disposition of property have been reduced to the form of a document that document shall be deemed to be the final agreement between the parties. The object is to prevent persons from making contemporaneous oral agreements which contradict or vary written contracts, and if a person ignoring this provision of law, executes a document which does not express his intention, and relies on a contemporaneous oral agreement varying its terms, he will not be allowed to prove the oral agreement, but will be bound by the written contract, and it follows that he will have only himself to blame if he finds himself in a false position owing to his having deliberately ignored the law.

My view therefore is that under the circumstances described in section 92 of the Evidence Act, direct oral evidence and evidence of acts and conduct are equally inadmissible, when offered for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written contract or disposition of property.

The evidence on which the plaintiff relies in the present case has been fully set forth at the commencement of the judgment of my learned colleague. It consists of evidence of the intention of the parties at the time of execution of the conveyance, and of evidence of their conduct before and after the conveyance, offered for the purpose of proving their intention. Following the exposition of the law on the subject which I have endeavoured to give above, I must hold that the evidence is equally inadmissible, whether on the ground of fraud, as has been urged by the learned Counsel for the plaintiff, or on the ground that it is evidence of acts and conduct as distinguished from direct oral evidence.

My learned colleague has commented on the hardship that is likely to result from applying to such cases the ruling of the Privy Council in *Balkishen Das* v. *Legge* (1). I agree that there may be individual cases of hardship, but I derive some consolation from the remarks that Lord Redesdale made in speaking of the Statute of Frauds in *Lyndsay* v. *Lynch* (13). He said "the Statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in Courts of Equity than that the relaxation of that Statute has been a ground of much perjury and much fraud. If the Statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred." These words appear to me to be strikingly applicable to the action of the Courts in India, in ignoring the plain provisions of section 92 of the Evidence

(13) Ghose's Law of Mortgage, 3rd edition, page 223.

Act, in their desire to follow the procedure of Courts of Equity in England. I need hardly add that the dangers in India of relaxing the law on this point are infinitely greater than in England. I think therefore that it is a matter for considerable satisfaction that the highest judicial tribunal has laid down that decisions of the English Court of Chancery have no application to cases governed by section 92 of the Indian Evidence Act.

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I would answer both questions in the negative.

Irwin, J.—I concur in the answers proposed by my learned colleagues to both questions, and I think my decision in *Ramesh Chandra Pal* v. *Nga Saung* (2) was wrong.

Before the Hon'ble Mr. H. Adamson, C.S.I., Chief Judge.

Criminal Revisio No. 787 of 1905.

PO WA *v.* KING-EMPEROR.

June 27th, 1905.

Mr. *Pennell*—for the applicant.

Mr. *McDonnell*, Assistant Government Advocate.

Examination of witnesses—cross-examination—practice.

In criminal cases, it is customary for the cross-examination of each witness for the defence to be made immediately after his examination-in-chief, and not postponed till after the examination-in-chief of all the defence witnesses. This practice should not be departed from against the wishes of the accused, and to his possible prejudice.

Chandi Pershad v. *Abdur Rahman*, (1894) I. L. R. 22 Cal., 131; *Abdool Kadir Khan* v. *The Magistrate of Purneah*, 20 W. R., Cr. 23; *Queen-Empress* v. *Nageshappa Pai*, (1895) I. L. R. 20 Bom., 543; *Kedar Nath Ghose* v. *Bhupendra Nath Bose*, (1900) 5 C. W. N. xv., referred to.

This is an application under section 526 of the Code of Criminal Procedure for the transfer of a case from the Court of the District Magistrate of Rangoon on the ground that such transfer is expedient for the ends of justice.

The case had reached the stage of examination of the witnesses for the defence. When the examination-in-chief of a certain witness had been concluded, the Government Prosecutor applied for leave to reserve his cross-examination until the examination-in-chief of certain other witnesses for the defence had been completed. The learned Counsel for the accused objected to this course, but the District Magistrate overruled the objection, and granted the permission applied for.

It is urged that the course adopted by the District Magistrate is prejudicial to the defence, because the accused's advocate is not in a position to exercise his discretion as to calling further evidence in respect of the same set of facts until he has heard the cross-examination of the witnesses whom he has already called.

The learned advocate for the applicant however states that he does not desire the transfer of the case, provided that the Magistrate adheres to the ordinary practice, which is to cross-examine each witness immediately after his examination-in-chief.

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I will therefore treat this case as an application for revision of an interlocutory order. That the High Court is competent at any stage of a case to interfere to exercise its powers of revision, has been ruled in *Chandi Pershad* v. *Abdur Rahman* (1), *Abdool Kadir Khan* v. *The Mgistrate of Purneah* (2) and *Queen-Empress* v. *Nageshappa Pai* (3).

Section 135 of the Evidence Act provides that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court. Section 138 provides that witnesses shall be first examined-in-chief, then cross-examined, then re-examined.

The only case to which I have been referred, or which I can find, bearing on the subject, is a civil case, *Kedar Nath Ghose* v. *Bhupendra Nath Bose* (4). In that case the first witness called was not the plaintiff, but the plaintiff was a witness in the case. At the close of the examination-in-chief of the first witness, the defendant's Counsel asked that the cross-examination should be deferred until after the examination-in-chief of the plaintiff. The learned Judge held that the ordinary practice should regulate the order of examination, and that the witness should be cross-examined at the conclusion of the examination-in-chief.

I think that the view taken by the learned Judge applied with stronger force to a criminal than to a civil case. The practice undoubtedly is to cross-examine immediately after the examination-in-chief. The reasons given by the learned advocate for thinking that the course adopted by the District Magistrate would prejudice the defence, are not in my opinion very strong, but I am not prepared to say that they are altogether groundless. The learned Assistant Government Advocate states that the course was adopted because by adopting it there was a greater likelihood of getting at the truth. But I think that in matters connected with the defence the ordinary practice should never be departed from, if such departure can in any possible way prejudice the defence, and if the accused objects to it.

The Code by a special provision enables the cross-examination of witnesses for the prosecution to be deferred, but there is no provision for deferring it in the case of witnesses for the defence, and even if the Magistrate has a discretion I think that he is exercising it wrongly, when he departs from the ordinary practice of the Court in respect of the defence, against the wishes of the accused, and to his possible prejudice.

I set aside the order by which the Magistrate allowed the cross-examination of certain witnesses for the defence to be deferred until after the examination-in-chief of other witnesses, and return the proceedings for disposal in accordance with law.

(1) (1894) I. L. R., 22 Cal., 131.
(2) 20 W. R., Cr. 23.
(3) (1895) I. L. R., 20 Bom., 543.
(4) (1900) 5 C. W. N., xv.

Before the Hon'ble Mr. H. Adamson, C.S.I., Chief Judge, and Mr. Justice Fox.

Criminal Appeal No. 373 of 1905.

August 16th, 1905.

SHWE CHO *v.* KING-EMPEROR.

Sentence of death—practice—Criminal Procedure Code, s. 367 (5).

A Sessions Judge, in passing sentence of death, remarked in his judgment that "the fact that the accused acted without premeditation will no doubt be considered by the proper tribunal." The idea that a Sessions Judge may devolve on a higher tribunal his responsibility in respect of sentence in a capital case, is erroneous.

Dictum of Irwin J. in Crown v. Tha Sin, (1 L. B. R., 216) that when a Sessions Judge is in doubt whether a sentence of death should be passed or not, he should pass sentence of death, and leave it to be commuted by the High Court if necessary, dissented from.

Adamson, C. J.—I must take exception to a remark made by the learned Sessions Judge when considering what sentence should be passed. He said, "The fact that the accused acted without premeditation will no doubt be considered by the proper tribunal." This remark indicates a misconception of the duty of a Sessions Judge in determining the penalty for a capital offence. It suggests that a Sessions Judge may rightly pass a sentence of death which is inappropriate, and leave it to a higher tribunal to correct it. I have noticed in several capital cases that have come before me recently that Sessions Judges take a similar view. It finds some countenance in a published judgment of this Court, *Crown* v. *Nga Tha Sin* (1). In that case a Full Bench ruled that the true interpretation of section 367 (5) of the Code of Criminal Procedure is that before passing a sentence other than death in a capital case, the Judge should find that there are extenuating circumstances, and not that there is merely an absence of aggravating circumstances. In that ruling I fully concur. But in the same case Mr. Justice Irwin stated that in his opinion when a Sessions Judge had any doubt whether a sentence of death should be passed or not, he should pass a sentence of death, and that where there is a doubt it should be decided by the High Court and not by the Court of Session. That is an *obiter dictum*, but apparently it has had considerable influence on Sessions Judges, and I must say with all respect that I strongly dissent from it. The proposition that a Judge, when he has doubt as to whether sentence of death should be passed, should pass sentence of death, appears to me to be as contrary to the principles of criminal jurisprudence as it is to the dictates of humanity. It is the duty of a Judge to consider whether there are extenuating circumstances, but when he has given his mind to that question and still feels a reasonable doubt as to whether death is the proper penalty, the doubt, like all other doubts, should be given in favour of the accused. There is no authority in law for holding that a Sessions Judge has any right to devolve his responsibility in respect of sentence in a capital case on a higher tribunal. Section 367 (5) of the Code of Criminal Procedure applies equally to High Courts in the exercise of original criminal jurisdiction and to Courts of Session. The responsibility of the Judge is the same in both. I have thought it proper to make these remarks because I have frequently of late observed a tendency on the part of

(1) (1902) 1 L. B. R., 216.

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Sessions Judges, which may be due to the *obiter dictum* which I have quoted, to throw upon the High Court a responsibility which no provision of law authorizes them to divest themselves of.

Fox, J.—The remark of the Sessions Judge as to the sentence which he should pass appears to me to show that he does not correctly apprehend his powers as regards sentences on convictions of murder. It is open to every Judge empowered to try a person accused of murder to pass one of two sentences upon conviction of the accused of that offence. No ruling can deprive such Judge of that power. But it must be exercised in accordance with law. The ruling of the Full Bench of this Court in *Crown* v. *Nga Tha Sin* (1) laid down that section 367, subsection (5) of the Code of Criminal Procedure contemplated the passing of a sentence of death as the ordinary rule in cases punishable with death, and the passing of a sentence of transportation for life as the exception, and that, so far as any rule on the matter could be laid down, a sentence of death should ordinarily be passed unless there are extenuating circumstances. Further, the ruling laid down that before passing the mitigated sentence, a Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances, and that it is not for a Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.

These propositions were accepted by all the Judges of the Court, and are binding on all Judges of Sessions Courts as statements of the law. They were arrived at after full consideration of rulings of the Special Court and of Judicial Commissioners of Lower Burma, in some of which rules had been laid down as to the circumstances under which a death sentence should be passed and under what circumstances the lesser sentence should be passed.

The Full Bench ruling abrogated the rules so laid down, which are no longer binding on the Courts.

The remarks of Mr. Justice Irwin regarding the duty or desirability of a Sessions Judge passing a sentence of death in a case in which he entertained doubt as to the proper sentence, were, as appears from his judgment, an expression of his individual opinion, and were not part of what was adopted by all the Judges of the Bench. As such they are not part of the ruling of the Court, and are not binding on Sessions Judges. But lest there should be continued misapprehension as to the effect of the ruling, I desire to emphasize that Sessions Judges are bound by the propositions which I have set out above, because they are propositions adopted by all the Judges of the Bench.

Criminal Revision No. 1341 of 1905.

December 1st, 1905.

Before Mr. Justice Irwin.

KING-EMPEROR *v.* KYAW HLA AUNG.

Whipping—house-breaking by night—previous convictions of theft—Criminal Procedure Code, s. 35—Indian Penal Code, s. 71—appeal—alteration of finding to legalize sentence—Criminal Procedure Code, s. 423.

When an accused with previous convictions of theft is convicted of house-breaking by night, a double sentence of imprisonment and whipping is not legal under

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section 3 of the Whipping Act, 1864; but if the house-breaking is accompanied with theft, the accused may be convicted on separate charges under sections 457 and 380 and sentenced to imprisonment and whipping for the theft.

When an illegal sentence comes before a Court of appeal, the propriety of legalizing the sentence by altering the conviction should be considered, if the result of not doing so would be an inadequate sentence.

The accused was found in possession of stolen property, and in consequence was convicted of house-breaking by night with intent to commit theft. He admitted two previous convictions for theft and was sentenced to eighteen months' rigorous imprisonment and 20 lashes.

The Sessions Judge in appeal remarked that the sentence was inadequate and the accused ought to have been tried by the District Magistrate; yet he set aside the sentence of whipping as illegal.

The double sentence of imprisonment and whipping was certainly not legal as a sentence under section 457, because the previous convictions were for theft; but on the facts found it was obviously open to the Sessions Judge to alter the conviction and to convict the accused of both house-breaking by night and theft in a house. The double sentence would then be legal as a sentence for theft. The learned Judge ought to have taken this course if he did not think it expedient to order a new trial before the District Magistrate.

The charge is badly framed. It runs thus—

"Committed theft in respect of property valued rupees fifteen from the house of complainant by committing house-breaking by night and thereby committed an offence punishable under section 457." The charge ought to have two heads and should run thus—

(1) "Committed house-breaking by night in the house of Mi Hla Pyu, in order to commit theft, and thereby committed an offence punishable under section 457."

(2) "Committed theft of some clothes from the house of Mi Hla Pyu, and thereby committed an offence punishable under section 380."

The Magistrate ought to have convicted expressly of both offences and then passed sentence for one only. See the illustration to section 35, Criminal Procedure Code.

For the charges of previous convictions the Magistrate used Form 79. He ought to have used Form 78.

The District Magistrate called for the case in revision, and remarked "Form No. 80 in this case is clearly superfluous." In this the District Magistrate is wrong. Even if the previous convictions did not render the accused liable to both imprisonment and whipping, Form 80 should be used. See paragraph 282, Courts Manual.

Before Mr. Justice Irwin.

Criminal Revision No. 1342 of 1905.

December 1st, 1905.

KING-EMPEROR *v.* MAUNG GALE *alias* PAN ZIN.

Joinder of charges—Criminal Procedure Code, ss. 233, 235—summons case—warrant case.

Charges of insult and mischief committed on two different days cannot be tried together.

When an offence punishable with imprisonment exceeding six months and an offence not so punishable are tried together at one trial, the case is a warrant case, and formal charges should be framed for both offences.

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Complaint was made that accused had committed mischief on 21st July, and insult likely to produce a breach of the peace on 22nd July. The two offences were tried at one trial, which was illegal as they did not form parts of one transaction, sections 233 and 235, Code of Criminal Procedure.

The Magistrate commenced the trial by stating to the accused the particulars of the complaint under section 426, Indian Penal Code, as prescribed in section 242, Code of Criminal Procedure, and taking his plea on that charge. Then he took the evidence for the prosecution and examined the accused. Then he framed a formal charge under section 504, Indian Penal Code, and took the accused's plea on that charge. Then he heard the defence.

This procedure is obviously likely to puzzle the accused, and it is not warranted by law. The Magistrate mistook the meaning of the terms "Summons case" and "Warrant case". Assuming that the two charges could lawfully be tried together, the trial of the two together forms only one case, not two. As the case relates to an offence punishable with more than six months' imprisonment it is a warrant case. The fact that it relates to some other offence also does not alter its nature. The procedure applicable to the whole case is that prescribed in Chapter XXI, and a formal charge should have been framed for each offence.

Criminal Appeal No. 538 of 1905.

November 20th, 1905.

Before the Hon'ble Mr. H. Adamson, C.S.I., I.C.S., Chief Judge, and Mr. Justice Fox.

KING-EMPEROR *v.* PO GYI.

Mr. *McDonnell*, Assistant Government Advocate.

Appeal from acquittal—grounds for—discovery of fresh evidence—Criminal Procedure Code, 1898, ss. 417, 428.

In an appeal from an acquittal, the fact that fresh evidence has been discovered subsequent to the acquittal, is not a sufficient reason for setting aside the acquittal or ordering a retrial.

King-Emperor v. *Nga Naing*, 1 U.B.R. (1902-03) 9, followed.

The accused was tried on a charge of culpable homicide not amounting to murder. The Magistrate states in his reasons for committal that while the accused was having a scuffle with some women, the deceased Mi Hla seized him by the testicles from behind, whereupon the accused struck out wildly with a knife and stabbed Mi Hla, causing her death.

In the trial before the Sessions Court Mi Ngwe gave evidence that Mi Hla had seized the accused's longyi from behind, and that the accused wounded her by striking backwards without looking in that direction.

The Civil Surgeon Mr. Minty gave evidence that he examined the accused on the next morning, that the accused was suffering from no disease, that he had been subjected to severe squeezing of the testicles, that the squeezing must have caused intense pain, that it was exceedingly improbable that a man would inflict such intense pain on himself to manufacture evidence, and that a man so maltreated would be in danger of life, and could hardly help striking out wildly in self defence.

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He also stated that there was only one serious wound on the deceased, that it was fatal, because it happened to sever a vital artery, and that no great force was needed to inflict it.

Another witness, whose evidence is not very material, was examined, and then, as recorded by the learned Sessions Judge, the Public Prosecutor, acting under the advice of the Court, closed his case, on the Advocate for the accused tendering a plea of guilty to the minor offence of intentional insult under section 504, Indian Penal Code.

The accused was then acquitted on the charge of culpable homicide, and convicted of the minor offence under section 504.

The learned Assistant Government Advocate under the directions of the Local Government has presented an appeal against the order of acquittal.

One ground of appeal is that the Sessions Judge erred in passing an order of acquittal without examining all the witnesses for the prosecution. The action of the Public Prosecutor has been described in loose language on the record. But we have no doubt as to what really occurred.

The Public Prosecutor with the consent of the Court and under the provisions of section 494 of the Code of Criminal Procedure withdrew from the prosecution on the charge of culpable homicide, and thereupon the accused was acquitted. We are unable to hold that this action was illegal or unreasonable. The inferences that arose from the record of the committing Magistrate, and from the evidence taken in the Sessions Court, showed that a conviction could not be obtained on charge of culpable homicide.

But the main ground of appeal is one that goes entirely outside the record. It is that the evidence of the Civil Surgeon is incorrect as to facts. Affidavits have been filed to show that the Civil Surgeon did not examine the accused until six days after the assault, and that the accused's conduct showed that he was not suffering from pain in the testicles immediately after the assault. If these affidavits could be accepted they would, of course, throw an entirely new aspect on the case. But we know of no authority for going beyond the record in a criminal appeal. Under the provisions of section 428 of the Code of Criminal Procedure an Appellate Court can admit additional evidence, but the necessity for taking such additional evidence must be apparent from something on the record, and cannot be derived from external information. The subject has been discussed in *King-Emperor* v. *Nga Naing* (1) where it was held that in an appeal from an acquittal, the fact that fresh evidence against the accused has been discovered subsequent to the acquittal, is not a sufficient reason for setting aside the acquittal or ordering a new trial. In this finding we concur.

Our conclusion is that on the face of the record there is no ground for this appeal, and we accordingly dismiss it summarily.

If there has been a failure of justice in this case it appears to be due to gross negligence on the part of those whose duty it was to investi-

(1) 1 U. B. R. (1902-03). 9.

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gate the case and put it before the Court. Mr. Minty's evidence as to the date of his examination of the accused, and as to the maltreatment of the accused, was given before the committing Magistrate more than two months before he repeated it in the Court of Session. The important bearing of this evidence on the case is obvious and if there was a material error in it, there was ample time to discover it.

Before Mr. Justice Irwin.

KING-EMPEROR *v.* PO NI AND OTHERS.

Criminal Revision No. 1259 of 1905.

November 11th, 1905.

Absconding accused—proclamation and attachment—warrant of arrest instead of summons—Criminal Procedure Code, 1898, sections 87, 88, 90.

When a Magistrate is asked to proclaim an accused person he should first of all take evidence that the accused has absconded. When the absconding is proved he should record evidence of the offence under section 512. Then if he considers that there is sufficient *primâ facie* proof of the offence he can proceed under sections 87 and 88. But Magistrates should use their discretion under these sections and should not ordinarily proclaim an accused when the offence is a petty one.

In a case in which a summons should ordinarily issue, a warrant of arrest cannot be issued unless the conditions of section 90 are fulfilled. A written report by a Police Officer is not evidence of service of summons under clause (*b*) of section 90.

The writer of Pantanaw police-station on 18th July made a report that the previous evening he had seen the accused gambling in the house of first accused and first accused taking commission. The Magistrate examined the writer and issued summonses under sections 11 and 12 of the Gambling Act. On the day fixed none of the accused appeared. The Magistrate thereupon issued warrants of arrest. The warrants were returned unexecuted. On this the Magistrate's order, dated 1st August 1905, was "Do according to sections 87 and 88." Adjourned to 15th August. On this proclamations were issued directing the accused to appear on 15th August and warrants of attachment were also issued. No property was found and the case was closed on 21st August.

The only authority under which the Magistrate could issue a warrant of arrest was section 90, Code of Criminal Procedure. Under that section it is imperative that the summons should be proved to have been duly served in good time. There is no such proof. There is a report by the station writer that he served the summonses, but that is not admissible in evidence.

The proclamation requiring the accused to appear on 18th August was illegal, as it allowed less than 30 days from the date of publishing the proclamation. The proclamation was not published until 6th August, and then it was not published as required by section 87(*2*). Clauses (*b*) and (*c*) were complied with but clause (*a*) was not.

The propriety of the action taken under sections 87 and 88 is open to much doubt. Proclaiming a man makes him a fugitive from justice, and is likely to drive him to crime. When the offence he is accused of is such a petty one as gambling in a common gaming house, or keeping a common gaming house in a small way, it would generally be more judicious to drop proceedings when the accused abscond.

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Moreover, even in the case of the most heinous offences it is improper to proclaim an accused person before the Magistrate has satisfied himself that *primâ facie* proof of the offence is forthcoming. I have known many cases in which proclaimed offenders have been arrested in different parts of the province, and when taken to the districts in which they had been proclaimed they had to be released because there was not sufficient evidence to send them up for trial.

When a Magistrate is asked to proclaim an accused person he should first take evidence that he has absconded. When the absconding is proved he should record evidence of the offence under section 512. Then if he considers there is sufficient *primâ facie* proof of the offence he can proceed under sections 87 and 88. If there is not sufficient *primâ facie* proof of the offence he should refuse to issue either proclamation or attachment.

Attention is invited to the first foot-tnote to the instructions for Criminal Register III, page 244, Lower Burma Courts Manual.

Before the Hon'ble Mr. H. Adamson, C.S.I., Chief Judge, and Mr. Justice Fox.

Civil 1st Appeal No. 11 of 1905.

MA GYI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

September 14th, 1905.

Mr. *Pennell*—for appellant (plaintiff), Mr. *Jordan*—for respondent (defendant).

Land Acquisition—Public Works Department entering upon land and cutting down trees before publication of notice of intended acquisition.

Under section 23 of the Land Acquisition Act (Act I of 1894), the Collector in assessing his award can consider only the market value of the land at the time of the declaration of intended acquisition under section 6 of the Act, and the value of such trees and crops as are on the land at the time when possession of it is taken by the Collector. When therefore the Public Works Department enter upon and damage land before publication of the notice under section 6, or remove trees or crops before possession is taken by the Collector, the Collector and the Court can consider only the market value of the land as damaged, and in the case of trees or crops only the value of such as remain when the Collector takes possession.

Compensation for severance is distinct from other compensation, and must be assessed separately. *MacIntyre* v. *Secretary of State*, (1903) 2 L.B.R., 208, followed.

Fox, J.—The appellant possessed two plots of garden land, the area of one of which was 1·72 acres and of the other 3·37 acres. Portions of these plots were acquired under the Land Acquisition Act for the pipe line from the Hlawga Water Works to Rangoon, the total amount of land taken amounting to ·98 of an acre.

The notification under which this land was required appears to have been dated the 14th May 1904, but it would appear that the land was actually entered upon, and the appellant's trees on it cut down some time before, for the appellant's first petition to the Collector is dated the 20th April 1904.

The appellant's proper remedy for the loss of her trees would have been by a suit for damages, for under section 23 of the Act what has to be considered is, firstly, the market value of the land at

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the date of the publication of the declaration under section 6 of the Act, and secondly the damage sustained by the person interested by reason of the taking of any standing crops or trees which may be on the land *at the time of the Collector's taking possession thereof.*

On the 14th May 1904, and on the 10th July 1904 when the Collector states he took over possession, I understand from the evidence that the land was bare of trees. The thugyi produced a list of all the trees which had been cut down. The proceedings have been carried on on the understanding that the trees which had been cut down long before the Collector took possession could be compensated for in a proceeding under the Act, but the provisions of the Act are very explicit, and, in my opinion, the Courts cannot go beyond them even with the consent of parties.

The District Court awarded Rs. 450 as the market value of the land taken, and did not award anything under the other heads given in section 23 of the Act. In coming to this valuation the Additional Judge went upon the value of the trees only, as he considered that the land except as garden land had no value.

However that may be, it is quite clear on the evidence that Rs. 450 was very ample compensation for the land in its condition on the 14th May 1904. The first three grounds of appeal deal with the valuation of the trees, but if there were no trees on the land on the 10th July 1904, there was no subject of inquiry under the second head of section 23 of the Act. The fourth ground of appeal is dependent upon the question of compensation for trees, and need not be considered.

The fifth ground claims that compensation for severance should have been awarded. In *MacIntyre* v. *The Secretary of State for India in Council* (1) this Court held that compensation under the second head of section 23 must be assessed separately. The same applies to the other heads.

There was evidence in this case that the land left to the appellant would be reduced in value owing to severance, and judging from the maps this view does not appear unreasonable. In the case of one plot the land taken up is near the boundary, but two small portions are left between it and the boundary, which *primâ facie* will be useless to the plaintiff. In the case of the other plot the land taken up appears to go almost through the centre of the plot. The Inspector of Land Records valued the land at Rs. 100 an acre, and considered that the lands left to the appellant would be reduced in value by two-third or half of their original value. A little over four acres are left to the appellant. On the Inspector's of Land Records evidence I think the appellant was entitled to compensation for severance, and I would add Rs. 200 to the District Court's award on that ground.

The sixth ground of appeal is against the District Court's order as to costs.

The Additional Judge deprived the appellant of costs because in his opinion her claim was impudently extravagant. In any view of the

(1) (1903) 2 L. B. R., 208.

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case it was a very extravagant claim, and the fact that she is a woman and had no legal advice is scarcely sufficient excuse for putting such a very extravagant claim, before the Collector.

In my opinion the award should be altered by allowing the plaintiff Rs. 200 more than was awarded by the District Court.

She should also be allowed her costs of this appeal, advocate's fee being fixed at three gold mohurs.

Her grievances on account of the loss of her trees cannot, in my opinion, be dealt with in this proceeding, and it should be left to her to take such steps as she may be advised to bring them before the Courts.

Adamson, C. J.—I concur in the judgment of my learned colleague.

Neither the Collector nor the District Judge has observed that the market value of land, as referred to in section 23 of the Land Acquisition Act, is the market value at the date of the declaration under section 6. In the present case the Public Works Department had before that date cleared away the fruit trees and left the land a mere waste.

The result of the unlawful action of the Public Works Department, and of the failure by the Collector and District Judge to see its legal effect, is that we have been obliged to give to the appellant more than she deserves for the land as waste, and that our decision leaves it still open to her to sue for nearly all that she originally asked for, *viz.*, the value of the trees that were cut down.

The market value of the land as awarded by the District Judge, Rs. 450, is far more than its value as waste, but we cannot reduce it, because the Collector has neither appealed against the finding nor taken objection to it.

Severance is quite a separate matter. We cannot reject the claim for severance on the ground that appellant gets more than the market value of the land acquired. It is clear that the holding is injuriously affected by the severance, and in fact the Collector made an award on this account.

Finally, notwithstanding the intentions of the Collector and the District Judge, we are bound, in the absence of any appeal by the Collector, to hold that the compensation awarded is compensation legally awardable under section 23 of the Act, and that it refers to nothing that occurred before the publication of the declaration. It follows that the appellant may have a further remedy with regard to damage to her property that occurred before the date of the declaration.

It is common knowledge that it is not unusual in this province for the Public Works Department to commence operations in anticipation of acquisition, before the Collector has taken possession, or even, as in the present case, before the publication of the declaration. It would be well that the consequence of such action should be clearly understood. If it is a question of the market value of land, both the Collector and the Court can consider only the value of the land at the time of publication of the declaration, and if the land has been previously deteriorated by the operations of the Public Works Department, the market value that has to be considered is the market value of the

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land as deteriorated. If it is a question of trees or standing crops, the Collector and the Court can consider only the value of such trees and standing crops as are on the land at the time when the Collector takes possession. If trees or standing crops have been removed before that date, their value cannot be considered. Neither the Collector nor the Court can go a step beyond the plain provisions contained in section 23. The consequence is that when the Public Works Department operate on land before they are, under the provisions of the Act, lawfully entitled to do so, no possible action by either the Collector or the Court can save the Secretary of State for India in Council from liability to a suit for damages.

Civil Revision No. 94 of 1905.

July 31st 1905.

Before Mr. Justice Irwin.

MAUNG GYI *v.* LU PE.

Maung Kyaw—for the applicant (plaintiff).

Nomenclature and constitution of Courts in Lower Burma.

When a suit is triable under section 31 (2) Lower Burma Courts Act by the Additional Judge of a Court, if the plaint be presented to the Judge of the Court he should not return it. Section 57 of the Code of Civil Procedure has no application.

Kabir Valad Ramjan v. *Mahadu Valad Shiwaji*, (1877) I. L. R., 2 Bom., 360; *Palneappa Chetty* v. *Maung Shwe Ge*, (1904) 2 U. B. R., Civil Procedure, 4; referred to.

Zeya v. *Mi On Kra Zan*, (1904) 2 L. B. R., 333, followed.

Lu Pe sued certain persons in the Township Court of Henzada and attached three buffaloes, apparently before judgment. Maung Gyi petitioned the Court saying the buffaloes belonged to him. After this, the defendants in the original suit objected that the Judge of the Court had no jurisdiction and on this the Judge returned the plaint to be presented to the Additional Judge of the same Court. The buffaloes seem to have been released as a matter of course because the plaint was returned. They were not attached again. The petition of Maung Gyi was returned to him.

Maung Gyi then sued Lu Pe for Rs. 35-12-0, costs incurred in prosecuting his objection to the attachment. He obtained a decree, which was reversed on appeal on the ground that Lu Pe's application for attachment was made in good faith, and that it was held in *Rabir Valad Ramjan* v. *Mahadu Valad Shiwaji* (1) that an action to recover costs of an action is not maintainable when the Court before which such proceedings were taken had made no order for payment of costs.

The present application is to revise that decision on the ground that such a suit is maintainable.

In my opinion, even if the decision were wrong in law that would not be a sufficient ground for revision under section 622. It is sufficient to cite the words of the late Chief Judge of this Court in *Zeya* v. *Mi On Kra Zan* (2) in which the authorities were exhaustively considered: "If the facts and the law applicable to the case have been duly

(1) (1877) I. L. R., 2 Bom., 360. | (2) (1904) 2 L. B. R., 333.

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considered by the Lower Court, then, though its decision may be erroneous, the error cannot be corrected on revision." In the present case it is not suggested that the Court did not duly consider the law.

At the same time I think it well to say that I see no reason to think that the decision of the District Court is erroneous. The only authority cited by the applicant is my own ruling in *Palneappa Chetty* v. *Maung Shwe Ge* (3); it is of no assistance in the present case in which no order was passed on the petition of Maung Gyi.

The application is dismissed summarily.

It is necessary to remark that the Judge and Additional Judge of the Township Court seem to labour under an extraordinary misapprehension about the constitution of Courts and the jurisdiction of Judges. The Additional Judge tried the present case. He heads his judgment "Court of the Additional Judge of Henzada Town." He says Lu Pe's suit was instituted in the Court of the Township Judge of Henzada and that it should have been instituted in the Court of the Civil Judge of the Headquarters. None of these Courts has any existence. There is one Township Court, established under section 21 of the Lower Burma Courts Act and two Judges have been appointed to that Court under section 34. Both Judges have jurisdiction throughout the Township. The plaint was presented in the proper Court, and section 57 of the Code of Civil Procedure had no application. Under section 31 of the Courts Act the District Judge can direct that all suits arising within Municipal limits which may be instituted in the Township Court shall be disposed of by the Additional Judge. If he had made such a direction then the Township Judge's proper course would have been to hand over Lu Pe's suit and Maung Gyi's objection to the Additional Judge, with a note on the diary of each record, stating why he did so. His so handing over the cases would not in any way affect the validity of the attachment before judgment.

It is surprising that the Judge of the District Court did not notice these errors of Judges subordinate to him, which have caused confusion and needless litigation. He not only failed to notice the errors, but he actually says in his own judgment that both parties filed their petitions in the wrong Court, which is not the fact. Under section 22 of the Lower Burma Courts Act it was the duty of the Judge of the District Court to point out the errors to the Township Court. The Courts Act is plain enough and there is no excuse for any misconception of its meaning since the issue of the late Chief Judge's inspection Memorandum No. 1, dated 23rd April 1904, paragraph 9.

Before Mr. Justice Irwin.

Criminal Appeal No. 587 of 1905.

November 18th, 1905.

NGA SEIN *v.* KING-EMPEROR.

Dacoity—one of band of dacoits using deadly weapon—Indian Penal Code, section, 397.

The fact that one of a band of dacoits uses a spear does not necessarily bring the other dacoits within the provisions as to punishment in section 397 of the Indian Penal Code.

(3) (1904) 2 U. B. R., Civil Proc., 4.

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Queen-Empress v. *Mahabir Tiwari*, (1899) I. L. R. 21 All., 263, distinguished.

* * * * *

The District Magistrate held that because one of the dacoits used a spear, the Court's discretion in the matter of sentence is limited by section 397, Indian Penal Code. The authority he cites is *Queen-Empress* v. *Mahabir Tiwari*(1). I think it is probable that the Magistrate did not read the report of that case, but merely the head note, as copied in Mayne's Criminal Law of India. The fact that a contrary ruling of the Madras High Court is cited by Mayne in the same paragraph ought to have made the Magistrate cautious about deciding the point of law without reading the whole report. The head note may easily be misconstrued. The case was one of dacoity in the house of a man called Gajraj, and Gajraj's arm was broken by the dacoits. Mahabir and several other dacoits joined in beating Gajraj. The actual blow which broke Gajraj's arm was not struck by Mahabir, but under section 34 Mahabir was held guilty of grievous hurt because the beating was in furtherance of the common intention of all, and he could have been convicted of causing grievous hurt if there had been no dacoity. That was why section 397 was held to apply. The present case is different. One of the dacoits, apparently the approver Po Lwin, carried a spear, and made thrusts with it through the door into the inner room which was dark. This fact would not render the other dacoits liable to conviction for using a spear, and therefore Mahabir's case is no authority for saying that section 397 applies in this case. The words in section 397 "such offender" plainly mean any offender who uses a deadly weapon and no other. I therefore alter the conviction to one of dacoity under section 395. The sentences of 7 years are appropriate, and I see no reason to reduce them.

Criminal Appeal No. 462 of 1905.

September 18th, 1905.

Before Mr. Justice Fox and Mr. Justice Irwin.

SHWE EIN *v.* KING-EMPEROR.

Murder—blows on the head—intention—Indian Penal Code, ss. 299, 300, 304.

The fourth clause of section 300, Indian Penal Code, does not apply to a case in which death has been caused by an act done with the intention of causing bodily injury to a particular person. In such a case the question whether the offence is murder or not must be decided by reference to the first three clauses of that section and the exceptions.

Reg. v. *Govinda*, (1876) I. L. R. 1 Bom., 342; *Queen* v. *Gorachand Gope*, (1866) B. L. R., Full Bench Rulings, Sup. Vol., 443; *Shwe Hla U* v. *King-Emperor*, (1903) 2 L. B. R. 125; referred to.

Fox, J.—The appellant has been convicted of murder on a finding by the learned Sessions Judge that he had caused the death of Nga Aw by an act which he must have known was likely to cause death. The Judge however found that it was probable that the accused had no intention of killing Nga Aw.

On these findings the conviction of the offence of murder was, in my opinion, not justified. The conviction should have been of culpable homicide not amounting to murder, and as the finding corresponded to

(1) (1899), I. L. R. 21, All., 263.

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SHWE EIN, v. KING-EMPEROR.

the words "the act is done with the knowledge that it is likely to cause death" in section 304 of the Indian Penal Code, the utmost punishment to which the accused was liable on a conviction on such finding was rigorous imprisonment for ten years or transportation in lieu of imprisonment for a like term.

The finding however appears to me to be inappropriate to a case like the present in which death has been caused by an act done in the intentional causing of bodily injury to a particular individual.

In such a case the question to be considered is with what intention did the accused commit the act. His knowledge of the probable results of his act must almost necessarily be a matter to be considered also, since knowledge and intention are usually closely bound up together. Where the act has been done in pursuance of an intention to do bodily harm to another, the case must, in my opinion, be decided according to the intention which must be attributed to the offender in doing the act, and the words and clause of section 299 and section 300 of the Indian Penal Code, which deal with knowledge, have no direct application to such a case.

The provisions of the Indian Penal Code regarding murder and culpable homicide not amounting to murder are undoubtedly somewhat obscure, and the distinctions between the cases stated are in some instances very fine. Taking as an example illustration (*c*) to section 300, which is obviously the illustration intended for a case falling within the third clause of the section, it appears to me that any ordinary person would reasonably and justifiably come to the conclusion that A in doing the act stated intended to kill Z, and in such case his act would fall under the first clause of the section. There may, however, be cases in which there may be a broader distinction than that afforded by illustration (*c*), and in which an intention to cause actual death might be negatived, while an intention to inflict what I will shortly call vital injury might be found.

The distinctions between the two offences of murder and culpable homicide are most clearly set out in the judgment of Melvill J. in *Reg.* v. *Govinda* (1). I accept the learned Judge's view as correct in every detail, but would add that the cases stated in section 299 and section 300 in which "knowledge" is made the determining constituent of the offence, appear to me to refer to cases in which the doer of the act constituting the crime had no intention of injuring any one in particular, but in which he has caused death by doing a reckless or rash act, which he must have known would either in all probability endanger human life, or would be likely to endanger human life. The 4th clause of section 300 must, I think, be read as a whole, and the last words of it, *viz*: "and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid" appear to me to show that that clause was intended for a case of the nature I have referred to above. Illustration (*d*) to the section strengthens this view.

The Code affords no good illustration of an offence of culpable homicide not amounting to murder by an act done with the knowledge on the part of the doer that he was likely to cause death, but without the

(1) (1876) I. L. R., 1 Bom., 342.

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intention of causing death or bodily injury likely to cause death. Part of illustration (*a*) to section 299 covers such a case. To illustrate my view of a crime falling within this category, I venture to offer the following illustration. The engine driver of a railway passenger train noticing a danger signal against him, but seeing no signs of danger on the line ahead of him runs his train past the danger signal, with the consequence that the train is upset and lives are lost. The engine driver's offence might not be held so culpable as to fall within the 4th clause of section 300, but it might clearly be a case punishable under the last part of section 304 of the Code.

I have expressed my views on the meaning and application of the parts of sections 299, 300 and 304 of the Code dealing with "knowledge" in order to make it clear why I think that in a case in which bodily injury intended for a particular individual has resulted in death those parts of the sections need not be considered.

Before arriving at a conclusion as to what the intention of the doer of an act causing death was, it is, I think, a good plan, to put before one-self the whole category of intentions expressed in the Code in connection with offences causing bodily injury. They are, taking them from the most grievous downwards:—

1st.—*An intention of causing death*, which I take to refer to an actual intention that death should be the result of the bodily injury which the offender inflicted.

2nd.—*An intention of causing such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm was caused.* Illustration (*b*) to section 300 illustrates the sort of case to which the 2nd clause of section 300 would apply, *viz*: a special case in which there existed some weakness or defect in the person injured such that an injury which would not in the ordinary course of nature kill a person of ordinary health, would be likely to kill him, and the offender knew would be likely to kill him.

3rd.—*An intention of causing bodily injury sufficient in the ordinary course of nature to cause death.*

4th.—*An intention of causing such bodily injury as is likely to cause death.*

5th.—*An intention of causing grievous hurt*, but grievous hurt which was not likely to endanger life.

6th.—*An intention of causing hurt* merely.

There are cases in which although an offender has actually caused death as a consequence of bodily injury inflicted by him, he has been held liable for only one or other of the minor offences of grievous hurt or hurt.

To justify a conviction of culpable homicide of any sort against an offender who has committed an intentional act causing bodily injury to another and which act was intended for some particular individual, there must at least be a finding that the offender intended by his act *to cause bodily injury likely to cause death.*

The first three degrees of intention stated above make the offence in the act causing death murder, unless one or more of the exceptions

stated in section 300 applies or apply. If no exception applies, the sentence must be in accordance with section 302. If an exception applies, the first part of section 304 regulates the punishment to be given.

If the offence has been committed with the fourth intention in the above category, the offence is culpable homicide not amounting to murder, and the punishment is also regulated by the first part of section 304, being covered by the words "if the act by which the death is caused is done with the intention of causing such bodily injury as is likely to cause death."

Great difficulty may be experienced in deciding whether a case falls within the 3rd or the 4th category. The distinction between the degrees of bodily injury intended is fine, but it is appreciable. That it exists and was intended to exist is, I think, shown by the wording "with the intention of causing such bodily injury as is likely to cause death" in section 299, and the wording "bodily injury sufficient in the ordinary course of nature to cause death" in the third clause of section 300.

In *Reg.* v. *Govinda* (1) Melvill J. said:—

> It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or stick on a vital part may be likely to cause death: a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

These words I take to be merely illustrative of the learned Judge's view.

In *Queen* v. *Gorachand Gope* (2) Campbell J. also recognized the fine distinction between the intentions referred to in sections 299 and 300, and said that an act which had caused death and had been done with the intention of causing *such bodily injury as was likely to cause death* tallied more exactly with the definition of culpable homicide than with that of murder.

Not only may the degree of bodily injury intended be a matter of much difficulty, but often the whole question of the accused's intention may present difficulties. In the absence of an expression of his intention by the accused previous to or after or at the time of committing the act, his intention can only be inferred from the act itself and the circumstances under which it was done. In making an inference as to the accused's intention, the knowledge which must be attributed to him must usually be a matter for consideration. As Mr. Mayne says in paragraph 207 of his Criminal Law of India:—

> "Intention is sometimes a presumption of law: sometimes it is a mere fact, to be proved like any other fact. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should follow."

Thus in a case like the present in which death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in

(2) (1866) B. L. R., Full Bench Rulings, Sup. Vol., 443.

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as a means of arriving at his intention when he committed the act which caused the death, and for that purpose, and not for the purpose of deciding whether the case falls within the 4th clause of section 300 or the last part of section 304 must the question be considered.

Applying the above considerations to the present case in which in a moment of anger the accused struck the deceased one blow on the head with a piece of wood 20 inches long, 8 inches in circumference and 78½ tolas in weight, the question is what must be assumed to have been the accused's intention when he struck the blow.

The circumstances do not warrant a conclusion that the accused actually intended to kill the deceased, nor does the act itself call for such a conclusion. The second clause of section 300 has no application to the case.

The decision must rest upon whether he must be held to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death, or whether he only intended to cause such bodily injury as was likely to cause death. I do not think an intention of causing a less degree of injury than that last mentioned can properly be attributed when such an instrument as that described above was used, for any sane man would know that in striking at another's head with such a weapon he was at least likely to cause death.

I think, however, it would be going too far to hold that he must have known that he would probably cause death or vital injury, and to conclude that he intended to cause bodily injury sufficient in the ordinary course of nature to cause death. It is common knowledge that heads have stood blows with far more formidable weapons than the one used in this case. In *Shwe Hla U* v. *King-Emperor* (3) I have set out quotations from the works of learned medical authors showing how capricious injuries to the head are in their after-effects and results. In the present case the primary result of the accused's blow was only a slight fracture of the left temporal bone, but extravasation of blood on the Dura Mater, and compression of the brain ensued, and the latter was the cause of death.

The case no doubt comes near the border line between the 3rd and 4th of the intentions I have referred to previously, but under the circumstances I do not think the intention to be imputed to the accused should be more than the less grave of the two.

I would accordingly acquit the accused of murder, reverse the sentence for that offence, but would find him guilty of culpable homicide not amounting to murder for that he culpably caused the death of Nga Aw by an act done with the intention of causing such bodily injury as was likely to cause death.

For this offence I would sentence the accused under the first part of section 304 coupled with section 59 of the Indian Penal Code to transportation for 10 years.

(3) (1903) 2 L. B. R., 125.

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Irwin, J.—Appellant does not deny that he struck Nga Aw, nor does he deny that Nga Aw died from the effects of that blow, but he says he had no intention to kill, he was instigated to the deed by Po Me and he was drunk.

It does not appear that he was drunk and the point is of no importance. There is no evidence that Po Me instigated him. The learned Sessions Judge has not found that appellant intended to cause death. He found that the blow was struck with a piece of wood 20 inches long, 8 inches in circumference and weighing 78½ tolas. This finding is not traversed in the appeal, and on the evidence I think it is a proper finding.

The learned Judge says that when a man hits another with such a weapon he must be presumed to know that by such an act he is likely to cause death; and he goes on to say that the offence is therefore murder unless it falls within any of the exceptions to section 300. The general proposition that causing death by doing an act with the knowledge that it is likely to cause death is murder unless it falls within some of the exceptions to section 300 is not tenable, as will be seen from a reference to Mayne's Criminal Law, section 430, in which the distinctions between murder and culpable homicide not amounting to murder, as laid down by Sir Barnes Peacock in *Queen* v. *Gorachand Gope* (2) are set forth. But the illustrations used by the learned Chief Judge in that case are entirely cases of acts in which the offender had no intention of causing hurt, and which were criminal merely by reason of rash or negligent disregard of the safety of others. When death is caused by an act done with the intention of causing bodily injury I think the words of clause (*4*) of section 300 "knows that it is so imminently dangerous that it must in all probability cause * * * such bodily injury as is likely to cause death" are quite as wide as the words of section 299 "with the knowledge that he is likely by such act to cause death," and I was therefore at first inclined to think that the learned Sessions Judge's interpretation of the law in this particular case was correct, but after considering Mr. Justice Fox's lucid exposition of this very intricate part of the Penal Code I agree with him that the last clause of section 300 must in every case be read as a whole and that the reference to incurring risk indicates that it is not intended to apply to any case in which death is caused by an act done with the intention of causing bodily injury to any particular person. This being so the question whether Nga Shwe Ein's act is murder or not must be decided on a consideration of the third clause of section 300. The blow was struck with a piece of wood picked up on the spur of the moment, during a heated altercation. The Sessions Judge has not found that appellant intended to cause such bodily injury as is sufficient in the ordinary course of nature to cause death, and under the circumstances such a finding would hardly be justified. I agree with Mr. Justice Fox in finding that appellant intended to cause such injury as would be likely to cause death, and I concur in the proposed alteration of the conviction and sentence.

Criminal Appeal No. 531 of 1905.

September 28th, 1905.

Before Mr. Justice Irwin.

SHWE KO AND ANOTHER *v.* KING-EMPEROR.

Mr. *Villa*—for appellants.

Assaulting process-server when executiug a warrant—Penal Code, s. 353—production of warrant in evidence—Evidence Act, 1872, s. 91—duty of Magistrates to ascertain facts of case—Criminal Procedure Code, 1898, ss. 344, 540.

The accused were convicted of assaulting a process-server while executing a warrant issued by a Civil Court. The warrant was not produced before the Magistrate, and the Magistrate did not require its production.

Held—that the contents of the warrant were an essential part of the case for the prosecution, and that those contents can only be proved in the manner prescribed in section 91, Evidence Act.

It is a Magistrate's business to find out the truth, and to supplement defects in the case either of the prosecution or of the defence by using the powers to postpone or adjourn proceedings, and to summon material witnesses, which are conferred by sections 344 and 540 of the Criminal Procedure Code.

Chunder Coomar Sen v. *Queen-Empress*, (1899) 3 C. W. N. 605, cited.

The appellants have been convicted of assaulting a process-server of the Small Cause Court of Rangoon in order to deter him from discharging his duty. The duty was to arrest one Po Ka under a warrant issued from the Court of Small Causes. The warrant was not produced, and there is no legal evidence of the contents of the warrant. It appears from the judgment that the learned Advocate for the accused pointed out this defect and argued that without production of the warrant there could be no conviction. He also objected to the production of the warrant "at this stage of the proceeding." There is nothing to show what "this stage of the proceeding" means, but it must have been at some time before judgment, and the objection was not one that should be allowed.

It is true that the case for the prosecution should ordinarily be complete before the accused is called on for his defence, but it is the Magistrate's business to find out the truth, and provision is made in section 540 for supplementing defects in either the prosecution or the defence. A criminal trial before a Magistrate is not necessariiy conducted by a prosecutor. Chapter XXI contains no provision corresponding to section 270 which applies to Sessions trials. The position of a Magistrate therefore differs materially from that of a Sessions Judge, and he may often have to make much freer use of sections 540 and 344 than would be proper in a Court of Session. The Police may make mistakes in preparing a case for trial through imperfect acquaintance with the law of evidence. It is the Magistrate's duty as a rule to take the necessary steps to correct such mistakes. In the present case there were strong grounds for supposing that a warrant of arrest of Po Ka was in existence, and even if the omission to produce it was noticed only at the conclusion of the defence the Magistrate would have been justified in requiring its production then, and even in adjourning the case if necessary in order that it might be produced. The accused would then be entitled to be heard further.

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The Magistrate ruled that it was not necessary to produce the warrant at all. Here he was certainly wrong. The fact that the process-server was attempting to discharge his duty as a public servant is an essential part of the offence, and of that fact there is no legal evidence of any kind on the record. Under sections 250 and 251 of the Civil Procedure Code the warrant must be in writing, and therefore under section 91 of the Evidence Act the fact that the warrant contained authority for Hari Pal to arrest Po Ka cannot be proved except by production of the warrant or by secondary evidence of its contents in case secondary evidence is admissible. There are no circumstances appearing on the record which would render secondary evidence admissible. The case of *Chunder Coomar Sen* v. *Queen-Empress* (1) is rightly relied on by appellants' advocate as showing the necessity of producing the warrant to prove its contents.

The evidence on the record, therefore, does not support the conviction. I do not think it is expedient to take further evidence because I think there is a doubt about the identify of the offenders. The appellants were arrested in the next house. There were several persons present when the process-server was obstructed. The Magistrate does not seem to have weighed the evidence for the defence properly. The mere fact that accused were guests in Ma Shu's house is not sufficient reason for saying that she is not an independent witness. The fact that Ma Shu is Po Ka's sister-in-law is irrelevant, as accused are merely acquaintances of Po Ka. It is not necessary to assume that the Crown witnesses have intentionally given false evidence. It may be a case of mistaken identify.

I therefore reverse the convictions and sentences, and acquit the appellants, and direct that their bailbonds be cancelled.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., I.C.S., Chief Judge, and Mr. Justice Fox.

Civil 2nd Appeal No. 43 of 1905.

December 20th 1905.

AUNG BAW *v.* TUN GAUNG.

Mr. *Pennell*—for appellant (defendant).

Execution of decree—delivery of land—standing crops—Civil Procedure Code, 1882, section 263—appeal from order of execution.

When the holder of a decree for redemption is put in possession of land under section 263 of the Code of Civil Procedure, such possession includes the standing crops. The defendant cannot re-enter in order to reap and dispose of a crop which he has cultivated upon the land.

In an appeal from an order in execution proceedings, the Appellate Court cannot alter the effect of the decree in the original suit.

Fox, J.—On the 7th September 1903 the plaintiff-respondent obtained in the District Court a decree for redemption. The decree directed that if he paid to the defendant or into Court the sum of Rs. 207 less costs on or before the 7th December 1903 he would be entitled to redemption.

(1) (1899) 3 C. W. N., 605.

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On the 14th September 1903 the plaintiff applied for execution of the decree. The District Judge ordered a warrant to issue to the Bailiff to give possession of the land under section 263 of the Code of Civil Procedure on payment of the above sum less the costs.

On the 24th September 1903 the warrant was returned executed.

On the 19th November 1903 the defendant-appellant applied to the District Court for permission to remove the crop which he alleged he had sown on the land. The District Court rejected the application. The Divisional Judge on appeal from this order directed the District Court to dispose of the dispute regarding the crop in a proceeding under section 244 of the Code. The District Court in a proceeding in execution held that the defendant was entitled to a portion of the proceeds of the crop which had then been reaped and sold. The defendant again appealed to the Divisional Court claiming that he was entitled to the whole of the crop. The Divisional Court dismissed this appeal.

The Defendant preferred this second appeal to this Court, claiming that the crop was his entirely.

The proceedings and judgments of the lower Courts are difficult to understand, and much litigation has been caused by an erroneous opinion of the Additional Divisional Judge that the decree of the District Court of the 7th September 1903 gave the plaintiff no right to the crop which was growing on the land. The Judge dismissed the appeal from the decree itself, but on the appeal from the order rejecting the defendant's application regarding the crops, he held that the original decree should have been different to what it actually was.

The original decree however stood, not having been altered on the appeal from it. In execution of it delivery of possession of the land was given to the plaintiff under section 263 of the Code. This delivery was a delivery of the land and of all things attached to it including the growing crop.

No authority has been cited, and none can be found for the proposition that when delivery of immoveable property has been given under the above section, a defendant from whose possession the property has been taken, can claim to re-enter the property in order to reap, gather and dispose of a crop he had cultivated on it.

It is no doubt the case that the crop on land does not always belong to the owner of the land, or to the person entitled to possession of the land. The actual occupant of the land may be entitled to the crop. In such a case when a plaintiff obtains a decree for possession against a person other than occupant, possession is given under section 264 of the Code. That section did not apply as between the plaintiff and defendant in the present case. The District Court did not intend to reserve to the defendant any right to the crop, and did not in fact do so. Even if the defendant had any right to the crop, this Court could not on an appeal in execution proceedings in any way alter the original decree so as to allow him or declare his right to the crop. I would dismiss the appeal.

Adamson, C. J.—I concur.

Before Mr. Justice Irwin.

HLA GYAW *v.* SIT YÔN AND OTHERS.

Civil Revision No. 35 of 1905.

January 24th, 1906.

Mr. *Dhar*—for applicant. | Mr. *Palit*—for 1st and 2nd respondents. Mr. *Datta*—for 3rd respondent.

Revision—Civil Procedure Code, 1882, section 622—order in matter relating to execution of decree—force of—section 244 (c), 2.

The High Court will not interfere in revision, under section 622 of the Code of Civil Procedure, where a way of remedy by appeal is or has been open to the applicant.

A decision given in a matter relating to the execution of a decree is binding on the parties and those claiming under them, and cannot be altered except by a higher Court.

Ram Kirpal v. *Rup Kuari*, (1883) I. L. R., 6 All., 269, referred to.

This is an application for revision of "the order of the learned District Judge of Toungoo, dated the 15th day of November 1904." The petition does not specify in what proceeding that order was passed. The original order has not been sent up to this Court. There is a copy of it on Execution Case No. 44 of the Township Court of Shwegyin. From the terms of this so called order it is clear that it is not an order at all. It ends with these words "These remarks are given without prejudice to any order I may pass hereafter in appeal." The document therefore seems to be merely a copy of an extra judicial opinion recorded by the District Judge. There is nothing to show that the case was judicially before him at all: the contrary may be inferred from the words which I have quoted.

It was highly irregular and improper for the District Judge to record these remarks at all. One result of this irregular action is that the Township Judge did not pass any order in the matter, as he was bound to do, but merely recorded "The District Judge has decided the above matter".

As there is no order of the District Court in existence it is clear that I cannot revise any such order. But the applicant urges that the application is substantially one for revision of the orders of the Township Court. The applicant Hla Gyaw on 2nd April 1902 obtained a mortgage decree against Sit Yôn and Ma Chet. He has applied four times to have that decree executed by sale of the mortgaged property, *viz*:—

On 5th August 1902	in execution	case	No.	42
On 10th November 1902	„	„	„	„	62
On 22nd May 1903	„	„	„	„	19
and on 8th September 1904	„	„	„	„	44

The mortgage was one on which Sit Yôn and Ma Chet borrowed Rs. 200 from San Hla, brother of Hla Gyaw. One Ramaswami obtained a money decree against San Hla, and in execution of that decree the mortgage was sold on 27th September 1901, and bought by San Hla's brother Hla Gyaw. On 2nd August 1901 one Ma The Nu in execution of another decree against San Hla had attached under section 268, Civil Procedure Code, the debt of Rs. 200 due by Ma Chet to San Hla. On 4th March 1902 Ma Chet was served with a notice to pay the Rs. 200 into Court, and she did so.

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On Hla Gyaw's first application for execution of his mortgage decree on 5th August 1902, the Bailiff reported that the mortgage debt of Rs. 200 had been paid into Court in execution of Ma The Nu's decree. On this the Judge recorded "Warrant withdrawn. Only issued for Rs. 21-9-6." This is a badly worded and hardly intelligible order, but it is clear enough that it operated as a dismissal of Hla Gyaw's application on the ground that the mortgage debt had been paid into Court.

Hla Gyaw's second application for execution was dismissed on the same ground on 22nd December 1902. The order is wrongly filed in a separate record, No. 12 Miscellaneous.

Hla Gyaw's third application was rejected on 2nd July 1903 on the ground that the same claim had been made and dismissed by two previous Judges of the Court. The case seems to have been re-opened in some way on 28th July 1903, and finally sent to the District Judge on 23rd November 1903, with a report, of which there is no trace on the record. These later proceedings are unintelligible.

Hla Gyaw's fourth application for execution was disposed of in the manner I have already described.

Assuming the present application to be one for revision of any or all of the orders of the Township Court, there are more reasons than one why it cannot succeed. In the first place in each of the first three execution cases at any rate the Township Court decided a question arising between the parties, relating to the execution of the decree [section 244 (*c*)] and each of the orders is therefore a decree within the definition in the Code. An appeal lay from each of those orders to the District Court and if the plaintiff had been unsuccessful there he would have had a second appeal to this Court as the questions decided were questions of law. The operation of section 622 is therefore barred. Applicant argues that no appeal lies to this Court because he neglected to appeal to the District Court. I cannot accept that construction of section 622. Its plain meaning is that the High Court is not to interfere on revision so long as another remedy by way of appeal is open, and even if this were not to be found in section 622 I should on general principles refuse to interfere when the applicant had neglected to take the obvious remedy that was open to him by way of appeal.

Secondly I could not interfere with the dismissal of the second, third or fourth applications for the Township Court was in any case bound by its own decision in the first case. In *Ram Kirpal* v. *Rup Kuari* (1) their Lordships of the Privy Council said that a decision given in an execution case is "as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon section 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end of litigation".

(1) (1883) I. L. R. 6 All., 269.

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The applicant is therefore thrown back on the order of 12th August 1902 dismissing his first application. He could have appealed against that order but did not do so. Whenever the Judge of the Court was changed he tried a new application on the new Judge. Not until more than two years later did he apply for revision. Even if there were no appeal he would not be entitled to revision after such a delay.

The application is dismissed with costs. Rs. 34 are allowed as fee for Sit Yôn and Ma Chet's advocate, and Rs. 34 as fee for Ma The Nu's advocate.

Before the Hon'ble Sir H. Adamson, C.S.I., Chief Judge.

Criminal Sessions Trial No. 49 of 1905.

KING-EMPEROR *v.* E MAUNG AND SIX OTHERS.

February 9th 1906.

Messrs. *Eddis, Cowasjee* and *Banurji*—for Crown. | Messrs. *Norton, Garth* and *Fagan*—for defence.

Duty of Prosecution.

The accused were charged with having abducted a girl who is not a minor, with the intention that she should be forced to illicit intercourse. The defence was that the girl went of her own accord.

There were three stages in the case:—

(1) The time when the girl was kept in concealment by the accused, and was under the influence of the accused.
(2) A period of three days when she was under the protection of English Officers, and was under the immediate influence of neither the accused nor her own parents.
(3) The time after her return to her parents when she was under their influence.

The prosecution alleged that during the second stage, while the girl was living in the house of a respectable Burman official of high standing, she was compelled by the accused's mother to copy a false letter to support the case for the defence.

It appeared that during the second stage the girl in the presence of respectable persons deliberated for an hour in making up her mind whether she would return to Rangoon with her own relatives or with the accused's relatives.

With regard to the second stage the prosecution tendered no evidence except that of the girl herself. The officers at Meiktila to whom she came for protection were not called by the prosecution. Neither the Burman official in whose house she was alleged to have been compelled to copy a false letter, nor any member of his household was called to elucidate the allegation. No person who was present during the girl's deliberations was called to give independent evidence of what occured.

Held,—that in all these matters the prosecution failed in their duty. It is the duty of the prosecution to call all the persons who are shown to be connected with the transactions, and who from such connection must be able to give material evidence. The only thing that can relieve the prosecution from calling such witnesses is a reasonable belief that if called they would not speak the truth. In the present case no such reasonable belief could possibly have existed.

(Charge to the Jury.)

Gentlemen of the jury, you have now reached the last stage of a case that has engaged your attention for 14 long days. I will not detain you very much longer. I am going to comment upon everything that has been referred to by the learned Counsel for the prosecution and for the defence, and on one or two other points not adverted to. I do not intend to elaborate any single point at great length, I will refrain from

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repeating myself as much as I can, and so I will ask you, during the comparatively short time in which I will engage your attention, to give me your undivided attention.

My first duty is to caution you, as I cautioned you at the outset, that you must try this case solely on the evidence that you have heard in this Court. It is a case that has created a considerable amount of interest in Rangoon for the past 6 or 8 months, and it can scarcely be but that some or probably all of you have heard a great deal about it outside of this Court. I will ask you, gentlemen, to put aside from your memories every thing that you have heard outside of this Court and to rest your decision solely on the evidence which you have heard in this Court. There is an aspect of the case which I wish to impress upon you. In a trial for any crime, what the jury have to determine is whether it is proved beyond reasonable doubt that the accused committed the offence. If there is a reasonable doubt, the doubt should be given in favour of the accused. Now in the case of an ordinary crime such as murder, if a jury finds that there is doubt, and brings in a verdict of not guilty, no tangible and appreciable harm is done to any individual person even if the jury have acquitted the guilty man. There has, it is true, been the general shock to society of letting loose a murderer, but no individual person is harmed. The present case is different. If you find the accused not guilty, it can scarcely be but that in the eyes of the public, Ma Nu's reputation will suffer injury. Now what I have to tell you is, that so far as your duty in this trial is concerned, you have no concern with Ma Nu's reputation. You should not be influenced in any way by the idea that the result of your decision may affect her. What you have to determine is whether the accused are guilty or not guilty, and the consequence that may result to Ma Nu or to any other person from your verdict is a matter which should not influence your decision in any way.

The seven accused are charged with having abducted Ma Nu with the intention or knowledge that she would be forced or seduced to illicit intercourse. The sections of the Penal Code which apply are sections 362 and 366. Section 362 defines abduction and is as follows:—(*Read*). Section 366 describes the offence and is as follows:—(*Read*).

In this case the complainant, Ma Nu, is not a minor. She is 22 years of age. She is therefore a free agent to go or come where she pleases, to marry or even to have illicit intercourse as she pleases. Provided that she consents, however much her parents may object, the man who marries her or even has illicit intercourse with her, commits no offence. The whole case for the prosecution therefore hinges on the question whether Ma Nu was taken away by force against her will, or whether the apparent compulsion was only a show of force, a mere pretence, done with her consent. If you come to the conclusion that the compulsion was not a sham, but that she was really taken by force and against her consent, you will have no trouble with the remaining part of the definition of the offence, for it is perfectly clear to every one that if a young woman is forcibly taken away by a young

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man and kept for many weeks, under such circumstances as the evidence in this case indicates, the intention of the young man is either to force her to marriage, which is equally an offence under the section, or to force or to seduce her to illicit intercourse; and it is just as clear that if a number of men assist in forcibly carrying away a young woman under such circumstances as are detailed in this case, they have the guilty knowledge that is implied in the section, and it is no excuse to say that they thought that it was an arranged affair and merely a show of force, for a man deals with an unmarried girl at his peril, and unless he can show that he has substantial ground for believing that the force was a pretence done with the woman's consent, he is liable to conviction under the section.

The important question for you to determine therefore is whether Ma Nu was taken by force and against her will.

This has been a very protracted case. It has lasted for many days and it can hardly be that all the evidence that has been recorded remains fresh in your memories. I therefore think it proper to give you a summary of the evidence. I will make it as short as I can, consistent with clearness and inclusion of all that is material, and at the same time I will show you where the evidence has been broken by cross-examination. There is much of the cross-examination that I am not going to trouble you with, especially that kind in which a complicated question was put, and the answer yes or no was insisted on. Cross-examination of that nature has the effect of paralysing the faculties of the witness rather than of eliciting the truth. In this summary of the evidence I propose to take the witnesses pretty much in the order in which they were examined.

Thereafter I will take you through the events that occurred in the proper sequence of time, and will remark on the various stages of the case.

Ma Nu the most important witness says that she was abducted on the 16th July. She, with her mother, aunt and other female relatives had been living in their garden at Boundary Road for two days. On Sunday afternoon they were crossing the road to Maung Thin's garden when a gharry came from behind and separated the party. She was seized by a *kula* and a Burman and thrust into the gharry. In it were E Maung and two others with *dahs* and sticks. The gharry drove off amid great noise. She was not allowed to scream. The gharry went on to the water edge, she does not know where. She was in a dazed condition. She was taken from the gharry to a sampan and taken across the water. Then she was made to walk some distance to Po Hla's house. Her eyes were dim and she was faint from fear. On arrival at the house she was faint and some medicine was given to her to smell. Then she lost consciousness. When she recovered consciousness next morning she was in a boat, in the stern cabin. E Maung told her that he had carried her off for love. On the second day she was moved to the forward portion of the boat and put down in the hold. There she was kept for about seven weeks. At night she was allowed to come up and bathe. She performed the

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calls of nature in a pot in the hold and had to bring it up at night and throw it out. For three or four days E Maung tried to induce her to have intercourse with him and eventually came with a *dah* and threatened her and she had to give in. After that he had from time to time intercourse with her, against her will. The boat meanwhile moved on and never stopped at a village or place where there were people. She was only twice landed during the whole time, once on a sandbank when a tidal bore came up, and once they took her for a walk in the jungle and she worshipped at a pagoda. The boat halted at one place for a few days, and finally in a fishery where it was concealed in dense jungle for fifteen or twenty days. While on the boat she was compelled to copy letters drafted by E Maung and purporting to be from her. Po Than came to the boat and brought and took letters. The first two letters that she wrote were addressed to her mother and were, she says, written about eight days after she was taken away. They were afterwards posted in Rangoon, and they bear the postal dates 27th and 30th July, *i.e.*, eleven and fourteen days after the abduction. The burden of the letters is a request to withdraw the warrants as she was there of her own choice. Under the same compulsion and at the same dictation she wrote a letter to her father. He had just returned from England. It was posted in Rangoon on 17th August. Thereafter, she says, a message came from Rangoon that the first three letters were not satisfactory because they did not say that she had gone of her own accord, and so two more letters were written, one to her father and one to the Commissioner of Police. They bear the Rangoon post marks of 27th and 28th August. They state that she and E Maung had previously loved, and the one to the Commissioner of Police states that she went with him of her own accord. On the same day she wrote to E Maung's mother, Ma Saw Nyun, under the same compulsion and circumstances. It was in reply to a letter received from her, the contents of which were that if she, Ma Saw Nyun, had known that her son had loved her so, she would have arranged matters with Ma Nu's parents, and asking her to go to another town and put in a petition for the withdrawal of criminal proceedings, and promising that she, Ma Saw Nyun, would accompany her. Ten or eleven days later Ma Nu received the letter, Exhibit K. It is a letter from Ma Saw Nyun to Ma Nu asking her to copy a petition which was sent. This letter was found in a box in the boat, which the Myoôk sealed and sent to the Commissioner of Police. Under the same circumstances as before she copied the petition. The threat was that if she did not do as desired she would be taken to some inaccessible place, the Shan States or Bangkok. Matters having been thus arranged they left the boat. The party was Po Than, Ma E Me, Ma Nyein Tha and a boy E Gyan. These two women had come from Rangoon bringing the letter K and they were the first women, she states, that she had seen since the abduction. Up to this time she had had no communication with a single relative of her own. Naturally it was so, because her relatives did not know where she was. The party went to the Railway Station. The Railway Station must have been Pyuntaza

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or some adjacent station about five hours' journey from Rangoon. She was however not taken to Rangoon, but was taken up-country nearly a twelve hours' journey to Thazi, which is the junction for Meiktila. She was put in a carriage with Ma Saw Nyun who was there ready to receive her. Alighting at the junction Thazi, she was put in the bathroom of the waiting-room. A man U Po Yin, who had done rafting business for her father, recognized her. The Police were informed and they took her to Inspector Cox's house. She was examined by him. Then the District Superintendent of Police, Mr. Whiting, turned up and said that she was to go to Meiktila.

Before going she asked Cox to send a telegram to her father, which he said he had done, but she never got any reply. She then went to Meiktila with Ma Saw Nyun and her friends and arrived about 7-30 P. M. In the train Ma Saw Nyun pressed her again to say that she had eloped of her own accord. She was in great distress, as she had received no reply from her father, and thought that he had cast her off. She had no one left to rely on but Ma Saw Nyun, and she was also afraid that if she did not do as she was desired she would be hidden away again. She was taken to the Deputy Commissioner Major Obbard's house in Meiktila. She was asked a few questions and then sent away. Ma Saw Nyun took her for that night to the house of a friend of hers. That night she wrote another letter to Ma Saw Nyun's dictation. Next day she was taken again to Major Obbard's house. I will presently read to you extracts from her evidence relating to the Meiktila incidents as it is very important.

Eventually security was given for her appearance in Rangoon by Ma Saw Nyun and two men. She was then taken to the Treasury Officer's house, and in the evening (10th September) Ma Saw Nyun and her friends took her to the Railway Station, where they got into the train. Then Mr. Summers, Assistant Commissioner of Police of Rangoon, appeared, and with him was Maung Sein, Ma Nu's brother-in-law, who lives in the same house as she. This is the first relative of her own that she had seen since the abduction. She says that she went straight to them against Ma Saw Nyun's protest, and that Ma Saw Nyun and Mr. Summers had words about it. She then went with Mr. Summers to the Commissioner's house, and slept that night at the Treasury Officer's house. Next day the security bond executed by Ma Saw Nyun and her friends was cancelled, and a fresh security bond was entered into by Maung Sein, Ma Nu's brother-in-law. Then Maung Sein took her to the house of a friend of his, and the same day Maung Sein took her to Rangoon. She further states that while in the boat she was compelled to copy three love letters to E Maung purporting to be letters written previous to the date of the abduction. In cross-examination Ma Nu was asked whether she had made paper boats on the boat. She admitted that she had made paper boxes to amuse herself. The deepest grief is assuaged by time, and there is nothing extraordinary in the idea that an abducted girl leading a life of solitude should amuse herself with something. The same remarks apply to another point in the case. In one of the letters that she

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wrote she gave detailed instructions as to business matters. It is suggested that a girl who had been abducted by force could not have directed her attention to such matters. There does not appear to be any reason why she should not, after a reasonable lapse of time.

Ma Nu was wearing her sister's watch when she was taken away. She did not bring it back. It was suggested in cross-examination that she had given it as a gift to E Maung, and had said nothing about it and made no complaint about it after her return. E Maung and Ma Nu are wealthy people and it would probably never have crossed her mind that he had stolen her watch. The incident is sufficiently explained by Mr. Summers, who shows that she made no concealment of the loss of the watch, thought it had been left behind in the boat and asked him to have the boat searched for it.

Ma Nu was cross-examined about her knowledge of English. It seemed to me that she rather minimized her knowledge of English, considering that she admits that she had passed the Seventh Anglo-Vernacular Standard.

She was asked why she had not mentioned the Shan States and Bangkok threat to the Magistrate. The reply that she was not particularly questioned on the point appears to be plausible enough.

In examination-in-chief Ma Nu said that she had never even heard E Maung's name before the abduction. In cross-examination she admitted that before the abduction she had heard that E Maung, son of Aung Gyi, had gone to marry a wife in Moulmein, and that the Moulmein wife had once been pointed out to her at the pagoda.

Some other points were indicated in which her statements to the Magistrate differed slightly from her statements in this Court. But none of them is of any importance.

She says in the Magistrate's Court that on the road from the river side to Po Hla's house she was supported by people on either side. In this Court she said that people supported her on either side at some places. It is suggested that the road is so narrow that the statement cannot be true. I have not seen the road, but you, gentlemen, have seen it, and will be able to draw your own inferences. She admitted that she had made no complaint of violation till she arrived in Rangoon. I am not surprised that she did not mention this to Ko Sein, a man, or to any one else. She would naturally assume that every one who knew the circumstances must know that she had been violated. It has been suggested by Mr. Eardley Norton that if her account of the violation is true E Maung should have been charged with rape. It is perfectly obvious why this course was not adopted. There is no evidence of rape except Ma Nu's uncorroborated statement, and whether true or false there could have been no prospect of a conviction on that charge.

An incident was brought out about a fawn which was caught and which she saw from the boat. It shows that there must have been occasions when she was not shut up in the hold.

The incidents with regard to which cross-examination chiefly shook Ma Nu's testimony are the Meiktila incidents, and I will refer to them now.

As regards the facts that occurred at Thazi and Meiktila I do not think that you will have any doubt whatever in your minds that you have got a perfectly true account of them from the witnesses, Inspector Cox, Mr. Whiting, Major Obbard and Mr. Summers. Ma Nu had arrived at Thazi Station and was in the waiting room. U Po Yin, a friend of her father's and an emissary of the Commissioner of Police, saw and recognized her and went for assistance to Mr. Cox, who was unwell in his house. Cox sent a Head Constable and some Police to assist him. They brought Ma Nu, Ma Saw Nyun and Ma E Me to his house. Cox wired to the Commissioner of Police and to Ma Nu's father. He got a reply from the Commissioner of Police directing him to detain Ma Nu till the arrival of Mr. Summers, who was starting that evening, but not to arrest her. He showed this telegram to Ma Nu. He got no reply from her father until after Ma Nu had left. He thinks that it was of his own accord and not at her request that he wired to her father. But in this he is probably mistaken, as it is not apparent where he could have got On Gaing's address, 1 Lancaster Road, except from Ma Nu. He sent a special messenger to Mr. Whiting, the District Superintendent of Police. Meanwhile he questioned Ma Nu. She said first that she had come from Rangoon, next that she had caught the train at Penwègôn, and had met Ma Saw Nyun there, as she had written to her to come with her to the Deputy Commissioner of Meiktila, and that E Maung was not with her and had not been with her for three days. She made this statement in the presence of Ma Saw Nyun, Ma E Me and U Po Yin. She answered questions readily and Mr. Cox had no reason to suspect that the answers were not honest and true. He was intending to detain her in accordance with the instructions of the Commissioner of Police, when Mr. Whiting arrived, and asked Ma Nu if she wanted to go to Meiktila to see the Deputy Commissioner. She said that she did, and then Mr. Whiting took her to Meiktila. Mr. Whiting says that he received Cox's message in the afternoon of the Saturday. Half an hour previously he had heard from Major Browning, the Commissioner, on the authority of the *Akunwun*, Tha Nyo, that Ma Nu had been arrested at Thazi. He went by train to Thazi arriving at 6 P.M., and found Ma Nu and the other two ladies in Mr. Cox's house. Ma Nu informed him that she wished to go to Meiktila to see the Deputy Commissioner by the train that was just about to leave. They all proceeded to Meiktila (including Tha Nyo who had also come to Thazi) and arrived at Meiktila Station at 8 P.M. Whiting bicycled on to the Deputy Commissioner's house, and Tha Nyo brought the three ladies and arrived a few minutes later. In the Deputy Commissioner's office room were Major Obbard, Mr. Whiting and Ma Nu. Tha Nyo was brought in and identified her and then went out. The other women were at the gate of the compound. Major Obbard told her that she was now in a place where she had nothing to fear. She presented a petition and asked to be put on oath. There was no Burmese Bible in the house, and Obbard proposed to put her on oath next morning. Obbard asked her under what circumstances she had gone with E Maung. She

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said that she went of her own accord and that she had asked E Maung to take her with a show of force. She seemed put out about having been arrested at Thazi. She also said that she had not seen E Maung for three days and did not know where he was.

That was all that occurred that night. Next morning Ma Nu again came to Major Obbard's office room in his house. She was examined on oath on the Burmese Bible, to which she did not object. She said that the petition which she had presented was a true statement and was made by her. No one was present except Obbard, Whiting and Ma Nu. Her statements to Major Obbard on the two occasions as recorded by him, and the petition are as follows :—

Ma Nu produced by the District Superintendent of Police at 8-15 P.M. on the 9th September 1905. Identified by Maung Tha Nyo, Extra Assistant Commissioner, puts in this written statement. Questioned in presence of District Superintendent of Police—no others being present—states that she went with Maung E Maung of her own free will and had asked him to come and take her with a show of force.

O. J. Obbard,
District Magistrate.

9-9-05.

Ma Nu sworn as a Burmese Buddhist. The above statement which was written by me myself, is the truth, I wish to have it recorded, so that I may not be arrested on the way to Rangoon where I wish to appear as a witness. Yesterday I was arrested at Thazi by the Police on my way into Meiktila to make this statement before the District Magistrate.

It is about two months since I ran away with Maung E Maung.

Read over and acknowledged correct.

O. J. Obbard,
District Magistrate.

10-9-05.

Petition presented to the District Magistrate.

I, Ma Nu, most respectfully beg to state as follows :—

I and Maung E Maung after having made an appointment eloped together, Maung E Maung did not forcibly abduct me in the gharry. I went of my own accord.

I am 21 years of age. I have come to the age of one who can take care of herself and over whom a mother can have no control.

Formerly I and Maung E Maung having been on loving terms, correspondence has passed constantly between us in the shape of love letters. Being afraid of my parents I dared not disclose to them that I was in love with Maung E Maung.

Formerly I attempted to elope in this manner but without success Now I have succeeded in eloping as my father is away.

I am desirous of cohabiting and living together with Maung E Maung, my husband, with whom I eloped.

There is a big reward offered for the arrest of my husband, Maung E Maung, after whom there are pursuers. If I am found, my mother (used in the plural) will forcibly take me away, and I will be separated from my husband We have stealthily run away from Rangoon and have come here. To withdraw the criminal proceedings instituted against my husband Maung E Maung, I have written several times to my mother, but the criminal cases have not been withdrawn yet.

I would therefore humbly pray that your honour will be pleased to forward this petition together with the deposition volunteered by me of my own accord and taken on oath by your honour, to the Court concerned, so that the warrants and the criminal proceedings may be withdrawn.

The above statements are true.

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She was then put on security to appear in Rangoon, Tha Nyo and another man being the sureties.

Mr. Whiting's impression was that the statement was a voluntary and honest one; and he states that Ma Nu appeared to be quite at her ease. The statement was read over to her and she acknowledged it to be correct.

Major Obbard's evidence is to the same effect. She volunteered to be sworn as a Buddhist. She said that she had asked E Maung to take her with a show of force. Major Obbard saw no signs of hesitation, or tuition, about her, and he believed that she had made the statement of her own free will. Major Obbard has given his reasons for putting her on security to appear as a witness in Rangoon. According to her own statement she was an absconding witness, and Major Obbard knew that some persons in Rangoon had been arrested and prosecuted for abducting her. It was necessary on their account that she should be made to go to Rangoon and give evidence. I am not going to enter into the question whether Major Obbard's action in putting her on security was strictly in accordance with law. It does not matter for the purposes of this case whether it was or was not. Anyhow, there was a good common sense reason for it.

Mr. Summers, Assistant Commissioner of Police, states that he went to Meiktila to bring down Ma Nu. He found her and Ma Saw Nyun and some others in a railway carriage starting for Rangoon. He made her leave the carriage and come to the Commissioner's house. Ma Nu was suspicious and frightened. In the Commissioner's house she asked, "How many men have you in waiting?" She said that she would stay with Ma Saw Nyun that night, as her brother-in-law Ko Sein who had come with Summers had no women folk, and that she would go with Maung Sein next day if women folk were with him. Next day Ma Nu was called to the Commissioner's house to ascertain definitely with whom she wished to go to Rangoon. It took her an hour to make up her mind to go with Ko Sein, her own near relative.

The events that occurred during the hour when Ma Nu was making up her mind are not known to us. Summers was not present. But there were others who could have testified to them. The events that occurred in that hour would have formed a very important link in the chain of evidence. Ko Sein was there and he was not called. There may have been a reason for this. But Summers also states that the Treasury Officer's wife was present. There was thus independent evidence that could have been produced, and I must say that the prosecution have failed in their duty in not producing independent evidence on this very important point in the case.

The only witness called by the prosecution about these events at Meiktila is Ma Nu herself. Mr. Summers was not put in as a witness in the Magistrate's Court though he has been called here. The witnesses Whiting, Obbard, and Cox were first summoned for the defence, and were then made Court witnesses so that Counsel for the defence might have the opportunity, an opportunity to which they are certainly entitled, of cross-examining them. I am bound to observe

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that I strongly disapprove of the conduct of the prosecution in this respect. It is the duty of the prosecution to call all the persons who are shown to be connected with the transactions connected with the prosecution and who from such connection must be able to give material evidence. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that if called they would not speak the truth. Mr. Eddis has said that his reason for not calling them is that he believes that the whole truth would not be drawn from them without cross-examination. This statement is in my judgment absolutely unreasonable. It is an extraordinary statement to emanate from the Counsel that represents the Crown. We all know perfectly well that officers in the position of Major Obbard and Mr. Whiting are honest and will tell the truth to the best of their ability. The affair that occurred at Meiktila constitutes a very important link in the chain of events. There for the first time Ma Nu was brought into contact with people who could protect her and before whom she might be expected to act as a free agent. These witnesses should certainly have been produced as prosecution witnesses. However, that error so far as these three witnesses are concerned has now been remedied by me, and no prejudice has been suffered by the defence. Ma Nu's statement as to these events is as follows. I must read to you a portion of her evidence in detail. She says,—

We alighted at Thazi Station about 10 A.M. They helped me into the waiting room. Ma Saw Nyun brought a chair to the bathroom, and told me to sit there. As I was sitting U Po Yin and some other policemen came. U Po Yin pointed me out to the police. The police took me to the house of Mr. Cox, a Police Officer. U Po Yin is a man who assisted my father in rafting business. I was taken to Mr. Cox's house. I was very much frightened. Ma Saw Nyun and Ma E Me accompanied me to Mr. Cox's house. I asked Mr. Cox to send a telegram to my parents. Mr. Cox said that he had sent it. He also told me that he had wired to the Police Commissioner. Before I left the house I asked him if he had got an answer to these telegrams. He said he had got a reply from the Commissioner of Police but not from my parents. I was examined by Mr. Cox. The District Superintendent of Police came and said that the Commissioner at Meiktila had sent for me. When I made this statement to Cox, Ma Saw Nyun and Ma E Me were present and Cox's wife a Burman. I went to Meiktila with Ma Saw Nyun, Ma E Me, Ma Nyein Tha, Ma Thin and two other women. Afterwards I discovered that they were the sister-in-law of Ma Saw Nyun and her sisters. I did not know them before. Po Than and five or six other men also went to Meiktila with me. I saw U Po Yin again in Cox's house. I asked what had become of U Po Yin, Cox said Po Yin ran away because he was afraid of the people on the other side and that he had had to send two policemen to the Railway Station to protect him. I did not see U Po Yin again before going to Meiktila. I saw him in Meiktila. We arrived at Meiktila about 7-30 P.M. I was taken to an Englishman's house. Ma Saw Nyun, Ma E Me, another woman and a few men went with me. Among the men there was none I knew except Po Than. The District Superintendent of Police and a stout Burman took me into the compound. An Englishman was seated in the house. He asked me if I had come to petition, and I produced my petition. He spoke to me in Burmese. The petition I gave was the one I copied in the boat. I had to copy out twice the same petition. I gave one to the English gentleman in Meiktila, the other copy was in Ma Saw Nyun's possession. Ma Saw Nyun told me to say that I had gone of my own accord. She told me this in the train between Thaz and Meiktila. The Englishman asked me if I went of my own accord. I said yes. This statement was not true. Ma Saw Nyun had told me that if I did not say that I went of my own accord they would hide me again. I thought over it this way. I

had asked Mr. Cox to telegraph to my parents, and no reply had been received nor any messengers. I thought my parents were angry with me thinking I had dishonoured them. Thinking that my people would not reclaim me and that I, a daughter of respectable people, had been dishonoured, I thought I must have somebody on whom I could depend, so there being no one else, I thought I had better depend on Ma Saw Nyun. I also thought if Ma Saw Nyun got angry with me and left me alone I would be ruined. The Englishman asked if there were *dahs* at the time of abduction. I said that I was forcibly abducted with *dahs*.

Obbard has told us the facts of this incident. He asked why, if she went of her own accord, *dahs* were used, as he had read in the newspapers. She replied that she had asked E Maung to take her with a show of force.

I identify Major Obbard as the Englishman who questioned me in Meiktila. I identify Mr. Whiting as the man who called me from Thazi to Meiktila. Major Obbard asked me of what race I was. I said I was a Hindu. He asked what God I worshipped. I said the Hindu God.

Major Obbard has denied that this conversation passed. He states that he asked her what her religion was and that she said she was "a Buddhist also." Major Obbard may however have been mistaken on this point as Mr. Whiting, who was present at this interview, was under the impression that she said she was a Hindu and also a Buddhist.

Then he told me to go back. That was all that happened on that night. Mr. Whiting was present. When I came out the stout Burman was near the fence and we went out together. That night Ma Saw Nyun took me to the house of a friend of hers. I heard him called U Me, and also Treasury Officer. That night Ma Saw Nyun asked me to write a letter. Ma Saw Nyun had it composed and asked me to copy it. I copied the letter and gave it to her.

I think this will be a convenient time to read this letter, which she says she was compelled to write at Meiktila. It is Exhibit 12 and is as follows:—

I, Ma Nu, beg to inform Ma Ma by letter that I and Ko E Maung are at present in very great trouble and are living in great discomfort. It is very hard for us to be evading the Police and the Government officials particularly, lest we may be arrested. Although I have written several letters to my parents requesting them to cancel the advertisements and to refrain from searching (me) yet, my fate acquired in the past existence seems to be so bad, that my parents are not taking notice of the letters written by me; that is the reason why I am writing this letter to Ma Ma. If Ma Ma were not to look after us, we will die with sorrow. Ko E Maung is at present not in very good health. He says that as Ma Ma (*used in the plural*) is not looking after him he is hurt in mind. That is the reason why he has asked me to write the letter. Do look after us. Do come personally to Meiktila positively, as soon as Ma Ma receives this letter. You will meet me at Meiktila.

MA NU.

This is the letter which Ma Nu says that she was compelled to copy at Meiktila after her first visit to Major Obbard. The defence say that it was the letter which Ma Nu admits that she wrote in the boat and to which the letter Exhibit K enclosing the petition was a reply. I will read Exhibit K.

Daughter Ma Nu Nu,

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Ma Ma sends this letter. Ma Ma has received the letter which you sent and it has made her very glad. Ma Ma is praying every day that daughter Ma Nu Nu may be well. To enjoin specially, do not be sad on any account. Ma Ma will herself wait at the Railway Station. She now sends Ko Po Than, younger sister Ma E Me and Ma Nyein Tha. Daughter Ma Nu Nu, please copy the writing which is delivered and write and bring two petitions. Then will it be possible to withdraw the warrants against Maung E Maung and others. This letter is sent to inform daughter Ma Nu Nu.

MA MA MA SAW NYUN.

You will have to consider which of these stories is the more probable. You have the context and the surrounding circumstances to judge by. I must say that I do not understand why Ma Nu should have considered herself to be under compulsion to write a false letter in Meiktila. She was in the house of the Treasury Officer, who presumably, and in the absence of evidence to the contrary, is a respectable official, and who, if his protection had been sought, would not have allowed so nefarious a thing to be done.

The most remarkable thing of all about this episode is that the prosecution have produced no evidence except Ma Nu's to show that when she was in Meiktila in the Treasury Officer's house she was in a position in which she could have been compelled to copy a letter against her will. Here again the prosecution have failed in their duty. This is a very important feature in the case. Ma Nu was in a respectable house, and whether the evidence was favourable to the prosecution or not, it was the duty of the prosecution to bring evidence of people living in that house to prove the conditions under which she was residing there, and to enable you to infer whether she was a free agent or a person acting under compulsion. The absence of this evidence raises a strong presumption against the allegation made by the prosecution that Ma Nu wrote Exhibit 12 in Meiktila. I will now go on with Ma Nu's evidence. She said:—

Next day was Sunday, I was taken to Major Obbard's house with Ma Saw Nyun, another woman and three or four men. The stout man was among them. I saw Major Obbard. I was taken into his room. He asked me where will you go? I said I wanted to go back to my parents. Major Obbard asked me when I saw my parents. I said nearly two months ago. He asked of what race I was. I said Hindu. He asked what God I worship. I said the Hindu God. He asked me what other God I worship. I said that I sometimes went to the Shwe Dagon Pagoda.

Major Obbard contradicts this evidence as to what occurred.

He asked if I wrote the petition. I said that it was my handwriting. He asked me to take the oath. I took an oath, I think the Burmese oath. He asked where will you go? I said to Rangoon to see my parents. He asked me to furnish bail. He did not say why. I said I had no relatives or friends in Meiktila.

This again is contradicted by Major Obbard.

Whiting went out and brought back Saw Nyun and two men. Obbard asked Saw Nyun to give security. These three signed. Then I knew their names, Shwe Zin and *Akunwun* Ko Tha Nyo were the men. The fat man of whom I have spoken is *Akunwun*, Ko Tha Nyo. I do not know who identified me to Obbard. I had never seen the fat man before I saw him in connection with this case. When security had been given Ma Saw Nyun and others took me to the

Treasury Officer's house. I was in the Treasury Officer's house up to that evening. In the evening Ma Saw Nyun and others took me to the Railway Station. We got into the train. Then Maung Sein and Mr. Summers came. I had never seen Mr. Summers before. Maung Sein is my brother-in-law. I knew him well. We live in the same house. I met them about 4-30 or 5 P.M. Mr. Summers called me. As I attempted to get up Ma Saw Nyun said, 'You must not go, I have stood security for you for Rs. 20,000.' She had put a lot of bundles before me. I pushed them aside and went out. Then Ma Saw Nyun and Mr. Summers had words.

Mr. Summers contradicts this and says she showed no inclination to go with him and that she showed great suspicion.

I will now read some extracts from Ma Nu's cross-examination. She said:—

When I got to Thazi I was arrested by the police. U Po Yin was present when the police arrested me. I did not cling to Ma Saw Nyun for protection. I did not ask U Po Yin any questions. I have met him in Rangoon and have not asked him. Mr. Cox took down a statement but I said nothing there. When he questioned me I made no reply. We were sitting together and Cox asked questions and Ma Saw Nyun answered. I said nothing.

This is directly contradicted by Cox, who says that he examined her and that she gave her answers.

I heard a question put to Ma Saw Nyun. I did not see him record it. I met Whiting at Cox's house He took me to Meiktila to Major Obbard's house. Major Obbard, Whiting and myself were in the room. I did not see any one identify me. I told Major Obbard that I had gone with E Maung of my own will and that I had been taken with a show of force. On that night Obbard asked me if I had been taken with *dahs* and I said I had. He did not ask me which of these statements was true. Next day I was examined on oath. I said what I did as I was told to do so. I intended to tell a lie. I had no one then but Ma Saw Nyun to depend on. I said to Major Obbard that the petition was written by myself and was true. I did not say that I wished my statement recorded so that I might not be arrested on my way to Rangoon.

Major Obbard has testified that she did say this, and it is also recorded in the proceedings I have read to you.

I did not say that I was arrested at Thazi on my way to Meiktila to make the statement. My deposition was not read out to me and I did not say that it was correct.

Here again she is contradicted by Obbard.

Obbard took down a statement. Somebody else made it. I did not. Ma Saw Nyun made the statement. Ma Saw Nyun was not in the room on the Saturday night. When I made the statement on oath next day Ma Saw Nyun was not present. After I took the oath I said nothing.

Well, this is a mass of incoherent evidence, but it is fair to say that it occurred at the end of a long and fatiguing day's cross-examination.

The first question by Obbard was, where do you want to go? I said to Rangoon to my parents. After that he asked for security. Then Ma Saw Nyun came in. He did not read out to me what he had taken down. I did not say it was correct.

This was contradicted by Obbard. That, gentlemen, is the last extract from the evidence that I will read to you.

It is quite clear that many of Ma Nu's statements about the Thazi and Meiktila incidents have been contradicted by Obbard, Whiting, Cox and Summers and that her statements have been considerably

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broken down by cross-examination. And, gentlemen, you must remember that this failure in her evidence occurred on the very occasion on which she was relating events of which we have other independent and reliable evidence. The Meiktila evidence tells very strongly against the case for the prosecution. It is quite clear that Ma Nu when temporarily removed from the influence of the friends of the accused first made a statement to an official, who she must have known had power to protect her, to the effect that she had gone with E Maung of her own accord, and that she not only made the statement, but that she next day repeated it solemnly on oath.

So much for Ma Nu's evidence. I now pass on to the evidence of the other prosecution witnesses.

Ma Nyun and Ma Hnit give evidence as to the abduction. According to them it was certainly a forcible abduction and it alarmed them very much.

Maung On Gaing was in England when his daughter was taken away. He tells us that he and his family are Hindus and do not intermarry with Buddhists. His daughter has been brought up strictly and has not been allowed to go anywhere except in the company of one of her parents. He is himself well acquainted with E Maung's father, and on one occasion asked him and his family to a feast. Aung Gyi alone came. The only occasion on which Ma Nu ever accepted Aung Gyi's hospitability was at a *purda nashin* entertainment given seven or eight years ago, at which only women were present. On that occasion Ma Nu went with her mother and grandmother. The cross-examination of On Gaing by Mr. Norton was intensely amusing. But I do not think that you will be likely to believe the insinuations that On Gaing, who for many years has been a well known public man in Rangoon, got his decorations, A.T.M. and the C.I.E., by misrepresentations as to his religion. It is of course a fact that the indigenous Hindu of Burma takes a much broader view of his religious and caste conditions than the orthdox Brahmin of India. On Gaing is a Burman in the sense that Burma has been the native soil of himself and his family for generations. He has, as Hindus of this class have, a sympathy for, and as he says, a belief in the Buddhist religion. His charities have been given freely to Burma and to the Buddhist religion. But there is nothing which has been elicited in his cross-examination which could lead you to believe that he would complacently allow his daughters to intermarry with Buddhists.

Before On Gaing returned from England two letters, Exhibits A and B, had been received by his wife from Ma Nu. The postmarks show that they were delivered on 27th and 30th July. From the end of July to the 17th August when On Gaing returned to Burma, these letters were concealed by his wife and his daughter and were not shown to the Police or even to their advocates, and this notwithstanding the fact that at least two persons were under trial for the forcible abduction of Ma Nu. The letters are to the effect that Ma Nu had eloped of her own free will, and it is of course obvious that they should not have

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been concealed for a day. Their concealment raises the inference that Ma Nu's mother and her sister thought at the time that Ma Nu had eloped of her own free will. However when On Gaing returned to Burma and heard of the letters he at once gave them up to the Police.

Ma Nu had admitted that she had copied three love letters in the boat addressed to E Maung. She stated most positively that she had never in her life written other letters to him. Seven other letters were produced by the defence purporting to be love letters written by Ma Nu to E Maung. They were examined by On Gaing and compared with letters admittedly in Ma Nu's handwriting. Maung On Gaing admits that the signatures on the letters Exhibits 7, 8 and 9 closely resemble Ma Nu's and that the contents of these letters so closely resemble Ma Nu's handwriting that he is unable to point out anything in the writing that is unlike hers. As regards the other four letters Exhibits 19, 20, 21 and 22, On Gaing also says that the handwriting resembles Ma Nu's, and he can find little or nothing in the letters that is markedly unlike Ma Nu's handwriting. I will deal more fully with these letters later on.

Ma Mya, Ma Nu's sister, was present when Ma Nu was carried away. She thinks that she can identify San Nyein, third accused, and Abdul Rahman, sixth accused, as two of the abductors. She recognises the slipper, Exhibit X, as one that Ma Nu was wearing.

Ma Hla was also present when Ma Nu was carried away. She very clearly identifies the sixth accused, Abdul Rahman, as the man who put Ma Nu into the gharry, and her identification is of value because she knew him well before.

Ma Yeik is Ma Nu's mother. She was present when Ma Nu was taken away. She can identify none of the abductors, but she heard Ma Hla call out "Ma Saw Nyun's coachman, catch him." This refers to the accused Abdul Rahman. She admits that she borrowed a diamond chain from Mrs. Poulton, or rather that she employed Mrs. Poulton to borrow a chain for her, and it appears that it was actually borrowed from Ma Saw Nyun; but she says that this is not the chain which Ma Nu wore when photographed. The chain was borrowed for her niece to wear. The chain which Ma Nu wore when photographed has been produced and belongs to her mother.

The reason that Ma Yeik gives for having concealed the letters, A and B, is that she forgot all about them. Her evidence on this point is palpably untrue.

E Maung, a boy, a brother of Ma Nu, states that on the morning of the abduction four men came to the garden and asked for flowers. He identifies the third and fourth accused, San Nyein and Ba U, as two of the men. He says that he has seen Ba U before, but in the Magistrate's Court he had said that he knew none of the four before.

Ba San saw the gharry being driven away after the occurrence. Seventh accused was driving and sixth accused was on the step. Next day he identified the sixth accused in the police station. He had shaved his beard and moustache. He says that he had seen the

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sixth accused driving a private gharry before and knew him by sight. In the Magistrate's Court he said that he did not know him before.

Maung Me relates an incident that occurred earlier in the day. About 9 o'clock he saw two gharries near Bahan guard. In the hinder gharry was the accused E Maung, and alongside it dancing and singing were a number of people including the second accused, Ba Aung, the fourth accused, Ba U, and the fifth accused San Min. The sixth accused Abdul Rahman was also among them. He was driving one of the gharries. A few hours later he was in Maung Thin's house when the report of the abduction came.

Mahomed Mall saw two gharries on the road between 1 and 2 o'clock. The sixth accused was harnessing a gharry. He also saw the two gharries after the abduction. The sixth accused was on the step, a Burman was on the roof. The front window was open and he saw one Burman inside, and judged from the sound of shouting that there were more inside. Two Burmans followed the gharry with *dahs* and they turned off at the path at Moolla Mahomed's garden. When he saw the sixth accused afterwards at the police station his head and moustache were shaved.

U Shwe Gya and the Shwegyin Myoôk, Sein Maung, tell about finding the boat in the Inmalwe fishery, and they describe with what care the boat was concealed in the jungle.

Suleiman, a telephone operator, states that on the 15th July (*i.e.*, the day before the occurence) San Nyun who was in the company of the second and fourth accused asked him to take part in a business for which he would be well paid, money being no consideration whatever. Next morning he saw San Nyun and the second and fourth accused and another man taking a gharry from a stall opposite to his office. San Nyun called him but he could not go as his relief had not come. Next morning he heard the Police telephone about the abduction, and he telephoned to the Obo guard that if San Nyun were arrested all the others would be found. This witness did not seem to me to be at all shaken in cross-examination.

Shwe Pu, a pensioned Inspector of Police, lived next door to Po Hla in Dawbong, to whose house Ma Nu was taken. He saw the party walk along to Po Hla's house, the first and second accused in the front, Ma Nu in the middle and the sixth accused beside her, and two other Burmans behind One of the Burmans behind had a weapon up his sleeve like a *dah*. He says the girl was looking pale, but she was walking along quietly, and the impression that the witness got was that the men were bringing along a dancing girl. He saw no signs of compulsion.

Amir Alli is the sampan-wallah who took Ma Nu across to Dawbon. They arrived in a gharry four inside and two outside. The sixth accused was outside, and first and second accused were two of the men inside. He says the girl looked unhappy because her face was pale and the men were swaggering, but she was not crying and she made no resistance. E Maung gently touched and helped her to the sampan.

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Abdul Satter is the sampan-wallah who took the rest of the party across. He identifies the sixth accused who was in his boat. He says that the girl was taken by the hand and made to come down from the gharry. In the Magistrate's Court he said that the girl alighted from the gharry of her own accord and was helped into the sampan. This witness also says that she was not crying.

Maung Tun, the next witness, was hopeless. He said he had known E Maung since childhood and then identified Ba Aung as E Maung.

The witnesses Kundaswamy and Darmalingam give evidence of an admission by the seventh accused Kistna. On the afternoon of the occurrence he arrived at the stables in an excited and exhausted condition and said that on the instructions of the broker's son he had driven four Burmans to Boundary road and unharnessed his gharry. A little while after, the broker's son came in a gharry, left the gharry and got into Kistna's gharry and shut the windows. Then the ladies appeared. The broker's son called to his friends to put the girl in the gharry. This was done and the Burmans kept back the others with *dahs*. Then he Kistna drove the gharry to Steel's mill at Puzundoung amid much shouting and noise and he was struck to make him drive faster. According to one of these witnesses Kistna said that he refused and was struck on that account.

The first of these witnesses added a story that Kistna had said he had been beaten with the palms of the hands all the way to the water-side. He did not say so in the Magistrate's Court, and I do not think that you will have much doubt in coming to the conclusion that this part of his tale is false. The second of these witnesses was not broken down in any way in cross-examination.

I do not think that you will have much doubt that the story is in the main true, and that Kistna did make this admission. Kundaswamy reported it at once to the Police, and he had good reason, for his own gharry had been seized on suspicion. The admission amounts to a confession, for it shows that Kistna did know that he was taking away the girl by force. He stated that he was compelled to do it by threats, but the law is that an offence is an offence even if the offender is compelled by threats to do it, provided that the threats do not reasonably cause the apprehension of instant death. There is no suggestion that there was any fear of instant death.

Kistna's admission is a confession and it is evidence against himself. It has been urged by the learned Counsel for the accused that though his confession is evidence against himself, it is not evidence against any other of the accused whom he may implicate. This is an entire misapprehension of the law. The law is that the statement of an accused is not evidence against his co-accused, unless it is a confession. If it is a confession, it may be considered against any other of the co-accused whom it may implicate. It is really a matter of no importance. The only person implicated is the broker's son, and if he is E Maung, there is ample evidence without Kistna's, that he was implicated in taking Ma Nu away with, at any rate, a show of force, and in fact he admits it.

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Kundaswamy's evidence also shows that a slipper was left in the gharry which has been identified by other witnesses as belonging to Ma Nu.

And now I come to the evidence about the love letters, which has occupied a considerable portion of our time. The first that was heard of love letters written by Ma Nu to E Maung was on the day after Ma Nu was carried away. The accused San Min told Inspector Brown that love letters had been sent by Ma Nu to E Maung. He was asked to search for them and he disappeared. San Min was arrested on 18th August. An unsuccessful search was made for the letters, and San Min told the Commissioner of Police that he had handed over three love letters to the accused's Advocate. These three love letters have been produced in this Court and they are identified by Ma Nu as the three love letters which she says she wrote under compulsion in the boat. Seven more love letters purporting to be from Ma Nu to E Maung have been produced at this trial and E Maung says that they are genuine letters which he received from Ma Nu. All the ten love letters purport on their face to have been written prior to the date of the carrying away of Ma Nu. A very important question that has naturally arisen is whether the other seven, *viz.*, Exhibits 7, 8, 9, 19, 20, 21 and 22 are genuine or whether they have been forged for the purposes of the defence. Ma Nu refused to give an opinion as to the handwriting of any of these until she had read them. Then she denied the handwriting. Her father On Gaing had to admit that the handwriting of all these letters was very similar to that of his daughter. That is indeed the case, as must have been very apparent to any of you who know Burmese. The first doubt thrown upon them in evidence is by the witness, Tun Nyein, the Government Translator in the Secretariat. He contrasted all the exhibits that were known to be in Ma Nu's handwriting with those that were under suspicion, and has pointed out differences in orthography. The most important difference is in the writing of the very common word "ba." In the genuine letters "ba" was found 91 times, and in every case spelled correctly. In the suspected letters "ba" was found 84 times and spelled incorrectly 46 times. He points out other less important differences that occur very seldom in the letters and his conclusion is that the genuine letters were written by an educated person, and the suspected ones by an imperfectly educated person. In cross-examination, however, he admitted that there were many mistakes in spelling in the genuine letters.

The letters were laid before Mr. Hardless, the Government of India expert in handwriting and he made a detailed examination which lasted for five days. The papers handed to Mr. Hardless were Exhibits A and B, letters written from the boat by Ma Nu to her mother, Exhibit C a letter written by her from the boat to her father, Exhibits 5, 6 and 10 the love letters which she says she was compelled to write from the boat, Exhibit I a letter written by her from the boat to her father, Exhibit 12 the letter which she says she was compelled to write in Meiktila, Exhibit L the petition to the Meiktila Court which she copied out, Exhibit 3 the specimens of her signature which she wrote in this Court,

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Exhibits 7, 8 and 9 the three signed love letters produced by E Maung and Exhibits 19, 20, 21 and 22 the four unsigned love letters produced by E Maung. Exhibit 5 one of the genuine love letters was given to Mr. Hardless as a standard and he was informed that it was in the handwriting of Ma Nu. He was asked to examine all the other documents and to give his opinion as to which were and which were not in Ma Nu's handwriting. Mr. Hardless, as the result of a minute examination, has unhesitatingly declared that all the letters are in Ma Nu's handwriting except Exhibits 7, 8, 9, 19, 20, 21 and 22, which exactly fits the case for the prosecution. The first thing that strikes one is that if Mr. Hardless is an honest witness, if his inferences from these letters are derived solely from his inspection of them, and not from outside information, there is something more than accident in the accuracy with which he has distinguished the genuine from the suspected letters. For my own part I see no reason to doubt that Mr. Hardless is an honest witness. He says himself that he received no external information. There is nothing on the record from which it can be inferred that he did. You have heard Mr. Hardless examined and cross-examined at great length on the reasons on which he based his opinions, and it is for you to judge whether he has justified his pretensions to skill. His evidence is fresh in your memories and I do not purpose to take you through all the details of it. He first referred to what in his ignorance of the Burmese language he mistook for punctuation, the colon-shaped symbol which is really an accent. It is prevalent in the genuine series and does not occur in the suspected papers. In this he is not accurate, as this symbol was found many times in the suspected letters when they were read by the Government Translator, Tun Nyein. Then he points out that the character which is known as "nga-that" indicates three different writers, one for the Exhibit 5 series, one for the 7, 8 and 9 series, and one for the 19, 20, 21 and 22 series. Then he points out differences in the formation of "Nu", in the character which is shaped like an O and is known as "longyitin," and in the characteristics of the formation of the word "kya." He also noticed marked differences in the closeness of the writing, the uprightness of the hand, and in touching up and erasures. It is difficult for the unpractised eye to follow him in all details, but it must be remembered that the eye of a practised expert may be able to note differences that do not present themselves to the unpractised eye. The absence of a folded margin in the Exhibit 5 series and the presence of a margin in the other papers is a striking differenee that he has pointed out. Perhaps the most convincing part of his evidence to a lay mind is his evidence as to the signatures on Exhibits 7, 8 and 9. In Exhibit 8 the signature has been twice made on the same spot. In Exhibit 9 the signature was three times tried. It is very unlikely that this would occur in any letter unless the letter was a forgery.

On the other hand the defence allege that the letters 7, 8 and 9 and 19, 20, 21 and 22 were written at an anterior date, two or three years before the other Exhibits, and that this might account for the differences in the handwriting.

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As regards this evidence I must tell you that evidence of an expert in handwriting is not evidence of fact, it is evidence of opinion. It cannot be regarded as conclusive. I must also point out that even the most famous experts have at times made fearful mistakes, as in the Adolf Beck and the Dreyfus cases, which I have no doubt you have heard of. I must also point out that if these mistakes occur when an expert is giving evidence as to handwriting in a language with which he is thoroughly acquainted, they are much more likely to occur in the present case, where the witness is entirely unacquainted with the language in which the documents are written, and can take as his base little else than the mere formation of the symbols. In such a case you must naturally be particularly cautious in accepting the evidence of an expert. But still the important fact remains that Mr. Hardless was able to single out and separate the genuine and suspected letters.

Very little evidence nas been adduced for the defence but some of it is very important.

Mr. Fagan's clerk Ramree states that the three letters Exhibits 5, 6 and 10 (these are the letters which Ma Nu says she wrote under compulsion in the boat) were given to him by the accused San Min on the 19th July for safe custody. He kept them in his purse in his pocket till 3rd August, when his master Mr. Fagan was retained for one of the accused. He then gave them to Mr. Fagan. They were put in a brief and kept as in the ordinary course of business in the office, till 19th August when San Min, having been arrested, was released. On the 19th August as the Police were wanting the letters he suggested to Mr. Fagan that they were not secure, and Mr. Fagan locked them up in his safe.

Now this witness is a friend of E Maung and his party, and had been interesting himself in the case. If the incident of the letters depended on his evidence alone there might be some ground for the suspicion that has been raised by the prosecution that the original three letters were removed and the genuine ones written by Ma Nu substituted. But even on this hypothesis it is difficult to surmise what the three original letters could have been.

But on this subject Mr. Fagan has also given evidence. He states that the three letters were given to him by his clerk on 3rd August. A translation was read out and he knows that they were love letters. They lay in a brief in his office until 19th August. Mr. Fagan does not know Burmese, and if the letters had been tampered with between the 3rd and 19th August he would have been none the wiser. But on the 19th August he put them in his safe, and he alone handled the keys of the safe. He is certain of the date, he fixes it both by San Min's release, and by the fact that it was his own birthday. Before going to Maymyo on 9th October he removed them for safe custody to the Chartered Bank. He took them out upon his return, when an application had been made to Court by the prosecution for the production of the letters, and he then kept them in his safe until the arrival of Mr. Norton and Mr. Garth on 15th January.

There is thus a great probability that these three letters were in existence at the time of the abduction, and if Mr. Fagan's evidence is

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to be believed, which I do not think that any of you will doubt, there is a practical certainty that these three letters, intact, and as they are now, were in existence and in Mr. Fagan's possession on the 19th August.

Ma Nu's statement about these letters is as follows:—

I copied the love letters to E Maung 7 or 8 days before I left for Meiktila. I left the boat on a Friday. I was made to copy the letters about 8 or 10 days before I was in Meiktila. I wrote them a day or two after I wrote to the Commissioner of Police. I made the statement in the Magistrate's Court that Po Than told me that letters were wanted by the Advocates to the effect that I loved E Maung. I heard Grant, Fagan and Pennell's names mentioned. I understood that the Advocates wanted the letters to help E Maung.

Now Ma Nu's letter to the Commissioner of Police bears the Rangoon Postmark of 28th August. Ma Nu reached Meiktila on the 9th September. She is therefore quite right as to the length of the interval that occurred between her letter to the Commissioner of Police and her visit to Meiktila. According to Ma Nu the love letters must have been written about the 30th or 31st August. And in contradiction of this we have Mr. Fagan's evidence that they were in his possession on 19th August.

Ma Nu's evidence having been thus upset Mr. Eddis turns round and conjectures that she gave the wrong date by mistake, and that the letters were really written sometime before. His conjecture is that they were taken off the boat by Ba Gyi, who according to the diary kept by E Maung, left the boat on 25th August. But even this would not account for their being in Fagan's possession on 19th August.

It is difficult to follow Mr. Eddis when he goes into the region of conjecture. You cannot convict on a conjecture of what the evidence should have been. If you convict at all it must be on the evidence as it actually is.

Mr. Eddis asks how Ma Nu could have described the contents of these letters so accurately, as undoubtedly she did, if she had no means of knowing which were the love letters that were in Fagan's possession. He says that it could not be a coincidence that she selected these three indentical letters and described them. He says that it is impossible, consistent with the story of the defence, that Ma Nu could have described these letters. Mr. Eddis has entered upon conjecture, and if I entered upon conjecture too, it would not be difficult to account for Ma Nu's knowledge. According to the defence three letters were being preserved for E Maung's security since the 17th August. Might not E Maung have known from his friends who went to and from Rangoon and the boat that these letters were preserved for his defence? Might not E Maung when he and Ma Nu were on terms of amity on the boat, as the defence allege they were, have told Ma Nu what these letters were? This is an answer by conjecture to Mr. Eddis' conjecture. But, gentlemen, we are not dealing with conjecture. We are dealing with evidence, and Ma Nu's evidence about the letters is most clearly refuted by Fagan.

There are two other witnesses for the defence, who say that they were go-betweens and carried letters between Ma Nu and E Maung.

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In cross-examination they contradicted each other in some details. Such evidence would be easily manufactured, and for my own part I attach little importance to it.

And now, gentlemen, having refreshed your memories with a summary of the evidence, I will take you through the events in chronological order with such other comments as the evidence suggests to me. The first stage is the capture of the girl. There cannot be a doubt, and in fact those of the accused who admit that they were present do not deny, that she was taken away with a show of force. It appears to be quite clear from the conduct of the mother and the aunt, the elder ladies of the party, that they did not suspect at that time that it was anything else than a forcible abduction. Nor is there any evidence from which it can be inferred that the younger members of the party had at that time any suspicion that the abduction was other than its natural appearance suggested.

The second stage of the events is the journey from Boundary Road to Po Hla's house in Dawbong. The gharry journey from Boundary Road to the Pazundaung Creek is a little under three miles. At the fast rate at which the gharry was going it must have occupied about 20 minutes. At the creek we have the first witnesses who saw Ma Nu after the abduction, the two sampan-wallas, Amir Ali and Abdul Sattar. Their evidence is that the girl looked unhappy because her face was pale and the men were swaggering, but she was not crying and she made no resistance. E Maung touched her with his hand and helped her to the sampan. She sat quietly and did nothing to attract special attention in the crossing. Now, gentlemen, you have to consider whether this would be the natural conduct of a girl who had been forcibly abducted 20 minutes before by men whom she did not know. As regards the pallor of her countenance, is not that what you might expect as the result of her excitement whether she had gone voluntarily or by force? It is quite possible that she might have been terrified into making no resistance. But would her tears have dried in 20 minutes? Would she not have been in a sobbing and hysterical condition, that must have been apparent to the most unobserving witness? She was taken from the gharry and she saw that she must cross the river, in fact that she was being taken away from Rangoon. Would not this new terror have caused a fresh outburst of tears? Could she have crossed that river without uttering fresh exclamations of despair, wringing her hands and crying, after the manner of her people, *Oh amè lè*! Then the creek was crossed, and there was about half a mile's walk on the other side to Po Hla's house. Two witnesses testify to seeing the party during that walk. Po Tun saw her first. He, you will remember, is the hopeless witness who said that he had known E Maung from childhood and yet could not identify him in Court. He saw the party walking along quietly. The other witness was Nga Pu, who so far as I could judge appeared to be a truthful witness. His house is next to Po Hla's. He saw the party walking along to Po Hla's house, first two Burmans, then the girl, and by her side the *kula*, and two Burmans behind, one of whom had something like a *dah* up his

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sleeve. The girl was walking without help. Her face appeared to be pale, which, as I have said, is natural enough under any explanation, but she was walking quietly, and the impression that the witness got was, not that she was being forced, but that the men were escorting a dancing girl.

Such is the evidence as to this stage of the case. It is for you to consider whether it is more consistent with a forcible abduction, or with a sham abduction to which the girl really consented. I am not suggesting that you should regard the evidence as conclusive, one way or the other. But this stage, where Ma Nu first came under the observation of independent witnessess, is an important link in the chain, and the inferences which you may draw from the evidence will assist you in coming to a conclusion on the whole case.

Then comes an extraordinary statement—Ma Nu says she was faint when she arrived at Po Hla's house, and was given something to smell, and then she became unconscious and did not recover consciousness till next morning when she found herself in the boat. The prosecution have not suggested that she was drugged, or that the thing which she was given to smell was other than of the nature of smelling salts. If it had been suggested that she was drugged, then they would have had to show what kind of medicine could have been administered in this way that would keep her unconscious all night. But in answer to a question put by me, after a question asked by the jury, Mr. Eddis disclaimed all idea of drugging.

You have heard the evidence as to Ma Nu's behaviour on the journey to Dawbong, and you have seen her demeanour in the witness-box. She is stolid, but she is not a girl with highly strung nerves and of a markedly hysterical nature. She could hardly have slept soundly after a forcible abduction, and have been carried to the boat without awaking. What is the explanation of her being unconscious all night? The defence have stated that she went into her lover's arms on arrival at Po Hla's house, and that it is in order to conceal this fact that she pretended unconsciousness. If she had been a consenting party she would naturally have gone into her lover's arms. Can you find any explanation that is consistent with the truth of the statement that she remained unconscious all night and recovered consciousness in the boat?

The next stage in the case is the period of about six weeks that was spent on the boat. The prosecution have shown how carefully the boat was concealed during this period. Proclamations had been issued broadcast for information of Ma Nu's whereabouts. E Maung and others had been proclaimed as absconding offenders and large rewards had been offered for their apprehension, of which they were perfectly aware. If no offence had been committed, if Ma Nu had gone willingly, why did not they all come in? What was the need for concealment? Ma Nu was of age, and had a right to marry E Maung, or to live unmarried with him as she pleased. E Maung's explanation of this point is that it was his parents and Ma Nu's parents that he was looking to and not the Police, and that he had made up his mind to be concealed until the parents consented. It has also been suggested that

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even though innocent it is probable that E Maung may have feared the Police.

I have already related to you Ma Nu's account of what occurred in the boat. Naturally she is the only witness that the prosecution have been able to produce as to these events. She says that she was made to copy letters on the boat that had been composed for her. This is corroborated to a certain extent by the letter, Exhibit K, which was found in the box seized on the boat and opened by the Commissioner of Police. That was a letter addressed to Ma Nu asking her to copy a petition which had been sent. However, the fact that a formal petition was drafted for her to copy is not unnatural, and it cannot be inferred from that, that formal private letters did not emanate from herself. Mr. Eddis has mentioned another indication that she copied the letters. The word "couples" is used in the plural in E Maung's diary and in the letter Exhibit J from Ma Nu to the Commissioner of Police. The use of the plural is rather extraordinary. It really proves very little. If the parties were friendly and living of their own free will in the boat, they would probably be engaged together in writing so formal a letter as a letter to the Commissioner of Police.

I must revert for a moment to Mr. Eddis' opening address. He painted in lurid colours the discomforts that a woman who had been tenderly nurtured must experience in spending a honeymoon in such a boat as you have seen. That is all very true if you are referring to an English lady. No evidence has been offered to show that there would be any peculiar discomfort to a Burman lady in spending her honeymoon in such a boat, and, so far as my experience goes, I do not think that a Burman lady, even of high position, would consider it either uncomfortable or indecent to spend a honeymoon in such a boat along with her own husband.

The story for the prosecution as to the events that occurred on the boat depend on the evidence of Ma Nu, and in testing her veracity you will have to consider whether she is truthful in other matters that are capable of corroboration by independent testimony.

The fourth stage in the case comprises the events that occurred at Thazi and Meiktila. Instead of coming to Rangoon, the party from the boat went a twelve hours' journey up-country to Thazi and Meiktila. We may conjecture from Major Obbard's evidence that an arrangement had been made between Major Browning, the Commissioner of Meiktila, Tha Nyo, the *Akunwun* of Mandalay, and E Maung's father to bring her to Meiktila. The prosecution have not called Major Browning or Tha Nyo, though they must have known, or might have easily ascertained the part that they played in the matter. Major Browning is an officer of high standing, and Tha Nyo is not only a fat man, as the witnesses say, which is itself a symbol of respectability among Orientals, but he is a Burman in a high official and social position. You may have observed in the newspapers that he is the gentleman who read the address to Their Royal Highnesses on their visit to Mandalay.

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In view of the respectability of these persons, and in absence of evidence that might have been produced by the prosecution, it must be assumed that there was nothing sinister in the arrangements made for bringing Ma Nu to Meiktila.

The events that occurred during Ma Nu's visit to Meiktila are of the utmost importance in enabling you to get to the truth of this case. From the time that Ma Nu was carried away until the time that she arrived in Thazi she was under the influence of E Maung and his friends. From the time that she left Meiktila up to the present time she has been under the influence of her parents and their friends. During the time that she was at Thazi and Meiktila she had, at all events, an opportunity of getting rid of any influence that she might have considered hostile to her intentions. She was brought before high English officials, and it might be expected that a girl of Ma Nu's education and intelligence would know that she had nothing further to fear. Well, what happened? She was first brought before Inspector Cox. Mr. Eddis tried to explain her conduct. He said that she was brought to Cox under arrest, and that this was what they had feared all through. I interrupted him, you will remember, and asked "who?" He replied that Ma Nu had feared arrest as well as E Maung, that she had seen posters offering rewards for E Maung's arrest and for information regarding herself, and that being an ignorant girl she did not know what would happen to her. Can it be supposed that Ma Nu, this educated and intelligent young woman, did not know that these posters were issued for her own protection and that she had nothing to fear from the Police? Well, she was brought before Cox. She knew that his services had been called in by U Po Yin, a friend of her father. What possible reason could she have had for distrusting the Police? According to her own showing she is a person against whom a crime had been committed, of so gross a nature as to provoke the enduring resentment of any woman. One would imagine that the Police were the very people that she would most desire to meet. One would imagine that on meeting a Police Inspector she would have at once poured out her grievance. Nothing of the kind occurred. She said that she wanted to go to the Deputy Commissioner at Meiktila. Mr. Cox was anxious to get from her information about E Maung. She made no attempt to take her revenge by putting Mr. Cox on his track. Then the District Superintendent of Police Mr. Whiting appeared. She made no complaint of her grievances to him, and was taken at her own request to Meiktila to Major Obbard, the District Magistrate. She had two interviews with him, and in both she was entirely separated from E Maung's friends. She was told that she had nothing to fear. She presented the petition and said that she wanted to be put on oath. There was no Bible to swear her on. She said that she had gone with E Maung of her own accord, and that she had asked him to take her with a show of force. Then she had a night to sleep over it, and next morning she appeared again and insisted on being put on oath. Then she not only said but swore that she had gone with E Maung of her own accord. Then she was put on security to appear as a witness in

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Rangoon, and on the same day she went to the train with Ma Saw Nyun, and took her seat in the carriage for Rangoon. At this point Mr. Summers appeared with Ma Nu's brother-in-law, Ko Sein. This was the first near relation that she had seen since the abduction. She showed no eagerness to go with Mr. Summers and Ko Sein. On the contrary, she regarded Mr. Summers with suspicion. He used his authority to bring her to the Commissioner's house. She elected to stay with Ma Saw Nyun that night instead of with her brother-in-law. Next morning they all met again at the Commissioner's house, so that she might elect with whom she would go to Rangoon. Ma Nu took an hour to deliberate before she finally determined to go-with Ko Sein. And though there were independent and respectable persons present at this most important stage of the case, when Ma Nu after deliberation went over from E Maung's friends to her father's friends, none of them has been called by the prosecution.

These facts are testified to by Major Obbard, Mr. Whiting, Mr. Summers and Mr. Cox. It is for you to determine the value of their evidence. In my view it is unimpeachable. I have already explained to you at length, and I need not repeat, how contradictory Ma Nu's evidence is to the evidence of these witnesses.

It has been suggested that the conduct of the Meiktila officials was imprudent, that they should have separated Ma Nu in a more marked way from Ma Saw Nyun before taking her statement. Well, she was separated from Ma Saw Nyun. I fail to see what more could have been done by the Meiktila officials, unless they had committed another crime and made a second abduction.

Such is the history of the Meiktila stage of this case. It is for you, gentlemen, to determine whether Ma Nu's conduct at Thazi and Meiktila is consistent with her allegation that she was abducted against her will. It is also for you to determine whether the evidence that she has given as to the Meiktila events inclines you to put any trust in her veracity when she speaks of events regarding which she is the only witness.

The last stage in the case is the events that occurred after she left Meiktila. On her way to Rangoon she was met at Pegu by her mother, and from that time she has been under parental control, and has persistently denied what she stated at Meiktila, and has alleged that the abduction was forcible and against her will.

Then as to her letters, I will first take the suspected letters, Exhibits 7, 8, 9, 19, 20, 21 and 22. You have heard the evidence of the expert. I have told you that the evidence of Mr. Hardless cannot be regarded as conclusive, but still you may possibly be convinced in your own minds that it is true. It is a matter within your own discretion. Assuming that you do find that these letters are forged, how will this fact affect the case? You must remember that E Maung is not on his trial for forgery. He is on his trial solely for abduction. You have to consider that it is quite possible that he may be innocent of the abduction and yet guilty of the forgery. The misguided young man may have attempted to improve his defence by forging these letters. The

only effect so far as this trial is concerned of a finding by you that the letters are forged, is that one of the lines of defence falls to the ground.

The question that you have to put to yourselves is, are the inculpating facts as regards the forgery of these letters incompatible with the innocence of the accused on the charge of abduction, and incapable of explanation upon any other reasonable hypothesis than that he abducted the girl against her will. I put it to you that even if you find the forgery proved, that fact does not conclusively prove that he is also guilty of abduction. The forgery may have been committed by an unprincipled young man, solely for the purpose of strengthening his defence.

And last of all I come to the genuine letters, Exhibits 5, 6 and 10. What is the effect of Mr. Fagan's evidence? If you believe Mr. Fagan, as I must say that I do, Ma Nu's statement as to the reason for writing these letters and as to the time at which she wrote them, is untrue, and one of the strongest planks of the prosecution falls to the ground. Mr. Fagan's evidence is most damning to the prosecution.

There are weak points in the case for the defence. The weakest of all is that no previous acquaintance has been proved between E Maung and Ma Nu. Evidence has been produced, which may be true or false, of correspondence between them, and it is alleged that this correspondence has lasted for a period of nearly four years. Yet there is not a particle of evidence that they even met or ever conversed together. But I tell you, and I lay it down as a matter of law that you must follow, that in a criminal trial an accused person has no duty except to himself. He is not bound to call evidence in his defence, and you can draw no inferences against him from the fact of his relying on the weakness of the prosecution and declining to call evidence for himself. The prosecution must stand or fall on its own strength.

And now, gentlemen, I will give you my own opinion on the more prominent features of the case. I am entitled to give you my opinion, but you are not bound to follow it. The decision on the facts rests entirely with you. I think that in view of the evidence describing Ma Nu's demeanour on the way between Boundary Road and Po Hla's house and her unconsciousness in that house; in view of her conduct at Thazi and Meiktila; of the contradictory evidence that she has given regarding these events; of the very strong evidence given by the Meiktila officials that she was a free agent and yet openly declared and swore that she had gone of her own consent with E Maung; in view of her extraordinary tale of being compelled in a respectable official's house to copy a false letter, a tale which is entirely uncorroborated; in view of the fact as shown by Mr. Summers that she showed no immediate inclination to leave E Maung's friends and go to her own brother-in-law; in view of the fact that Ma Nu's statement as to the time and reason of writing the genuine letters, Exhibits 5, 6 and 10, is disproved; in view of the fact that the prosecution has failed to call available evidence as to the very important incidents that occurred at Meiktila when Ma Nu in the course of a long deliberation decided to leave E Maung's friends and to join her parent's friends; I say that in view of all these

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facts, and even assuming as true the additional fact that E Maung has forged the letters, Exhibits 7, 8, 9, 19, 20, 21 and 22, for the purpose of strengthening his defence, I am unable to think that it is proved beyond reasonable doubt that Ma Nu was taken away against her own will and consent.

So far I have dealt with the case generally on the question of consent, because that question affects all of the accused. If you find that it is not proved that Ma Nu was taken against her consent, then it is your duty to find all of the accused not guilty.

If you differ from my opinion as to the matter of consent, which you are perfectly entitled to do, if you find that Ma Nu was actually taken by force and not with her consent, then it remains for you to consider with regard to each of the accused separately whether he is guilty of abduction.

As regards the first accused, E Maung, there will in that case be no doubt in your minds.

As regards the second accused, Ba Aung, and the third accused, San Nyein, they admit that they took an active part in the carrying away of Ma Nu. They have not shown that they had any substantial ground for beleving that the force was a pretence, done with the woman's consent, and if you convict E Maung it follows logically that you should convict them too.

As regards the fourth accused, Ba U, his defence is that he did not take part in the abduction. The boy E Maung, the brother of Ma Nu, says that Ba U was one of the four men who came to the garden some time before the occurrence and that he knew him before. This, however, he had denied in the Magistrate's Court. Maung Me says that Ba U was one of the Burmans who was with the gharries some time before the abduction. Suleiman, the telephone operator, says that Ba U was one of the men who asked him to take part in a big job the day before the abduction. This is all the evidence that connects Ba U with the case. It is for you to consider whether this evidence is sufficient to cause you to believe beyond reasonable doubt that the accused Ba U was actually one of the persons who took part in the abduction. It is only a matter of inference; there is no evidence that he was actually one of the abductors.

As regards the fifth accused, San Min, he denies that he took part in the abduction. The only evidence against him is that of Maung Me, who says that he saw him with the gharries shortly before the abduction. In his case I think that you will have no doubt that the evidence is not sufficient to show beyond reasonable doubt that he took part in the abduction.

As regards the sixth accused, Abdul Rahman, his defence is that he was not present at the elopement but met the party at Pazundaung and accompanied them to Po Hla's house. He is identified as having taken a very prominent part in the abduction by Ma Nu, Ma Mya, Ma Hla, Ba San and Mahomed Mall, and also by Maung Me as having been with the gharries immediately before the abduction. Ma Hla's evidence is particularly strong, as she knew him before. The sampan-walla Amir

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Ali also says that he saw Abdul Rahman in the gharry. It is for you to say whether this evidence is credible or not. It appears to me to be quite credible.

The seventh accused, Kistna, admits that he drove the gharry in which Ma Nu was from Boundary Road to Pazundaung. You have heard the evidence of Kundaswamy and Durmalingam as to Kistna's conduct afterwards. You have to consider whether what occurred when Ma Nu was put in the gharry was such as to indicate that Ma Nu was being taken away by force. If so, Kistna committed the offence of abduction in allowing himself to be made a party to the abduction, and as I have pointed out to you, neither his own fear, nor the threats of others, so long as these threats did not put him in apprehension of immediate death, can excuse him from guilt.

Such is the case against each of the accused individually. But I must again remind you that it all hangs on the question of Ma Nu's consent. Unless you find that Ma Nu was taken by force and against her consent you should find all of the accused not guilty. I need only further remind you that any reasonable doubt that you may have should be given in favour of the accused.

Full Bench—(Criminal Reference.)

Before the Hon'ble Sir Harvey Adamson, C.S.I., Chief Judge, Mr. Justice Fox, and Mr. Justice Irwin.

Criminal Reference No. 69 of 1905.

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December 4th, 1905.

Whipping in addition to imprisonment—house-breaking—house-theft—previous conviction—Whipping Act, s. 2, Groups A and D.

Per Adamson, *C. J. and* Fox, *J.*—On a finding that the accused having been previously convicted of an offence under section 380, Indian Penal Code, committed "house-breaking by night and theft of property valued at Rs. 35, an offence punishable under section 457 of the Indian Penal Code," a sentence of imprisonment and whipping is illegal.

Per Irwin, *J.*—The finding was a finding of two offences, house-breaking and theft, and the sentence was evidently intended to be a sentence for theft. It was therefore legal.

Crown v. *Po Maung*, (1902) 1 L. B. R., 362; *Crown* v. *Shan Byu*, (1901) 1 L. B. R., 149; *Crown* v. *On Bu*, (1902) 1 L. B. R., 279; referred to.

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

Accused has been convicted of house-breaking by night and theft of property. Both in the charge and the judgment this is described as an offence punishable under section 457 of the Penal Code, but as previous convictions of theft in a house were proved the Magistrate passed a sentence of imprisonment and whipping "under section 2, Group A and section 3 of the Whipping Act." Taking the finding literally it must be said that an offence punishable under section 457 is not in Group A, and it would seem that section 3 does not apply. The case

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is not quite on all fours with *Crown* v. *Po Maung* (1) in which a Full Bench of this Court held that on a conviction under section 380, following one under section 457, a sentence of imprisonment and whipping could not be passed. It is true that this part of the decision followed the ruling in *Crown* v. *Shan Byu* (2) in which the offences were committed in the reverse order, but so far as an offence under section 457, following one under section 380, is concerned, the ruling seems to be an *obiter dictum*, and I have some doubt whether the present case cannot be distinguished from the case of Po Maung.

Nga To has been convicted both of house-breaking by night and of theft. The words " in a house," which appear in the charge are omitted in the judgment, but clearly theft in a house is meant. The omission to specify the section under which the theft is punishable seems to me to be a matter of form, not of substance. The Magistrate's finding is a conviction of two offences, and such double conviction is legal. It would also be legal to pass sentence for one or other of the offences, but not for both, *Crown* v. *On Bu* (3). The question then arises, Can the double sentence in the present case be properly regarded as a legal sentence under section 380 of the Penal Code and section 3 of the Whipping Act?

The report of the case of the *Crown* v. *Shan Byu* (2) is very short, and it does not appear that any arguments were heard. It seems that the offenders did not stop short at house-breaking with intent to commit theft, but actually committed theft. It would seem that Birks, J. was of opinion that the conviction could legally have been altered on appeal to one of theft. If on appeal, why not on revision and if both offences were committed why should not the offender be convicted of both though punished only for one?

As these points seem to me to require further consideration I refer to a Full Bench the question.

Is a sentence of imprisonment and whipping legal, on a finding that the accused committed "house-breaking by night and theft of property valued at Rs. 35, an offence punishable under section 457 of the Indian Penal Code" and had been previously convicted of theft under section 580?

The opinion of the Bench was as follows:—

Adamson, C. J.—I think that the question should be answered in the negative. The Magistrate might under the circumstances have convicted the accused of two offences, *viz.*, offences under section 457 and section 380. He could have sentenced him under only one of these sections. If he had selected section 380, he could have imposed both imprisonment and whipping because the accused had been previously convicted under section 380. But the conviction as it stands must be regarded as a conviction solely under section 457, and for the reasons stated in *Crown* v. *Shan Byu* (2) the sentence of imprisonment and whipping is illegal.

(1) (1902) 1 L. B. R., 362. | (2) (1901) 1 L. B. R., 149.
(3) (1902) 1 L. B. R., 279.

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

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Irwin, J.—The answer to the question referred depends on the question. Of what offence or offences has Nga To been convicted? In order to answer this question I think we should look at the whole of the judgment, and not merely at the section of the Penal Code specified in the finding. Cases have several times come to my notice in which a Magistrate has passed a judgment purporting to pass sentence under a section which is not applicable to the facts found. For instance, if the finding and the sentence ran thus:—

"Accused has committed theft in an open threshing floor, an offence punishable under section 380 Penal Code, that conviction could not possibly be held to be a conviction under section 380, and a sentence exceeding three years' imprisonment would be illegal. In my opinion the same principles should apply in every case, and this Court should look to the substance of the conviction rather than to the form.

The judgment opens with a statement that complainant's house was broken into and certain property carried away by the perpetrator. The evidence against Nga To is simply that some of the stolen property was found in his possession and the conclusion the Magistrate arrived at is this, "I am convinced that he (Nga To) had stolen the longyi from complainant's house." The fact that Nga To committed house-breaking was purely an inference from the proved fact that he had committed theft. The formal finding is that Nga To committed house-breaking by night and theft of property. The sentence is expressly passed under section 2, Group A, and section 3 of the Whipping Act. Group A contains no mention of house-breaking, I find myself unable to construe the finding in any other way than as a conviction of two offences, and the sentence as a sentence for theft.

My answer to the question referred therefore is that the sentence is legal.

Adamson, C. J.—In accordance with the opinion of the majority of the Full Bench, the question is answered in the negative.

Before the Hon'ble Sir H. Adamson, C.S.I., Chief Judge.

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Criminal Revision No. 3 of 1906.

Sentence of death-evidence.

January 4th, 1906.

Judges must not shrink from the duty, however painful it may be, of passing sentence of death in capital cases, when the offence is proved beyond reasonable doubt, and is of such a nature as to deserve the extreme penalty.

Queen-Empress v. *Budduruddeen*, (1869) 11 W. R., Cr. 20, cited.

The learned Sessions Judge found the accused guilty of three premeditated brutal murders, and passed sentence of transportation for life. The reason which he gives for refraining from passing sentence of death is that though he has found the accused to be guilty, he thinks that there may be a remote possibility of his innocence. The learned Judge appears to think that the extreme penalty should not be passed unless there is such evidence as excludes all possibility of error. Evidence of this nature, amounting to mathematical demonstration,

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cannot be obtained in the investigation of matters of fact, of which the most that can ever be said is that there is no reasonable doubt concerning them. If there is no reasonable doubt that an accused person committed murder, he should be convicted of murder, and if the murder is of such a nature as to deserve the sentence of death, that sentence should be imposed.

The Code of Criminal Procedure does not indicate what reasons should be considered sufficient for refraining from passing a sentence of death. I have searched the authorities and found no reported case in which the minor sentence was imposed on such grounds as the learned Judge has given. These grounds appear to me to be altogether illogical.

The learned Judge has quoted *Queen-Empress* v. *Budduruddeen*(1). In that case the Judge refrained from passing the extreme penalty, because the body of the victim had not been found. He did so, not because he had doubts as to his finding, but because in arriving at that finding he had contravened the well known rule of criminal jurisprudence, that the *corpus delicti* (that is, the fact that a crime had been committed) should not be inferred from other facts, but should be proved independently. That, at all events, was a substantial reason for his action, and it was accepted as proper by the High Court.

I have read the evidence and the judgment, and I think that the guilt of the accused was proved beyond any reasonable doubt, and that the death penalty should have been imposed.

Judges must not shrink from doing their duty, however painful it may be, and must pass capital sentences in cases of deliberate murder, if they believe the evidence, as the Judge did in this case.

Civil Regular No. 46 of 1905.

September 4th, 1905.

Before Mr. Justice Irwin.

MA MYIT AND ANOTHER *v.* SHWE THA AND TWO OTHERS.

Mr. *Burn*—for plaintiffs.

Mr. *Das*—for 1st and 2nd defendants.
Mr. *Higinbotham*—for 3rd defendant.

Jurisiction—place of suing—suit for compensation for wrong—Civil Procedure Code, s. 18.

Plaintiff sued defendants, who all resided in Pyapôn, for damages for wrongful seizure of boats under an order of a Magistrate at Pyapôn acting at the instance of 3rd defendant. The boats were seized in Rangoon, and the question was whether, in view of the terms of section 18 of the Code of Civil Procedure, the suit might be brought in the Chief Court, which has original jurisdiction within the limits of Rangoon Town.

Held,—That the suit might be brought in the Chief Court.
Luddy v. *Johnson*, (1871) 6 B. L. R., 141, referred to.

The suit is one for damages for wrongfully causing two cargo boats to be taken out of the plaintiff's possession. They were, it is alleged, seized in Rangoon by order of a Magistrate having jurisdiction in Pyapôn district, on a prosecution, for theft instituted by the third defendant. The place of suing is prescribed in section 18, Civil Pro-

(1) (1869) 11 W. R., Cr. 20.

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cedure Code. The defendants all reside in Pyapôn, and third defendant says that the cause of action arose in Pyapôn because it was only in Pyapôn that defendant did anything which resulted in the seizing of the boats. No authority is cited on either side. The only decision which I can find that throws any light on the case is *Luddy* v. *Johnson* (1) in which defendant had instituted criminal proceedings before the Magistrate of Moradabad, who issued a warrant on which plaintiff was arrested in Calcutta. The plaintiff sued in the High Court of Calcutta for damages for malicious prosecution. On application to take the plaint off the file for want of jurisdiction, the learned Judge said: "I think I cannot go so far as to say that the arrest, the most important occurrence in the whole of the proceedings, is not a part of the cause of action within the meaning of the Letters Patent." That case is not quite on all fours with the present one: malicious intention was part of the cause of action, and the decision depended on the construction of section 12 of the Letters Patent, under which the High Court has jurisdiction "if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction." The words of section 18 of the Civil Procedure Code are quite different from this. The question is whether on the allegations in the plaint "the wrong was done" in Rangoon. The words "the wrong was done" seem to have the same meaning as "the cause of action arises" in section 17 (*a*). I think the reasoning of Phear J. in the case I have cited applies to this case, and the wrong was done in Rangoon, notwithstanding that the plaintiff's action, which caused the alleged wrong to be done, was taken in Pyapôn. I therefore find that this Court has jurisdiction.

Before the Hon'ble Mr. Harvey Adamson, C.S.I., I.C.S., Chief Judge, and Mr. Justice Fox.

Civil 1st Appeal No. 43 of 1905.

December 18th. 1905.

MOMENT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Mr. *Pennell*—for appellant (defendant).

The Government Advocate for respondent (plaintiff).

Lower Burma Town and Village Lands Act, 1898—suit by Government for possession—jurisdiction of Civil Court.

The Secretary of State for India in Council had obtained a decree against appellant for possession of certain land known as site No. 36A, Sandwith Road, in the Cantonment of Rangoon. On appeal, the question was raised whether, in view of the provisions of the Lower Burma Town and Village Lands Act, 1898, the suit was within the jurisdiction of a Civil Court.

The land was State land at the disposal of Government as defined in section 4, sub-sections (*1*) and (*2*) of the Act.

It was also either in a town or a village as defined in section 4, sub-sections (*3*) and (*5*). *Held*, therefore, that both clauses of section 41 operated to bar the jurisdiction of the Civil Courts.

Adamson, C. J.—The Secretary of State for India in Council sued Mr. J. Moment for possession of land known as site No. 36A, Sandwith Road, in the Cantonment of Rangoon, and obtained a decree for the

(1) (1871) 6 B. L. R., 141.

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same. The present case is an appeal by Mr. Moment against that decree.

When the appeal came on for hearing we indicated that there might be some doubt as to whether, in view of the provisions of the Lower Burma Town and Village Lands Act (Burma Act IV of 1898), the suit was within the jurisdiction of a Civil Court. As the point was one affecting jurisdiction, which had not been raised either in the Court of First Instance or in the memorandum of appeal, we allowed time for its consideration, and we have now had the advantage of hearing both sides of the question fully argued.

The learned Advocate for the respondent admits that if the land in suit is contained in a town or in a village as defined in the Act, the Civil Courts have no jurisdiction. There appears to be no doubt that this view is correct.

With the exception of Chapters II and IV the Act extends to Cantonments. "State land" is defined as all land of which no absolute and revenue free grant has been made recognized or continued by or on behalf of the British Government. Section 18 prescribes the method of recovering possession of State land which at the commencement of the Act is in possession of a person who has not acquired a landholder's right. He may be evicted after three months' notice from the Revenue Officer to quit the land. This section applies in all cases except that specified in sub-section (*2*), that is to say where the person holding the land holds it under a grant or lease made by or on behalf of the British Government. Section 21 indicates the procedure for evicting persons liable to eviction, and imposes on the Revenue Officer the powers and duties of eviction. Section 41 provides that no Civil Court shall have jurisdiction to determine:—

(*a*) Any matter which under this Act is to be determined by the Revenue Officer.

(*b*) Any claim to any right over land as against the Government.

The present suit is a suit for possession of State land. No question arises of landholder's right, because the land is in Cantonments, and Chapter II of the Act, which creates landholder's right, does not apply to Cantonments. Nor is it alleged by the plaintiff that the land is held under a grant or lease made by or on behalf of the British Government. Both clauses of section 41 are a bar to the suit. The Civil Court cannot evict the appellant from the land because that is a matter which under the Act is to be determined by the Revenue Officer. The Civil Court cannot determine the suit at the instance of Government, because in doing so it would be adjudicating also on a claim to a right over land made by the appellant against Government.

The provisions of the Act apply only to lands in towns and villages. I have endeavoured to show, and in truth the proposition has been conceded on both sides, that if the land is in either a town or a village, the Civil Court can have no jurisdiction. The sole question that has to be determined is whether the land is in a town or a village as defined in the Act.

I do not propose to follow the learned Government Advocate in his researches as to whether the land is situated in the town of Rangoon. He has discussed the various notifications on the subject, and has expressed an opinion that some of them are *ultra vires*, and some indefinite owing to errors. As the result he is doubtful whether the land is included in the town of Rangoon or not. It is not necessary to decide the question. If the land is in a town it ends the matter.

It is sufficient to say that if the land is not in a town it must be in a village as defined in the Act. "Village" means an area appropriated to dwelling places not included in the limits of a town. It is undisputed that the land has been used as a dwelling place for many years If stress be put on the fact that the word "dwelling places" is used in the plural in the definition, and if it be argued that one dwelling place does not constitute a village, the land will still be included in the definition, for it is admitted that the house site in question is, as its designation 36A, Sandwith Road, implies, one of many sites appropriated to dwelling places in the vicinity. The argument of the learned Government Advocate is that the word "town" in the definition of "village" must be interpreted in its ordinary sense, and not in the sense in which it is defined in the Act. I understand him to mean that if "town" be used in its ordinary sense, it would include the whole of the Municipality and the whole of the Cantonment, and that nothing could be a village unless it were situated beyond these limits. It is urged that unless the word "town" be interpreted in its ordinary sense in this definition there is no object in the distinction which is made between towns and villages in the Act. As regards this argument I am not prepared to say that "town" in its ordinary sense would include both Municipality and Cantonments, and I think that sufficient reason appears in the Act for distinguishing towns and villages in the fact that Chapter VIII, the provisions for record of possession, are confined to towns and are not applied to villages. I think that the contention of the learned Government Advocate is strained and untenable, and that the word "town" in the definition of "village" must be regarded as bearing the interpretation which is given to it in the definition of "town," which occurs a few lines further up the page.

My view is that if the land in suit is not in a town, it must be in a village as defined in the Act. It follows that the land is either in a town or in a village, which is a finding sufficient for the determination of the case. I hold that the suit does not fall within the jurisdiction of the Civil Court. If it were prosecuted to a conclusion in this Court, and decided in favour of the appellant, our decree would not bar the Revenue Officer from evicting the appellant.

I would set aside the decree and dismiss the original suit and give costs in both Courts to the appellant.

Fox, J.—I concur.

Special Civil 2nd Appeal No. 182 of 1904.

December 13th, 1905.

Before Mr. Justice Irwin.

SHWE BIN v. MA THEIN AND 8 OTHERS, LEGAL REPRESENTATIVES OF MAUNG NU (DECEASED).

Messrs. *Agabeg* and *Maung Kin*—for appellant (plaintiff) | Messrs. *Cowasjee* and *Cowasjee*—for respondents (defendants).

Death of one of several defendants—plaintiff failing to apply in time for substitution of legal representative—abatement of suit against all defendants—Civil Procedure Code, 1882, s. 368.

Plaintiff sued the two defendants for land which was in the joint possession of both. There was no right of suit against one of the defendants alone. One of the defendants died, and plaintiff-appellant's application to substitute that defendants' legal representatives was rejected as being time-barred.

Held,—that the appeal abated altogether, and not only as against the deceased defendants' representatives.

Hem Kunwar v. *Amba Prasad*, (1900) I. L. R., 22 All., 430; *Chandarsang Versabhai* v. *Khimabhai Raghubhai*, (1897) I. L. R, 22 Bom., 718; *Bai Full* v. *Adesang Pahadsang*, (1901) I. L. R., 26 Bom., 203; referred to.

The application to substitute the respondents 2 to 9 as the legal representatives of Maung Nu was made on 25th April 1905, and in that application it is stated that Maung Nu died on 29th June 1904. The application therefore was time-barred, under Article 175C of the Second Schedule to the Limitation Act, and under the penultimate clause of section 368, Civil Procedure Code, the appeal must abate unless the appellant satisfies the Court that he had sufficient cause for not making the application within the prescribed period. The appellant has not attempted to satisfy the Court on this point, and indeed could not do so, for the third paragraph of his application for review of the judgment of the District Court shows that on 19th July 1904 he knew that Maung Nu was dead.

The suit must therefore abate, and it has now to be considered whether it must abate wholly or only as against the respondents 2 to 9.

The original defendants Maung Nu and Ma Thein were husband and wife and they were sued jointly as having jointly entered on the premises without leave of the plaintiff. In the case of *Hem Kunwar* v. *Amba Prasad* (1) four plaintiffs had sued jointly to recover property and had got a decree; defendants appealed; one of the plaintiffs died and his legal representative was not added in time. The appeal was held to have abated altogether, because the right to appeal did not survive against the surviving respondents, but against them and the representatives of the deceased respondent.

The Bombay Case of *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (2) seems to conflict with the above ruling. Nine plaintiffs sued four defendants for possession of some land, and obtained a decree. The defendants appealed, and pending the appeal one appellant and one respondent died. Applications to place the names of the heirs on the record were rejected as too late. The lower Appellate Court dismissed the appeal on the ground that "the land being held

(1) (1900) I. L. R., 22 All., 430. | (2) (1897) I. L. R., 22 Bom., 718.

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in common, the appeal is, therefore, obviously defective for want of parties."

On second appeal this order was set aside. So far as the death of the appellant was concerned it was pointed out that the Court could proceed under section 544. With regard to the death of the respondent the words of the judgment are "the lower Appellate Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code, and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents, under section 554, Civil Procedure Code, or else to have directed that the legal representatives of Samatsung should be placed upon the record." In this passage the reference to section 544 seems to be an error, for that section contains no warrant whatever for proceeding with an appeal without making all the decree holders parties to the appeal. I think the true meaning of this judgment appears from the later case of *Bai Full* v. *Adesang Pahadsang* (3) in which plaintiff sued for a share under a will. The judgment is as follows:—

"We think the learned Assistant Judge was wrong in directing that the appeal should abate as far as all the respondents are concerned. It has been contended that the appeal survives against the other respondents. The proper course, following the decision in *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (2) would appear to be to have declared that the appeal had abated as far as the second and fifth respondents are concerned, and to have proceeded to hear the appeal on the merits as against the other respondents. It may be that at the hearing it will be found that the appeal did not survive against the remaining respondents, in which case the Assistant Judge will deal with it accordingly."

I can see no material distinction between an appeal not surviving against the remaining respondents and an appeal not surviving against them apart from the deceased respondent. In the present case the suit was for possession of land which was in the joint possession of the two defendants, and in my opinion there can be no right of suit against one of them alone.

I therefore declare that the appeal abates altogether. Appellant will pay respondents' costs.

Before the Hon'ble Sir Harvey Adamson, C.S.I., I.C.S., Chief Judge, and Mr. Justice Fox.

Civil 2nd Appeal No. 128 of 1905.

SHWE THE *v.* THA KADO.

January 8th, 1906.

Mr. *Villa*—for appellant (defendant). | Mr. *Lentaigne*—for respondent (plaintiff).

Suit for redemption—joinder of parties—plaintiff of unsound mind suing by next friend—Civil Procedure Code, section 463—scope of Chapter XXXI.

Held,—that even in places where the Transfer of Property Act is not in force, all the parties interested must be joined in a suit for redemption.

Maung Ko v. *Maung Kye*, 2 U. B. R. (1892-96), 586; *Ma Min Tha* v. *Ma Naw*, 2 U. B. R. (1892-96), 581; *Ram Bakh Singh* v. *Mohunt Ram Lall Doss*, (1874) 21 W. R., 428; referred to.

Held also,—following the rulings of the Bombay and Allahabad High Courts, that the provisions of Chapter XXXI of the Code are not exhaustive, and that where a plaintiff is admitted or found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858 or any other law for the time being in

(3) (1901) I. L. R., 26 Bom., 203.

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force, he should be allowed to sue by his next friend, provided that the suit is for his benefit.

Tukaram Anant Joshi v. *Vithal Joshi*, (1889) I. L. R. 13 Bom., 656; *Nabbu Khan* v. *Sita*, (1897) I. L. R., 20 All., 2; *Pransukhram Dinanath* v. *Bai Ladkor*, (1899) I. L. R., 23 Bom, 653; followed.

The plaintiffs in this case are Ma Cho and Maung Tha Kado, mother and son. They are the widow and eldest son respectively of U Shwe Ni. The suit is to redeem land which was mortgaged by U Shwe Ni. In the heading of the plaint it is stated that Ma Cho sues by her next friend Maung Tha Kado. An application was presented by Maung Tha Kado, alleging that Ma Cho was old and in her dotage and unable to conduct the case or her own affairs, and asking that he might be permitted to act as her next friend. On this the Judge endorsed "Put up on date fixed for hearing." The date fixed for hearing was 26th November 1904. On that date the defendant filed a written statement in which among other things he objected to the plaintiff Ma Cho suing by her next friend. The District Judge took no notice of this objection or at all events recorded nothing for on the same day he endorsed on Maung Tha Kado's application the word "granted" which clearly means that he permitted Ma Cho to sue by Maung Tha Kado as her next friend. The case then went to trial on the merits and a decree for redemption was passed in favour of both plaintiffs.

On appeal to the Divisional Court the objection was raised among others, that Maung Tha Kado was not entitled to sue on behalf of Ma Cho as her next friend. The Divisional Judge misapprehended the action that had been taken in the lower Court, and erroneously thought that Ma Cho had never been admitted as a party to the suit. He also held that even if she had been admitted she was not properly admitted to sue by her next friend, because she had never in accordance with the provisions of section 463, Civil Procedure Code, been adjudged to be of unsound mind under Act XXXV of 1858 or under any other law for the time being in force.

The Divisional Judge then struck out Ma Cho's name from the case and proceeded to try the appeal as if Maung Tha Kado had been the sole plaintiff. He held that Maung Tha Kado as the eldest son of U Shwe Ni had an interest in the land sufficient to give him the right of redemption without his mother being joined as a plaintiff. After considering the evidence he dismissed the appeal as against Maung Tha Kado. The defendant has come up in second appeal against that decision.

On the question whether the suit for redemption is maintainable by Maung Tha Kado as the sole plaintiff, the provisions of the Transfer of Property Act have been referred to. This Act was not in force when the suit was filed, but it has been well remarked by the learned Judicial Commissioner of Upper Burma, Mr. Burgess, in *Maung Ko* v. *Maung Kye* (1) that the spirit of the rules which it contains is the natural guide of Courts bound under section 13 (3) of the Burma Laws Act to act according to Justice equity and good conscience. The Courts are

(1) 2 U. B. R. (1892-96) 586.

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under a special obligation in the matter, for it is directed in paragraph 698 of the Lower Burma Courts' Manual that the Courts shall be guided by the provisions of sections 83 to 97 of the Transfer of Property Act in dealing with suits relating to mortgages. We do not propose to reiterate the exhaustive arguments that were used by the learned Judicial Commissioner in the judgment which has been quoted, and in *Ma Min Tha* v. *Ma Naw* (2), which led him to the conclusion that in places where the Transfer of Property Act is not in force, it is nevertheless the plain duty of the Courts to insist on the joinder of all the parties that are interested in a suit for redemption. We will content ourselves with saying that the Transfer of Property Act, which was enacted in 1882, made no change in the law or practice of the Courts in respect of the joinder of parties interested in such cases, for as far back as 1874 it was held by the Calcutta High Court in *Ram Baksh Singh* v. *Mohunt Ram Lall Doss* (3) that a suit for the redemption of mortgaged property cannot go on to a due determination until all the mortgagees are made parties. Under Buddhist Law the heir of a deceased husband is his widow, and though the eldest son may have a limited interest to the extent of one-fourth during the widow's lifetime, if he seeks to obtain it, it is quite clear that alone he is not in a position to bring a suit for redemption of the estate. The Divisional Judge's decision that Maung Tha Kado suing alone is entitled to redemption is wrong.

It is unfortunate that Maung Tha Kado in his capacity as next friend to Ma Cho did not appeal against the order of the Divisional Judge striking Ma Cho's name from the record. Maung Tha Kado by the decree of the Divisional Court had obtained practically all that both he and Ma Cho asked for. It was therefore natural that he should not appeal. The result however is that Ma Cho's name is not on the record of this appeal, which renders it more difficult to put matters straight. But we obviously cannot let the case continue on the lines that have been taken in the judgment of the Divisional Judge. The Divisional Judge did not state in his judgment the real question to be determined, nor did he determine the real question. Maung Tha Kado did not sue alone for redemption, and the question whether be is entitled alone to redeem should never have arisen, and cannot determine the suit which is a suit brought not by Maung Tha Kado alone, but by Ma Cho and Maung Tha Kado jointly. The proper course under these circumstances is to order a retrial of the appeal in the Divisional Court, and this is the course that we propose to adopt.

We have a few observations to add on the question of Ma Cho's status. The learned Advocate for the appellant has defended the action of the Divisional Judge in striking Ma Cho's name from the record. He urged that Maung Tha Kadc had no right to file the suit as the next friend of his mother, who is alleged to be of unsound mind, because she has never been adjudged to be so under Act XXXV of 1858 or any other law, and therefore the provisions of section 463 of the Civil Procedure Code do not apply. In support of this contention we are referred

(2) 2 U. B. R. (1892-96) 581. | (3) (1874) 21 W. R. 428.

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to *Tukaram Anant Joshi* v. *Vithal Joshi* (4), where it was held that the provisions of the Civil Procedure Code, which enable a lunatic to sue by his next friend, are applicable only to cases where there has been an adjudication of lunacy previous to the institution of the suit. This is a Bombay case, and there are subsequent rulings of both the Allahabad and the Bombay Courts which dissent from it. In *Nabbu Khan* v. *Sita* (5) it was held by the Allahabad Court that the provisions of Chapter XXXI of the Civil Procedure Code are not exhaustive, and that where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858 or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should provide a guardian *ad litem* where he is a defendant, provided that what is done is clearly for the benefit of the person of weak mind. In *Pransukhram Dinanath* v. *Bai Ladkor* (6) a Bench of the Bombay Court followed the Allahabad ruling. The case is very similar to the present one. A wife alleging her husband to be of unsound mind brought a suit as next friend to set aside certain deeds said to have been executed by him when of unsound mind and under undue influence. The learned Judges observed that the suit was *primâ facie* founded on a good and beneficial cause of action, and that the onus lay on the defendants to show that it could not be really for the benefit of the person of unsound mind. They framed two issues, *viz.*:—Is plaintiff a person of unsound mind? Do the defendants prove that the suit instituted by his next friend is not for his benefit? and remanded the case for evidence and a finding on these issues. This is the course which the Divisional Judge should adopt with regard to the question raised.

We set aside the decree of the Divisional Court and order a retrial of the appeal. Costs to follow the result.

Civil Revision No. 84 of 1905.

January 31st 1906.

Before Mr. Justice Irwin.

THA MAUNG *v.* T. A. AGAMBERAM CHETTY.

Mr. *McDonnell*—for applicant.

Insolvency—imprisonment of applicant—Civil Procedure Code, 1882, section 359.

The applicant's petition to be declared an insolvent, under section 344 of the Code, was rejected on 2nd February 1905. On 25th March a creditor applied for the imprisonment of applicant under section 359, and after applicant had been heard he was sentenced to six months' rigorous imprisonment.

Held—that the Court had jurisdiction to entertain and act upon the creditor's application.

Held also—that the word "imprisonment" in section 359 means imprisonment of either description as defined in the Indian Penal Code.

Kadir Bakhsh v. *Bhawani Prasad*, (1892) I.L.R., 14 All., 145, referred to.

The petitioner's application to be declared insolvent was rejected on 2nd February 1905.

On 25th March a creditor made an application under section 359. Notice was issued to the petitioner to show cause, and after his

(4) (1889) I. L. R., 13 Bom., 656. | (5) (1897) I. L. R., 20 All., 2.
(6) (1899) I. L. R., 23 Bom., 653.

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pleader had been heard he was sentenced on 1st April to six months' rigorous imprisonment.

He applies for revision of this sentence on the grounds that (*a*) when the Court had dismissed the application on 2nd February it ceased to have jurisdiction in the matter, and it had no power to entertain a subsequent application under section 359, and that (*b*) the Court had no power to order rigorous imprisonment.

On the first point I have not been able to discover any ruling except that in *Kadir Bakhsh* v *Bhawani Prasad* (1), which is against the petitioner. After a careful consideration of the terms of the section I see no reason to dissent from that ruling. I am of opinion that the Court had jurisdiction to entertain and act on the application which was made one month and 23 days after the application to be declared insolvent had been dismissed.

On the second point I can find no ruling of any kind. The Civil Procedure Code was enacted in 1882. Under section 4 of the General Clauses Act, 1897, the word "imprisonment" in the Code means imprisonment of either description as defined in the Penal Code, unless there is anything repugnant in the subject or context. Under section 254 of the Code a decree or order may be enforced by imprisonment of the judgment-debtor, and under section 336 his imprisonment may be in the Civil Jail, and so forth. This is no doubt repugnant to the meaning put on the word "imprisonment" in the General Clauses Act, and that meaning would therefore not apply to section 254. But so far as I can see, there is nothing in the subject or context of section 359, which can oust the General Clauses Act from that section. The object of the imprisonment too is quite different. In section 254 it is "an order may be enforced by imprisonment" in section 359 a person "proved guilty shall be sentenced to imprisonment." The object of section 359 is punishment of an offence, and it is quite fitting and suitable that the punishment should be imprisonment either simple or rigorous in the Criminal Jail.

The form of warrant prescribed by this Court for use under section 359 provides for either simple or rigorous imprisonment. There is therefore no indication in any direction that the meaning of imprisonment in this section is not the meaning given in the General Clauses Act.

The application is dismissed. The petitioner will be re-arrested and committed to jail to finish his sentence.

Before the Hon'ble Sir Harvey Adamson, Kt., C.S.I., Chief Judge, and Mr. Justice Fox.

Criminal Appeal No. 230 of 1905.

THEIN MAUNG *v.* KING-EMPEROR.

June 27th 1905.

Confessions by accused persons—duty of Magistrate—Criminal Procedure Code, 1898, sections 164, 364.

When a prisoner is brought before a Magistrate to make a confession, the Magistrate is bound to question him with a view to discover whether he con-

(1) (1892) I.L.R., 14 All., 145.

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fesses voluntarily. This questioning is not a mere formality, but must be in pursuance of a real desire to find out the object of it. Unless the Magistrate has made a real and substantial enquiry as to the voluntary nature of a confession, the confession recorded by him is inadmissible in evidence.

Fox, J.—

* * * * *

1936.RC 253 Feh.

The first evidence admitted against the accused which calls for consideration is a confession he made to a Magistrate in Moulmein between three and four days after the crime, and after he had been in custody for three days. The accused retracted the confession in the inquiry before the committing Magistrate, and said he had made it because the police officer who took him before the first Magistrate told him that if he confessed as he did, he would get off. The confession was to the effect that in the dark he and the Tavoy man (Nga Dut) had bumped together, Nga Dut had then struck him with his fist, and then he (the accused) being in liquor, and thinking that his assailant had a *dah* with him, struck him a blow with a wooden stick which he had in his hand. The Magistrate who recorded the confession was examined before the Sessions Court. He stated that the accused was brought before him by a police officer, and that the only question he asked the accused was the one he recorded, *viz.*: "Why have you come before a Magistrate?" and the answer to it was, "I have come to make a confession before a Magistrate of my own accord in connection with a murder case." The record of the confession itself starts with the words "I have come before a Magistrate to make a confession of my own free will."

The Sessions Judge admitted the confession in evidence, holding that sub-section 3 of section 164 of the Code of Criminal Procedure had been substantially complied with. The provisions of that sub-section require that a Magistrate shall not record a confession unless upon questioning the person making it he has reason to believe that he has confessed voluntarily. The Sessions Judge says that if a person tells a Magistrate that he is about to make a confession voluntarily there is no intrinsic reason why the Magistrate should disbelieve him. The Sessions Judge has failed to appreciate the object of the provision enacted in the sub-section above quoted. If he were right, that object would be frustrated in every case by the police inducing would-be confessing prisoners to start their statements before a Magistrate with statements similar to the one made before the Magistrate in this case. The duty imposed upon a Magistrate before whom a person is brought to make a confession is plain. He must question the prisoner with a view to discovering whether the prisoner confesses voluntarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by a few formal questions. In fact the wording of the sub-section contemplates that the Magistrate shall hear the confession first without making a record, that he shall then put questions with a view to ascertaining whether the prisoner has confessed voluntarily and then, if he has reason to believe after such questions that the prisoner has confessed voluntarily, he may record the confession writing out in full

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every question put by him and every answer given by the accused, and following the provisions of section 364 of the Code.

The questioning of the accused before recording a confession is a matter of substance and not of mere form, and if it has been omitted, the omission cannot be cured by any evidence under section 533 of the Code. In view of the propensity of the police to induce prisoners to confess, the Legislature has imposed on Magistrates the duty of making a substantial inquiry for themselves as to the voluntary nature of a confession and unless such inquiry is made, a confession even before a Magistrate is not admissible in evidence.

In the present case no such inquiry was made, and in my judgment, the confession must be entirely rejected, and not taken into consideration.

* * * * *

Adamson, C. J.—I concur.

Full Bench—(Civil Reference).

Before the Hon'ble Sir Harvey Adamson, Kt., C.S.I., Chief Judge, Mr. Justice Fox and Mr. Justice Irwin, C.S.I.

Civil Reference No. 9 of 1905,

February 8th, 1906.

THEIN PE *v.* U PET.

Messrs. *Cowasjee* and *Cowasjee*—for appellant (defendant).

Mr. *Connell*—for respondent (plaintiff).

Buddhist Law: Husband and Wife—grounds for divorce—desertion—section 17, Chapter V, Manukye—custom—force of Dhammathats.

Held (*Fox J.* dissenting) that desertion of the husband by the wife for one year, or of the wife by the husband for three years, does not *ipso facto*, and without any further and expressed act of volition on the part of either party to the marriage, dissolve the marriage tie.

Ma Thin v. *Maung Kyaw Ya*, 2 U. B. R. (1892–96) 56: *Hurpurshad* v. *Sheo Dyal*, (1876) L. R., 3 I. A., 259: *Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar*, (1872) 14 Moore's I. A., 570: *Maung Po Aung* v. *Ma Nyein*, (1904) 10 B. L. R., 132: *Po Maung* v. *Nagalingum Chetty*, 2 U. B. R., (1892—96) 53: *Maung Ko* v. *Ma Me*, (1874) S. J., L. B., 19: *Mi Nu* v. *Maung Saing*, (1874) S. J., L. B, 28; *Nga Nwe* v. *Mi Su Ma*, (1886) S. J., L. B., 391: *Ma Le* v. *Ma Pauk Pin*, (1883) S. J., L. B., 225 (232): *Ma Gywe* v. *Ma Thi Da*, 2 U. B. R., (1892—96) 194, referred to.

Ma Thet v. *Ma San On*, (1903) 2 L. B. R., 85, *pro tanto* over-ruled.

The following reference was made to a Full Bench by a Bench consisting of *Adamson, C. J.*, and *Fox, J*:—

Adamson, C. J.—The respondent applied for letters of administration to the estate of his deceased wife Ma Min Gon. Ma Min Gon died in 1896, leaving a son Maung Min Dun by the respondent. Maung Min Dun died in 1900, leaving a son Maung Thein Pe who is the appellant. The appellant obtained letters of administration to the estate of his father Maung Min Dun. It is admitted that the estate for which the respondent has applied for letters as being that of Ma Min Gon, is the same estate for which the appellant obtained letters as being that of Maung Min Dun. The District Court refused to grant

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letters of administration to respondent on the ground that it had no power to grant letters of administration to two separate persons in respect of the same estate.

Respondent appealed to this Court. It was held that the decision was wrong in law. The order of the District Judge was set aside. He was directed to re-hear the case, and to try the question whether respondent was a person who according to the rules for the distribution of an estate would be entitled to the whole or any part of the estate, or in other words, whether respondent at the time of the death of Ma Min Gon, was, as he professed to be, her husband. Finally the District Judge was instructed that, if he were satisfied on that point, it was within his discretion to grant letters to the respondent.

The District Judge, after re-trying the case, has found that respondent was the husband of Ma Min Gon at the time of her death, and has granted letters of administration to respondent.

The grounds of appeal and the arguments of the learned Advocate for the appellant have been directed to one and only one point, namely, that the marriage tie between respondent and Ma Min Gon was severed before Ma Min Gon's death.

The facts of the case are as follows :—

Respondent and Ma Min Gon were husband and wife and lived together in Tavoy up to 1872. In that year respondent was appointed Myoôk of Thayetchaung, and went to reside there. Ma Min Gon accompanied him, but did not like Thayetchaung, and after a time returned to Tavoy and resided in the house in which they had formerly lived there. Respondent, being left alone, took a lesser wife. The date of this marriage is not clearly proved, but it certainly was not later than 1876. Ma Min Gon was much incensed at this marriage, and from that time refused to have any intercourse with respondent. She continued to live in Tavoy in the house which they had formerly occupied and which belonged to her, and lived on her own means which appear to have been considerable. From the time of respondent's second marriage he never in any way provided for Ma Min Gon's maintenance. She declined to go to his house or to receive him at her's. These relations continued down to the time of her death in 1896.

It is settled law that the taking of a lesser wife does not in itself entitle a wife to leave her husband, and therefore on the facts which I have stated, it must be held that Ma Min Gon deserted her husband the respondent in 1876.

Under the law as expressed in section 17, Chapter V of the Manukye respondent acquired the right to divorce Ma Min Gon after one year of desertion that is to say in 1877. Under the strict letter of the law it would appear that Ma Min Gon at the same time acquired the right to divorce the respondent. I am not however prepared to say that such right actually did accrue because I think that it may be argued on the construction of the Manukye and of other *Dhammathats*, that desertion does not give the party who is in fault a right to divorce the other, and this in fact has been held by the learned Judicial Commis-

sioner of Upper Burma (Mr. Copleston) in *Ma Thin* v. *Maung Kyaw Ya* (1). The question does not arise in this case, or at all events it is unnecessary to decide it.

It is quite clear however that whether one or the other or both had a right to divorce, neither of the parties to the marriage ever took any action for the purpose of declaring its dissolution. Respondent certainly never asserted that the marriage was dissolved, and not a single witness for the appellant has been able to say that Ma Min Gon ever claimed a divorce, or asserted that she was divorced, or did any overt act to obtain a divorce, or even desired a divorce. On the contrary the parties to the marriage sued each other as husband and wife in the Court of the Deputy Commissioner of Tavoy in 1881, long after the full period of desertion that entitled them to a divorce had expired. It is clear from the evidence that down to the time of Ma Min Gon's death, the parties to the marriage and their neighbours believed that the status of marriage was still in existence. Even in this case the appellant himself in his written statement did not assert that at the time of Ma Min Gon's death the marriage had been dissolved, which, if true, would obviously have been the strongest objection that could be put forward against the claim for letters of administration. On the contrary he stated in evidence that respondent and Ma Min Gon had not been divorced.

What has been urged before us in this appeal is—

(1) That desertion for the period specified in the *Dhammathat*, *ipso facto* terminates a marriage, without any act of volition on the part of either party to the marriage.

(2) That if an act of volition is necessary, it is implied by the conduct of Ma Min Gon.

I think that I have said sufficient to show that the second of these grounds must fail. The sole question is therefore confined to the first of these grounds. Was the marriage in fact terminated in 1877, notwithstanding that neither the parties to the marriage, nor the parties to this suit, nor any other persons were aware that it had terminated?

I must confess that whether on a consideration of the evidence in this case as to the customs, sentiments, and ideas of the people, which must always be taken into account in construing the *Dhammathats*, or whether on a construction of the actual letter of the *Dhammathats*, or whether on first principles, I should be inclined to hold that death is the only way in which a marriage can be terminated without an act of volition on the part of one or other of the contracting parties. But it has been pointed out to me that we are bound by the ruling of a Bench of this Court in *Ma Thet* v. *Ma San On* (2), where it was held that desertion by the wife for one year *ipso facto* dissolved the marriage tie. The question of volition does not appear to have been specially considered in that case, but the effect of the ruling undoubtedly is, that desertion, without any other condition, *ipso facto* dissolves the tie.

(1) 2 U. B. R. (1892—96), 56.
(2) (1903) 2 L. B. R. 85.

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The question is one which, having regard to the customs and sentiments of the people, is very important. I would refer it to a Full Bench.

The reference is:—

Does desertion for the periods specified in section 17, Chapter V of the Manukye *ipso facto*, and without any further and expressed act of volition on the part of either party to the marriage, dissolve the marriage tie?

Fox, J.—I agree in thinking that the above important question should be referred to a Full Bench of the Court.

The opinion of the Bench was as follows:—

Fox, J.—The question referred being one regarding marriage between Burmese Buddhists must be decided according to Buddhist law, except so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

There is no enactment of the British Legislature bearing on the subject: and in my opinion there is no custom having the force of law either proved or which otherwise can be taken notice of.

I take the words "custom having the force of law" in section 13 of the Burma Laws Act, 1898, to refer to a custom as defined by their Lordships of the Privy Council in *Hurpurshad* v. *Sheo Dyal* (3). They say (at p. 285 of the report)—

"A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly."

As to the evidence which is needed to prove such a custom, I quote the following words of their Lordships in *Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar* (4)—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts, and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

The quotations are sufficient to show that if custom is made the basis of decision, the custom must be proved strictly and with certainty.

I do not understand that there is any distinction between "custom having the force of law" and "customary law."

There is no evidence of any custom relating to the question referred in this case. Even if the conduct of parties, whose attention may or may not have been directed to the law as laid down in the *Dhammathats*, could be taken into consideration, it would in my opinion be a very unsafe basis on which to rest a decision one way or the other.

(3) (1876) L. R., 3 I. A., 259.

(4) (1872) 14 Moore's I. A., 570.

The ordinary Burman man and woman is as liable to be mistaken as to his and her legal status under the law as is a man or woman governed by any less obscure and more clearly ascertainable law.

The general rules of Buddhist law applicable to Burmese Buddhists are, I understand, those laid down in the *Dhammathats*. By those laws Burmese Buddhists profess to be and desire to be governed in matters of marriage, inheritance and succession. I cannot call to my mind any instance of any Burmese Buddhist claiming any right in such matters based on any custom opposed to the laws contained in the *Dhammathats*. The latter are regarded, as far as I can judge, as the fountains of the laws governing them. Alien Judges have expressed opinions to the effect that the Burmese Buddhist law in force in later time, may be different from the laws laid down in the *Dhammathats*, but I am not aware that any Burmese Buddhist has ever advanced the same view.

It appears to me that the *Dhammathats* must be referred to as containing the general rules of Buddhist law governing Burmese Buddhists just as the ancient law books of the Hindus are referred to as containing the Hindu law, and the Koran and the commentaries of authority are referred to for ascertaining the Mohammedan law.

There being no custom relating to the matter in question proved, the decision must, in my opinion, rest upon the proper construction of the texts in the *Dhammathats* connected with the matter involved in the reference.

Sections 301 and 312 of the Kinwun Mingyi's Digest contain texts bearing on the question.

In *Maung Po Aung* v. *Ma Nyein* (5), *Sir Herbert Thirkell White*, C.J., said:—

"It has always, I think, been regarded as settled law that desertion or abandonment by a husband for three years, or by a wife for one year, operates to dissolve the marriage bond. This is the effect of all the texts save one in section 301 of the general Digest of the Buddhist law and of the texts in section 312 of that compilation."

Sir Herbert White was a party also to the judgment in *Ma Thet* v. *Ma Sar On* (2) in which I expressed an opinion that under the circumstances of a wife leaving her husband's house, and the husband not sending her maintenance, the marriage between the parties was dissolved at the end of a year from the date of the separation. I still think that these views were correct.

The texts quoted in the sections of the Digest deal with two cases, one that of a husband abandoning or deserting his wife, the other that of a wife abandoning her husband.

In the first case according to the majority of them, if the desertion continues for three years, the wife is at liberty to marry another husband. None of the texts say that the right is merely to obtain a divorce, or to declare herself divorced, nor do any of them say that the wife must communicate her intention of dissolving the marriage to her husband. In some of the cases stated such communication would

(5) (1904) 10 B. L. R., 132.

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be impossible. If then the wife has the right to marry another husband at the end of the three years, it appears to me to follow that the marriage becomes dissolved at the end of that period, for the idea of a woman whilst married to one man having the right to marry another man is as foreign to Burmese Buddhist law as it is to the Christian law.

The second case is that of a wife leaving her husband. This case is most fully dealt with in section 17 of Chapter V of *Manukye*. It says that if a wife leaves her husband, and he does not send her what may be considered emblems of maintenance for a year, each shall have the right of taking another husband or wife as the case may be. It goes further and says that they shall not claim each other as husband or wife, and I understand that imperative words are used.

In this case there has been voluntary action on the part of both parties; the wife has left her husband, and the husband by not sending her maintenance has given a plain intimation that he does not want her as a wife any longer.

The case approaches that of a divorce by mutual consent which is permissible under Burmese Buddhist law.

I read the section as containing a mandate that parties who neglect the duties and obligations of husband and wife in the manner and for the period stated shall not consider themselves to be such and shall not be such, after the lengthened period of persistence in their conduct. If they may not call one another husband and wife, and if they may not claim one another as such, how can a marriage exist? It is of the essence of the marriage tie that as long as marriage subsists the married parties can make claims upon one another, however bad the conduct of one of the parties may have been.

The imperative words of the text are followed by the words "let them have the right to separate." These words no doubt seem to imply that the result of the conduct at the end of the year is merely to give a right to a divorce at the option of either party, and that something must be done by at least one party after the period before the marriage will be actually dissolved.

Reading them however with the rest of the text, I do not think that this is their true meaning. *Prima facie* they are unnecessary, for the parties have already separated. The intention in inserting them may have been to render lawful after the year what has been unlawful previously. In any case it appears to me that the most important part of the text is the injunction not to claim one another as husband and wife, and the words giving each the right to take another spouse. As in the case of a husband deserting his wife for three years, there is nothing making it compulsory for either the husband or the wife to communicate his or her intention to be no longer bound by the marriage tie, or to do anything indicating such intention.

Whatever the correct interpretation of the texts bearing upon the question may be, I think the decision should be according to such interpretation, irrespective of whether the law according to it is a good one or bad one, and irrespective of one's ideas as to how the Burmese

community of the present day regard the matter or would regard the matter if the general opinion could in any way be ascertained.

There are many things in the Hindu and Mohammedan laws which may appear to Europeans not to be either just or equitable, but that affords no reason for British Courts not administering such laws in matters of marriage and inheritance.

The people have some means of changing their general laws in such matters by developing customs inconsistent with such laws, but this Court as well as the Courts in India are bound by the decisions of their Lordships of the Privy Council as to what is a custom which may take the place of the general law, and how such a custom must be proved.

I would answer the question referred as follows :—

At the end of three years of continued desertion of a wife by a husband, and at the end of one year of continued desertion by a wife of her husband coupled in each case with failure on the part of the husband to maintain his wife in any way, the marriage of the husband and wife is dissolved without any further and expressed act of volition on the part of either party.

Adamson, C.J.—The question whether desertion for the periods specified in section 17 of Chapter V of the Manukye automatically dissolves a marriage without regard to the wishes of either party, is one that, so far as I can ascertain, has never been either considered or decided by the High Court of either Lower or Upper Burma.

It is true that the decision in *Ma Thet* v. *Ma San On* (2) tacitly assumes an affirmative answer to the question. But it is quite apparent from the judgment in the case that the point was not specifically raised, and that it was not even considered.

In *Maung Po Aung* v. *Ma Nyein* (5) *Thirkell White, C.J.*, said—

"It has always, I think, been regarded as settled law that desertion or abandonment by a husband for three years, or by a wife for one year, operates to dissolve the marriage bond."

I do not regard this remark as being even an expression of opinion on the point now before us, for the question in that case was not whether desertion dissolved the marriage bond, but whether it gave the wife a right to dissolve it.

Perhaps the nearest approach to a discussion of the question which is to be found in any law report in Burma is in *Po Maung* v. *L.H.R.L. P. Nagalingum Chetty* (6), where the learned Judicial Commissioner of Upper Burma, Mr. *Burgess*, observed as follows :—

"It has been argued on one side that a husband's abandonment of his wife completely for a period of three years puts an end *ipso facto* and without any special action to the matrimonial union, and on the other that such separation merely confers a right to claim a divorce, and does not itself constitute a divorce without formal steps being taken to give effect to the claim. The rules of Buddhist law on the subject are to be found in section 17, Chapter V of the Manukye, and in section 291 of the Attathankepa, and these rules have been discussed more or less in the following cases, *Maung Ko* v. *Ma Me* (7), *Mi Nu* v. *Maung Saing* (8), and *Nga Nwe* v. *Mi Su Ma* (9). But the precise point which might arise here has

(6) (1892-96), 2 U. B. R. 53.
(7) (1874) S. J. L. B., 19.
(8) (1874) S. J. L. B., 28.
(9) (1886) S. J. L. B., 391.

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not been distinctly dealt with, though it seems to be implied that the union is naturally dissolved at the end of three years. The *Dhammathats* give liberty to take another wife or husband at the expiration of three years, and they make no provision for any communication with the former husband or wife, or for the taking of any formal proceedings for declaring the dissolution of the marriage bond. Apparently the severance of the connubial tie is deemed to be sufficiently manifested by open separation for such a length of time. The actual taking of another wife or husband would of course make the state of affairs clearer and more public, but it does not appear to be absolutely necessary that this, or anything else, should be done to render the separation a complete divorce."

The point was merely raised, but not decided, so that these remarks are of the nature of an *obiter dictum*, but emanating from so distinguished an authority on Buddhist law as the late Mr. Burgess, they are worthy of great respect. The case was similar to the present one, in as much as the wife was dead, and the question of her status arose in a suit between the husband and a third party. But it differed in one very material point. The wife had not only been anxious to get a divorce, but had actually sued for it. There was no doubt that by her action she had expressed her volition. I think therefore that Mr. Burgess' opinion goes no further than that, assuming that there was desertion for three years, the wife could have achieved her divorce, by merely asserting her intention, without taking formal proceedings, such as the institution of a suit, to dissolve the marriage bond. That question is not before us at present, and it is sufficient to say that Mr. Burgess' opinion does not go so far as to say that desertion for three years dissolves the bond without the consent or desire of one or other of the married parties.

On the other hand there is one recorded decision which distinctly implies an answer in the negative to the question before us. In *Ma Thin* v. *Maung Kyaw Ya* (1) it was held by Mr. Copleston, when Judicial Commissioner of Upper Burma, that desertion by the wife, without fault of or cause given by the husband, he not having given her a stick of firewood or a leaf of vegetables during a year, does not entitle her to a divorce against his will.

In my order of reference in this case I expressed an opinion that the question must be answered in the negative, and I based that opinion on three grounds, *viz.*—

(1) The letter of the *Dhammathats*.
(2) The customs of the people.
(3) The fundamental principles of the marriage contract.

As regards the *Dhammathats* the most authoritative provision is contained in section 17 of Chapter V of the *Manukye*, which is translated by Richardson as follows :—

"Any husband and wife living together, if the husband saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years let each have the right to take another wife or husband. 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."

A more correct translation of the last two sentences is "They may not say 'you are my husband,' 'you are my wife.' Let them have the right to divorce and marry again." In my view this section does not in any way support the proposition that desertion is *ipso facto* a dissolution of marriage. It merely asserts that desertion gives a right to dissolve marriage. I am unable to follow my learned colleague Mr. Justice Fox in regarding the section as containing a mandate of the lawgiver enjoining a husband and wife who conduct themselves in the manner stated in the section not to consider or claim one another after the periods stated as husband and wife. In my view the section merely directs that the party in fault shall not claim the other against the other's wish. Nor do I think that any such inconsistency as that pointed out by my learned colleague, *viz.*; that a woman, although still married to one man, has a right to marry another, can possibly arise under the provisions of the section.

The right given is first to divorce and then to marry again. The right to marry again appears to have been introduced into the section merely as a visible symbol of the fact that the marriage tie has been dissolved. Whether the dissolution can be accomplished by a mere act of volition, as the section seems to imply, or whether it would require some more formal action, is a question which in the present case does not concern us. But it appears to me that the letter of the law requires that there shall be at least an act of volition.

In sections 301 and 312 of Volume II of the Digest of Burmese Buddhist Law there are extracts from many *Dhammathats*. They vary in details, but in the main principle they agree. On the one side is the husband or wife who is in fault, on the other is the wife or husband who has been deserted. They give to the party who is sinned against the right to be no longer bound by the marriage tie. But in no case is it suggested that there can be a dissolution of marriage except at the desire of a party to the marriage.

I now turn to the customs of the people. In determining questions that come within the purview of section 13 of the Burma Laws Act, 1898, it should never be forgotten that the texts of the *Dhammathats* are not the sole guide. These form the rule of decision only in as far as they are not opposed to any custom having the force of law. It is true that attempts made during the course of litigation to ascertain the prevalent ideas and customs and beliefs of Burmans on the subjects of inheritance and marriage, have not, so far as the experience of this Court shows, led to satisfactory results. But in the present case there is a large volume of evidence that illustrates the customs and beliefs of the people on the subject of divorce, and this evidence is all the more valuable from the circumstance that it has emerged spontaneously, and not in answer to an inquiry about customs. The parties to this marriage were not ignorant jungle-folk. One was a Burman Myoôk, an educated man. Both were in a high grade in Burman society, and both were in a position in which they might be expected to be intimately acquainted with the customs of their own race in questions relating to marriage and divorce, especially when owing to their

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disagreement these questions had a personal interest to themselves. If desertion for a year by a wife, constitutes not a ground for divorce but an actual divorce, these persons had already been divorced in 1881, and yet we find that in that year they sued each other as husband and wife and had no conception that the tie was dissolved. From that year down to the wife's death in 1896 they lived apart, but neither of them either asserted or suggested that they were other than man and wife. Can it be believed that persons in this position would be so ignorant, not of the written law, but of the every day customs of their race as to believe for twenty years that they were man and wife, when they actually were not? Then again we have a large number of witnesses in this case, persons of the Burmese race, who were well acquainted with the facts of the case, and knew the circumstances of the couple. It never occurred to them that these circumstances constituted a divorce. The neighbours, knowing the facts, believed that the marriage still subsisted. And finally the appellant, a trader in a respectable position in society, a grandson of the couple and intimately acquainted with their circumstances, did not assert in his written statement that at the time of the woman's death the marriage had been dissolved, although this, if true, would obviously have been an unanswerable objection to the claim for letters of administration. So far was he from making such an assertion, that he actually stated in evidence that up to the time of the woman's death, the couple had not been divorced. Surely this evidence, taken as a whole, presents a vivid picture of the beliefs and the customs of the people. To my mind it brings an irresistible inference, that the dissolution of the marriage tie by desertion alone, without any act of volition on the part of one or other of the parties to the marriage, is inconsistent with the beliefs and customs of Burmans. I think therefore that even if the actual texts of the *Dhammathats* supported the proposition that marriage is dissolved by desertion without any further act of volition, we would, on the inferences that arise from the evidence, be required by the provisions of section 13 of the Burma Laws Act to pause before deciding in accordance with the texts.

I further think that the idea that marriage can be terminated in any way except by death, without the wish of one or other of the parties is inconsistent with the fundamental principles of the marriage contract. On first principles marriage is a contract that is intended to last during life. Why should it alone of all contracts be terminated by the failure of one of the parties to perform all his obligations, if neither party wishes to terminate it? It is perfectly conceivable, in fact it often happens in actual life, that a wife may be deserted, and yet may not wish for a divorce. If she is divorced she may lose social status. She may have not only the consequences to herself to think of, but the consequences to her children. It is conceivable that for these or other reasons, when a husband and wife are each possessed of a considerable amount of property, as in the present case, they may quarrel and live apart, each on their own means, and yet neither of them desire to proceed to the extremity of a

divorce. Why should they not be allowed to do so? They know best what is advantageous to themselves. In my view it would be intolerable, under any law or system of marriage whatever, that when two persons have been lawfully married, and have notwithstanding disagreements maintained by their own free choice the status of marriage during their lifetime, third parties should be allowed to come in after their death, and assert for their own purposes that the marriage had been dissolved by the mutual conduct of the parties to it, conduct which concerned the parties themselves and no one else.

I am of opinion therefore on all grounds that the question should be answered in the negative.

Irwin, J.—The question referred to this Bench being one regarding marriage, in a case in which the parties are Buddhists, the rule of decision must be sought, under section 13 of the Burma Laws Act, 1898, in "the Buddhist law, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law." The question then arises, "Where is the Buddhist law to be found? Does the Buddhist law consist of the *Dhammathats* and nothing else? and are the Courts bound to follow the *Dhammathats* unless they are shewn to be opposed to any custom having the force of law?" I do not think that would be exactly a correct construction of the expression "Buddhist Law."

In section 2 of the Kinwun Mingyi's Digest a *Dhammathat* is defined as "a collection of rules which are in accordance with custom and usage, and which are referred to in the settlement of disputes relating to person and property."

Mr. *Jardine* in 1883 said, in the case of *Ma Le* v. *Ma Pauk Pin* (10)—

"Whilst I am of opinion that it is the function of the Courts to know the present customs of the people so as to avoid the administering of long-forgotten law, I must observe that the *Dhammathats*, especially the more recent ones, are almost our only guides, and that here, as in India, the customs are changing. The knowledge of the present ought to go with the learning of the books."

And again—

"It would be contrary to the modern spirit to apply the rules which perhaps suited the circumstances of the olden time when we find more recent Buddhist rules in force * * * * * * * The tendency of seeking out the proper meaning of the Sanskrit words is, I think, to apply the doctrines of Hindu law which one finds in the research. In India the danger was to some extent avoided by an executive inquiry into custom. In Burma no such enquiry has been made; and the tendency of the lower Courts is to deal with particular passages or even sections of the *Dhammathats* of last century as if there were no other means of ascertaining the existing law. The result is to throw an enormous labour and responsibility on this Court, which has to apply more numerous and severer tests to the propositions advanced than would be wanting if the existing law were better known."

In 1891 Mr. *Hodgkinson*, in *Ma Gywe* v. *Ma Thi Da* (11) cited this remark of Mr. Jardine:—

"We cannot apply the principle or practice of the *Dhammathat* to the changed society without modification; and in the moulding of the law it is of great im-

(10) (1883) S. J. L. B., 225 (232). | (11) 2 U. B. R. (1892-96) 194.

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portance that the Judges should modify the old rules in the line of present customs and opinion rather than in that of a bygone day."

And followed this up by his own opinion :—

"I entirely think that care must be taken in applying to cases at the present day principles derived from an archaic society and now materially affected in their application by the existing order of things."

I think I have shown enough authority for holding that the Buddhist law for which we have to seek is not the *Dhammathats* pure and simple, but on the contrary that it is a customary law, or in other words it is the body of customs observed by the Burmese Buddhists, and that the *Dhammathats* form one of the most important sources of information about that body of customs. Further, customs have a tendency to change, and the text of a *Dhammathat* cannot be assumed to be a perfectly correct exposition of existing customs.

The *Dhammathats* are not expressed in precise logical and consistent terms, nor is it to be expected that they should be. The accuracy of expression which to a European mind is essential to rules of law is not so to an Oriental. I have great doubt whether the writers of any of the *Dhammathats* perceived any distinction between desertion operating automatically to dissolve a marriage and desertion conferring a right to claim a divorce. But be that as it may I agree with the learned Chief Judge that in section 17 of Chapter V of the Manukye the true translation of the most important sentence is "Let them have the right to divorce and marry again," and that part of the section at any rate neither indicates that desertion for a specified time operates to dissolve the marriage, nor authorizes a wife to marry again while the first marriage subsists.

I quite agree that the idea of a woman while married to one man having the right to marry another is foreign to Burmese Buddhist law, but the contrary could easily be proved if the *Dhammathats* be construed literally. Section 388 of the Kinwun Mingyi's Digest contains abundant authority for the propositions that a wife left without maintenance during her husband's absence may marry another man, who does not thereby commit adultery, and that at the same time the original husband retains the right to redeem her on his return. If the first marriage were dissolved before the second took place, the first husband could have no right of redemption. It would be easy to multiply instances of flat contradictions in the *Dhammathats*, resulting from interpreting them as if they had been written by Europeans.

I do not think I can pass by without remark the two decisions of the Privy Council which are cited by Mr. Justice Fox, as those decisions are binding on us. In both cases there was no dispute about the general Hindu law applicable to the case: the point in issue was whether the general Hindu law was superseded by a local custom. In the present case I think no such question arises: the question we have to decide is what is the general Burmese Buddhist law relating to the point in issue. If that be so, these rulings of the Privy Council, in my opinion, do not govern the solution of the question.

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The question referred is one which probably never occupied the minds of the writers of any of the *Dhammathats*, and to my mind a definite pronouncement on it cannot be gathered from the *Dhammathats*. That being so, the opinion held by the husband and wife in the present case as to the effect of desertion is, I think, of great importance. The law to which they were subject was not, in my opinion, the law of the *Dhammathats*, but the customary law, for the ascertaining of which the *Dhammathats* are a very important guide, but not the only guide. I agree with the learned Chief Judge that the opinion of this husband and wife, persons of good social standing, as to the legal effect of separation in their own case is very valuable evidence of the nature of the customary law which applied to them.

Some little light is thrown on the same point by a criminal case which came before me recently in revision. The accused was convicted of adultery for taking the wife of a man whose husband had deserted her about four years previously. He pleaded not guilty and said the husband had deserted the woman, but it does not seem to have occurred to him that the desertion had operated to effect a divorce. Neither did it occur to the Magistrate, who has 18 years' service. He held that a technical offence had been committed, and passed a nominal sentence.

On the other side there is nothing to show that any Burman ever regarded desertion as operating *ipso facto* to effect a divorce.

All the reported judicial pronouncements on the point now in issue seem to be *obiter dicta* except in the case of *Ma Thet* v. *Ma San On* (2). The decision in that case I think ought to be overruled. A law declaring that marriage may be dissolved by mere expiry of a fixed period after an act, the date of which the parties may have forgotten, is so contrary to preconceived notions, not only of the marriage contract but of any contract, that I do not think such a customary law should be affirmed without clear and decided evidence of its existence.

I would therefore answer the question referred in the negative.

Before the Hon'ble Sir Harvey Adamson, Kt., C.S.I., Chief Judge.

Criminal Revisio No. 134 of 1906

March 9th, 1906.

KING-EMPEROR *v.* GOOROOMOONDIAN.

Workman's Breach of Contract Act, 1859—application of.

The Workman's Breach of Contract Act, 1859, applies only where there has been a contract for work, with money given as wages in advance. It does not apply where money has been given as a loan, with a condition attached that the borrower is to work for the lender.

Ram Prasad v. *Dirgpal*, (1881) I. L. R., 3 All., 744; followed.

In this case Act XIII of 1859 was wrongly applied.

The Act provides for the punishment of breaches of contract by artificers, workmen, and labourers, who have received money in advance on account of work which they have contracted to perform.

There must be a contract for work, and the money must have been received in advance on account of the work to be performed.

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The accused in this case received an advance of Rs. 205 from the complainant, and contracted that he would work for a year under the complainant and would then repay the advance.

It has been held in *Ram Prasad* v. *Dirgpal* (1) that the Act does not apply to a contract of this nature. The money received was not an advance on account of work contracted to be performed. The contract was a loan, to which was attached a condition that the borrower should work for the complainant. The effect of such a contract, if it could be enforced, might be to give the complainant a right to the services of the accused, on complainant's own terms as to wages and work. It was never intended to make the breach of such a contract an offence.

The conviction is set aside, and the accused acquitted.

Before the Hon'ble C. E. Fox, Officiating Chief Judge.

Special Civil 2nd Appeal No. 232 of 1904.

May 1st 1906.

SAN DUN AND OTHERS *v.* MEIN GALE AND OTHERS.

Messrs. *Burjorjee* and *Dantra*—for appellants (plaintiffs).

Messrs. *Eddis, Connell* and *Lentaigne*—for respondents (defendants).

Sale of property to defeat creditors—Transfer of Property Act, section 53.

The intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors generally. If there has been good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor.

Bhagwant Appaji v *Kedari Kashinath*, (1900) I. L. R., 25 Bom., 202, followed.

The defendant Ma Mein Gale and her husband Maung Shwe La obtained two decrees against Ma Gyok, the mother of the plaintiffs. One was for Rs. 1,394 and the other was for Rs. 9,514. The latter came before the Chief Court on appeal, and this Court reduced the amount decreed to Rs. 3,440. Its decision was given on the 14th August 1902. On the 1st September 1902 Ma Gyok and the plaintiff raised Rs. 4,000 from a Chetty for the purpose of paying off this decree, and by the agreement entered into they undertook to mortgage to the Chetty the land now in dispute. On the 2nd October 1902 Ma Gyok sold to the plaintiffs her half share in the land for Rs. 5,000. The plaintiffs subsequently mortgaged the land to the Chetty. It was admitted that the decree for Rs. 3,340 was paid off and satisfied. On the 28th August 1902 the defendant Ma Mein Gale and her husband had applied for execution of their other decree (for Rs. 1,394) by attachment of Ma Gyok's interest in the land now in dispute. An attachment order was made, but the procedure prescribed by section 274 of the Code of Civil Procedure was not followed, and in fact the attachment was never made as required by law. Another attachment order was made on the 2nd October 1902, and a warrant under this order was stuck up on the land on the 4th of the same month. On the 31st of that month the plaintiffs applied for removal of the attachment upon

(1) (1881), I. L.R. 3 All., 744.

the ground that the land belonged entirely to them in consequence of their own rights in it and of Ma Gyok's sale to them of her share.

The application having been dismissed, the plaintiffs brought the suit out of which this appeal arises to declare their right to the whole of the land. The Subdivisional Court gave a decree in their favour. The Divisional Court reversed the Subdivisional Court's decree holding that the sale by Ma Gyok was fraudulent as against the defendant Ma Mein Gale and her husband. The learned Judge of the Divisional Court did not question there having been some consideration for the sale. It is in fact evident that the decree for Rs. 3,440 was satisfied by money raised in consequence of the plaintiffs making themselves personally responsible, and some of Ma Gyok's other debts were also paid off out of the balance of the consideration money. The learned Judge however found that Ma Gyok and the plaintiffs were aware of the execution proceedings begun on the 28th August 1902 for the purpose of realizing the decree for Rs. 1,394, and that Ma Gyok's sale was made with intent to defeat Ma Mein Gale and Maung Shwe La's claim under this decree.

I agree with the learned Judge's view of the facts, but he has erred in law in holding that those facts gave Ma Mein Gale and her husband the right to have Ma Gyok's sale declared fraudulent and a nullity.

The learned Judge based his decision upon the principles enunciated in section 53 of the Transfer of Property Act. The only part of that section applicable to the present case would be that which declares that every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated and delayed. It has been laid down in numerous cases which are remarked on in the exhaustive consideration of the provisions of section 53 of the Transfer of Property Act given in Mr. Justice Battys' judgment in *Bhagwant Appaji* v *Kedari Kashinath* (1) that the intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors generally.

The decision in the above case shows that if there has been good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor. In the present case there is no ground for holding that the sale by Ma Gyok was not a real transaction or that it was made for a grossly inadequate consideration. Even if she was not liable for all the amounts set against the consideration money stated in the sale deed, she was certainly liable for the greater part of them, and so far as the evidence goes, she in any case received full value for her interest in the property.

The appeal is allowed. The decree of the Divisional Court is reversed and that of the Subdivisional Court is restored. The defendants respondents must pay the plaintiffs' costs in the Divisional Court and in this Court.

(1) (1900) I. L. R., 25 Bom., 202.

Special Civil 2nd Appeal No. 162 of 1905.

February 28th, 1906.

Before Mr. Justice Irwin, C.S.I.

HLA NYO *v.* SANI PYU AND SANI PRU

R. M. Das—for appellant (plaintiff).

Mortgage—decree for redemption—execution.

A decree for redemption should specify a period within which the redemption money must be paid; and if it is not paid by the date fixed the mortgagee's remedy is not by a separate suit for possession of the land, but by an application to the Court to pass a final foreclosure decree or an order absolute for sale in the original suit.

Maung Mo Gale v. *Ma Sa U,* (1902) 1 L. B. R., 186, referred to.

The 1st defendant-respondent Sani Pyu had, in suit No. 80 of 1900, obtained a decree for redemption of the land. Plaintiff-appellant instituted the present suit, No. 24 of 1904, to recover the land, on the ground that Sani Pyu had not paid the redemption money as ordered in the decree in suit No. 80 of 1900.

The first objection taken in the written statement is that the judgment in suit No. 80 of 1900 was final, and the present suit is altogether barred by it. The last paragraph of the written statement again presses the point that the first objection should be decided first; yet neither the Township Court nor the District Court took the slightest notice of it. This is all the more surprising as the Judge of the Township Court began his judgment with the words "This is in fact a suit for the foreclosure of the right of redemption." This is quite correct, but it follows that the objection taken in the written statement is good. The question of foreclosure must necessarily be determined in the suit for redemption.

The decree in suit No. 80 is defective, but even as it stands it points to the necessity for a final decree in case the money is not paid in time. Sample decrees are given in *Maung Mo Gale* v. *Ma Sa U* (1). It is true that that judgment was not in existence to guide the Court in suit No. 80 of 1900, but it was in existence to show the Courts in 1904 that the plaint in suit No. 24 contained no cause of action.

The facts found are that the money was ordered to be paid on or before 31st January 1901. Defendant paid it on 7th January, but he also appealed, and the decree was reversed. Plaintiff appealed to the Chief Court, and the decree of the Township Court was restored on 20th August 1901. Defendant drew the redemption money out of Court on 17th September 1901, why or on whose order is not known.

Now, if plaintiff did not know that the money was in Court when the decree of the Chief Court was passed, her proper course was to apply to the Court to pass a final foreclosure decree in suit No. 80. So long as such a decree is not passed she has no right to possession of the land. The decree of the District Court now appealed against is correct, though the reasons on which it is based are irrelevant.

The appeal is dismissed with costs.

(1) (1902) 1 L. B. R., 186.

Before Mr. Justice Irwin, C.S.I.

Civil 2nd Appeal No. 246 of 1905.

MAUNG MEIK *v.* K. A. MEYAPPA CHETTY.

April 4th 1906.

Pennell—for appellant. | *Cowasjee*—for respondent.

"Same matter"—Civil Procedure Code, sections 28, 45—multifariousness.

"Matter," in section 28 of the Code of Civil Procedure, means the subject matter of the suit. Hence, a suit against the makers of a promissory note and against a party who has subsequently become surety for the payment of the amount is not multifarious.

Narsingh Das v. *Mangal Dubey*, (1832) I. L. R., 5 All., 163, cited.

The respondent instituted this suit against three persons, and the substance of his plaint is that on 5th December 1903, the 1st and 2nd defendants executed a promissory note for Rs. 1,000, that after about two months plaintiff demanded payment, and threatened to sue the defendants and attach their property, that 3rd defendant, on consideration of plaintiff giving time to the 1st and 2nd defendants, became surety for the payment of the amount due on the promissory note. On these facts plaintiff prayed judgment against all the three defendants for the amount due on the note, and costs.

The 3rd defendant alone contested the suit. A decree was given against all three. Maung Meik appealed and was unsuccessful. He appeals again on the sole ground that the suit is bad for multifariousness. This objection was not taken in the lower Courts, but appellant urges that it affects the jurisdiction of the Court.

Appellant relies mainly on the Allahabad Full Bench ruling in *Narsingh Das* v. *Mangal Dubey* (1). The facts of that case are so totally different from those of the present case that the judgment is important only in respect of the interpretation put on the words "the same matter" in section 28, Civil Procedure Code. The meaning of those words, however, is the main point in this appeal. The four Judges who formed the majority of the Bench expressed some doubt whether "the same matter" means "the same cause of action." They first described the expression "same matter" as "an expression it is difficult to interpret as meaning more than the same cause of action." A little later they said "whether the use of the two expressions 'cause of action' and 'matter' was intended to convey any very important distinction or difference is not particularly clear, though there is no doubt force in the argument that coming so near to one another in the Act, they can scarcely be construed as bearing precisely the same meaning." Finally, by assuming that section 28 must be read with section 45, they arrived at a conclusion which implies that the two expressions have precisely the same meaning. Mr. Justice Mahmood held that "matter" is not indentical with "cause of action," and his reasoning commends itself to my judgment. The method employed by the majority of the Court, namely, comparing the Code with the rules of the English Judicature Act, is not in my opinion a sound method of arriving at the meaning of an Indian statute.

(1) (1882) I. L. R. 5 All., 163.

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If plaintiff had first obtained a decree against the 1st and 2nd defendants, and failing to obtain satisfaction had then sued Maung Meik, he would almost certainly have been met by the objection that the suit was barred by sections 42 and 43, Civil Procedure Code, an objection which it would be very difficult to meet, especially in view of the last clause of section 43, in which there is no mention of the obligation and the security being contemporaneous.

I have not the least doubt that "matter" in section 28 means the subject matter of the suit; and in the present suit the subject matter is a debt of Rs. 1,000 and interest. The three defendants were rightly joined, and the suit is not multifarious.

The appeal is dismissed with costs.

Civil Misc. Appeal No. 26 of 1905.

February 27th, 1905.

Before the Hon'ble C. E. Fox, Offg. Chief Judge, and Mr. Justice Irwin, C.S.I.

MAUNG BWA *v.* MA THI.

Pennell—for appellant (defendant).

Lentaigne—for respondent (plaintiff).

Probate and Administration—legal representative of deceased—right of other party than executor to sue for debts due to estate—Probate and Administration Act, 1881, ss. 4, 82.

Under section 4 of the Probate and Administration Act, 1881, the executor or administrator is ordinarily the only person entitled to sue for recovery of property belonging to the deceased's estate. But where there is collusion between the executor or administrator and a debtor to the estate, a party interested in the estate may sue both the administrator and the debtor for the recovery of the debt.

Oriental Bank Corporation v. *Gobinloll Seal*, (1884) I. L. R., 10 Cal., 713, referred to.

The gist of the statements in the plaint is as follows:—The plaintiff is the sole surviving sister and heir of Ma Ye who died at Tavoy in 1900. Ma Ye was at the time of her death entitled to and in possession of the piece of land sued for. In 1903 letters of administration to Ma Ye's estate were granted to the second defendant Maung Shwe Hlwa. The plaintiff had instituted a suit against Maung Shwe Hlwa in 1902, and had ultimately obtained a decree declaring her to be the sole heir and entitled to the whole estate of Ma Ye. In that suit Maung Shwe Hlwa, acting in collusion with the first defendant Maung Bwa, had pleaded that the piece of land now sued for had been sold by Ma Ye to Maung Bwa, and that only a balance of Rs. 400 of the purchase money was due by the latter. No decision on this matter had been given in that suit. The plaintiff denied that any such sale had taken place, and she now claimed judgment in this suit for possession of the land. She sued in her personal capacity; the second defendant Maung Shwe Hlwa was sued as administrator to the estate of Ma Ye. It is unnecessary to refer to the defence, as the learned Judge of the District Court dismissed the suit on the preliminary point to be hereafter discussed. Upon appeal to the Divisional Court, the decree of the District Court was set aside, and the case was remanded for trial under section 562 of the Code of Civil Procedure. The appeal before us is against that order.

The ground on which the Judge of the District Court dismissed the suit was that it was barred by section 82 of the Probate and Administration Act. That section is as follows:—

"After a grant of probate or letters of administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise *act as representative of the deceased*, throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked."

A very lengthy argument has been addressed to us in support of the proposition that this section was an absolute bar to the plaintiff's suit.

Mr. Pennell's argument involves two propositions—(1) that no other than the administrator can sue as representative of the deceased, and (2) that no person can sue, except as representative of the deceased, to recover any part of the estate. The former proposition is contained in section 82, the latter is not. Plaintiff never claimed to sue as representative, and the frame of her suit shows that she did not sue in that character. Section 82 therefore has nothing to do with the suit.

If any section of the Act has a bearing on the question of the plaintiff's right to sue the first defendant, it is section 4, which says:—

"The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such."

If the property sued for was Ma Ye's property at the time of her death, it vested in the second defendant by virtue of this section. If this was so, then under the ordinary rule of law that the person having the legal title is the proper person to sue another for recovery of property, the second defendant is the only person who could sue the first defendant for the property now in question.

The Courts of England however in special cases allow parties interested in an estate to sue both the administrator and debtors to the estate for the recovery of a debt due to the estate. Collusion between the administrator and the debtor is one of the cases in which this is permitted to be done.—*See* Williams on Executors (10th Edition), p. 1650.

There is no distinction in India, so far as inheritance and liability to payment of debts are concerned, between what is called real and personal property in England, and immoveable and moveable property in India.

The question is whether the above exception to the general rule should be allowed in this country. The exception is founded on equity, and equitable principles are as applicable in this country as they are in England. The matter was discussed at length in the *Oriental Bank Corporation* v. *Gobinloll Seal* (1). The decision in that case, so far from being an authority that the exception to the general rule is not applicable in this country, expressly recognises that it is applicable. The suit was dismissed on the ground that there was an adminis-

(1) (1884) I. L. R., 10 Cal., 713.

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tration suit pending in which the plaintiffs could obtain their remedy. *Wilson* J. said:—

"In the present case, had there been no administration suit pending, there would have been, in the collusion of the administratix and the trustees, a substantial impediment to her suing them, and a strong probability of the loss of the assets, unless a suit like the present were admitted, and, in my judgment, the authorities show that it would have lain."

Garth, C. J. was disposed to hold that the suit lay in spite of the pending administration suit.

The last illustration to section 50 of the Code of Civil Procedure shows that the legislature contemplated that the exception to the general rule would be applicable in India.

The decision of the Divisional Judge that section 82 of the Probate and Administration Act was not a bar to the suit was certainly correct, and there is no other express provision of law which bars it.

The appeal is dismissed with costs.

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minal Revi- No. 1648 of 1905.

nuary 30th, 1906.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* PO TAW.

Throwing missiles at human beings—offence committed.

To throw a bottle into a house, among the inmates, with the intention of hurting or frightening them, constitutes the offence of assault (section 351, Indian Penal Code), and not an offence under section 336.

Crown v. *Nga San Pe*, (1902) 1 L. B. R., 259, referred to.

The facts found are that accused went into Tun Wa's house, struck Tun Wa, exposed his person indecently, and then went out and threw a bottle into Tun Wa's house, where Tun Wa and his family were. For throwing the bottle he was convicted of a rash and negligent act under section 336, Penal Code. The bottle was obviously thrown for the purpose either of hurting some of the inmates of the house or of frightening them. Such an act is neither rash nor negligent within the meaning of the Penal Code, as was pointed out in *Crown* v. *Nga San Pe* (1). To merely raise the bottle in his hand and make a feint of throwing it at the house would be an assault as defined in section 351, Penal Code. *A fortiori* the act of throwing it into the house where it broke some cups was an assault.

I alter the conviction under section 336 to one of assault, under section 352, Penal Code.

The sentence will stand.

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vil Misc. cation No. 9 of 1906.

nuary 28th, 1906.

Before Mr. Justice Irwin, C.S.I.

SHAIK BUFFATI *v.* KALLOO KHAN.

N. C. Sen—for applicant.

Pauper appeals—limitation—Civil Procedure Code, 1882, sections 413, 582A.

Section 413 of the Code of Civil Procedure applies to petitions for leave to appeal as a pauper. When such a petition is dismissed, the appeal does not

(1) (1902) 1 L. B. R., 259.

continue to subsist, and the appellant's only course is to present an appeal in the ordinary way, duly stamped.

Bai Ful v. *Desai Manorbhai Bhavanidas*, (1897) I. L. R., 22 Bom., 849, followed. *Skinner* v. *Orde*, (1879) I. L. R., 2 All, 241; *Girwar Lal* v. *Lakshmi Narain*, (1904) I. L. R., 26 All., 329; referred to.

The order of the Divisional Court dismissing the appeal is dated 28th April 1905. The present application for leave to appeal as a pauper was presented on 1st February 1906. It is admittedly out of time, and section 5 of the Limitation Act does not apply to it.

Petitioner's advocate asks for leave to pay the stamp on the appeal, and for a month in which to do so. He relies on a medical certificate from Captain Röst, I.M.S., to the effect that petitioner was laid up with typhoid and diarrhœa from the beginning of June to 29th January.

In support of his request he cites the case of *Bai Ful* v. *Desai Manorbhai Bhavanidas* (1). In that case the petition for leave to appeal as a pauper was presented within time. After some months spent in the inquiry it was dismissed. Thereafter the petitioner applied for leave to stamp the appeal within a week, and this was granted. The District Judge did not say whether he treated the appeal as having been presented within time though unstamped, or whether he considered it as presented only when stamped, and admitted it under section 5 of the Limitation Act. Two Judges of the High Court upheld his action, but for different reasons. The learned Chief Justice held that the appeal was presented unstamped and was not a nullity, and on the analogy of section 582A the District Court was right in allowing the appellant to stamp it. He relied on the decision of the Privy Council in *Skinner* v. *Orde* (2). Mr. Justice Candy held that section 413, Civil Procedure Code, applies to appeals, and that when the application for leave to appeal as a pauper was dismissed the appeal did not continue to subsist, and the only course open to the appellant was to file an appeal in the ordinary way. He considered that the District Court in effect excused the delay under section 5 of the Limitation Act.

That case is not on all fours with the present one, because the petition was in time and was dismissed on the merits. But the principles discussed in it apply to the present case.

Mr. Justice Candy's view of the law was adopted in *Girwar Lal* v. *Lakshmi Narain* (3), and it commends itself to me. I think he gives sound reasons for holding that section 413 applies to appeals.

I dismiss the petition, and, following the suggestion of Mr. Justice Candy on page 859 of the report above quoted, I direct that the appeal and copies of judgments and decree be detached from the petition and returned to the petitioner. If he chooses to stamp the appeal and present it again the question whether the delay can be excused under section 5 of the Limitation Act will then be considered.

(1) (1897) I. L. R., 22 Bom., 849. | (2) (1879) I. L. R., 2 All., 241.
(3) (1904) I. L. R., 26 All., 329.

minal Appeal
. 170 of 1906.

pril 7th, 1906.

Before Mr. Justice Irwin, C.S.I.

PO MAUNG *v.* KING-EMPEROR.

Cases of hurt or grievous hurt—duty of Magistrate in classifying—Penal Code, s. 320.

In cases of hurt, it is the duty of the Magistrate to come to a finding of his own as to whether the hurt was grievous or simple, and for this purpose to examine the medical officer to ascertain whether the injuries are of any of the kinds specified in section 320 of the Indian Penal Code. It is not the business of the medical officer to classify a hurt as grievous or simple, but to describe facts, from which the Magistrate will decide whether the hurt is grievous or not.

I admitted this appeal solely because I had doubt about the nature of the injuries.

The Magistrate says of Po San, "The wounds on the abdomen were dangerous to life, and were classed as grievous." The medical evidence is simply this: "Owing to the abdominal wounds I classified the case as one falling under clause 8 of section 320, all being inflicted with a sharp weapon." How the medical officer classified the case is perfectly immaterial. It is not his business to decide whether a wound is grievous hurt or not. His duty is to describe the facts. It is for the Magistrate to classify. Clause 8 of section 320 contains three different sets of facts, any one of which would constitute grievous hurt. The medical officer did not say that the wounds collectively or any of them endangered the patient's life, nor that they caused him for 20 days to be in severe bodily pain, nor that they caused him to be for 20 days unable to follow his ordinary pursuits. There is thus no evidence on the record that Po San's injuries were grievous.

The Magistrate says the wound on Mi Kywin's stomach was no doubt dangerous to life. He cannot lawfully assume that it is grievous without evidence to that effect. The medical officer did not say how far the wound penetrated. He said it was a grievous hurt inflicted with a sharp weapon, but did not say why he considered it grievous. The woman was 15 days in hospital. There is no evidence on which the Magistrate could lawfully find that the wound was grievous hurt, either because it endangers life or for any other reason.

Ye Hlaing had 8 wounds, of which two were on the abdomen. The medical officer said he classified it (the case?) as falling under clause 8 of section 320 because the pleura and lungs were punctured. Here is exactly the same omission as in Po San's case. Ye Hlaing was 19 days in hospital. There is no evidence on which the Magistrate could lawfully find that the hurt was grievous.

I direct that the record be returned to the Magistrate, who will recall the medical officer and examine him to ascertain facts on which it may be possible to decide whether the hurt in each case was grievous or not.

I remark that in his written reports the Hospital Assistant entirely disregarded the printed directions at foot of Police Form 75 about clause 8 of section 320.

Before Mr. Justice Irwin, C.S.I.

Criminal Revision No. 8 of 1906.

February 14th, 1906.

PO LWIN *v.* KING-EMPEROR AND MA ME.

Lambert—for applicant | *Patker*—for respondent.

Disposal of property seized by Police—Criminal Procedure Code, 1898, section 523.

In disposing of property seized by the Police, if the Magistrate finds that the person entitled to possession is known, he need not issue any proclamation. If he has issued proclamation, that will not prevent him from ordering immediate delivery of the property to a person to whom he might have ordered delivery without issue of proclamation.

When the Magistrate finds that a claim which has been made is proved provided no other claimants appear, he should wait until the six months specified in the proclamation have expired before passing final orders.

Queen-Empress v. *Mahalabuddin*, (1895) I. L. R., 22 Cal, 761, cited.

On 6th April 1905 the house of Ma Me in Prome was searched by the police who took possession of 101 sovereigns and 3,506 rupees. Nga Kauk and his wife Ma E Hla were staying in the house at the time. Nga Kauk was arrested then, and was tried before the Chief Court for obtaining money on forged mates' receipts from different persons, one of whom was the petitioner Po Lwin.

After the trial the presiding Judge sent the sovereigns and rupees to the District Magistrate, to be dealt with under section 518, Code of Criminal Procedure. On 29th July the District Magistrate ordered proclamation to issue under section 523, but it was not issued then.

On 31st July Ma Me claimed Rs. 3,194. On 1st August Ma E Hla claimed all the sovereigns and Rs. 312. On 3rd August Po Lwin claimed Rs. 4,500. Notice was sent to all three that their claims would be inquired into on 28th August, and the general proclamation which had been ordered on 29th July was published on 17th August.

The evidence adduced by the three claimants was heard, and on 30th September the District Magistrate passed orders. He held that Ma Me had substantiated her claim, and he ordered Rs. 3,194 to be paid to her. With respect to the rest of the money, 101 sovereigns and Rs. 312, his finding is that it appears to be part of the money fraudulently obtained by Nga Kauk, but Po Lwin had not proved that it had been obtained from him: it might nave been obtained from another victim of the frauds. He therefore deferred passing orders for the disposal of this money until the six months specified in the proclamation had expired.

Po Lwin applies for revision of these orders on the grounds that—

(*a*) On the evidence Ma Me has not established her right to the Rs. 3,194.

(*b*) No final order about this sum should have been passed until the expiry of the six months.

(*c*) If that order was right the rest of the money should be paid to Po Lwin at once, as the evidence in support of his claim was just as good as the evidence for Ma Me.

The first ground is untenable. I decline to go into questions of fact on the evidence.

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The second point is not free from difficulty. The petitioner relies on the case of *Queen-Empress* v. *Mahalabuddin* (1), in which the only claimants were the persons from whom the Police had taken the property. The Magistrate was satisfied that the property did not belong to the petitioners, and therefore directed that proclamation should issue under section 523. In the application to the High Court the substantial grievance set out by the petitioners seems to have been that the Magistrate had refused to summon some witnesses because there was delay in applying for summons. The Magistrate replied that he was not bound to record evidence at all. The decision of the learned Judges was this—

"It is clear to us that it is not intended that any final steps should be taken by the Magistrate, or that (*sic*) he is bound to take any final steps to ascertain whether the property belongs to the person in whose possession it was found, until after the expiry of the six months, but when the proclamation has been issued and the six months have expired, then the provisions of section 524 come in, and the person in whose possession it was found can come forward and show that it is his own."

That case is not similar to the present one. The point there was that the Magistrate had not fully inquired into the petitioners' claims before issuing the proclamation. In this case the claims have been fully inquired into. Ma Me's claim was not made under the proclamation. Her claim was a claim under section 523 that she was known to be entitled to the property, and the Magistrate found that claim proved. The issue of the proclamation was a matter apart from her claim, and the Magistrate's object in issuing it seems to have been to save time in case the claims of Ma Me and Ma E Hla were not established. The decision of the learned Judges in th Calcutta case, that it is not intended that the Magistrate should take any final steps, and that he is not bound to take such steps, on the claim of the person who was found in possession until the six months have expired, does not seem to me to be equivalent to saying that the Magistrate cannot lawfully adjudicate on the claim of that person without issuing any proclamation at all. In my opinion the section empowers him to do so, and if he thinks fit to do so, it cannot be said that the person entitled to the property is unknown until the Magistrate has decided that the person in whose possession it was found has failed to prove his claim. The Magistrate was not bound to issue any proclamation about the Rs. 3,194, and the fact that he did issue such proclamation does not, in my opinion, invalidate the order he made on Ma Me's claim.

The third point is one of mixed law and fact. The proposition of law, that if the order in Ma Me's favour is right, the rest of the money should be paid to Po Lwin at once, depends on the assumption of fact that Po Lwin has proved his claim. The Magistrate finds that he has not proved his claim, and I decline to interfere with this finding of fact. Moreover Ma E Hla is the person who claimed that the money was taken from her possession. The Magistrate has dismissed her claim to be entitled to the possession of it. Po Lwin's claim also has

(1) (1895), I. L. R., 22 Cal., 761.

been found not fully proved. The Magistrate's decision seems to amount to this, that the money belongs to some one or other of Nga Kauk's victims, that those victims have not all presented claims, and that they are entitled to the full six months in which to present them. In my opinion this construction of the law is correct.

The application is dismissed.

PO LWIN v. KING-EMPEROR. AND MA ME.

Before the Hon'ble C. E. Fox, Officiating Chief Judge.

KING-EMPEROR *v.* BA TIN.

Criminal Revision No. 599 of 1906.

June 5th, 1906.

Accused person refusing to sign record—Criminal Procedure Code, s. 364 (2).

An accused person who refuses to sign the record of his examination by the Court does not commit an offence punishable under section 180 of the Indian Penal Code.

Imperatrix v. *Sirsapa*, (1877) I. L. R., 4 Bom., 15, followed.

When examined as an accused by a Magistrate inquiring into an offence alleged against him, the accused refused to sign the record which the Magistrate made of the questions put to and the answers given by him.

The Magistrate sanctioned his prosecution under section 180 of the Indian Penal Code, and sent him for trial before another Magistrate. The latter convicted him of an offence punishable under the above section. The case has been referred with a view to obtaining a ruling of this Court on the legality of the conviction.

In *Imperatrix* v. *Sirsapa* (1) the majority of the learned Judges held that an accused person who refused to sign the record of his examination by the Court did not commit an offence punishable under section 180 of the Indian Penal Code. I agree with that decision. It appears to me that the provision of sub-section 2 of section 364 of the Code of Criminal Procedure as to an accused signing the record of his examination is merely directory of what the procedure should be. The section itself says that the record shall be signed by the accused, but it imposes no penalty on him if he does not sign it. The procedure indicated involves the Magistrate offering the record for the accused's signature, but it does not empower the Magistrate to require his signature. It is only when a person refuses to sign a statement which a public servant is legally empowered to require him to sign that he renders himself liable to punishment.

I set aside the conviction and sentence and find the accused not guilty.

Before the Hon'ble Sir Harvey Adamson, Kt., C.S.I. Chief Judge.

NGA HMVIN *v.* KING-EMPEROR.

Criminal Revision No. 121 of 1906.

Lambert—for applicant.

February 28th, 1906.

Occupier of land reaping crop sown by a trespasser—charge of theft not sustainable.

If a person trespasses on land in the possession of another and sows paddy on it, that does not entitle him to property in the paddy that results from the sowing; and if the person in possession reaps and removes such paddy he does not thereby commit theft.

(1) (1877) I. L. R. 4 Bom., 15.

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Both of the Lower Courts have based their decisions on the ground that the complainants sowed the paddy, and that therefore the accused committed theft by reaping and removing it.

The evidence adduced by the accused, which appears to be as good as that adduced for the prosecution, that the accused also sowed seed has been altogether ignored.

But even if it be admitted that the complainants sowed the seed, it has not been shown that they did so otherwise than as trespassers. They in fact were convicted for having trespassed on the land and sown the seed, but were acquitted on appeal on the technical ground that their intention was not to insult, intimidate or annoy the person in possession.

There is no reliable evidence that the complainants were ever in possession of the land, in fact the inference from their own evidence is the reverse, for accused was in possession and paid the revenue in the previous year.

If a person trespasses on land in the possession of another and sows paddy on it, that does not entitle him to property in the paddy that results from the sowing, and if a person in possession of land reaps and removes paddy that has been sown on it by a trespasser, he does not thereby commit theft.

The conviction and sentence are set aside and the accused is acquitted.

Criminal Appeal No. 232 of 1906.

May 21st, 1906.

Before Mr. Justice Irwin, C.S.I.

THA PO *v.* KING-EMPEROR.

Agabeg—for appellant.

Criminal breach of trust—money paid to another for purchase and supply of paddy—Indian Penal Code, s. 405.

A paid B Rs. 1,355, to be used by B in buying paddy and supplying it to A. B dishonestly converted the money to his own use and did not supply any paddy.

Held,—that B had been "entrusted" with the money within the meaning of section 405 of the Indian Penal Code, and had been rightly convicted of criminal breach of trust under section 406.

Pwa Gyi v. *Queen-Empress*, (1893) 2 Bur. L. R. 9, followed.

Maung Myaing v. *Queen-Empress*, (1893) 2 Bur. L. R., 11, dissented from.

On 29th December Maung Than paid appellant Rs. 1,355 for the purpose of buying paddy. Appellant and his wife Ma Chit Su signed a receipt for the money. Appellant denied that he signed the receipt exhibit A, and says he signed a promissory note. There is no reason to doubt that he signed exhibit A, which is in a form specially printed for transactions of this kind.

The money appellant received was 13 currency notes of 100 each, and 55 rupees.

On 31st December appellant's wife brought Maung Than a letter signed by appellant saying that he had lost 12 of the 13 notes. He missed them on getting out of a *gari* at Hlegu, and he thought they must have dropped out of his pocket at Dabein Railway station.

Two men who travelled with appellant to Hlegu say he never mentioned the loss to them. Ko Kyet of Hlegu says appellant came to

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Hlegu to buy paddy and put up in his house, but did not mention the loss.

Appellant stayed the night in Hlegu. He did not report his loss either to the police or to the *Thugyi*. Next morning he returned to Dabein and reported to the *Thugyi* there.

On 30th or 31st December appellant's wife paid a debt of Rs 270 to Ma Le, by two notes of Rs. 100 and 7 notes of Rs. 10. Neither appellant nor his wife has vouchsafed any explanation of how they got this money except that they had it before.

The Colonial Italian Trading Company sued the appellant for Rs. 439, and obtained a decree about the middle of January. Appellant owes Anamale Chitti Rs. 100, and paid four months' interest last November. Under these circumstances the statement that they had the Rs. 270 before is not credible and Ma Le's statement that appellant said he would pay her when he got an advance from Maung Than makes it almost certain that he did pay her out of the money received from Maung Than. Appellant himself says that he changed one of the Rs. 100 notes, which accounts for the Rs. 10 notes paid to Ma Le.

Ma Le said she had noted the numbers of the notes on a piece of paper, but did not know where that paper was. She ought to have been asked what she had done with the notes.

The evidence for defence given by Po Mya of Hlegu and Kaung Gyaw is in no way inconsistent with the theory that the notes were not lost at all. It is almost incredible that after discovering his loss at Hlegu as he pretended to do appellant would spend the night there without mentioning the loss to his host or to the police or the *Thugyi* or the Magistrate, if the loss were real. I think it is proved beyond reasonable doubt that the story of losing 12 notes out of his pocket is false from beginning to end. It must be inferred that appellant converted the money to his own use. From the circumstances it is quite clear that the conversion was dishonest. It remains to be considered whether appellant had been entrusted with the money within the meaning of section 405 of the Penal Code.

I am indebted to Mr. Agabeg for putting before me two rulings by Recorders of Rangoon, the first in *Maung Pwa Gyi* v. *Queen-Empress* (1), by Mr. Agnew, which is against the appellant, and the second in *Maung Myaing* v. *Queen-Empress* (2), by Mr. McEwen, which is in the appellant's favour. In both cases the money said to be misappropriated was money advanced for the purpose of buying paddy. In each case the accused signed a promissory note for the money, and promised to use the money advanced for the purpose of buying paddy. In the earlier case it was found that the accused had used the greater part of the money for his own purposes; in the later case the finding of a breach was based merely on non-delivery of paddy and absconding.

The material part of Mr. Agnew's judgment is as follows:—

"It has been argued for the appellant that the conviction was wrong inasmuch as no trust was created. The contention is that the transaction amounted only to a loan and that when the relation of debtor and creditor is established, no charge

(1) (1893) 2 Bur. L. R., 9. | (2) (1893) 2 Bur. L. R., 11.

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of criminal breach of trust can be maintained, unless some other legal status is created. The fact that the appellant agreed to pay interest is relied upon as showing that the transaction was merely a loan. But the fact that the relation of debtor and creditor is established does not necessarily make it impossible to convict the debtor of criminal breach of trust. Such a relation exists between a banker and his customer in respect of the customer's money in the banker's hands. The banker is entitled to use that money in legitimate banking business. If he loses it in such business, he cannot be liable for criminal breach of trust. But if he dishonestly uses that money he can be made liable. The agreement to pay interest does not, I think, make any difference. A banker may agree to pay interest to his customer on the money deposited by the latter, but that will not prevent him from being liable for criminal breach of trust, if he uses the money deposited dishonestly. Of course the banker is liable under a different section of the Penal Code. The definition of criminal breach of trust, however, is the same in each case. It appears to me that, though the word "advance" is made use of in the agreement, this was not a "loan" in the ordinary sense of the word. The appellant got the money from Messrs. Bulloch Brothers & Co. for a specific purpose, namely, to buy paddy for them, and he was bound either to return the money to them or to supply them with paddy purchased with it, or some portion of it, and, if it was not all applied in the purchase of paddy, to return the balance. It is perfectly certain that the appellant would not have got the money except on those terms. Messrs. Bulloch Brothers & Co. are not money-lenders, and if the appellant had simply applied for a loan on the security of his boat, promissory note and the guarantee of the brokers he would not have got it. The question, as Mr. Mayne says in his notes to section 406 of the Indian Penal Code, is "Did the party know that he was holding the property under a trust and did he wilfully violate the trust, intending to defraud"? Now a trust is a confidence reposed in some other person, and the appellant must have known that, but for the confidence reposed in him that he would apply the money in the purchase of paddy, he would not have got it. It was not handed to him, to be applied as he thought fit, as is the case in an ordinary loan, but it was handed to him in the belief that he would apply it in a particular way for the owner's benefit. It was therefore, in my opinion, "entrusted" to him within the meaning of section 405 of the Indian Penal Code."

Mr. McEwen on the other hand seems to have substantially held that there was no trust because the case did not come within any of the illustrations to section 405, although he said that those illustrations are not exhaustive.

Mayne does not mention any case such as he present, but he suggests as a definition of a trust, "any arrangement by which one person is authorized to deal with property for the benefit of another."* If that definition be correct it is immaterial whether the money was lent or not, so long as it was advanced for a specified purpose for the benefit of the lender. The definition supports Mr. Agnew's ruling.

The appellant's case is that the money was lent to enable him to buy paddy, which he was to sell to Maung Than. He was to buy at any rate he could, and to sell at the ruling rate at the time of delivery. He was to make and retain any profit he could in this way; and if the rate in Rangoon suddenly fell he would have to bear any consequent loss. There is no evidence on these points, but the accused's view of the contract may be accepted. It is substantially the same as in the two cases cited above. Mr. Agnew's decision turns on his opinion that the relation of debtor and creditor is not incompatible with the existence of a trust in respect of the money advanced. The money was advanced for a specific purpose, and apart from that purpose it would not have

* Criminal Law of India, 3rd ed., 754.

been advanced at all. I agree with Mr. Agnew, and I think that in the present case also the money was entrusted to the appellant within the meaning of section 405 of the Penal Code.

The sentence is not excessive. The appeal is dismissed.

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Full Bench—(Civil Reference.)

Before the Hon'ble C. E. Fox, Officiating Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

Civil Reference No. 4 of 1906.

LU BEIN *v.* PO SEIN.

May 17th, 1906.

J. R. Das—for applicant. | *Maung Sein*—for respondent.

Appeals from orders—order rejecting an application to set aside an order passed ex-parte under section 280, Civil Procedure Code—Civil Procedure Code, ss. 108, 588 (9), 647.

Clause 9 of section 588 of the Code of Civil Procedure, 1882, applies only to orders setting aside *ex-parte decrees*. An order under section 280, releasing property from attachment, is not a decree, and therefore no appeal lies against an order rejecting an application under sections 108 and 647 to set aside such an order passed *ex-parte*.

Minakshi Naidu v. *Subramanya Sastri*, (1887) I. L. R. 11 Mad., 26, referred to. *Poresh Nath Chatterjee* v. *Secretary of State for India*, (1888) I. L. R. 16 Cal., 31, dissented from.

The following reference was made by *Irwin, J.*:—

The Judge of the Divisional Court says: "It is now urged for the respondent that section 108 does not apply to cases of this nature."

Mr. J. R. Das who appeared for Lu Bein in this Court, appeared for him in the Divisional Court also. He does not contend that section 108 does not apply, but that there is no appeal against an order rejecting an application to set aside an order passed *ex-parte* under section 280, releasing property from attachment. He says this was what he urged in the Divisional Court. The Judge took no notice whatever of this argument.

Even if this point had not been raised at all in the Divisional Court, that would make no difference here, as it goes to the roots of the Divisional Court's jurisdiction. It is an objection which cannot be ignored, even if raised now for the first time. That is the law as laid down by the Privy Council in *Minakshi Naidu* v. *Subramanya Sastri* (1).

Section 588 (9) allows an appeal against an order rejecting an application under section 108 to set aside a decree passed *ex-parte*. Section 108 applies only to decrees, but the procedure therein prescribed is extended by section 647 to orders passed *ex-parte* under section 280. But does section 647 operate also to allow an appeal under section 588 (9), in which only decrees are mentioned, not orders?

I have no hesitation in rejecting the respondent's proposition that an order under section 280 is a decree. The definition of a decree embraces only orders in suits, appeals and execution proceedings. An application for removal of attachment is none of the three.

That being so, there can be no appeal unless it is expressly allowed by section 588. I should be inclined to say that no appeal lies because clause 9 of section 588 contains no express reference to section 647 nor to *ex-parte* orders as distinguished from *ex-parte* decrees, but a

(1) (1887) I. L. R. 11 Mad., 26.

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Bench of the Calcutta High Court seems to have held a different opinion in *Poresh Nath Chatterjee* v. *Secretary of State for India* (2) in which case a Judge acting under the Land Acquisition Act, X of 1870, refused to set aside his *ex-parte* order. There seems to be no reason for supposing that an award or order under that Act was ever regarded as a decree within the meaning of the Civil Procedure Code, but the learned Judges held that having regard to the provisions of section 647, an appeal lay.

I therefore refer to a Bench of this Court the question:—

Does an appeal lie, under clause 9 of section 588 of the Civil Procedure Code, against an order rejecting an application under sections 108 and 647 of the same Code, to set aside an order passed *ex-parte* under section 280, releasing property from attachment?

The opinion of the Bench was as follows:—

Fox, Offg. C. J.—I would answer the question referred in the negative.

In my opinion clause 9 of section 588 of the Civil Procedure Code applies only to what is expressly mentioned therein, namely, orders rejecting applications under section 108 for an order to set aside a decree *ex-parte*. The applicant in this case had not made an application to set aside a decree. What had been passed against him was an order under section 280, which is not a decree.

Irwin, J.—I concur.

Hartnoll, J.—I concur.

Criminal Appeal No. 323 of 1906.

June 14th, 1906.

Before Mr. Justice Irwin, C.S.I.

DOLABI *v.* KING-EMPEROR.

False evidence – sending a witness for trial, section 476 Criminal Procedure Code.

When a witness at a Sessions trial contradicts the evidence which he gave before the committing Magistrate, the Sessions Judge should not, without some special and cogent reason, order the prosecution of the witness for giving false evidence, unless he is satisfied that the evidence given at the Sessions trial was false.

Queen-Empress v. *Po Nyun*, (1894) P.J L.B., 79, followed.

Before the committing Magistrate Mi Dolabi stated that one Abdul Majid had raped her. When he had been committed for trial Mi Dolabi stated before the Court of Session that she had never had sexual intercourse with Abdul Majid and that she had given false evidence before the Magistrate because the headman threatened to beat her.

The learned Sessions Judge under section 476 of the Code of Criminal Procedure sent her to a Magistrate to be tried for perjury. He expressed no opinion as to which of the depositions made by the accused was false. He merely said that one or other of them must be false and she was probably tutored.

She was charged, not in the alternative, but simply with giving false evidence before the committing Magistrate with intent to cause Abdul Majid to be convicted of rape. She pleaded guilty and said she gave false evidence because she was afraid her uncle and the other villagers would beat her.

(2) (1888) I. L. R. 16 Cal., 31.

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In her appeal she says that Abdul Majid bribed her uncle, who thereupon threatend to beat her if she did not retract before the Court of Session the evidence she had given before the Magistrate. This last version of the facts deserves no consideration.

In *Queen-Empress* v. *Nga Po Nyun* (1) the learned Judicial Commissioner said:—

It is of paramount importance and the interests of justice imperatively demand that witnesses at a criminal trial shall speak the truth. A witness who has given false evidence before a committing Magistrate will be encouraged to adhere to such a false statement at the subsequent trial if he has cause to fear that by changing to the truth in the Sessions Court he will invite a prosecution for having given false evidence, merely because he may contradict his own evidence before the committing Magistrate.

The committing Magistrate may be misled by false evidence into committing an innocent person for trial. The Sessions Court may be misled by false evidence into the far more dangerous error of convicting and sentencing an innocent person.

Criminal Courts charged with the responsibility of recording a judicial decision affecting the liberty and perhaps the life of a prisoner cannot be blamed if they are reluctant to place any obstacle in the way which may hinder the truth from being elicited in the evidence adduced at the trial. There should be some special and cogent reason for a Sessions Judge sanctioning the prosecution of a witness who has given evidence at the trial, if the Sessions Judge is not satisfied that the evidence given before himself by such witness is false and such as to render the witness liable to be prosecuted under section 193 of the Indian Penal Code. A mere contradiction between the evidence given by him at the trial and the evidence given before the committing Magistrate does not constitute a special or cogent reason. For although Schedule V provides (Form XXVIII—II-4) a form of alternative charge on section 193, Indian Penal Code, any such mere contradiction affords not ground for belief that the evidence given at the trial before the Sessions Court was false.

I do not think these remarks have ever been dissented from. I entirely concur in them. In the present case there is nothing on record to show that the learned Sessions Judge thought that the evidence given before himself was false. It would have been more judicious to refrain from prosecuting Mi Dolabi.

For this reason I reduce her sentence to three months' rigorous imprisonment, a period which will have expired before this order can reach the jail.

Full Bench—(Civil Reference).

Before the Hon'ble C. E. Fox, Officiating Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

Civil Reference No. 12 of 1905.

May 14th, 1906.

In the matter of a reference made by the Financial Commissioner, Burma, under section 57, sub-section (1) of the Indian Stamp Act, 1899, as amended by the Lower Burma Courts Act, 1900, Schedule I.

Young, Officiating Government Advocate—for the Local Government.
Lentaigne—for the British India Steam Navigation Company, Limited.

Stamps—Deed of conveyance of land, duly stamped, accompanied by deed of mortgage of same land by purchaser in favour of vendor as security for balance of price—Stamp duty on deed of mortgage—Indian Stamp Act, 1899, s. 4.

The vendor Company sold a piece of land for Rs. 3,00,000 in consideration of Rs. 50,000 already paid and the execution of a mortgage of the land by the purchaser to the Company as security for the payment of the balance in yearly instalments.

(1) (1894) P. J. L. B. 79.

The conveyance was correctly stamped with a stamp of the value of Rs. 3,000. The mortgage, which bore the same date as the conveyance, bore a stamp of the value of Re. 1.

The Financial Commissioner, Burma, referred the following question for the decision of the Chief Court, under section 57, sub-section (1) of the Indian Stamp Act, 1899:—

"Of the two instruments attached to this order, *viz.*, a conveyance and a mortgage, is the first, *viz.*, the conveyance, to be regarded as a 'principal instrument' within the meaning of section 4 of the Act, and is the second, *viz.*, the mortgage, to be regarded as an 'other instrument' within the meaning of the said section or are the two instruments distinct instruments and is the second instrument, *viz.*, the mortgage, chargeable with duty on the full amount of the consideration?"

Held,—that the mortgage deed was a distinct instrument and was not "employed for completing the transaction" within the meaning of sub-section (1) of section 4 of the Indian Stamp Act, 1899. It was therefore chargeable with stamp duty on the full amount of the consideration expressed in it.

The opinion of the Bench was as follows:—

Fox, Offg. C. J.—The recitals of the conveyance or deed of sale show that the vendor Company agreed to sell to the purchaser a piece of land in Rangoon for three lakhs of rupees. The purchaser paid Rs. 20,000 of this amount prior to the execution of the agreement: he was to pay another instalment of Rs. 30,000 on or before the 1st September 1905, and the balance of the three lakhs he was to pay by yearly instalments of Rs. 50,000 payable on or before the 1st September in each year, and he was to pay interest on all instalments remaining due after the 1st September 1905. The instalments due after the payment of Rs. 30,000 on that date were to be secured to the Company by a mortgage of the land to it: that is to say the Company was not content with the charge which it would have had upon the property for the balance of unpaid purchase money under clause (*b*) of sub-section 4 of section 55 of the Transfer of Property Act, but was to have a deed or mortgage securing the balance to it.

The Rs. 30,000 having been duly paid, a conveyance was executed by the Company's Agent at Calcutta on the 26th October 1905. On the same date the purchaser executed (apparently at Rangoon) a mortgage deed securing the payment of the balance of the purchase money by instalments, as had been agreed upon. The conveyance bears the correct stamp to the value of Rs. 3,000. The mortgage bears a stamp of one rupee. It bears also the following certificate of the Collector of Stamp Revenue, Calcutta, "Certified that a stamp duty amounting to Rupees Three Thousand only has been paid on the principal instrument." This certificate is dated "Calcutta Collectorate the 4th November 1905." There is nothing to show how the mortgage came before the Collector of Stamp Revenue, Calcutta, but his endorsement is not one under section 32 of the Indian Stamp Act. It would appear to have been made under section 16 of the Act. The effect given to an endorsement under section 32 is not given to an endorsement under section 16, consequently this Court is not debarred from considering whether the mortgage deed is duly stamped.

This question depends entirely upon whether the mortgage was in the words of section 4 of the Act "employed for completing the transaction."

The section is as follows:—

4. (1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only

shall be chargeable with the duty prescribed in Schedule I for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument.

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

"In one sense, no doubt, it may be said that the mortgage was employed for completing the transaction between the parties, namely, the agreement to sell and buy the property and to secure the balance of purchase money by a mortgage. The word "transaction" however in the above section clearly refers to the sale or the mortgage or the settlement for which more documents than one have been employed. It does not include a transaction which comprises a mortgage as well as a sale.

In the present case the sale was completed by the conveyance. That effected, in the words of section 54 of the Transfer of Property Act, a transfer of ownership in exchange for a price part-paid and part-promised. It was complete in itself.

The mortgage was an entirely distinct matter: it, again in the words of the Transfer of Property Act, "transferred an interest in specific immoveable property for the purpose of securing payment of an existing or future debt."

It would be against reason to hold that a document whereby a purchaser transferred to his vendor an interest in the land he had bought from him, had been employed for the purpose of completing the transfer of the ownership of the land to him. In answer to the question referred, I would say that the mortgage deed was not employed for completing the sale of the property and that it was and is chargeable with the full amount of duty appropriate to the description of mortgage under which it comes, specified in Article 40 of Schedule I of the Indian Stamp Act, 1899.

Irwin, J.—I concur in the answer to the reference proposed by the learned Chief Judge, and I do not think the last proviso to section 24 in any way supports a contrary interpretation of section 4. The former is an express provision of law, exempting a document from part of the duty to which it would otherwise be liable under the substantive part of the section. As there is no similar express proviso in the case of a mortgage executed by a purchaser in favour of the vendor it follows that the full duty must be paid. The word "sale" in section 4 cannot be construed to include a transaction which comprises both sale and mortgage.

Hartnoll, J.—I concur in the answer to the reference proposed by the learned Chief Judge, and in his interpretation of the word "transaction" used in section 4 of the Stamp Act. The conveyance under reference seems to me to be complete in itself and to complete the sale.

The mortgage deed in my opinion was a distinct matter and was not necessary for completing the sale. It is therefore in my opinion chargeable with the full amount of duty to which it is liable under the Indian Stamp Act, 1899.

Full Bench—(Criminal Reference).

Criminal Reference No. 12 of 1906.

May 22nd, 1906.

Before the Hon'ble C. E. Fox, Officiating Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

ABBAS ALI *v.* KING-EMPEROR.

R. M. Das—for appellant.

McDonnell, Assistant Government Advocate—for King-Emperor.

Admissions by accused—charge of giving false evidence—Criminal Procedure Code, s. 342—Indian Evidence Act, 1872, s. 80.

When a person charged with giving false evidence has admitted both in his examination and in his defence that he made the statement which is alleged to be false, the conviction is not necessarily illegal by reason of the fact that no evidence of the identity of the accused with the person who made the alleged false statement was adduced.

Queen-Empress v. *Durgâ Sonar*, (1885) I. L. R. 11 Cal., 580; *Basanta Kumar Ghattak* v. *Queen-Empress*, (1898) I. L. R. 26 Cal., 49; *Mohideen Abdul Kadir* v. *King-Emperor*, (1903) I. L. R. 27 Mad., 238; *Nga Wan Ye* v. *King-Emperor*, (1903) 2 L. B. R., 53; *Yasin* v. *King-Emperor*, (1901) I. L. R. 28 Cal., 689; *New South Wales* v. *Bertrand*, (1867) 36 L. J. P. C. 51; *Queen-Empress* v. *Murarji Gokuldas*, (1888) I.L.R. 13 Bom., 389; *Regina* v. *Thornhill*, (1838) 8 C. & P., 575; cited

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

Appellant has been convicted of giving false evidence in an affidavit which he made before the Assistant Registrar of the Chief Court.

The first objection taken in appeal is that the conviction is bad in law because there is no evidence that appellant is the person who made the affidavit.

The Magistrate read the affidavit and then asked the accused, "Did you make the affidavit, Exhibit A, on solemn affirmation before the Registrar of the Chief Court?" The accused replied, "Yes. I will produce evidence to prove what I stated." He was then charged and pleaded not guilty, and the defence he made was "What I stated in the affidavit is true," and he proceeded to call 16 witnesses.

There is no doubt that the Magistrate ought to have taken evidence of the identity of the accused with the person who made the affidavit. No presumption on this point is created by section 80 of the Evidence Act. The law is explained in the last paragraph of the notes to section 80 in "The Law of Evidence applicable to British India" by Ameer Ali and Woodroffe, page 660 of the third edition.

It is equally clear that so long as this necessary evidence had not been given the question "Did you make the affidavit?" was unwarranted by section 342 of the Code of Criminal Procedure.

Appellant's advocate contends that the conviction is vitiated by want of the evidence of identity, and he cites some precedents which strongly support his contention. *Queen-Empress* v. *Durga Sonar*(1) was a reference for confirmation of a sentence of death. Durga had been offered a pardon, and examined. The pardon was revoked, and he was tried and convicted of the murder, on the statement which he had made on oath. No evidence was given to prove that he was

(1) (1885) I. L. R. 12 Cal., 580.

the person who made the statement on oath, and on this ground the High Court set aside the conviction and discharged him. *Basanta Kumar Ghattak* v. *Queen-Empress* (2) was a jury trial, in which a complaint alleged to have been presented to a Magistrate by the accused was read, and the Sessions Judge told the jury that it was a material circumstance from which the intention of the accused would be apparent. This was held to be a misdirection because there was no evidence that the complaint had ever been put in by the accused. It does not appear whether the accused was examined about it. The conviction was set aside, and a new trial ordered.

In *Mohideen Abdul Kadir* v. *King-Emperor* (3) the accused were convicted by a Magistrate of defamation in the shape of statements contained in a petition addressed to the Collector. On appeal the Sessions Judge noticed that there was no proof that the petition had been signed or sent by the accused. The Magistrate asked the accused, "Did you sign the petition?" The Sessions Judge concluded his remarks thus: "Appellants have not taken exception in their appeal memo. to the Magistrate's procedure. Had they done so, I should have been obliged to order a retrial." More than four months after this judgment in appeal the appellants applied for revision, and the learned Chief Justice held that the omission to prove the making and publishing was a defect which vitiated the conviction and he ordered a new trial.

The second of these three cases is perhaps not of much importance here. As the error of procedure culminated in a misdirection to the jury, the proper course was to set aside the conviction. The other two cases are directly in point. I feel some difficulty about following them when there is no doubt at all about the fact. The appellant admitted making the affidavit, and undertook to prove that it was true. If the appellant had not been examined about the fact of making the affidavit and had made no admission about it, I take it that the defect could be remedied by directing the Magistrate to take further evidence under section 428 of the Code of Criminal Procedure. If the more drastic course of ordering a new trial is necessary when the accused has been asked and has answered an improper question, the reason must be that there is no other way of expunging from the record the answer which was improperly obtained. When the accused has never thought of denying at the trial the authorship of the affidavit it might be said that this method of curing an irregularity amounts to preferring technicalities to substantial justice. If the matter were *res integra* I should be inclined to say that as the appellant was not entrapped into an admission, and based his defence on the truth of the affidavit, the omission to prove the making of the affidavit does not vitiate the conviction and the admission of the accused can be taken as supplying the place of evidence. It may however be thought that such a ruling might encourage laxity on the part of Magistrates and be taken as excuse for a procedure which is repugnant to British notions of justice.

The decision in this case is likely to have far-reaching consequences, for it would probably be held *a fortiori* to govern questions relating to

(2) (1898) I. L. R. 26 Cal., 49. | (3) (1903) I. L. R. 27 Mad., 238.

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the application of section 511 of the Code of Criminal Procedure, in which evidence of identity is expressly declared to be necessary. From a long experience of Magistrates' Courts in this province I can safely say that the usual practice is on production of the documentary evidence described in section 511, clause (*a*) or (*b*), to ask the accused whether he admits the previous conviction, and unless and until he denies it, no evidence of identity is produced, and this procedure seems hitherto to have been considered not a curable error, but perfectly correct, as appears from the remarks of Mr. Justice Birks in *Nga Wan Ye* v. *King-Emperor* (4), *viz.*, "The certificate in question being signed by the Jail Superintendent comes under clause (*b*) of section 511 of the Code of Criminal Procedure, 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."

Even the Calcutta High Court has held that the framing of the charge of a previous conviction without any evidence to support it was a curable error, in *Yasin* v. *King-Emperor* (5). The learned Judges remarked "On the Sessions record we have an admission by the appellant of the previous convictions duly recorded. Under section 310 of the Code of Criminal Procedure the Judge was justified in proceeding to pass sentence. The irregularity in the enquiry is to be regretted and should have been remedied at the trial, but it does not appear that the accused was prejudiced by reason of it," and the appeal was dismissed. That seems to me to be good authority for holding that in the present case if the accused had pleaded guilty the fact that there is on the record no legal evidence of one material factor in the offence would not be a good ground for disturbing the conviction and that would be so even if section 412 of the Code of Criminal Procedure did not exist. It seems to follow as a necessary corollary that appellant having in his defence expressly admitted making the affidavit the lack of legal evidence of that fact does not invalidate the trial and conviction.

The point seems to be a sufficiently important one to be considered by other Judges. I therefore refer to a Full Bench the question:—

"When a person charged with giving false evidence has admitted both in his examination and in his defence that he made the statement which is alleged to be false, is the conviction illegal by reason of the fact that no evidence of the identity of the accused with the person who made the alleged false statement was adduced?"

The opinion of the Bench was as follows:—

Fox, Officiating C. J.—In my opinion the conviction in the case was not illegal by reason of the fact that no evidence of the identity of the accused with the person who made the alleged false statement was adduced.

The reference has been made on the assumption that the question put by the Magistrate to the accused when examining him was not one justified by the terms of section 342 of the Code of Criminal Procedure. I do not think that this Bench is called upon to express an opinion upon whether such assumption is correct or incorrect. It is not itself trying

(4) (1903) 2 L. B. R., 53. | (5) (1901) I. L. R. 28 Cal., 689.

the appeal. Assuming that the question was not one warranted by section 342, the accused's defence having been that what he had stated in the affidavit was true, this involved the admission on his part that it was he who had made the affidavit. No doubt it has been said that an accused person can consent to nothing—see *The Attorney-General of New South Wales* v. *Bertrand* (6) and *Queen-Empress* v. *Murarji Gokuldas* (7). The observation however refers to irregularities of procedure, and want of jurisdiction. An accused can make admissions of facts at his trial which may relieve the prosecution from bringing evidence to prove such admitted facts. In England it was the practice of the Judges at the Assizes to refuse to allow Counsel to make any admission when the charge was one of felony: in a case of an indictment for perjury (a misdemeanour under the law of England) in which the Attorneys on both sides had agreed before the trial that the formal proof should be dispensed with and that that part of the prosecutor's case should be admitted, Lord Abinger said—"I cannot allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel." See *Regina* v. *Thornhill* (8). This shows that the accused and his counsel might have admitted facts at the trial. A plea of guilty as an extreme instance is an admission of the facts on which the charge is founded, as well as an admission of guilt in respect of them. A confession is also an admission of facts as well as an admission of guilt. An accused may confess at his trial as well as before it. There is no provision of law which says that the accused must either plead not guilty and deny all facts alleged against him by the prosecution or plead guilty or confess. There is nothing to prevent him from admitting some facts, and pleading that on those facts, or that by reason of other facts, he is not guilty of the offence charged against him.

A defence founded, for instance, upon the right of self-defence must logically be based upon the admission of the accused that he committed an act which *prima facie* was a crime.

If then an accused may at his trial admit facts, there appears to be no strong reason why the rule of evidence that what is admitted need not be proved should not apply to any fact so admitted. I guard myself however from saying that this would apply to every case of an admission. If the accused's defence in the present case had not been what it was, that is to say, if it had not involved the admission that he had made the affidavit, I think the admission made in answer to the unauthorised question of the Magistrate would not have relieved the prosecution from the obligation to prove by evidence that it was the accused who had made the affidavit. The rule can only apply to admissions made in due course of procedure.

Under the present section 254 of the Code of Criminal Procedure, the Magistrate was justified in framing the charge against the accused before every essential piece of evidence in support of the prosecution had been taken. Section 255 requires a Magistrate to take the accused's plea immediately after the charge has been framed, and has

(6) (1867) 36 L. J. P. C., 51. | (7) (1888) I. L. R. 13 Bom., 389.
(8) (1838) 8 C. & P., 575.

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been read and explained to the accused. If when giving his plea or stating his defence the accused voluntarily admits facts, there appears to me to be no necessity for the prosecution to call evidence to prove such facts. To do so would only entail needless prolongation of the trial. Even if in the present case the examination of the accused is, so to speak, expunged from the record, and left out of consideration, there appears to me to be on the record in the statement of the defence of the accused sufficient to show that he had made the affidavit, part of which was alleged to contain false statements, and consequently, in my opinion, the conviction was not defective merely by reason of there being on the record no evidence of the identity of the accused with the alleged perjurer.

I would therefore answer the question referred in the negative.

Hartnoll, J.—Section 342 of the Code of Criminal Procedure lays down, that an accused may be examined to enable him to explain any circumstances appearing in the evidence against him.

In the present case an affidavit duly sworn and purporting to be made by one Abbas Ali, son of Baker Ali deceased, petty trader residing at Shwegyin, was put in as evidence against the accused who is called Abbas Ali, whose father is Baker Ali, and who is a trader living at Shwegyin. Under section 80 of the Evidence Act the Court must presume that this document is genuine, and that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true. It is certainly evidence against the accused and purports to be made and signed by himself. The affidavit contains the following:—

"That I was present at 3-30 P.M. on 31st July 1905, with my brother Ismail *alias* Po Kin, at the house of R. Pinto, Esq., Subdivisional Magistrate of Shwegyin, when Criminal Regular No. 52 of 1905 was called on for hearing."

Mr. Pinto in his examination in this case as a witness says, "Abbas Ali is the brother of the accused Ismail *alias* Po Kin."

The present criminal proceedings arise out of incidents said to have taken place at the trial of Ismail *alias* Po Kin. When Mr. Pinto said that Abbas Ali was the brother of Ismail *alias* Po Kin, he was evidently referring to the accused, Abbas Ali. This statement of Mr. Pinto connected Abbas Ali with the Abbas Ali of the affidavit.

Under these circumstances I am unable to hold that the Magistrate was wrong under section 342 of the Code of Criminal Procedure in asking the question that he did, as the presumption was that the document was genuine, and, if so, coupled with Mr. Pinto's evidence, it may be presumed to have been signed by the accused before the Court, and no other. I cannot see that there was any trapping of him into an admission. He was asked to explain what was against him, and it was open to him to deny signing the affidavit. For this reason alone I would answer this reference in the negative.

Subject to the foregoing remarks, I concur in the answer to the reference proposed by the learned Chief Judge.

Irwin, J.—I have had the advantage of seeing the judgment of Mr. Justice Hartnoll, which deals with a point which was overlooked both at the hearing of the appeal and at the hearing of the reference.

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I concur with my learned colleague that in this particular case the question "Did you make this affidavit, etc.," was a proper question, and within the terms of section 342 of the Code of Criminal Procedure because the affidavit itself, compared with the description accused gave of himself at his trial, was sufficient *primâ facie* evidence of identity.

But on the assumption that the question was not warranted by section 342, I concur in the judgment of the learned Chief Judge. To ask the question "Did you make the affidavit?" was at most an irregularity which did not occasion any failure of justice, and section 537 precludes the Appellate Court from reversing the conviction on account of such irregularity. It could be cured by taking additional evidence under section 428 if the accused had not in his defence admitted making the affidavit. As this was admitted in his defence there is nothing to be cured, and no necessity to adduce any evidence of identity.

Before Mr. Justice Hartnoll.

Criminal Appeal No. 275 of 1906.

SHWE SIN AND ANOTHER *v.* KING-EMPEROR.

June 12th 1906.

Confessions by accused persons—duty of Magistrate—Criminal Procedure Code, 1898, ss. 164, 364.

It is the imperative duty of a Magistrate, before recording a confession, carefully to examine the accused person and to the best of his ability satisfy himself that the accused does not speak in consequence of any inducement, threat, or promise, but that his confession is purely voluntary. The omission of the Magistrate to question the accused person before recording a confession is a fatal defect, which renders the confession inadmissible in evidence. The argument that the omission is merely *primâ facie* ground for supposing that the confession may not have been voluntarily made and that, if this presumption can be rebutted, the confession is admissible, is untenable.

Thein Maung v. *King-Emperor*, (1905) 3 L.B.R., 173, cited.

Nga Shwe Sin and Du Teik have been convicted by the Sessions Judge of Tenasserim under section 398 of the Indian Penal Code and sentenced to 12 years' transportation each, in that they were two of those who dacoited the house of one Ta Shan on the night of the 21st January last.

They both of them have made confessions and the question arises whether these are admissible or not. The confessions were taken by the Township Magistrate, Maung Ta Dut. This officer states that when he examined Maung Shwe Sin, it was only after recording his statement that he asked him if he made the confession voluntarily, and as regards Du Teik he states:

I asked both Du Teik and Gandama, if they wished to confess voluntarily before I took down their confessions at all.....I did not ask Du Teik whether he wished to make a confession voluntarily until after I had recorded his confession. Yes, I did ask him before I recorded his confession. I said, '*Thabaw ataing pyaung chet pe mi la.*' After recording the confession I asked him how long he had been in custody. I asked him if he had been illtreated by the Police, but I did not record this question.

In commenting on this evidence the learned Sessions Judge remarks:—

In the present case the Magistrate omitted to put a single question to the accused Du Teik with a view to find out whether the confession was voluntary until after the confession had been recorded. He took him to the jungle and no

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doubt conversed freely with him before writing anything, but I think there is no question that he did not comply with the provisions of section 164 Criminal Procedure Code in as much as it is doubtful whether he had any sufficient reason to suppose that the confession would be voluntary, and it is certain that, even so, such reason was not in any way the outcome of deliberate questions which he had put for that purpose.

The Sessions Judge subsequently refers to the words of Mr. Justice Fox in the case *Thein Maung* v. *King-Emperor* (1) and writes:—

"It is true that in the case of Thein Maung Mr. Justice Fox says: 'In the present case no such enquiry was made and in my judgment the confession must be entirely rejected and not taken into consideration' but I do not understand this to mean, that, if the conditions of section 164 (3) are not properly complied with, the confession *qua* this irregularity is *ipso facto* worthless and inadmissible. The omission or irregularity is, I take it, held to be *primâ facie* ground for supposing that the confession may not have been voluntarily made and unless the presumption can be rebutted, it cannot be admitted."

He then proceeds to discuss how the *primâ facie* inference has been rebutted. In my opinion the learned Sessions Judge is looking at this important matter in a wrong light. It is the imperative duty of the Magistrate before recording a confession to carefully examine the accused person and to the best of his ability ascertain, that he is not wishing to speak owing to any inducement, threat or promise, but that his confession is purely voluntary. This is especially necessary in this country, where the Police are so prone to induce prisoners to confess, and where evidence is so frequently manufactured, and sometimes in a skilful and not a clumsy manner, so that detection of the manufacture is difficult. The omission of the Magistrate to question the accused person before recording the confession as to the voluntary nature of it is, in my opinion, a fatal defect and a defect that renders it inadmissible. In the present case the Magistrate allows that he did not question Maung Shwe Sin before recording his confession, and as regards Du Teik he makes contradictory and unsatisfactory statements. As far as the record goes, each man was only once asked at the end of his statement, whether he confessed voluntarily or was induced to do so. This was not a sufficient requirement with the provisions of section 164 (3). Therefore in my opinion the retracted confessions of Maung Shew Sin and Du Teik must be rejected entirely as inadmissible in evidence.

Criminal Revision No. 282 of 1906.

May 10th, 1906.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.*
1. MADHUB CHANDRA RAJ.
2. KOYLAS CHANDRA DAS.
3. SULKAN.
4. DUBAS.

Personating another before a passport examining officer—omission to appear before such officer—offences committed—joinder of charges—Indian Penal Code, s. 188—Epidemic Diseases Act, 1897, s. 3—Criminal Procedure Code, ss. 233, 239.

A person who merely personates another before an officer appointed under the Epidemic Diseases Act, 1897, does not commit the offence of cheating by personation under section 419 Indian Penal Code.

An offence under section 188 of the Indian Penal Code read with section 3 of the Epidemic Diseases Act, 1897, is not punishable with rigorous imprisonment unless it is expressly found that danger was thereby caused to human life, health or safety.

(1) (1905) 3 L. B. R., 173.

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Four persons, who may be called shortly Madhub, Koylas, Sulkan and Dubas, were tried together at one trial. The facts found proved were that Koylas and Sulkan arrived at Akyab by mail steamer on 27th December 1905. They were allowed to land and were furnished with passports, apparently issued under Rule VIII (8) of Notification No. 209, dated 7th October 1897, as amended by several other Notifications. In these passports they bind themselves to appear daily for the next succeeding ten days before the passport examining officer. On 31st December Sulkan did not appear, but sent Dubas with his passport, and Dubas personated Sulkan before the passport examining officer. Likewise on 1st January Koylas did not appear, but sent Madhub with his passport, and Madhub personated Koylas before the passport examining officer. On these facts Koylas and Sulkan have been convicted of disobeying a lawful order of a public servant, under section 188 Penal Code, read with section 3 of the Epidemic Diseases Act, 1897; and Madhub and Dubas have been convicted of attempting to cheat the passport examining officer by personation, under sections 419 and 511 of the Penal Code. All four were sentenced to ten days' rigorous imprisonment.

The acts for which Sulkan and Dubas were convicted were entirely distinct from those for which Koylas and Madhub were convicted. Even if Koylas and Sulkan had absented themselves on the same day (which they did not) it would not be lawful to try them together. The trial was illegal, and if the accused had applied for revision it would have been necessary to set aside the convictions.

Section 188 Penal Code contains two scales of punishment, one for disobedience which tends to cause risk of obstruction, annoyance or injury to any persons lawfully employed, and the other for disobedience which tends to cause danger to human life, health or safety, etc. The punishment for the former is limited to simple imprisonment for one month or Rs. 200 fine, or both. The punishment for the other may extend to rigorous imprisonment for six months, or Rs. 1,000 fine, or both. Section 3 of the Epidemic Diseases Act does not expressly apply the higher scale of punishment to every disobedience of an order under the Act, and therefore in my opinion the sentences of rigorous imprisonment are illegal, as the Magistrate has not expressly found that the disobedience tended to cause danger to human life or health. Moreover I do not think he could properly find that it caused such danger when the accused were not in fact suffering from any epidemic disease. The imprisonment ought to have been simple.

The convictions for attempting to cheat cannot be sustained. The facts found do not come within the definition of cheating. It may be said that the accused by deceiving the passport examining officer attempted to induce him to abstain from examining the persons whom they personated, but it is not suggested that such abstention was likely to cause any danger or harm to the officer.

It is not necessary for me to consider whether the two personators could be convicted of abetting the disobedience of the persons they personated. The sentences have long ago expired. I could not lawfully convict the accused of any offence on a trial which was conducted in an illegal manner.

I set aside the convictions of Madhub and Dubas, and acquit them of attempting to cheat.

Criminal Appeal No. 288 of 1906.

May 25th 1906.

Before Mr. Justice Hartnoll.

AH LOK AND ANOTHER *v.* KING-EMPEROR.

Lentaigne—for appellants.

Evidence—proof of nature of contents of bottles or packages—cocaine.

The appellants were convicted of possession of four packages of cocaine, each containing eight bottles of one-eighth ounce each. The convicting Magistrate wrote:—

"That the packets contain bottles of cocaine is sufficiently shown in the packets and bottles themselves. The bundles or packets are intact, the outer wrapper being blue paper on which is the label 'Cocaine manufactured by E. Marck, Darmstadt.'

Each bundle contains eight bottles of one-eighth ounce each; and each bottle has its capsule and outer tissue paper wrapper intact and labelled 'Cocaine manufactured by E. Marck, Darmstadt.'"

In appeal, it was contended that there was no evidence that the contents of the bottles were really cocaine or an intoxicating drug.

Held,—that in view of the ways of people in this country the circumstances did not go to prove beyond reasonable doubt that the bottles contained cocaine. The Magistrate should have taken evidence on this point.

Convictions and sentences set aside, and accused acquitted.

Queen-Empress v. *Taw Aung*, P. J. L. B., 369, referred to.

The two appellants have been convicted of being in possession of four bundles of cocaine, each bundle containing eight bottles of one-eighth ounce each. One of the grounds of appeal is that there is no evidence that the contents of the bottles or packages are an intoxicating drug or cocaine, and the mere labels are not sufficient evidence that the contents are an intoxicating drug for the purpose of a criminal conviction.

From the record it appears that the bottles were never sent to the Chemical Examiner to be analysed. The Magistrate writes:—

That the packets contain bottles of cocaine is sufficiently shown in the packets and bottles themselves. The bundles or packets are intact, the outer wrapper being blue paper on which is the label "Cocaine manufactured by E. Marck, Darmstadt." Each bundle contains eight bottles of one-eighth ounce each; and each bottle has its capsule and outer tissue paper wrapper intact and labelled "Cocaine manufactured by E. Marck, Darmstadt."

The point for consideration is, whether under such circumstances it may be taken as proved, that the bottles contained cocaine. The probabilities are, that they did, but can it be taken as proved according to the rules of evidence, that they did?

According to the Evidence Act a fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A much stricter degree of proof is required in criminal proceedings than in civil ones, and it has been said in criminal proceedings, that the persuasion of guilt must amount to "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."

It has again been said:—

It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the minds of the jury but the doubt to the benefit of which the accused

is entitled must be such as rational thinking sensible men may fairly and reasonably entertain; not the doubts of a vacillating mind, that has not the moral courage to decide but shelters itself in a vain and idle scepticism. They must be doubts, which men may honestly and conscientiously entertain.

To apply these principles to the present case I would note as follows. I have weighed the evidence and see no reason to disbelieve the peon, when he says that he found the appellants in possession of the bundles, I believe him. They deny possession. This is a point against them, as if the bundles contained drugs that they could lawfully possess, why should they deny possession? On the other hand I have known cases in this country where men have endeavoured to pass off as opium what was really cutch, or something else. There would be an element of cheating in this. Supposing that the bundles did not contain cocaine, though they are labelled as cocaine, the accused's denial might come from the guilty knowledge that they were going to pass off as cocaine, what was not so. The condition, however, in which the bundles and bottles were found, goes to negative any supposition that the appellants had been opening the packets and tampering with the bottles, if they did originally come from a European cocaine manufacturer. But still another supposition arises, and that is, that the bottles and their contents did not come from a European manufacturer at all, that they may not have contained cocaine, though they were falsely labelled and done up as such by the appellants with a view to their disposing of them as cocaine. Is this supposition so far-fetched that it should be discarded? It is within my own knowledge, that in this country people do put false labels and capsules on bottles containing liquor that is not of the nature indicated by the labels. I am therefore of opinion that my supposition should not be discarded as far-fetched. There is to my mind a possibility that these bottles did not contain cocaine, though the probabilities are stronger in favour of their containing it. Is this possibility sufficiently strong for me to hold that it was not conclusively proved that the bottles contained cocaine? Considering the degree of proof required in criminal cases, and with my knowledge of the ways of persons in this country, I am of opinion that it was not conclusively proved that the bottles really did contain cocaine. There is a doubt in my mind, and the appellants are entitled to the benefit of it.

I quite understand why the bundles were put into Court intact as they were. It was to show them as found by the peon. But the prosecutor should have asked the Magistrate to have their contents analysed, or the Magistrate should have had them analysed on his own motion. An analysis would have put the matter beyond all doubt.

There is another point in the case, and that is, that the Customs peon was not an Excise officer, and so his action was illegal. There is nothing on the record to show that he was an Excise officer. If he was not, the conviction would not necessarily become illegal(1).

I set aside the convictions and sentences passed on the accused and direct that they be set at liberty.

(1) *Queen-Empress v. Taw Aung*, P.J. L. B., 369.

Full Bench—(Criminal Revision).

Criminal Revision No. 97 of 1906.

June 15th, 1906.

Before the Hon'ble C. E. Fox, Offg. Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

KING-EMPEROR *v.* PO KA.

Joinder of charges—double conviction under s. 19 (e) Indian Arms Act, 1878, and s. 30 Rangoon Police Act, 1899—General Clauses Act, 1897, s. 26.

The accused was arrested one night, in a street in Rangoon, having in his possession a loaded revolver, a jemmy, and an auger. He was prosecuted in separate cases and was convicted and sentenced to separate punishments under section 19 clause (*e*) of the Indian Arms Act, 1878, and section 30 of the Rangoon Police Act, 1899 (apprehension and punishment of reputed thieves and others).

Held,—that the prosecution under the Rangoon Police Act was improper, and that accused was not liable to be separately convicted under that Act.

Per Hartnoll, J.—In a prosecution under section 30 of the Rangoon Police Act, separate punishments cannot be inflicted on an accused whose case falls within two or more of the clauses of that section.

Fox, Offg. C. J.—In my opinion the conviction and sentence under section 30 of the Rangoon Police Act were not justifiable. The facts on which the charge under this section was founded were the same as those on which the graver charge under the Arms Act was founded. Charges under both sections might have been inquired into by the same Magistrate, and if they had been that Magistrate would not have been justified in inflicting a second sentence for the offence under the Police Act.

I would set aside the conviction and sentence under the Rangoon Police Act.

Irwin, J.—I concur with the learned Chief Judge. Accused could have been tried at one trial under section 30 (*a*) of the Rangoon Police Act for going armed with the revolver, and under clause (*e*) of the same section for possessing the jemmy and auger. If he had been so prosecuted it is obvious that only one sentence could have been passed.

Apart from this, section 30 is a special provision for punishing persons who in this large town are found under circumstances which raise a strong suspicion that they intend to commit offences punishable under the ordinary law applicable to the whole country. When there is proof of such an offence having been actually committed section 30 of the Rangoon Police Act does not come into operation at all, on the same principle on which a person who has committed murder is not tried for voluntarily causing hurt.

Hartnoll, J.—Section 26 of the General Clauses Act (X of 1897) seems to apply to the facts of this case. It enacts as follows:—

> When an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

The circumstances under which Maung Po Ka was found render him liable under section 19 (*e*) of the Arms Act, and also under section 30 (*a*) and (*e*) of the Rangoon Police Act. It seems to me, that when a person is found under such circumstances as render him liable at the

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same time under more than one clause of section 30 of the Rangoon Police Act, he is only guilty of an offence under that section, and not of an offence under each clause. Whether the circumstances under which he is found come under one or more of the clauses of section 30, I consider that he can be tried only once on the facts—combined, if they refer to more than one clause—and only punished once for them. The law is set in motion by his being taken into custody, and then the facts that render him liable to imprisonment have to be proved. In my opinion it was never meant that on the facts that lead to his arrest a person should be liable to three months under clause (*a*), to three months under clause (*b*), and so on. It may be found at his trial that his offence comes under more than one clause, but in my opinion he can only be punished once under the section, and he cannot receive a sentence of more than three months. If my view is correct, Maung Po Ka's offence, as far as the Rangoon Police Act is concerned, comes generally under section 30, and does not constitute two offences, one under clause (*a*) and one under clause (*e*). He is not liable separately under each clause. The being armed and being in possession of house-breaking implements must be taken as part and parcel of the same offence; the possession of the house-breaking instruments must be considered together with the possession of the revolver, and the whole of the facts together constitute an offence under section 30.

Hence the set of facts, under which he was arrested, constitute an offence under section 19 (*e*) of the Arms Act, and under section 30 of the Rangoon Police Act, and only one offence under section 30 of the Rangoon Police Act for the reasons given above.

I am therefore of opinion that section 26 of the General Clauses Act applies, and that Maung Po Ka can only be punished once for his offence.

I therefore concur with the order proposed by the learned Chief Judge.

Before Mr. Justice Irwin, C.S.I.

Special Civil 2nd Appeal No. 114 of 1905.

May 21st, 1906.

SEIN TUN BY HIS GUARDIAN *ad-litem* MAUNG THA HLA *v.* MI ON KRA ZAN AND MI HNIN MRA KHAING BY HER NEXT FRIEND, MI ON KRA ZAN (1ST RESPONDENT).

Maung Kin—for appellant (plaintiff) | *Maung Kyaw*—for respondents (defendants).

Buddhist Law: Inheritance—share of grandchild of deceased first wife, when second wife and her child survive.

A dies, leaving (1) a grandchild by his deceased first wife, the grandchild's mother, A's daughter, being dead, and (2) his second wife and (3) a child by the second wife.

Under Buddhist law, the grandchild is entitled to nine-twentieths of the *atetpa* property possessed by A at his second marriage, and to one-eighth of the *lettetpwa* of the second marriage.

Ma Pu v. *Ma Le*, (1901) 1 L. B. R., 93; 2 Leading Cases, 75 (Chan Toon); *Saw Ngwe* v. *Thein Yin*, (1901) 1 L. B. R., 198; 2 Leading Cases, 210 (Chan Toon); cited.

The subject of this appeal is the distribution of the estate of Kaung San Ri, who died about July 1903. He was married twice. His first wife died about 23 years ago. The second wife is alive and is first respondent. The first wife had three children, who all died before their father but after their mother. Plaintiff-appellant is the only

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grandchild of the first wife. The second wife has one daughter who is the 2nd respondent.

There are practically two points in the appeal, but the second was not argued and there is clearly nothing in it. The one point for decision is whether the Divisional Court was right in holding that appellant was an out-of-time child and therefore entitled to only one-fourth of the share of the property to which his mother would have been entitled if she had survived her father.

The Court of First Instance gave plaintiff a decree for three-fourths of the *atetpa* property and one-fourth of one-eighth of the *letletpwa*.

The Divisional Court on appeal altered the proportion of the *atetpa* to which plaintiff is entitled to one-fourth of three-fourths.

Two rulings were relied on, *viz. Ma Pu* v. *Ma Le* (1) and *Ma Saw Ngwe* v. *Ma Thein Yin*(2), and the decision of the Divisional Court is based on the latter. In my opinion neither of these rulings is applicable to the present case. *Ma Pu* v. *Ma Le* (1) was a case in which grandchildren by the first wife sued children by the third wife, all the wives being dead. In the case of *Ma Saw Ngwe* v. *Ma Thein Yin*(2) the ancestor had only one wife. Both cases relate to partition among heirs when the ancestors, husband and wife, were all dead. The present case is between a grandchild of the first wife on the one hand, and the second wife and her daughter on the other hand. I have not discovered any ruling applicable to the case, but it is specifically provided for in section 271 of the *Kinwun Mingyi's Digest*, and the authorities are summed up in section 226 of the *Attasankhepa Vannana Dhammathat*. At first sight the extracts given in the *Digest* would seem to refer only to cases in which the grandchildren's parents predeceased both their grandparents, but the heading of the section contains no such limitation, and if the section does not apply to the present case I can find no section which does.

The first extract from *Rajabala* contains the following sentence:—

> The grandchildren referred to above are those whose parents predeceased the grandparent who died first; those whose parents survive the grandparent who died first *and have therefore received their due share,* should not receive any more on the death of the surviving grandparent.

The reason of this sentence is clearly contained in the words "and have therefore received their due share." Chapter VI of the *Digest* contains some apparently contradictory rules about partition between one surviving parent, and the children, and this seems to account for the words we are now considering. The meaning of the clause clearly is that grandchildren whose parents died after one grandparent and before the other are excluded from the operation of the rule because, and if, they have already received their portion, and for no other reason. The rule is interpreted in this sense in the *Attasankhepa Vannana* without any reference to the question whether the parents predeceased one or both of the grandparents;—

> This rule applies when the parents have not yet received shares of the estate of the grandparents and when such inheritance has evolved on the grandchildren.

(1) (1901) 1 L. B. R., 93; 2 Leading case, 75 (Chan Toon).
(2) (1901) 1 L. B. R., 198; 2 Leading cases, 210 (Chan Toon).

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I therefore find that this section of the *Digest* (271) applies fully to the present case.

The question of the grandchildren being out of time or not cannot arise, because the section provides specifically for grandchildren whose parents predeceased one or both of the grandparents.

The rule of division of the *atetpa* property is not uniform in section 271, but there is a great preponderance of authority in favour of the grandchildren taking $\frac{3}{4} \times \frac{3}{5} = \frac{9}{20}$. In the words of *Attasankhepa*—

> Let the property brought by the grandparent be divided into four shares, and let the step-grandparent take one share; the remaining three shares shall be again divided into five shares, and let the grandchildren take three shares, and the children two shares.

As regards the *lettetpwa* property the rules cited in section 271 of the *Digest* are about equally divided in favour of the grandchildren taking one-eighth or one-ninth. In *Attasankhepa* the rule is one-eighth.

Attasankhepa makes a distinction respecting property acquired by the grandparents by inheritance, one-fourth of which only is allotted to the grandchildren. I find no trace of this in the *Digest*. I do not think it requires any further consideration.

On the authority of the *Dhammathats* above quoted I must alter the plaintiff-appellant's share of the *ateipa* property from $\frac{3}{16}$ to $\frac{9}{20}$, and his share of the *lettetpwa* property from $\frac{1}{3\frac{1}{2}}$ to $\frac{1}{8}$.

The Divisional Judge found that the *atetpa* property was worth Rs. 677-8-0, and the *lettetpwa* worth Rs. 550; after giving plaintiff his shares of these he added Rs. 18-12-0 as undisputed *lettetpwa*. I do not understand this. Rs. 18-12-0 was the amount of *lettetpwa* allotted to plaintiff by the Court of First Instance.

I set aside the decree of the Divisional Court, and I declare that out of the *atetpa* property plaintiff-appellant is entitled to Rs. (677-8-0) $\frac{9}{20}$ = Rs. 304-6-0, and that out of the *lettetpwa* property he is entitled to Rs. $\frac{550}{8}$ = Rs. 68-12-0.

Respondents will pay appellant's costs calculated on Rs. 210.

Before Mr. Justice Irwin, C.S.I.

Criminal Appeal No. 252 of 1906.

KING-EMPEROR v. PO HLA.

July 6th, 1906.

McDonnell, Assistant Government Advocate—for the King-Emperor.

Escaping from lawful custody—Indian Penal Code, s. 224—joinder of charges—Criminal Procedure Code, s. 233.

A person charged with an offence, and lawfully detained in custody on that charge, commits an offence under section 224 of the Penal Code if he escapes from such custody, even if he is afterwards acquitted of the charge on which he was arrested.

Ganga Charan Singh v. *Queen-Empress*, (1893) I. L. R. 21 Cal., 337, distinguished.

Deo Sahay Lal v. *Queen-Empress*, (1900) I. L. R. 28 Cal., 253, referred to.

A charge of theft and a charge of escaping from lawful custody in which the accused was detained on account of that theft, cannot be tried together at one trial.

San Daik v. *Crown*, (1902) 1 L. B. R., 361, referred to.

The Magistrate's judgment appears to me to be inconsistent. The headman said that accused admitted that the bullock was in his possession, and the Magistrate believed this. That being so the

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discrepancies between Nga Paw's statement and those of other witnesses were absolutely immaterial. The defence was that the bullock never was in accused's possession. The Magistrate having found it proved that it was seen in accused's possession, the question for decision was whether it came into his possession lawfully. The Magistrate took no notice of Maung Po Hmaing's evidence about the bullock being tied up, nor of the evidence that accused ran away when he was asked where he got the bullock.

The reason given by the Magistrate for acquitting the accused of escaping from lawful custody, namely that as the theft for which he had been arrested was not proved there could be no offence under section 224, is not sound. The case of *Ganga Charan Singh* v. *Queen-Empress* (1) is not in point. In that case the person arrested was not the person who had been accused of the offence but another man of the same name. See *Deo Sahay Lal* v. *Queen-Empress* (2). The part of section 224 of the Penal Code with which we are concerned runs thus: "Whoever escapes from any custody in which he is lawfully detained for any such offence," that is, for any offence with which he is charged or of which he has been convicted. Here the question whether he is guilty of such offence is immaterial. The facts to be proved are that he was charged with an offence, that he was lawfully detained in custody for that offence, and that he escaped from that custody. So far as the evidence goes it appears that the arrest and the custody were lawful.

The trial of the two charges at one trial was contrary to section 233 of the Code of Criminal Procedure. The theft and the escape were not so connected as to form one transaction, and none of the sections mentioned in section 233 will cover the joinder. The trial therefore was illegal. See *Nga San Daik* v. *Crown*. (3). As the trial was illegally conducted it is not open to me to convict the respondent of any offence.

I set aside the acquittals on both charges, and direct that the respondent be retried at two separate trials.

Criminal Appeal No. 296 of 1906.

July 11th, 1906.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* TUN AUNG GYAW.

McDonnell, Officiating Assistant Government Advocate—for the King-Emperor.
Dawson—for respondent.

Registration—personating a party to a deed before a registration officer—intent—offence committed—abetment by other parties—forgery—Indian Registration Act, 1877, s. 82 (c) and (d)—Indian Penal Code, ss. 43, 467, 114.

G, jointly with six others, mortgaged a piece of land to K. When the deed was being registered, B and T, with G's knowledge and in his presence, G remaining silent, falsely personated two of the joint mortgagors before the registering officer and affixed false signatures to the registration endorsements.

Held,—that even if B and T acted without fraudulent or dishonest intent, they had committed offences under section 82 (*c*) of the Indian Registration Act, 1877.

Held also,—that there being no presumption of common dishonest intent in the personation, or of instigation to or conspiracy therein on G's part, G's mere silence

(1) (1893) I. L. R., 21 Cal., 337. | (2) (1900) I. L. R., 28 Cal., 253.
(3) (1902) 1 L. B. R., 361.

was not an illegal omission making him guilty of abetment of any offence committed by the personators.

Loothy Bewa, (1869) 11 W. R., 24; *Emperor* v. *Kalya*, (1903) 5 Bom. L. R., 138; referred to.

On 10th June 1904 a deed of mortage of land, inherited property, purporting to be signed by seven persons was presented for registration to the Sub-registrar exercising the powers of the Registrar of Hanthawaddy District under section 7 of the Registration Act. One of the seven owners of the land was the appellant Tun Aung Gyaw, who was then a village headman. Two others were his brother Po Lin and cousin Po Kyin. These two were not present at the Registration Office. Po Tin personated Po Kyin, and Pan Byu personated Po Lin. Po Tin wrote Po Kyin's name as signature, and affixed his thumb mark under it. Pan Byu did the same to Po Lin's name. Tun Aung Gyaw knew that these two persons falsely personated two others in his presence. The mortgagee Maung Kyaw said he knew none of the seven except Tun Aung Gyaw, and did not know whether the real Po Kyin and Po Lin were present or not. He did not prosecute. The complaint was made by Po Kyin, against Tun Aung Gyaw and Pan Byu. Only in the course of the trial it was discovered that Pan Byu had personated, not Po Kyin but Po Lin.

After charges had been framed Pan Byu absconded and the trial proceeded without him. Tun Aung Gyaw was convicted of abetment of personation under section 82 (*d*) of the Registration Act, and of abetment of forgery under sections 465 and 114 of the Penal Code. One head of charge related to both the personation of Po Lin and that of Po Kyin; the other related to the forgeries of the two names. The Sessions Judge rightly pointed out that there should have been four heads of charge.

Tun Aung Gyaw appealed against the conviction for abetment of forgery, but his petition of appeal does not in any way challenge the correctness of the conviction for abetment of personation. Both convictions were set aside on the single ground that no dishonesty on the part of Tun Aung Gyaw was proved. The learned Sessions Judge added that in his opinion a conviction under section 82 (*c*) of the Registration Act would be bad unless dishonesty, or at any rate bad faith, were established, and that in effect section 82 (*c*) merely provides enhanced punishment for cheating by personation when registration business is affected by the offence. The Local Government has appealed against the acquittals.

The Sessions Judge gave no reasons for his opinion. It was argued for the respondent that "falsely" means "fraudulently." I cannot agree to that. The expression "falsely personates" occurs in section 170 of the Penal Code, but neither that section nor section 82 of the Registration Act makes any mention of either fraud or dishonesty, and to my mind the meaning of the section is quite plain. It was enacted to punish acts which are not offences under the Penal Code, and a fraudulent or dishonest intent is immaterial. In the case of *Loothy Bewa* (1) this was the construction placed on section 93 of Act XX of

(1) (1869) 11 W. R., 24.

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1866, the terms of which, except the words "or enquiry," are identical with those of section 82 (*c*) of the present Act. To the same effect is the ruling of the Bombay High Court under the present Act, in *Emperor* v. *Kalya* (2).

But there remains the difficult question whether Tun Aung Gyaw abetted the offences committed by Po Tin and Pan Byu. The Magistrate disposed of this point very shortly. He said "There is no doubt whatever that whatever offences have been committed by the second accused in this transaction the first accused abetted them. He was the negotiator of the mortgage. The documents were, so far as complainant's land is concerned, in his possession." The Sessions Judge did not discuss the point at all.

It is important to remember that the respondent was not tried for any act connected with the preparation and execution of the mortgage, and the Magistrate had no jurisdiction to try him for any such acts, as they were not done in Hanthawaddy District. He was tried solely for abetting offences committed in the Registration Office. There is no evidence that respondent opened his lips in the Registration Office except to acknowledge his own signature. The Magistrate recorded that he was not convinced that from first to last there was any dishonesty in the transaction. There is nothing in the record from which it can properly be inferred that abetment was committed by instigation or conspiracy. If respondent aided the offences at all he did so not by act but by illegal omission. If he is guilty his offence consisted of keeping silence when Po Tin and Pan Byu personated Po Kyin and Po Lin, and when Po Ni informed the registering officer that he knew these two persons to be Po Kyin and Po Lin. Was this an illegal omission?

Section 43 of the Penal Code runs thus:—

> The word 'illegal' is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be 'legally bound to do' whatever it is illegal in him to omit.

There is no question of respondent's silence being *ipso facto* an offence, or prohibited by law. It is only necessary to consider whether it would furnish ground for a civil action.

The Magistrate considered that there was a fraud committed against the mortgagee, and assuming that there was fraud, as distinguished from dishonesty, that perhaps might give Maung Kyaw a right to sue the respondent, but if so the right would arise from the fact of the mortgage not having been signed by Po Kyin. The Magistrate's finding that there was no dishonesty shows that he, rightly I think, disbelieved or doubted some important parts of Po Kyin's complaint. When the question whether Po Kyin was really a consenting party to the mortgage or not is outside the scope of the present case it can hardly be said that the mere fact of the registration of the mortgage having been attained by personation of Po Kyin would furnish ground for a civil action against Tun Aung Gyaw who stood by and heard and saw the personation committed. In my opinion his silence was not an illegal omission within the meaning of the Penal Code, and therefore

(2) (1905) 5 Bom. L. R., 138.

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he was not guilty of abetment of any offence committed by Pan Byu or Po Tin.

This concludes the matter, but with respect to the charge of abetment of forgery I think it right to remark that for writing Po Kyin's name Po Tin could have been convicted under section 82 (*c*) of the Registration Act. The admission that Po Kyin had signed the deed and the writing of Po Kyin's name were parts of one offence under that section, and therefore section 71 of the Penal Code bars a second punishment for the forgery if the act amounted to forgery.

The appeal is dismissed.

Before Mr. Justice Hartnoll.

Civil Revision No. 126 of 1905.

June 6th, 1906.

RAMAN CHETTY *v.* { 1. S. M. R. M. OLAGAPPA CHETTY. 2. AUNG GYI. 3. MA OH. 4. KYA NU.

N. C. Datta—for applicant. | *R. N. Burjorjee*—for 2nd to 4th respondents.

Execution of decree—sale of immoveable property—effect of failure to deposit part of purchase money—Civil Procedure Code, s. 306.

The payment of the deposit required by section 306 of the Code of Civil Procedure is not a condition essential to a valid sale of property in execution of decree. It merely constitutes an irregularity in conducting the sale.

Intizam Ali Khan v. *Narain Singh*, (1883) I. L. R. 5 All., 316; *Bhim Singh* v. *Sarwan Singh*, (1888) I. L. R. 16 Cal., 33; *Venkata* v. *Sama and others*, (1890) I. L. R. 14 Mad., 227; *Ramdhani Sahai* v. *Rajrani Kooer*, (1881) I. L. R. 7 Cal., 337; *Javherbai* v. *Haribhai*, (1881) I. L. R. 5 Bom., 575; *Vallabhan* v. *Pangunni*, (1889) I. L. R. 12 Mad., 454; cited.

Certain paddy land was put up for sale by the bailiff of the District Court, Pegu, on the 26th April, 1905, and on the 29th April the bailiff reported that it was sold to one Yama of Pegu 'as he declared to be the highest bidder (*sic*).' This Yama is evidently the applicant Raman Chetty. Twenty-five per cent. of his bid was not deposited till the 28th April. Subsequently as the balance of the purchase money was not paid in time, the deposit was forfeited to Government, and resale ordered under section 308 Civil Procedure Code. An application was made to the District Judge to review his order and this was dismissed. It is now desired to revise the order of dismissal.

The main grounds for revision put forward are:—

(1) That the District Judge ought to have held that there was no sale; and (2) that he was wrong in holding that there was a sale on the 28th April.

The cases relied on by applicants' Counsel with regard to his first ground are *Intizam Ali Khan* v. *Narain Singh* (1) and *Bhim Singh* v. *Sarwan Singh* (2).

In the first case it was held that owing to failure to pay the deposit immediately there was no sale at all. In the second case the view taken in the Allahabad case was dissented from, and it was held that failure to make the deposit as required by section 306 of the Code constituted a material irregularity in conducting the sale. My attention was

(1) (1883) I. L. R. 5 All., 316. | (2) (1888) I. L. R. 16 Cal., 33.

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particularly directed to the remarks of Mr. Justice Norris printed at page 38 of the volume of the law reports referred to.

The point for determination in this case is, whether there was not a sale in execution of decree of the land put up to auction to Raman Chetty on the 26th April, 1905, though he did not pay his deposit immediately. I cannot agree with the District Judge, that the sale took place on the 28th April, when the deposit was paid. It seems to me, that it either took place on the 26th April, or not at all.

The determination of the point for decision seems to depend on how the words of section 306 should be interpreted. In the case of *Intizam Ali Khan* v. *Narain Singh* (1) it was held that there was no sale in as much as the indispensable conditions of the law, as contained in section 306 of the Civil Procedure Code, were not fulfilled by the person declared to be the purchaser.

In the case of *Bhim Singh* v. *Sarwan Singh* (2) it was held that failure to make the immediate deposit constituted a material irregularity in conducting the sale.

In the case of *Venkata* v. *Sama and others* (3), it was held that the delay in making the deposit required by section 306 was an irregularity, and the learned Judges remarked :—

> This Court has held, that the omission to make the deposit immediately, or the fact of the sale taking place before the expiration of thirty days, is not fatal to the sale, unless substantial injury is proved.

In other words they held that there might be a valid sale, although the deposit was not paid at once, and that it is not an essential part of the sale, that the deposit should be paid at once.

In the case of *Ramdhani Sahai* v. *Rajrani Kooer* (4) the learned Judges remarked :—

> We think, that the contention of the appellant's pleader, that section 293 only applies to cases of resale under section 309, cannot stand examination. We do not pretend to explain why the Legislature adopted the expression 'resold' and 'resale' in section 293 and sections 308 and 309, while the expression in section 297 and section 306 is 'put up again and sold;' but it is quite clear that the second sale whether held under section 297, section 306, or section 308 is a resale and that section 293 applies to all of them.

In the cases of *Javherbai* v. *Haribhai* (5) and *Vallabhan* v. *Pangunni* (6) it was also held that a purchaser of property at a Court sale who fails to pay the deposit directed to be paid by section 306 is a defaulting purchaser within the meaning of section 293.

The conclusion at which I have arrived is that the payment of the deposit required by section 306 of the Code is not one of the conditions essential to create a sale of property in execution of decree. Where a duly authorized officer puts up property in execution of decree for sale, and after receiving bids knocks it down to the highest bidder, it seems to me that the sale is complete. Section 306 of the Code distinctly refers to the purchaser as the person who should make the deposit. If there is a purchaser, surely there has been a sale. If the officer conducting the sale neglects to demand the deposit immediately and the

(1) (1883) I. L. R. 5 All., 316.
(2) (1888) I. L. R. 16 Cal., 33.
(3) (1890) I. L. R. 14 Mad., 227.
(4) (1881) I. L. R. 7 Cal., 337.
(5) (1881) I. L. R. 5 Bom., 575.
(6) (1889) I. L. R. 12 Mad., 454.

purchaser does not pay it, and if the property is not put up again for sale in consequence of its not being paid, nevertheless that seems to me only to constitute an irregularity in conducting the sale, and I am of opinion that there has still been a sale in execution of decree.

That being so, I must hold that in the present case there was a sale on the 26th April. The balance of the purchase money was not paid within the time allowed by section 307, and so I think that the deposit was rightly confiscated under section 308.

The application is rejected with costs—one gold mohur.

Before Mr. Justice Hartnoll.

Civil Regular No. 169 of 1905. June 6th, 1906.

S. NARAYANSAWMY *v.* JAMES D. RODRIGNEZ.

Hamlyn—for plaintiff.

Pennell—for defendant.

Mistake in agreement—rectification of—Specific Relief Act, 1877, s. 31,—Evidence Act, 1872, s. 92, proviso (1) *and illustration* (*e*).

Evidence to prove a mistake in the terms of an agreement may be brought in a suit upon that agreement as well as in a suit to rectify the mistake under section 31 of the Specific Relief Act, 1877.

Balkishen Das v. *Legge*, (1899) I. L. R. 22 All., 149; *Maung Bin* v. *Ma Hlaing*, (1905) 11 Bur. L. R. 281: referred to.

Mahendra Nath Mukherjee v. *Jogendra Nath Roy Chaudhury*, (1897) 2 C.W.N. 260, followed.

It seems to me that Mr. Pennell's contention must prevail. He pleads that the words in the agreement "for 100 square pawam" were entered by a mutual mistake for the words "for 100 pawam square." Under section 31 of the Specific Relief Act a suit could have been brought to rectify the mistake, and the Court could have rectified the mistake, if it found clearly, that it had been made, and ascertained the real intention of the parties in executing the contract. Under proviso (*1*) to section 92 of the Evidence Act it therefore seems to me that evidence may be admitted to prove that there was a mutual mistake, and to prove what the real intention of the parties was. It seems to me that illustration (*e*) to section 92 of the Evidence Act, which has been referred to by Mr. Hamlyn as in his favour is against him. In that illustration to get relief A would have to prove that the mistake was such an one as would entitle him to relief under section 31 of the Specific Relief Act. The finding at which I have arrived, does not seem to me to conflict with the findings come to in the cases of *Balkishen Das* v. *Legge* (1) and *Maung Bin* v. *Ma Hlaing and 7 others* (2), as in this case proviso (*1*) to section 92 of the Evidence Act comes into force. I agree with the words of Banerjee, J. in the case of *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy Chaudhury* (3), that evidence of the alleged mistake may be given in this suit and not only in a suit brought under section 31 of the Specific Relief Act.

This point of law being settled, the suit will proceed.

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(1) (1899) I. L. R. 22 All., 149. (2) (1905) 11 Bur. L. R., 281.
(3) (1897) 2 C. W. N., 269.

Civil Miscellaneous Appeal No. 34 of 1905.
July 2nd 1906.

Before the Hon'ble C. E. Fox, Offg. Chief Judge, and Mr. Justice Irwin, C.S.I.

S. ANAMALAY PILLAY *v.* PO LAN.

P. N. Chari—for appellant. | *Villa*—for respondent.

Marriage—presumption of validity—Hindu of pariah class marrying Burmese Buddhist woman.

S, a Tamil of the pariah or so-called "fifth caste", applied for letters of administration of the estate of M, a Burmese Buddhist woman deceased. He claimed to have been her husband; there was evidence of cohabitation for many years, and some evidence of repute. The application was dismissed on the ground that a Hindu cannot contract a valid marriage out of his own caste.

Held,—that in the absence of evidence that the class to which S belongs have adopted the rule observed by Hindus of the recognized castes in these matters, the ordinary presumption of marriage must be applied to the relationship between S. and M; and *ordered*, that letters be granted to him as the husband of the deceased.

Baden Singh v. *Ma May*, (1900) 2 Chan Toon's L.C., 27; *Ma Sin* v. *Tarakinka Sen*, (1904) 10 Bur. L.R. 269; referred to.

Fox, Offg. C. J.—Seniyappa Anamalay the appellant, applied for letters of administration to the estate of Ma Me. He claimed to administer the estate on the ground that Ma Me was his wife at the time of her death. His application was opposed by Po Lan one of the brothers of Ma Me, on the ground that the appellant had not been the legal husband of his sister.

The appellant when asked his description said that he was born in Madras, and that he was by race Sudra. Later on in his evidence he said he was from birth a pariah. He asserted that Ma Me was his wife, and that he and she had married 16 or 17 years previously. There was no ceremony, but they agreed to live together, and they did so until she died. They had no children. She used to cook food for him, and he used to eat with her. All along he used to go to the Hindu Temple, but he used also to go with her to the Pagoda and to Pongyi Kyaungs. He said they used to light candles at the Pagoda and worship there. He professed to know some Burmese prayers. There was some evidence that the two were regarded as man and wife.

The learned District Judge dismissed his application on the ground that the appellant being a Hindu could not lawfully intermarry with a Burmese woman.

It may be that a Hindu of one of the castes recognized by the Hindu faith cannot lawfully marry any one who does not belong to the caste to which he or she belongs, see *Baden Singh* v. *Ma May* (1) and *Ma Sin* v. *Tarakinka Sen* (2). In the present case however the appellant says he is what is termed by the English a pariah, but what is termed in Tamil a *panchama* or member of the fifth caste.

A fifth caste is not known to orthodox Hinduism, but the descendants of the original inhabitants of Southern India have probably adopted the term in their imitation of the caste system of their Aryan conquerors. Although the parians may imitate the systems and practices of the Hindu faith, and may believe many of its tenets, they are according to its orthodox tenets not within the pale of Hinduism.

(1) (1900) 2 Chan Toon's L.C., 27. | (2) (1904) 10 Bur. L.R., 269.

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The laws binding on them must be founded on their customs and usages. There is no evidence in this case that by customary law a pariah cannot marry any one who is not also a pariah by birth.

The frequency of permanent alliances between Tamil cultivators and Burmese women in this province tends to show that Tamils of the lower orders do not consider themselves bound by a rule of Hindu law which Hindus of the recognized castes regard as one of the essentials of their religion and system.

In the absence of anything to show that the pariahs have adopted the rule in their imitation of the Hindu system, I think that the ordinary presumption of marriage must be applied to the relationship between the appellant and Ma Me for so many years and under the circumstances which he details.

If the appellant was the husband of Ma Me he had the first right to administer her estate.

I would allow this appeal, and setting aside the order dismissing the appellant's application, and the order for grant of letters to the respondent, I would direct that letters of administration to the estate of Ma Me be granted to the appellant on his complying with the requirements of the law.

Irwin, J. I concur.

Before the Hon'ble C. E. Fox, Offg. Chief Judge.

AH SHEE AND 22 OTHERS *v.* KING-EMPEROR.

Criminal Appeal / Revision Nos. 295 *of* 1906. 474
July 25th, 1906.

Lentaigne—for appellant and applicants.

McDonnell, Assistant Government Advocate—for the King-Emperor.

Search by police officer—persons not qualified to be called in to witness—Burma Gambling Act, 1899, ss. 6, 7,—Criminal Procedure Code, 1898, ss. 102, 103.

Section 6 of the Burma Gambling Act, 1899, requires that all searches made under that section shall be made in accordance with the provisions of sub-section (3) of section 102, and of section 103 of the Code of Criminal Procedure, 1898.

Section 103 of the Code of Criminal Procedure enacts that the officer about to make a search shall call upon *two or more respectable inhabitants of the locality in which the place to be searched is situate* to attend and witness the search.

The section obviously contemplates that two respectable members of the public and inhabitants of the locality unconnected in any way with Government and officialdom should be called in to witness a search.

Hence, when the only witnesses of a search under the Gambling Act were two ward-headmen appointed to their offices by the Commissioner of Police, Rangoon, under the Rangoon Police Act—

Held,—that the premises were not duly entered and searched under the provisions of section 6 of the Gambling Act, and that therefore the presumption, under section 7, that the house was a common gaming-house, was inadmissible.

On the 22nd March 1906 a building at the junction of 19th and Dalhousie Streets, Rangoon, occupied by an institution calling itself the Rangoon Club, was entered by police officers under a warrant issued by the Commissioner of Police, Rangoon, under section 6 of the Burma Gambling Act, 1899.

There is much discrepancy in the evidence as to what took place before and after the entry into the building. To witness the search the police took with them two so-called lugyis of the quarter. One was a headman of 25th Street, and the other a headman of 26th Street.

Followed 21 Ind. Cas. 1 B. R.

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Although there was no evidence that illegal gaming was discovered upon the entry, and there was no evidence that illegal gaming had ever taken place in the institution, the prosecution sought to show that the institution conducted a common gaming house by proving that instruments of gaming were found on the premises entered under the provisions of section 6 of the Burma Gambling Act. The Magistrate appears to have had much doubt as to whether the majority of the instruments of gaming alleged to have been found on the search had really been found, but upon the evidence of a superior police officer he came to the conclusion that some instruments of gaming had really been found on the occasion, and he therefore drew the presumption enjoined by section 7 of the Gambling Act, and convicted the accused who had been found on the premises, and the first accused who admitted that he was manager of the establishment. The Magistrate evidently had great doubts as to the real finding of any instruments of gaming apart from those which the superior police officer said were found in his presence. He said that the two lugyis seemed to be ready to swear to anything whether they actually saw what took place or not. They obviously appeared to him to be most unreliable persons.

I directed further evidence to be taken as to what position these witnesses called lugyis held. The further evidence shows that they were headmen of wards appointed by the Commissioner of Police. Under the Rangoon Police Act the latter exercises the powers of the Deputy Commissioner under the Lower Burma Towns Act, 1892. Under this Act headmen of wards and elders of block have to perform duties and exercise functions similar to those of police officers but to a minor extent.

Section 6 of the Burma Gambling Act requires that all searches under the section shall be made in accordance with the provisions of sub-section (3) of section 102, and of section 103 of the Code of Criminal Procedure, 1898.

The Magistrate having convicted solely upon the presumption laid down as obligatory by section 7 of the Gambling Act when premises are entered under section 6 of the Act, it is for consideration whether the premises were in the present case entered under section 6 of the Act.

The building was entered with the object of making a search therein for instruments of gaming. Section 103 of the Code of Criminal Procedure enacts that before making a search the officer about to make it shall call upon *two or more respectable inhabitants of the locality in which the place to be searched is situate* to attend and witness the search. The search must be made in their presence, and a list of things seized in the course of the search and of the places in which they are respectively found must be prepared by the officer and signed by the witnesses. The objects of this provision are obvious. It is aimed against possible chicanery and unfair dealings on the part of officers entrusted with search warrants, and it is in order to ensure confidence in neighbours of the person whose house is searched and in the public generally that anything incriminating which may be found in premises searched shall be really found, and shall not be what is termed

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"planted". The question arises in this case whether the section was complied with when headmen of wards were employed or called as witnesses of a search under the section.

The section obviously contemplates that two respectable members of the public and inhabitants of the locality unconnected in any way with the Government and officialdom should be called in to witness a search. If it were otherwise, a police officer might call in two other police officers to witness the search, and might say with truth that the search had been witnessed by two respectable inhabitants of the locality. Such procedure would obviously be contrary to the spirit and intention of the section, although it might be within its words.

In possibly a lesser but perhaps in a more dangerous degree the calling in and employment of headmen of wards and elders of blocks under the Lower Burma Towns Act as witnesses of a search under the section appears to me not to comply with the provisions of it.

I think it unnecessary to consider whether the two headmen called in to witness the search in this case were respectable inhabitants of the locality in which the place to be searched was situate. In any case these headmen were, in my opinion, not such persons as section 103 of the Code of Criminal Procedure contemplates should be called in to witness a search and consequently the premises were not duly entered and searched under the provisions of section 6 of the Burma Gambling Act. Under the circumstances the presumption which section 7 of that Act enacts shall be drawn, could not legitimately be applied. In the absence of evidence to show that illegal gaming occurred on the premises, there was no justification for holding that the premises constituted a common gaming house under the Act, and the convictions of all of the accused were unjustified.

I set them aside, and find the accused not guilty of the offences charged against them. The fines paid will be returned to the accused respectively.

Before Mr. Justice Irwin, C.S.I.

Criminal Revision No. 98 of 1906.

July 12th and 13th 1906.

KING-EMPEROR *v.* SHWE SO AND 13 OTHERS.

Joint trial of accused—offences under section 193 Indian Penal Code—Criminal Procedure Code, section 239—"same transaction."

The words "same transaction," in section 239 of the Code of Criminal Procedure, 1898, cannot be applied to a whole trial and all the evidence given in it. Hence, when several persons are accused of having given false evidence as witnesses in a case, they cannot be charged and tried together but must be charged and tried separately.

Procedure in trials for offences under section 193 Indian Penal Code, explained, with reference to the ruling in *Crown* v *Shwe Ke*, (1902) I. L. R. R., 268.

In the matter of Govindu, (1902) I. L. R. 26 Mad., 592, referred to.

The fourteen respondents were convicted at one trial of giving false evidence in a case of dacoity, and fined fifteen rupees each. The District Magistrate reported the case to the Chief Court because he considered the sentences inadequate.

The Magistrate says in his judgment that he thinks the accused conspired to give false evidence; but they were neither charged with nor convicted of conspiring. The joinder of charges was illegal: see

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Govindu's case (1). The words "the same transaction" in section 239 Code of Criminal Procedure, cannot embrace a whole trial, but only the examination of one witness. Notice has been served on all of the respondents except No. 8 Nga Tè and No. 11 San Yun, to show cause why new trials should not be ordered. No cause has been shown. I therefore set aside the convictions and sentences passed on (1) Nga Shwe So, (2) Nga Lu Gyi, (3) Nga Po Than, (4) Nga Chet, (5) Nga Shwe Ngo, (6) Nga Tok Gyi, (7) Nga Shwe Sa, (9) Nga Chet, (10) Nga Hmat Gyi, (12) Nga Pa, (13) Nga Pyaw, and (14) Nga Tun, and I direct that they be retried at separate trials.

Respecting the other two respondents orders will be passed hereafter.

Apart from the misjoinder, the trial was defective in another way. I cannot find on the record any evidence that the accused gave any evidence whatsoever, true or false, at the trial of Po Maung. The proper mode of proving the fact is to put in and read the original deposition, and to adduce oral evidence that the accused is the person who gave the evidence recorded in the deposition. The facts that the document is genuine and that the evidence was duly taken are presumed under section 80 of the Evidence Act. The deposition is the only admissible proof of what the witness said, under section 91. It may be proved by a certified copy under section 65 (*e*), but the best method is to produce the original. The original deposition should not be removed from the record of the previous case, but a certified copy of it should be placed on the record of the trial for perjury (paragraph 306, Lower Burma Courts Manual). See also *Crown* v. *Mi Shwe Ke* (2).

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* PO YIN AND THA MAUNG.

Criminal Revision No. 419 of 1906.

Dawson—for 1st respondent.

July 25th, 1906.

Appellate Court—altering finding—Criminal Procedure Code, 1898, ss. 237, 238, 423, 439.

Under sections 423 and 439 of the Code of Criminal Procedure, 1898, a Court of Appeal or Revision may alter the finding of the lower convicting Court. But as a rule it would obviously be unfair to the accused that he should be convicted of a more serious offence to which he had not pleaded in the lower Court. The general principle is that on appeal or revision an accused person cannot be convicted of an offence of which he could not have been convicted by the Court which tried him.

Emperor v. *Gur Narain Prasad*, (1903) I. L. R. 25 All., 534, dissented from.

Dwarka Manjhee, (1880) 6 C. L. R., 427; *Queen-Empress* v. *Imdad Khan*, (1885) I. L. R. 8 All., 120; *Monranjan Chowdhury* v. *Queen-Empress*, (1899) 3 C. W. N., 367; *Queen-Empress* v. *Lala Ojha*, (1899) 3 C. W. N., 653; (1899) I. L. R. 26 Cal., 863; *Fatu Singh* v. *Mahabir Singh*, (1900) I. L. R. 27 Cal., 660; followed.

The Magistrate convicted Tha Maung of theft, section 379, and Po Yin of abetment of theft, sections 379 and 114. Tha Maung had a previous conviction and was sentenced to one year's rigorous imprisonment. Po Yin was released under section 562 of the Code of Criminal Procedure.

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(1) (1902) I. L. R. 26 Mad., 592. (2) (1902) 1 L. B. R., 268.

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Tha Maung appealed, and the order of the Court of Session is that the appeal be dismissed but the conviction altered to one under section 392. I may remark that this is wrong in form. When a conviction is altered, whether in accordance with appellant's prayer or otherwise, it is not correct to say that the appeal is dismissed.

The learned Sessions Judge then referred the case to this Court with a recommendation that the sentence on each accused be enhanced to two years' rigorous imprisonment.

By order of Mr. Justice Hartnoll, notice has been served on Tha Maung to show cause why his sentence should not be enhanced, and on Po Yin to show cause why his conviction should not be altered to one under section 392 and his sentence enhanced.

The learned Advocate for Po Yin has argued that it is not proved that Po Yin seized Tun Gyaw's hands, and therefore there was no robbery by any person, and no abetment of any offence by Po Yin.

* * * * *

I consider it proved that Po Yin seized Tun Gyaw's hands in order to facilitate the picking of his pocket by Tha Maung. Although this act is not exactly identical with the act described in illustration (*a*) to section 390 of the Penal Code, yet I think it amounts to wrongful restraint within the meaning of section 339. The offence therefore was robbery.

If section 114 applied, Po Yin would be guilty of the substantive offence and not of abetment; but in my opinion section 114 does not apply, as Po Yin would not be an abettor if he were absent. The robbery was committed jointly by the two accused, and both are guilty of robbery under section 34 of the Penal Code.

The question then arises whether the alteration of the finding in Tha Maung's case by the Sessions Judge was within the powers conferred by section 423 of the Code of Criminal Procedure, and whether this Court can lawfully alter the conviction of Po Yin under section 439 read with section 423. The only ruling I have found which suggests an affirmative answer is that of a single Judge in *Emperor* v. *Gur Narain Prasad* (1). On the other side are the cases of *Dwarka Manjhee* (2), *Queen-Empress* v. *Imdad Khan* (3), *Monoranjan Chowdhury* v. *Queen-Empress* (4), *Queen-Empress* v. *Lala Ojha* (5), and *Jatu Singh* v. *Mahabir Singh* (6). The general principle which I think may be gathered from these rulings is that on appeal or revision an accused person cannot be convicted of an offence of which he could not have been convicted by the Court which tried him. In warrant cases it is necessary to frame a charge to give the accused due notice of what allegations he has to meet. Sections 237 and 238 of the Code of Criminal Procedure contain provision for convicting an accused in certain cases of offences with which he was not charged. In the case of *Lala Ojha* (5), the learned Judges intimated that some other exceptions to the rule might be allowed in appeal, and the one which

(1) (1903) I.L.R. 25 All., 534.
(2) (1880) 6 C.L.R., 427.
(3) (1885) I.L.R. 8 All., 120.
(4) (1899) 3 C.W.N., 367.
(5) (1899) 3 C.W.N., 653; (1899) I.L.R. 26 Cal., 863.
(6) (1900) I.L.R. 27 Cal., 660.

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they did allow was convicting the accused of the substantive offence, for abetment of which he had been tried and convicted in the Court below. One they expressly excluded was "if there were circumstances of aggravation of an offence to which the accused had not pleaded." In this view of the law I concur, and I am unable to agree with the opinion expressed in *Emperor* v. *Gur Narain Prasad* (1).

Therefore I think the conviction of Tha Maung for robbery cannot be upheld. But I see no reason to order a new trial as the violence used was very slight, the wrongful restraint was the smallest possible.

As Tha Maung admitted a previous conviction of house-breaking by night under section 456, for which he suffered six months' imprisonment, I think his present sentence of one year for picking a pocket in the jungle is unduly lenient.

As Po Yin is 33 years of age, and as he rejoined Tha Maung and slept at the same house with him on the night after the theft, I think the case was not a suitable one for applying section 562 of the Code of Criminal Procedure.

I set aside the order passed under section 562; I alter Po Yin's conviction from abetment of theft to theft under section 379, Penal Code, and I sentence him to six months' rigorous imprisonment.

I set aside the conviction of Tha Maung for robbery and I convict him of theft, under section 379, Penal Code, and I enhance his sentence to two years' rigorous imprisonment.

Criminal Reference No. 81 of 1905.

December 22nd, 1905, June 7th, 1906.

Full Bench—Criminal (Reference).

Before the Hon'ble C. E. Fox, Officiating Chief Judge, Mr. Justice Irwin, C.S.I., and Mr. Justice Hartnoll.

A. K. NUR MAHOMED *v.* AUNG GYI.

Jordan—for appellant. | *Villa*—for respondent.

Magistrate sending case for enquiry or trial under section 476, Criminal Procedure Code—Power of High Court to revise Magistrate's order—Criminal Procedure Code, 1898, sections 439, 476, 537.

The High Court has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere in revision with the action of a Magistrate sending a person for trial to another Magistrate under section 476, sub-section (1), of the Code of Criminal Procedure, 1898.

Duty of Magistrate taking action under section 476, sub-section (1) explained.

Bal Gangadhar Tilak, (1902) I. L. R. 26 Bom., 786, followed. *Eranholi Athan* v. *King-Emperor*, (1902) I. L. R. 26 Mad., 98, dissented from.

Mokun Maistry v. *Valoo Maistry*, (1902) 1. L. B. R., 286; *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi*, (1903) 8 C. W. N., 73; *In the matter of the petition of Bhup Kunwar*, (1903) I. L. R. 26 All., 249; *Suryanarayana Row* v. *Emperor*, (1905) I. L. R. 29 Mad., 100; *Krishnasawmy Naidoo* v. *Queen-Empress*, P. J. L. B., 388, second edition; referred to.

The following reference was made to a Full Bench by *Irwin, J.*:—

The Magistrate's order purports to sanction the prosecution of Nur Mahomed under section 211, Penal Code. Whether the order was in substance a proper one or not, its form is bad. Section 195 (*b*) prescribes that no Court shall take cognizance of certain offences committed in, or in relation to, any proceeding in any Court, except—

(i) with the previous sanction, or

(ii) on the complaint of the Court concerned. The first alternative, previous sanction, obviously refers to complaints by private parties. In the present case no person applied for sanction to make a complaint; therefore the order sanctioning the prosecution was inappropriate. The other alternative is for the Court itself to make a complaint, and that is what the Subdivisional Magistrate did in the present case. The procedure which should be observed in such cases is laid down in Chapter XXXV of the Code. The orders sending the case to the District Magistrate and requiring bail from the accused were in accordance with that Chapter. The order sanctioning the prosecution was not.

I now proceed to consider the merits of the case. The Magistrate says that Nur Mahomed "came before the Court and represented a deliberate falsehood that the accused has done away with the boat". This is the ground of his complaint to the District Magistrate. This is what must be proved at the trial of Nur Mahomed, else he cannot be convicted. But the Subdivisional Magistrate does not say what evidence he proposes to adduce to prove the fact that Nur Mahomed's statement is false. In the judgment I find these words: "There is no evidence of any kind to prove that the accused intended or tried to sell or do away with the boat in any other manner". This was, no doubt, a very proper reason for discharging Maung Aung Gyi, but, when it comes to trying Nur Mahomed, the onus of proving that Maung Aung Gyi misappropriated the boat will not lie on Nur Mahomed. It will be necessary for the prosecution to prove affirmatively that Aung Gyi did not misappropriate the boat and that Nur Mahomed knew that he had not done so. The Subdivisional Magistrate's order gives no indication of how these facts can be proved, and I can find no evidence on the record to prove them. In the case of *Mokun Maistry* v. *Valoo Maistry* (1), I said that a Judicial Officer to whom an application for sanction to prosecute is made should consider, "If I were prosecuting this case myself, am I in a position to produce such evidence as, if unrebutted, would support a conviction"? "I adhere to that dictum, and it certainly does not apply with less force to a case in which the Magistrate himself is prosecuting, as he is in the present case. If the Subdivisional Magistrate had considered the case from this point of view, I think it is pretty certain that he would not have made the complaint which he did make.

The petitioner applied to this Court to revoke the sanction. I have no hesitation about that. I revoke the sanction for two reasons, because nobody asked for it, and because the Magistrate granted it without having sufficient grounds for doing so. But when the sanction is revoked, the petitioner is not a whit better off than he was before. No sanction is necessary because the complaint is made by the Court itself, and the revocation of the sanction cannot prevent the trial from proceeding.

The question therefore arises whether this Court can interfere under section 439 of the Code of Criminal Procedure. So far as I can

(1) (1902) 1 L. B. R., 286.

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ascertain, the point has never been raised in this Court. The High Court of Bombay in the case of *Bal Gangadhar Tilak* (2) reviewed the rulings of all four High Courts, and found that all concurred in the view that the power of revision conferred by section 439 of the Code of Criminal Procedure extends to orders passed under section 476 of the Code of Criminal Procedure. This judgment is dated 19th August 1902. On 29th September 1902, however, a Full Bench of the Madras High Court in *Eranholi Athan* v. *King-Emperor* (3) overruling a previous Full Bench decision, held that a High Court has no power, under section 439, to interfere when a Court has taken action under section 476. The ground of this ruling is that under the Code of 1898, when action is taken under sub-section (*1*), such action is not to be regarded as an order but as the lodging of a complaint. This ruling has been referred to in subsequent judgments of the High Courts of Calcutta and Allahabad, *viz.*, *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi* (4) and *In the matter of the petition of Bhup Kunwar* (5), but the question in those cases was different because the action under section 476 was taken by a Civil Court.

In consequence of this conflict of opinion I refer to a Full Bench the questions—

(1) Can the High Court under section 439 of the Code of Criminal Procedure interfere with the action of a Magistrate under section 476 (*1*) of the Code of Criminal Procedure?

(2) If so, can such interference operate to stop the proceedings of the Magistrate who is acting under section 476 (*2*) or to render them void if they are completed?

I add the second part of the second question because I refused to stay the proceedings of the Magistrate to whom the case has been referred for trial and they have not come before me at all.

The opinion of the Bench was as follows:—

Fox, Officiating C. J.—All the High Courts have held that under the Criminal Procedure Code of 1882 orders made under section 476 were subject to revision under section 439 of the Code.

The first question now referred appears to depend upon whether the alterations made in section 476 by the Code of 1898 have taken away from High Courts powers which they had asserted and exercised. In *Eranholi Athan* v. *King-Emperor* (3) a Full Bench of the Madras High Court has held that such is the effect of the alterations. The ground of this decision was that by the introduction of the words "and as if upon complaint made and recorded under section 200" in sub-section (*2*) of the section the Legislature intended to make it clear that when action is taken under sub-section (*1*), such action is not to be regarded as an order but as the lodging of a complaint, which there is no power to revise.

Their Lordships' attention does not appear to have been drawn to the addition of the words "or any irregularity in proceedings taken under section 476" to clause (*b*) of section 537 made by the Code of

(2) (1902) I. L. R. 26 Bom., 785.
(3) (1902) I. L. R. 26 Mad., 98.
(4) (1903) 8 C. W. N., 73.
(5) (1903) I. L. R. 26 All., 249.

1898. If the intention of the Legislature in making the addition to section 476 was that stated above, it has nevertheless made it equally clear by its addition to clause (*b*) of section 537 that it contemplated that proceedings under section 476 might be subject to revision, which is the only form in which they could come before a High Court.

The ruling of the Madras High Court has been considered by a Bench of the Calcutta High Court, and a Full Bench of the Allahabad High Court, and lately by a Bench of the Madras High Court.

In *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi* (4) and *In the matter of the petition of Bhup Kunwar* (5) the question was whether the High Court had power to revise an order made by a Civil Court under section 476 of the Code. That question does not arise in the case under reference; it would be out of place for this Bench to express an opinion on what is an abstract question in relation to the case on which the reference has been made. It may be noted, however, that in the Allahabad case the learned Chief Justice was unable to concur in the reasons assigned by the learned Judges of the Madras High Court for the conclusion at which they arrived.

In the case of *Suryanarayana Row* v. *Emperor* (6) the order under section 476 had been made by a Magistrate, and objection was taken that there was no power to revise. The objection was overruled on the ground that the Magistrate had no jurisdiction to make the order. It was said that the Full Bench ruling referred to above could not possibly be held to apply to a case like the one before the learned Judges. If, however, the Magistrate's order was a complaint as laid down by the Full Bench, there could be no jurisdiction to revise it even when the Magistrate had acted without jurisdiction under section 476.

I am unable to concur in the reasons given by the learned Judges in the Madras Full Bench case for holding that a High Court has no power under the Criminal Procedure Code of 1898 to revise proceedings of subordinate Criminal Courts under section 476 of the Code.

The additional words in sub-section (*2*) of that section merely enable the Magistrate before whom the accused is taken to proceed as if a complaint had been made to him and he had examined the complainant upon it. They do not, in my opinion, make the order under the first sub-section a complaint itself, and the words used by the Legislature show that it did not consider that such an order would be a complaint. In the ordinary course contemplated by the first section, a Magistrate makes an order under it just as he makes any other order. It constitutes a direction, and although it may contain an allegation that a person has committed an offence, and it is sent to another Magistrate with a view to his taking action under the Code, it is something more than a complaint as defined in the Code for the Magistrate who receives it is bound to take action on it, and has not the option of postponing issue of process under section 202 or of dismissing it under section 203.

In my opinion the Code of 1898 has made no change in the law with respect to the power of High Courts to revise proceedings of inferior

(6) (1905) I. L. R. 29 Mad., 100.

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Criminal Courts, and I would answer the first question referred in the affirmative, that is to say if the learned Judge who referred the question considers that the Magistrate's order was one under section 476 of the Code it is open to him to deal with it in revision.

The second question referred cannot, in my opinion, be dealt with by this Bench. Section 11 of the Lower Burma Courts Act is the only section under which any question on a criminal appeal or revision can be referred to a Bench or Full Bench. The question referred must arise in the case, and the decision of the case must be dependent on it, for the Judge who refers must ultimately dispose of the case in accordance with the decision of the Bench to which the question has been referred.

The learned Judge says that he refused to stay the proceedings of the Magistrate to whom the case was referred, and those proceedings have not been before him. Under the circumstances the second question is not one on the decision of which by this Bench the disposal of any case depends, and is consequently not one on which the Bench is called upon to give a decision.

Irwin, J.—The Bombay case of *Bal Gangadhar Tilak* (2) was an application for stay of criminal proceedings which had been instituted by an order of a Civil Court passed under section 476 of the Code of Criminal Procedure. The review, in that judgment, of the rulings on the question whether the power of revision conferred by section 439 extends to orders passed under section 476 seems to have been quite irrelevant, as Chapter XXXII confers no power on the High Court to interfere with any proceeding of a Civil Court. The head note is misleading, for in the last sentence of the judgment the learned Judges expressly declined to decide whether section 435 or 439 empowered the High Court to interfere with the action of a Civil Court under section 476.

On examining the cases cited in that review, I find that the first two Calcutta cases are very much in point, though the question is not closely reasoned. The third Calcutta case seems to have nothing to do with section 476. The one Allahabad case before a single Judge deals with a prosecution instituted by a Civil Court. The Madras case has been overruled by a later Full Bench.

All the Bombay cases related to prosecutions instituted by Civil Courts.

It comes to this then, that there are no rulings of the Bombay and Allahabad Courts directly in point, the Madras Court has two apparently contradictory rulings, and there are two rulings of the Calcutta Court, unsupported by detailed reasons, in favour of the High Court having the power of revision.

I cannot agree in thinking that the words "or any irregularity in proceedings taken under section 476", which occur in clause (*b*) of section 537, are in point. They are supplementary to the words about want of sanction which were in the Code of 1882, and must, I think, be read in the same way. The want of sanction can only refer to the trial of the accused for an offence mentioned in section 476, and I think the whole of the clause refers to such trial, not to the proceedings

of the Court which institutes the prosecution. Moreover, I am not prepared to say that a Magistrate receiving an accused person with an order made by another Magistrate under section 476 has not the option of postponing issue of process. I would say that the words "as if upon complaint made and recorded under section 200" do not of themselves modify or restrict the powers or duties of the Magistrate as laid down in any sections following section 200. If so, there is no reason why a Court should not be as free to institute a prosecution without interference from the High Court as any private person. I agree with the learned Chief Judge that an order under section 476 is a complaint and something more. When first made it is an order. When delivered to "the nearest Magistrate of the first class" it becomes also a complaint. The Judicial Commissioner in *Krishnasawmy Naidoo* v. *Queen-Empress* (7) said it amounts to a complaint, and I do not think that has ever been dissented from.

If it were not a complaint the Magistrate would be precluded by section 195 from taking cognizance of the offence on it.

While I think that on general principles the High Court ought not to have the power of setting aside on revision an order passed under section 476, I am constrained to hold that it has that power, because section 476 is not mentioned in section 435, clause (*3*), which exempts certain proceedings of Magistrates from revision.

I therefore concur in the answer proposed by the learned Chief Judge to the first question.

As to the second question, if it is not dealt with by this Bench, and if the order under section 476 is set aside, the question will still remain undecided, whether there is a real complaint before the Magistrate, and whether, if there is no complaint, his proceedings are on that account void. This is a very unsatisfactory state of affairs, and it emphasizes the inexpediency of interference by the High Court with orders under section 476. Nevertheless I can see no reason for dissenting from the opinion of the learned Chief Judge. I agree that the question cannot be dealt with by this Bench.

Hartnoll, J.—I concur in the answers proposed by the learned Chief Judge to the reference.

It seems to me that the Code of 1898 has made no change in the law with respect to the powers of High Courts to revise proceedings of inferior Criminal Courts.

Under the repealed Code of 1882 there seems to have been a consensus of opinion, that orders under section 476 were subject to revision under section 439, and the words added to section 476 (*2*) in the Code of 1898 do not, in my opinion, operate to make the proceedings of the Magistrate under section 476 (*1*) merely a complaint. Section 476 (*1*) contemplates an order being passed after such enquiry as may be necessary, and that order is something more than a complaint. The words in section 476 (*2*) "as if on complaint made and recorded under section 200" do not, in my opinion, mean that the proceeding taken under section 476 (*1*) is to be regarded merely as a complaint and not

(7) P. J. L. B. 388, 2nd edition.

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as an order. The words added to section 537 of the Code certainly contemplate revisional action under section 476, and, moreover, section 476 does not find a place in section 435 (3), which exempts certain orders and proceedings from being called for for the purpose of examination. Both these facts go to explain the intention of the Legislature. With regard to the answer proposed to the second question I have no remarks to add to those made by the learned Chief Judge.

Criminal Appeal No. 495 of 1906.

September 6th, 1906.

Before Mr. Justice Irwin, C.S.I.

SHWE KIN *v.* KING-EMPEROR.

Young, Officiating Government Advocate for the King-Emperor.

Evidence—order in which witnesses are examined—direct evidence and corroborative evidence—Indian Evidence Act, 1872, ss. 136, 157.

Corroborative evidence under section 157 of the Evidence Act should not be admitted until after the witness sought to be corroborated has himself been examined. *Nistarini Dassee* v. *Rai Nundo Lall Bose*, (1900) 5 C. W. N., xvi, referred to.

The first witness examined was the headman Maung Pya Gyi. He related the substance of statements made to him by Lu Pe, Po Han, Ma Ngwe Nu and Po Chok. All this was pure hearsay and inadmissible; the Magistrate ought not to have recorded it. It is true that all these persons were afterwards called as witnesses. After they were examined evidence could have been given of previous statements made by them to the headman, in order to corroborate them under section 157 of the Evidence Act, but before they were examined there was nothing to corroborate, and therefore at that stage of the case the evidence of what they had said to the headman was inadmissible. In *Nistarini Dassee* v. *Rai Nundo Lall Bose* (1) it was said that ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given. The Court has no doubt a discretion to allow evidence to be given under section 157 out of the regular order upon an undertaking by counsel to call the witness sought to be corroborated, though such a course will be found in most cases to be inconvenient. If necessary, a witness will be allowed to be re-called to give evidence under this section after the person sought to be corroborated has given his evidence.

I am not prepared to say that the Court has not such a discretion as is indicated in that case, though it is not at all clear to me that such a discretion is given by section 136 of the Evidence Act; but I am strongly of opinion that if such discretion exists it should be rarely used, and only for very special reasons. To allow a witness to be corroborated before he is examined is, I think, not only inconvenient but likely to cause the Judge or jury to give undue weight to the hearsay statements. The Calcutta case I have cited was a civil one, and if the course referred to was there inconvenient or objectionable, though there were counsel on both sides, it is doubly objectionable in a criminal trial where the prisoner is undefended. The prisoner may be gravely prejudiced if the evidence which the witness eventually gives is not so unfavourable to the prisoner as the previous statements of the witness proved under section 157.

(1) (1900) 5 C. W. N., xvi.

Before Mr. Justice Hartnoll.

THA KAING v. MA HTAIK.

Civil 2nd Appeal No. 218 of 1905.

May 17th, 1906.

Lambert—for appellant (defendant). | *Villa*—for respondent (plaintiff).

Mortgage suits—joinder of parties—Civil Procedure Code, s. 32—Transfer of Property Act, 1882, s. 85.

Section 85 of the Transfer of Property Act, 1882, lays down that, subject to the provisions of section 437 of the Code of Civil Procedure, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under the Chapter relating to such mortgage, provided that the plaintiff has notice of such interest. Though section 85 is not in force in Lower Burma outside of certain Municipalities, it lays down a rule of law which should be generally followed for the avoidance of needless litigation and multiplicity of suits.

Ma Min Tha v. *Ma Naw*, 2 U. B. R. (1892-96), 581; *Maung Ko* v. *Maung Kye*, 2 U. B. R. (1892-96), 586; *Maung Pe* v. *Ma Taik*, 3 L. B. R., 15; *Ghulam Kadir Khan* v. *Mustakim Khan*, (1895) I. L. R. 18 All., 109; referred to.

The second and third grounds of appeal are :—

(1) that this suit is defective for non-joinder of all the heirs of the deceased ;

(2) that the lower Court was wrong in granting a decree for redemption, when it was proved that the respondent was not the sole owner.

If Ma Htaik was not the only person having any interest in the property the subject of this suit, I think that these grounds must prevail. Section 85 of the Transfer of Property Act lays down that subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage, provided that the plaintiff has notice of such interest. Though this section is not in force in the mofussil, it lays down a general rule of law, that should be followed in order to avoid needless litigation and multiplicity of suits. The principle has been discussed in Burma, and I would refer to the following cases (*a*) *Ma Min Tha* v. *Ma Naw* (1), (*b*) *Maung Ko* v. *Maung Kye* (2) and (*c*) *Maung Pe* v. *Ma Taik* (3). I would also refer to the case of *Ghulam Kadir Khan* v. *Mustakim Khan* (4).

The plaintiff would probably in this case have notice of all others having an interest in the land in dispute if there are any. Before passing final orders on these grounds of appeal, I should like to hear counsel on the question as to whether there are others having an interest in this property and, if so, as to who they are.

Before the Hon'ble C. E. Fox, Officiating Chief Judge, and Mr. Justice Irwin, C.S.I.

Civil Miscellaneous Appeal No. 27 of 1906.

IN THE MATTER OF JACOB AGABOB, AN INSOLVENT.

May 3rd, 1906.

Young—for appellant.

Insolvency—Indian Insolvency Act, 1848—appeal from order refusing benefit of —application by appellant for protection from arrest—ss. 13, 73—Lower Burma Courts Act, 1900, s. 8—Civil Procedure Code, ss. 545, 639, 647, 4.

Applicant had filed an appeal against the order of the learned Judge on the Original Side of the Chief Court, dismissing his petition for the benefit of the Act

(1) 2 U. B. R. (1892—96), 581.
(2) 2 U. B. R. (1892—96), 586.
(3) 3 L. B. R. 15.
(4) (1895) I. L. R. 18 All., 109.

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for the Relief of Insolvent Debtors. He applied for an order of protection from arrest during the hearing of the appeal.

Held,—after examination of the law applicable, that such an order could not be granted.

Fox, Offg. C. J.—The appellant has filed an appeal against the order of the learned Judge on the Original Side dismissing his petition for the benefit of the Act for the Relief of Insolvent Debtors. What has at present to be dealt with is his application for an order for protection from arrest pending the hearing of the appeal.

Clause (*d*) of sub-section (*1*) of section 8 of the Lower Burma Courts Act, 1900, declares that this Court shall have within the Rangoon Town such powers and authorities with respect to the persons and property of insolvent debtors, and with respect to their creditors, as are for the time being exercisable by a Court for Relief of Insolvent Debtors under the Indian Insolvency Act, 1848.

Sub-section (*2*) of the same section says, *inter alia*, that the procedure in insolvency cases shall be, as far as may be practicable, in accordance with the procedure prescribed by the above Statute as amended by any enactment for the time being in force. Sub-section (*3*) proceeds to say that nothing in Chapter XX of the Code of Civil Procedure shall apply to any Court having jurisdiction within the Rangoon Town. The learned Judge who deals with original petitions for the benefit of the Act, and a Bench dealing with appeals from orders under the Act, have therefore to follow the procedure laid down in the Act as far as may be practicable. The only power given by the Act to grant an *interim* order for the protection of the insolvent from arrest is that given by section 13 of the Act, and that is given to the Court to which the insolvent has presented his petition. Section 73 of the Act which deals with the powers of an Appellate Court does not give power to such Court to grant an *interim* order for the insolvent's protection from arrest pending the hearing of the appeal.

Learned counsel has argued that as this Court is not a Chartered High Court, it is open to it to exercise powers under section 545 of the Code of Civil Procedure in the case. No doubt the first paragraph of section 639 of the Code expressly states that nothing in the Code shall extend or apply to any Judge of a Chartered High Court in the exercise of jurisdiction of an Insolvent Court, but it does not follow, because there is no express provision of a similar nature regarding a Judge of a Chief Court when exercising such jurisdiction, that he can adopt the Civil Procedure Code in cases within that jurisdiction. The procedure to be followed by Judges of this Court is laid down by the Lower Burma Courts Act, and section 4 of the Code enacts that save as provided in the second paragraph of section 3 nothing in the Code shall be deemed to affect that Act. Moreover, even if section 545 and section 647 of the Code could be applied to the case, there is nothing to stay execution of: the applicant is as a result of the learned Judge's order merely left in the position in which he was before he applied for the benefits of the Insolvent Act. Further, stay of execution is not what he asks for. He asks for an *ad interim* order for his protection from arrest pending the hearing of his appeal, which is quite a different request from one asking stay of execution of an order or decree.

On these grounds I think the appellant's application must be rejected.

Irwin, J.—I concur.

Before Mr. Justice Hartnoll.

Special Civil 2nd Appeal No. 21 of 1906.

BI YA *v.* ON GAING AND MA SHWE THIT.

July 2nd, 1906.

Lentaigne—for appellant (plaintiff).

D. N. Palit—for respondents (defendants).

Compromise of suit—form of—Civil Procedure Code, s. 375—Evidence Act, 1872, s. 91—Specific Relief Act, 1877, s. 9.

When a suit is adjusted by agreement or compromise, section 375 of the Code of Civil Procedure does not require that the agreement or compromise shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit, or in other words that a note of the terms shall be made in the proceedings. If the Judge omits to make this note, section 91 of the Evidence Act does not operate to bar a suit from being brought on the terms of the compromise.

When an agreement or compromise is made in a suit brought under section 9 of the Specific Relief Act, the decree of the Court passed under section 375 of the Code does not bar any person from suing to establish his right to property and to recover possession thereof.

The main ground on which the Divisional Judge decided the suit, was that the compromise arrived at in 1900 was not reduced to writing and recorded under section 375 of the Civil Procedure Code, and so under section 91 of the Evidence Act no oral evidence of its terms can be given. Respondents' counsel now abandons this position, and states this part of the judgment of the learned Divisional Judge does not apply to the present case, since the agreement was made outside the Court, and the terms of the compromise were not known to the Court. It seems to me that the Divisional Judge was in error in the view he took. Section 375 of the Code of Civil Procedure, in my opinion, does not require that the agreement or compromise itself shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit, or in other words that a note of the terms should be made in the proceedings. The agreement, or compromise itself, that is made out of Court, may be in writing or by word of mouth. In the former suit I see that in the written petition U Bi Ya simply asked to withdraw the suit. In the written note the Judge recorded that there had been a compromise. It may have been irregular that he did not record the terms of it; but, since they were not recorded, for the above reason there seems to be no bar to a suit being brought on the terms of the compromise. It should also be noted that section 375 of the Code of Civil Procedure only allows the decree to be final so far as relates to the subject matter of the suit. No decree was passed, and if it had been, as the suit purported to be, one under section 9 of the Specific Relief Act, it could only have dealt with such a suit. This section distinctly states that it does not bar any person from suing to establish his title to property and recover possession thereof. This suit therefore does not seem to be barred in consequence of the previous litigation, nor does Mr. Palit contend that it is.

Special Civil 2nd Appeal No. 2 of 1906.

July 2nd, 1906.

Before Mr. Justice Irwin, C.S.I.

MAUNG MAN *v.* DORAMO.

Bland—for appellant (defendant).

Marriage—Hindu and Burmese Buddhist woman.

A Hindu of caste cannot marry a Burmese Buddhist woman.

Melaram Nudial v. *Thanooram Bamun*, (1868) 9 W. R., 552; *Narain Dhara* v. *Rakhal Gair*, (1875) I. L. R. 1 Cal., 1; *Upoma Kuchain* v. *Bholaram Dhubi*, (1888) I. L. R. 15 Cal., 708; *S. Anamalay Pillay* v. *Po Lan*, 3 L. B. R., 228; followed.

Appellant Maung Man attached a house in Po-tha-aung-gon village in execution of a money decree against Ma Shwe Me. Respondent Doramo applied for removal of attachment, and being unsuccessful he instituted this suit for a declaratory decree, alleging that although Ma Shwe Me is his wife, she is not his lawful married wife, as he is a Hindu and she is a Burmese Buddhist, and she has no right to his property. The issue fixed was whether the attached property belongs to Doramo alone or to him and Ma Shwe Me jointly.

Plaintiff Doramo was the only witness examined, and the parties asked the Court to decide the case on his evidence. The Court of First Instance found that the property was the joint property of plaintiff and Ma Shwe Me because they had lived together as man and wife for 16 years and the property was acquired after plaintiff had taken Ma Shwe Me to wife. Ma Shwe Me's share was declared to be one half.

The Judge of the District Court, in a careful and well-reasoned judgment, holds that as Ma Shwe Me is not a Hindu, and not of the same caste as Doramo, she cannot be his lawful wife, and has no interest in his property. One of the grounds of second appeal is that there was a valid marriage, and it was argued that Doramoswami had acquired a domicile in Burma, that his personal law had thereby altered, and the case should be decided according to the law prevailing in Burma. The learned pleader, however, could not say what that law was. Even if it were shown that Doramoswami had changed his domicile, he would still be subject to the same personal law.

A Hindu cannot contract a legal marriage except with a woman of his own caste. *Melaram Nudial* v. *Thanooram Bamun* (1); *Narain Dhara* v. *Rakhal Gair* (2); *Upoma Kuchain* v. *Bholaram Dhubi* (3). In a recent case before a bench of this Court (4) in which the plaintiff said he was a pariah, it was held that he could contract a legal marriage with a Burmese Buddhist, because pariahs are outcastes and the Hindu law relating to marriage does not apply to them. In the present case there is no suggestion that the plaintiff-respondent is an outcaste. He described himself as a Hindu, and defendant did not allege that plaintiff was not subject to caste laws. The material parts of his evidence are " Ma Shwe Me is my wife. I took her to wife about 16

(1) (1868) 9 W. R., 552.
(2) (1875) I. L. R. 1 Cal., 1.
(3) (1888) I. L. R. 15 Cal., 708.
(4) Civil Misc. Appeal 34 of 1905, *S. Anamalay Pillay* v. *Po Lan*, 3 L. B. R., 228.

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years ago. She and I have been living together since then. She bore me six children. I do not eat with her, but I sleep with her. I cook my own food and eat it. I have a married wife in India. She has no children. I own paddy land, which is in my name and in that of Ma Shwe Me. I gave her only 100 baskets of paddy and about Rs. 60 a year. I also supply her children with clothes. No one gave her to me in marriage. I had to woo her for about three months. She was living with her elder sister." I think it is impossible to avoid the conclusion that Doramoswami is subject to Hindu law, and that Ma Shwe Me is not his lawful wife.

Another ground of appeal is that if Ma Shwe Me is not the lawful wife of Doramoswami she is at least his partner, and the attached property should be held to be their joint property as it is registered in their joint names, and was acquired by their joint exertions.

The house in dispute is not registered in their joint names, and there is no evidence that it was acquired by their joint exertions. The evidence is simply that it was acquired by the plaintiff, and belongs to him. There are no grounds for holding that Ma Shwe Me has any interest in it.

The appeal is dismissed with costs.

Before the Hon'ble C. E. Fox, Offg. Chief Judge and Mr. Justice Hartnoll.

Civil 1st Appeal No. 88 of 1905.

June 14th 1906.

MA LE *v.* PO TAIK.

N. N. Burjorjee—for appellant (defendant). | *Connell*—for respondent (plaintiff).

Benami transaction for purpose of defrauding creditors—deed of conveyance not in real purchaser's name—suit by real purchaser against benamidar for possession.

The plaintiff alleged that he had bought a piece of land, but had caused the conveyance to be executed in the name of defendant (his mother). This was done fraudulently for the purpose of protecting the property against the claims of plaintiff's creditors. He now sued his mother for possession of the land.

Held,—that whether the intended fraud was carried out or not, the suit must be dismissed.

Jadu Nath Poddar v. *Rup Lal Poddar*, (1906) 10 C. W. N., 650; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, (1874) 21 W. R., 422; dissented from.

Chenvirappa v. Puttappa, (1887) I.L.R. 11 Bom., 708; *Yaramati* v. *Chundru*, (1897) I. L. R. 20 Mad., 326; followed.

Symes v. *Hughes*, (1870) L. R. 9 Equity, 475, referred to.

Fox, Offg. C. J.—The plaintiff sued the defendant (his mother) for a declaration that a piece of land, which had been conveyed to her some years previous to the suit, belonged to him, and he asked that she might be ordered to convey it to him, and to give him possession of it.

He founded his claim upon his having bought the land with his own money, and he set up that although the conveyance consequent upon his purchase was made to his mother, it was not intended that she should have any beneficial interest in the land, and it was put in her name *benami* for his use and benefit.

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The defendant did not claim that she was the real owner of the land, but she alleged that the land belonged to another of her sons. It appeared in evidence that the plaintiff and this son had done business together for many years as brokers to a firm of millers in Rangoon. At the time the property was purchased both were indebted to the firm in a considerable amount of money. The plaintiff admitted that the reason why the property in suit was conveyed to his mother was because the firm was about to sue for the money due to it, and in order that if the firm got a decrée against him it should not be able to attach the property, and that if he were declared an insolvent the Official Assignee should not be able to get it. This is an admission that the conveyance to his mother was taken in pursuance of fraudulent intentions on his part, and under such circumstances it has first to be considered whether the Court should have granted him the relief he asked, even if he did prove that he had bought the property with his own money, and that it was really his. There is no distinction in principle between the circumstances of the present case, and those of a number of cases in which an owner of property has made a sham and collusive conveyance of his property to another with intent to defeat his creditors, or perpetrate a fraud.

The history of the law applicable in such cases has been reviewed in an exhaustive judgment of *Mookerjee, J.*, in *Jadu Nath Poddar* v. *Rup Lal Poddar* (1). He says that although in the earliest cases a very stringent rule was laid down to the effect that a person is not entitled to ask a Court of Justice to afford him relief from the consequences of his own misconduct, the later cases enunciate the more lenient rule that the real nature of the transaction ought to guide the Court in determining the rights of the parties. This last observation was, as I read the judgment, in reference to cases in the Calcutta High Court alone. That Court has adopted the rule that where the intended fraud has been carried into effect, the Court will not allow the true owner to succeed in a suit against his benamidar for recovery of what was fraudulently conveyed, but where no one has been in fact defrauded, the Court will not punish the real owner for his intention to defraud by giving his estate away to another whose retention of it is an act of gross fraud.

The distinction is based upon the judgment of *Sir Richard Couch, C. J.* in *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (2), and it has been adopted in a number of cases in the Calcutta High Court including the one first cited.

The Bombay and Madras High Courts, however, do not recognize any distinction between a case in which an intended fraud has been completed, and one in which it has not been completed as affecting the right of the real owner to recover property from the *benami* holder. A bench of the Bombay High Court in *Chenvirappa* v. *Puttappa* (3), when commenting on the decision of Sir Richard Couch among others, said :—

> These decisions go a long way towards enabling a party to a dishonest trick, by which his creditors may have been defrauded, to get himself reinstated when his purpose has been served. The person entrusted with the property, in order to shield it

(1) (1906) 10 C. W. N., 650.
(2) (1874) 21 W. R., 422.
(3) (1887) I. L.R. 11 Bom., 708.

against just claims, acts dishonourably no doubt, in refusing to restore it when called on, but the risk of this operates to check knavery if the Courts refuse their aid to the sham vendor.

The Court held that the cases in the English Courts fell short of supporting Sir Richard Couch's decision.

In *Yaramati* v. *Chundru* (4) *Benson, J.*, refers to the few exceptions or rather *quasi*-exceptions to the general rule that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed, and says that with the exception of the cases to which he refers, there will not be found any authority for holding that a plaintiff can come into Court alleging his own fraud, and ask the Court simply and solely for his own benefit to set aside the fraudulent deed, or make a declaration to protect him from the threatened consequences of his act. The case out of which this appeal arises is one in which there is nothing to show that any creditors of the plaintiff were in fact defrauded. It is therefore a case in which the Calcutta High Court would, but the Bombay and Madras High Courts would not, give the plaintiff relief, if he made out that the property really belonged to him. It has to be decided which course of rulings should be followed by this Court.

The majority of the decisions appear to be in favour of the view taken by the Bombay and Madras High Courts, which was the view of the Calcutta Court until the decision of Sir Richard Couch in *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (2). He relied upon *Symes* v. *Hughes* (5), the correctness of the decision in which it has been doubted by very high authority.

It is said that to refuse relief to the real owner when no one has actually been defrauded in consequence of the fraudulent conveyance, would be to encourage a double fraud on the part of the *benami* holder, and to punish the single fraud on the part of the real owner. In my judgment no question of encouraging fraud on the part of the *benami* holder should affect the question. The matter of primary importance is the initial fraud which is a fraud aimed against persons who might have rights against the property collusively conveyed.

A fraud committed by one party to a fraudulent transaction against the other party to it, should be regarded as of small importance compared with the fraud against innocent parties who may possibly be robbed of their dues by the transaction.

The Courts are bound not to lend their aid to any one who has engaged in a fraudulent transaction for his own purposes and benefit, but who subsequently finds that the results of his scheme are not what he thought they would be.

In the words of one of the decisions of the Calcutta Sudder Court- "It is well that it should be understood, that when people execute fictitious deeds for the purpose of defeating their creditors, avoiding an attachment or effecting any other fraudulent purpose, they place themselves completely at the mercy of the person in whose name the fictitious conveyance is made out, and that their plea of the transaction being a *benami* one, will not be listened to". Departure from this rule can, in

(4) (1897) I. L. R. 20 Mad, 326. | (5) (1870) L. R. 9 Equity, 475.

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my opinion, only tend to the encouragement and increase of pernicious schemes of fraud which are far too frequent amongst Eastern peoples.

The particular method adopted by the present plaintiff of hiding his property with a view to take it out of the reach of his creditors, is even more pernicious than that of a conveyance by an owner to another person to hold *benami*.

If his creditors had sued the plaintiff, or if he had been declared insolvent, there would have been small chance of the property being traced as belonging to him, for his name does not appear in any register of lands. When an owner makes a fictitious transfer, the creditors and others have at least a chance of tracing the transaction and enquiring into the validity of it, but when a person buys land and takes the conveyance in the name of another, the difficulties in the way of creditors who should have the right of proceeding against such property for recovery of their debts are enormously increased. Such transactions should be especially discouraged.

Upon his own admissions in the case, the plaintiff, in my judgment, was not entitled to receive from the Court the relief he asked for.

Upon this ground, which renders consideration of the question whether the property was really his unnecessary, I think that the decree of the original Court should be reversed, and that the suit should be dismissed with costs, the plaintiff being also ordered to pay the defendant's costs on this appeal.

Hartnoll, J.—I agree that this appeal should be disposed of in the manner proposed by the learned Chief Judge.

It seems to me that every hindrance possible should be placed on the fraudulent disposal of property in order to cheat creditors, and that, where a person makes such a fraudulent disposition or a disposition with such a fraudulent intention, the Courts should not grant him relief by putting him back into the position that he was in before he made it. The refusal of relief in such cases should certainly tend to restrict the practice, as persons will be less prone to resort to fraud for fear of the consequences. In my opinion the protection of the creditor is a much more important matter than the granting of relief to a person who has lent himself to fraudulent practices, whether the intended fraud has been carried into effect or not.

Before Mr. Justice Irwin, C.S.I.

Civil Revision No. 33 of 1906.

August 16th, 1906.

PEROBSHAW SEROBSHAW v. GAWRIDUTT BOGLA.

Agabeg—for applicant (plaintiff). | *Lentaigne*—for respondent (defendant).

Pauper suits—"*right to sue*"—*Civil Procedure Code, ss. 407 (c), 409.*

The petitioner had applied in the District Court for permission to bring a suit *in forma pauperis* for damages for malicious prosecution. Respondent had obtained a conviction against him, which had been set aside on appeal on the ground that the Magistrate was not competent to try the case. The Judge of the District Court held that the suit was not maintainable because the petitioner was not acquitted on appeal by reason of the original conviction having proceeded on evidence which was known by the complainant to be false or on the wilful suppression by him of material information; and the Judge dismissed the application for leave to sue as a pauper.

Held,—that the question whether the suit was not maintainable on such a ground was one which related to the merits of the case and should not have been gone into in an enquiry under section 409 of the Code of Civil Procedure; and *ordered* that the District Court proceed with the enquiry into applicant's pauperism and make a fresh order under section 409.

Boja Reddi v. *Perumal Reddi*, (1902) I. L. R. 26 Mad., 506; *Gopal Chandra Neogy* v. *Bigoo Mistry*, (1903) 8 C. W. N., 70; *Maung Kya Bu* v. *Ma Sa Yi*, (1902) 9 Bur. L. R., 130; referred to.

The petitioner applied for leave to sue as a pauper.

Notice was issued under section 408 of the Civil Procedure Code, and on the day fixed the petitioner was examined as to his pauperism. Arguments were then heard on the question whether his allegations showed a right to sue in the Court. The learned Judge then passed an order refusing the application on the ground that the suit was, on the face of it, not maintainable. It was alleged in the plaint that the defendant falsely, maliciously and without reasonable and probable cause, accused the plaintiff before a Magistrate of having committed criminal breach of trust, that he was arrested and convicted and sentenced to imprisonment, and underwent 14 days' imprisonment, and that he was acquitted on appeal. The ground of the decision that the suit was not maintainable is the ruling of the High Court of Madras in *Boja Reddi* v. *Perumal Reddi* (1). In the course of the argument, the applicant's pleader urged that the question whether the suit was maintainable related to the merits, and should not be gone into at this stage. He cited *Gopal Chandra Neogy* v. *Bigoo Mistry* (2) and *Maung Kya Bu* v. *Ma Sa Yi* (3), and the learned Judge seems to have followed the latter ruling, as he understood it, for he says the point to be considered is, "Is there a possibility of the applicant succeeding in the present suit, or is it clear, on the face of it, that the suit is not maintainable"?

The Court was certainly bound, under the second paragraph of section 409, to hear any arguments which the parties might desire to offer, on the question whether the plaintiff's allegations do not show a right to sue in the Court, but the learned Judge seems to have regarded that question as a wider question than it really is. In the case of *Maung Kya Bu* v. *Ma Sa Y* (3), Mr. Justice Fox did not say that the point to be considered was whether there was any possibility of the applicant succeeding in the suit, but whether there could be any question as to the possibility of his succeeding. In the present case there certainly is a question. The point taken by the respondent is not dealt with in any statute law, and the view of the learned Judge is based on a single ruling of the Madras High Court. There may be a great deal more to be said on this point when the suit comes to trial, if it ever does so. One point that the learned Judge seems to have overlooked is that the question decided in Madras was whether a conviction by a competent Court is in all cases a bar to a suit for malicious prosecution, and that in the present case the Criminal Court of appeal decided that the Magistrate's Court was not a competent Court. This opens up a wide field for discussion.

(1) (1902) I. L. R. 26 Mad., 506. | (2) (1903) 8 C. W. N., 70.
(3) (1902) 9 Bur. L. R., 130.

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In my opinion there was a material irregularity in this case. The Court decided a point of law which was outside the scope of the question which it had authority to decide under section 409 of the Civil Procedure Code, and which pertained to the merits of the case.

I set aside the order of the District Court, and I direct that it do proceed with the inquiry into the pauperism of the applicant, and pass a fresh order under section 409, Civil Procedure Code.

The respondent will pay applicant's costs. Advocate's fee Rs. 34.

Special Civil Second Appeal No. 242 of 1905.

July 13th, 1906.

Before Mr. Justice Hartnoll.

SHWE PAN AND ANOTHER *v.* MAUNG PO AND ANOTHER.

R. N. Burjorjee—for appellants (plaintiffs).

Patker—for respondents (defendants).

Mutation of names in Revenue Register IX—"pyatpaing"—admissibility in evidence.

The "pyatpaing" or outer foil of the Revenue Register of Mutations, when not signed by the owner of the land, is not admissible in evidence to prove the terms of a report of a transaction in land made to the headman or surveyor who keeps up the Register (*Maung Cheik* v. *Tha Hmat*, 1 L. B. R., 260). But if the headman or surveyor who wrote the *pyatpaing* is called as a witness and gives evidence, from his own memory, of the terms of the report, then it is admissible to corroborate his statements under section 157 of the Evidence Act. It may also be usefully used under sections 159 and 160 of the same Act.

Ma Dan Da v. *Kyaw Zan*, 3 L. B. R., 5, referred to.

Maung Shwe Pan and Ma Thi sue Maung Po and Ma Ywet to allow redemption of two pieces of paddy land for Rs. 1,120. They state that in June 1901 they borrowed Rs. 800 from defendants, mortgaging their lands without possession as security, that after ten months the interest came to Rs. 320, and so about April (Tagu), 1902, in the presence of elders, the land was made over to the defendants by way of usufructuary mortgage, so that the latter could rent out the lands, and take the rent towards the interest, that in 1264 at the request of defendants a mutation of names took place before the circle clerk, Maung Nyo, and that the defendants will not now allow redemption, as they aver that the lands were given to them outright.

The defendants allow the lands were first mortgaged for Rs. 800, but state that, when the mutation took place, the lands were sold outright to them for the original loan Rs. 800 *plus* interest not paid Rs. 320 *plus* Rs. 200, balance of a decree passed against the plaintiffs. The defendants therefore plead a total consideration of Rs. 1,320.

The Court of First Instance gave a decree for redemption, and this decree the Divisional Court reversed dismissing the suit. So a second appeal has been laid. Both sides allow that there was a mutation of names, and that it took place before circle clerk, Maung Nyo, in the house of Ywathugyi, Maung Shwe Seik, who is now dead. The question arises whether there was a sale, when this mutation took place, or only a usufructuary mortgage. The burden of proof rests on the defendants to prove the sale, at any rate in the first instance. The

latest published ruling on the point is that of *Ma Dan Da* v. *Kyaw Zan* (1). Certain *pyatpaings* were produced to assist in proving the sale. The Court of First Instance would not admit the *pyatpaings* in evidence, stating that the ruling in the case of *Maung Cheik* v. *Maung Tha Hmat* (2) applied to them, as they were not signed by the parties, or at least by the seller. The learned Divisional Judge admitted them in evidence and writes:

"Maung Nyo swears that on the 12th December 1902, plaintiffs and defendants came to him and plaintiffs told him that they had sold outright the lands in dispute to defendants for Rs. 1,320. Plaintiffs signed in Register IX and the witness handed to defendants the outer foils of the register, which he identified in Court as Exhibits I and II. These outerfoils were subsequently excluded by the learned Judge as inadmissible in evidence under the ruling in *Maung Cheik* v. *Maung Tha Hmat* (2). In that case it appears that the thugyi, who certified the outerfoil, was not called as a witness. It is ruled, however, that the outerfoil, which is not usually signed by the owner of the land is not admissible in evidence to prove the report, and it is further stated that the inner foil, which is admissible in evidence, 'is the report itself'. The inner foil is the register itself, which remains in the custody of the Revenue Surveyor. I confess myself unable to follow the argument that the inner foil is the "Report itself". Transfers are reported under rule 7 of the Rules under the Lower Burma Land and Revenue Act, under which the parties are bound to make report, but are not bound to make the report in writing. As a matter of course they almost invariably make the report as they admittedly did in this instance by word of mouth. The best possible evidence of the terms of the report, therefore, is the oral testimony of the Revenue Surveyor to whom it was made. The Revenue Surveyor is legally bound, having received such a report to enter it in the village Record of Rights, and also to furnish to the parties a certified copy of the entries. This certified copy is the *pyatpaing*.

It seems to me, therefore, that Register IX is not the report itself but is a record of the report, and that either the Register itself (referred to by the Chief Court as the counterfoil) or the certified copy—referred to as the *pyatpaing*—are either of them secondary evidence as compared with the oral testimony of the Revenue Surveyor as to the terms of the report to him.

To avoid all doubt on the point, however, I summoned the circle thugyi to produce the register. He swears that it is missing. I accordingly admit in evidence the certified copies of the entries which were as required by law given to defendants and which were produced by them in the lower Court; and I admit them as corroborating the evidence of the Revenue Surveyor as to the terms of the verbal report made to him by the parties—Section 157 of the Evidence Act".

In commenting on this extract from the judgment of the lower Appellate Court, I would note that the learned Divisional Judge seems to question the correctness of the ruling in the case of *Maung Cheik* v. *Maung Tha Hmat* (2). It was not within his province to do so, and it is his duty to follow the rulings of this Court, unless and until they are set aside by competent authority. He admitted the *pyatpaings* in evidence on two grounds (1) as certified copies of the entries made by the surveyor and which are proved to have been lost by the thugyi, and (2) as corroborating the evidence of the Revenue Surveyor.

The learned Judge would seem to mean that the first ground for their admission would come under section 63 (*1*) of the Evidence Act. If so, I am unable to agree with him, for they are not certified as required by section 76. They do not come under section 63 (*2*) and (*5*).

(1) 3 L. B.R., 5. | (2) 1 L. B. R., 260.

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They are not proved to be made from or compared with the original, and so do not come under section 63 (*3*). The point remains as to whether they would come under section 63 (*4*). It was not argued by counsel. I doubt that section 63 (*4*) refers to duplicates of reports. It involves the execution of a document, which implies that the document must have some binding force on the executant, such as a contract. A report can hardly be said to be executed. I express, however, this opinion with diffidence, as the point has not been argued. But, apart from their being admissible as secondary evidence owing to the loss of the copy kept by Government, I agree with the learned Divisional Judge that they are admissible in order to corroborate the testimony of Maung Nyo, as they purport to be statements made in writing by him, when the report was made to him. This view, in my opinion, is not in conflict with the view held by my learned colleague, Mr. Justice Irwin, in the case of *Maung Cheik* v. *Maung Tha Hmat* (2). In that case it was ruled that the *pyatpaing* was not admissible in evidence to prove the report. My learned colleague did not state that it was not admissible as corroboratory of the statement of a witness. The point as to its being admissible as corroboratory of the taiksaye's statement does not seem to have arisen, though it appears to have been written by the taiksaye. My learned colleague merely ruled that a *pyatpaing* signed by a thugyi, who was not called as a witness, was not admissible in evidence to prove the report. The part kept by the revenue official should be signed by the person making the report, and then, if proved, it would be an admission against him relevant under section 21 of the Evidence Act. There would be available both a verbal and written report, and this I have ascertained to be the meaning of my learned colleague, when he wrote:—"If so signed, it is itself the report, and is admissible in evidence". I would also further remark that these *pyatpaing*s must necessarily often be of considerable use under sections 159 and 160 of the Evidence Act. In this very case Maung Nyo probably referred to them either in or before giving his evidence, or how could he have remembered the date—the 12th December 1902—as the date that the parties came to him? It seems to me that both foils and counterfoils might with advantage in many cases be used under sections 159 and 160 of the Evidence Act, and that in fact they often are.

Coming to the facts of the present case, I see no sufficient reason to interfere with the finding of the Divisional Judge. Having weighed the testimony of the witnesses and the evidence, it seems to me that the balance is much in favour of the defendants' story. Register No. 1 for 1902 shows an entry of an outright sale for Rs. 1,320. This entry would be made at the close of the season 1902-03. The entry seems relevant under section 35 of the Evidence Act. The register is kept in accordance with law under section 83 of the rules under the Lower Burma Land and Revenue Act. Maung Nyo is evidently not now employed in the Kyontani circle, where these lands are. The fact that there is an entry in Register No. 1 of 1902 of an outright sale goes far to corroborate the evidence of the defendants.

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The plaintiffs give no evidence of the transfer of the lands before lugyis, before the mutation took place, and they do not explain in any way the difference in the consideration alleged by the defendants.

The defendants in their written statement alleged that Rs. 200 of the consideration was money due on the decree, and so the plaintiffs had an opportunity of showing that this was not true and that the decree had been settled otherwise.

I am of opinion that defendants have discharged their burden of proof and shown that the transaction was reported as a sale, and unless the appellants can show that the transaction was really not a sale, they must, in my opinion, lose

Besides the evidence of those present at the mutation of names, and with regard to which, as I have stated already, I believe the defendants' story, one Maung Nyo is produced. His testimony is not sufficient, in my opinion, to show that the transaction was really a mortgage and not sale.

I accordingly dismiss this appeal with costs.

Before Mr. Justice Irwin, C.S.I.

Criminal Revisio No. 938 of 190

SAN MYA *v.* KING-EMPEROR.

August 27th, 190

D. N. Palit—for applicant.

Previous acquittals or convictions—accused tried twice on same facts—Forest Rules, rule 91—Criminal Procedure Code, 1898, s. 403.

A person convicted under the Forest Act for felling timber in excess of his license cannot, while that conviction remains in force, be tried again for felling the same timber merely because the evidence of the measurement of the timber given at the first trial was incorrect.

The petitioner took out a license to cut 3 tons of *pyingado* timber. He felled five trees under cover of this license. A forest subordinate officer reported that the measurement of the five trees amounted to 3·91 tons. Petitioner was prosecuted for a breach of rule 22 in respect of the excess, ·91 tons, convicted, and fined two rupees under rule 91, though the Magistrate in his judgment incorrectly stated that the offence was punishable under section 22 of the Forest Act.

The Deputy Ranger subsequently discovered that the measurement reported by the subordinate was incorrect, and that petitioner really obtained 7·3 tons of timber from the five trees. The petitioner was then prosecuted again on these facts, convicted of cutting 4·3 tons in excess of his license, in breach of rule 22, and sentenced under rule 91 to pay a fine of Rs. 30. The Magistrate held that section 403 of the Code of Criminal Procedure did not apply because at the previous trial he was tried for cutting only ·91 tons in excess of his license.

This is a fallacy. In both cases he was tried for cutting timber in excess of the amount allowed by his license, and in both cases the timber which was the subject of the prosecution consisted of the same five trees. He was therefore tried twice on the same facts. It was the duty of the prosecution to put before the Court true evidence respecting the measurement of the timber, and failure to do this at the

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first trial does not entitle the Crown to prosecute the offender again in respect of the same timber.

I set aside the conviction and sentence, and direct that the fine of Rs. 30 be refunded to Maung San Mya.

Before Mr. Justice Irwin, C.S.I.

Criminal Appeal No. 358 of 1906.

July 23rd, 1906.

SHWE THI *v.* KING-EMPEROR.

Criminal misappropriation—dishonestly retaining—distinction—Indian Penal Code, ss. 403, 411.

A person who is proved to have dishonestly misappropriated property cannot be convicted of the offence of dishonestly retaining it under section 411 of the Penal Code. That section applies when a person who has come honestly into the possession of property retains it after discovering that it is stolen property. Section 75 Indian Penal Code applies to section 411 but not to section 403.

The stolen bullocks ran away after a cow and were lost in the jungle. They were traced to appellant's possession the next day. The Magistrate convicted the appellant of dishonestly retaining the stolen cattle.

If the cattle had been taken by a thief out of the possession of the owner, the inference to be drawn from appellant's possession the next day would be that he was the thief.

The Magistrate no doubt did not frame a charge of theft because the cattle escaped and were not in the owner's possession when appellant appropriated them. The correct inference to draw from his possession is that he dishonestly misappropriated them, and this is the inference which the Magistrate did draw, as he did not frame any charge of receiving.

Mayne says (Criminal Law of India, section 545)—"Retaining seems to have the same relation to receiving that criminal misappropriation has to theft. If a man came honestly into possession of stolen property and then retained it, after he had discovered that it was stolen, he would have committed the offence of dishonestly retaining". I agree with that. A person who is proved to be the thief cannot be convicted of receiving, and I think by like reasoning a person who is proved to have dishonestly misappropriated property cannot be convicted of retaining it. There is perhaps a defect in the law, in that the punishment for misappropriation is less than for receiving or retaining, but with that the Courts have no concern.

I therefore alter the conviction to one of dishonest misappropriation, under section 403, Penal Code, and as section 75 does not apply to that offence, I reduce the sentence to two years' rigorous imprisonment. The order under section 565 of the Code of Criminal Procedure is also set aside.

(Civil Reference.)

Civil Reference No. 6 of 1906.

August 27th, 1906.

Before the Hon'ble C. E. Fox, Officiating Chief Judge, and Mr. Justice Irwin, C.S.I.

SIVA SAWMY SITIA v. SULIMAN DAWOODJI PAREK AND ANOTHER.

Attachment before judgment—property outside jurisdiction—Civil Procedure Code, Chapter XXXIV—Reference to High Court under s. 617—grounds for.

Property outside the local limits of the jurisdiction of a Court cannot be attached before judgment under Chapter XXXIV of the Code of Civil Procedure.

The rulings of the Chief Court are binding on Subordinate Courts. The fact that a ruling of the Chief Court conflicts with a ruling of another High Court is not a ground for making a reference to the Chief Court under section 617 of the Code.

Ram Pertab Jhowar v. *Madho Rai*, (1902) 7 C.W.N., 216, cited.

Pannu Thaven v. *Sathappa Chetty*, (1902) 1 L.B.R., 310; *Krishnasami* v. *Engel*; (1884) I.L.R. 8 Mad., 20; *Raja Goculdas* v. *Jankibai*, (1903) 5 Bom. L.R. 570; followed.

The following reference was made by the Judge of the Court of Small Causes, Moulmein, under section 617, Code of Civil Procedure :—

In Civil Regular No. 8 of 1906 of this Court (*the Firm of Haji Dawoodji Parek* v. *M. C. Arunagiri*) the plaintiffs attached about 1,000 baskets of paddy before judgment.

Siva Sawmy Sitia applied for removal of attachment on the usual grounds, and the case was fixed for hearing on the 14th May. It subsequently transpired that the paddy at the time of attachment was outside the jurisdiction of the Court, and the petitioner's learned advocate now urges that as it has been held in the case of *N. Pannu Thaven* v. *Sathappa Chetty* (1) that only property inside the jurisdiction of the Court can be attached before judgment the attachment be removed.

The respondent's learned advocate cites the case of *Ram Pertab Jhowar* v. *Madho Rai and others* (2), where the Honourable Judges of the High Court have ruled just the opposite.

The learned advocate admits that ordinarily this Court is bound to follow the rulings of the Chief Court, but urges that as the above two rulings were both passed in the same year, are diametrically opposed to each other, and the point is a very important one, it is most desirable to obtain a Full Bench ruling, and asks that the question be referred under section 617, Civil Procedure Code.

I agree with the learned advocate, and accordingly refer the question, *viz.*,—

Can property outside the jurisdiction of the Court be attached before judgment?

The opinion of the Bench was as follows:—

The District Judge was not warranted in referring the question to this Court under section 617 of the Code of Civil Procedure. He did so because one of the advocates in the case urged that a ruling of this

(1) (1902) 1 L.B.R., 310. (2) (1902) 7 C.W.N., 216.

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Court was diametrically opposed to a ruling of another High Court, and that the point was a very important one, and that it was very desirable to obtain a Full Bench ruling on it.

The learned Judge was bound to follow the ruling of this Court notwithstanding that another High Court had ruled differently on the point.

It is for the Judges of this Court, and not for the Judges of Subordinate Courts, to decide when a question should be determined by a Bench or a Full Bench of the Court.

In our opinion the ruling of the learned Chief Judge of this Court in *N. Pannu Thaven* v. *Sathappa Chetty* (1) is correct.

The only authority to the contrary is *Ram Pertab Jhowar* v. *Madho Rai* (2) in which Mr. Justice Sale followed what had been the uniform practice of the High Court of Calcutta except when Mr. Justice Jenkins presided on the Original Side.

A Bench of the High Court of Madras, in *Krishnasami* v. *Engle* (3) held that section 483 does not warrant the attachment of property outside the jurisdiction because the section itself specifies that plaintiff may apply to the Court to attach property within the jurisdiction ; and that section 648 does not enlarge the power of attachment given by other sections of the Code. We have no doubt that this is correct, and that the true meaning of section 648 is that it merely prescribes the procedure to be observed when powers conferred by other sections of the Code, such as 168 and 493, are exercised.

This view is supported by the decision of the High Court of Bombay in *Raja Goculdas* v. *Jankibai* (4).

Our answer to the question referred is, property outside the local limits of the jurisdiction of the Court cannot be attached before judgment under Chapter XXXIV of the Civil Procedure Code.

Civil 2nd Appeal No. 199 of 1905.

June 21st, 1906.

Before Mr. Justice Irwin, C.S.I.

MAUNG LAW *v.* SUPPAYA PADAYACHI

Agabeg—for appellant.

Suit for eviction—"house" and "site"—house on village land—jurisdiction of Court—Lower Burma Town and Village Lands Act, 1898, s. 41.

A suit for eviction from a house, for the purpose of obtaining possession of the house and site, is essentially different from a suit for possession of the materials of the house. In the former case the question of title to the house cannot be separated from that of title to the site. When, therefore, the house stands on village land at the disposal of Government, the jurisdiction of the Civil Courts to try a suit for possession is barred by section 41 of the Lower Burma Town and Village Lands Act, 1898.

Moment v. *The Secretary of State for India*, (1905) 3 L. B. R., 165, referred to.

Appellant's plaint sets out that he owned a house worth Rs. 100 built on village land in Pauktaw village, boundaries specified, that in Thadingyut 1263 he allowed respondent to occupy the house free of

(3) (1884) I.L.R. 8 Mad., 20. | (4) (1903) 5 Bom. L. R. 570.

rent on condition that respondent kept it in repair, that in 1266 he told respondent to quit, but he had not done so. Plaintiff, therefore, prayed for a decree ordering defendant to quit plaintiff's house.

Defendant denied that either house or site belonged to plaintiff and said they were his own. The case was tried on the single issue, "Did defendant occupy the plaintiff's house with his permission as alleged in paragraph 1 of the plaint"?

After the evidence had been recorded the Judge received copies of judgments of the District Court in appeal in two other and somewhat similar cases, in which it was held that the jurisdiction of the Civil Court was barred by section 41 of the Lower Burma Town and Village Lands Act, Burma Act IV of 1898. Following those judgments the Township Court dismissed the suit without discussing the merits. The decree was upheld in appeal by the District Court.

The principal ground of second appeal is that the question of title to the house is distinct from the question of title to the house-site, and that in respect to the former question the jurisdiction of the Civil Courts is not barred. It is not disputed that section 41 of the Town and Village Lands Act bars a suit for possession of a site which is at the disposal of Government. That question was decided in *Moment* v. *The Secretary of State for India* (1).

The District Judge says: "It is obviously impossible to evict a person from a house without evicting him from the occupation of the site on which it stands". I agree with that. The present suit, in my opinion, is really one for occupation of the land as well as the house, and is essentially different from a suit for possession of the materials of the house.

The only other ground of appeal which need be noticed is that if there was any question as to whether the plaintiff had acquired a landholder's right to the site, such question should have been referred to a revenue officer under section 15 (2) of the Town and Village Lands Act. The question of jurisdiction was not raised at all at the trial of the suit, and the Judge's attention having been drawn to it after he had reserved judgment, he ought to have summoned both parties again to hear them on this point; and if the plaintiff alleged that he had the status of a landholder an opportunity should have been given him to prove that fact. Plaintiff said he had bought the land from Shwe Kun, he thought in 1256, which would be ten years before suit. His witness Tun Yaung said Shwe Kun got the site about eight years before by lottery, which seems to mean that the Subdivisional Officer gave out sites by lot but without any lease or grant. It is not quite clear that plaintiff had not the status of a landholder, so far as the record goes, and if he had raised this question in first appeal it would undoubtedly have been necessary to remand the case for a decision of the point. But the point was not raised in first appeal, and though it was mentioned in the second appeal it was not argued. For both these reasons I decline to take action on it now.

The appeal is dismissed with costs.

(1) (1905) 3 L. B. R., 165.

Civil Revision No. 105 of 1905.

June 21st, 1906.

Before Mr. Justice Irwin, C.S.I.

SHWE SEIK *v.* M. A. R. SUMASUNDRAM CHETTI BY HIS ATTORNEY M. A. R. MERAPPA CHETTI.

Agabeg—for applicant (defendant). | *R. N. Chari*—for respondent (plaintiff).

Execution of decree—sale of property "subject to mortgage", "free from mortgage" — proclamation of sale — procedure—Civil Procedure Code, s. 295, provisoes (a) and (b).

When property attached in execution of a decree is sold "subject to a mortgage", the auction-purchaser merely buys the judgment-debtor's (mortgagor's) rights. The mortgagee retains his rights against the property, and has no claim on the sale-proceeds or any part of them (proviso *a*, section 295). In such cases the "Note" at the foot of the proclamation of sale should be carefully filled up, so that intending purchasers may know what further sum, after they have paid the auction-price to the Bailiff, they will have to pay to the mortgagee before they can redeem the property.

When property is sold "free from a mortgage" the auction-purchaser becomes the absolute owner of it. The mortgagee ceases to have any rights against the property, his rights being transferred to the sale-proceeds paid into Court. In such cases the proclamation of sale need not and ought not to contain any reference to the existence of the mortgage

When a decree-holder applies for the sale of property free from a mortgage, *i.e.*, asks that after the sale the mortgage-money may first be paid and only the surplus applied in satisfaction of his own decree, the Court should issue a notice to the mortgagee to ascertain whether he assents (*proviso b*, section 295).

Kolandan Chetty in execution of simple money decree against Maung Shwe Seik attached a theatre standing on a plot of land in Okpô Town. In his application for attachment he stated that the land and theatre were mortgaged to Sumasundram Chetti for Rs. 3,000, and he prayed that after sale by auction the mortgage money principal and interest should be paid and the surplus only should be applied in satisfaction of his own decree.

The property was attached by prohibitory order, and a proclamation of sale was published on 12th April. At the foot of this proclamation is a statement that the property is mortgaged to Sumasundram and other Chettis for Rs. 3,000. It is not stated whether the property would be sold free of the mortgage or subject to the mortgage, and the printed form of note relating to encumbrances, at the foot of the form of proclamation, was entirely disregarded. The date fixed for sale in that proclamation was 13th May. On that day the Bailiff reported that all intending purchasers were not present, and he therefore had not held the sale. The Judge ordered a fresh proclamation to issue for 20th May, and this second proclamation was reported to have been published on 13th May. It contains no mention of the mortgage.

On 15th May Merappa Chetti presented a petition setting out that Sumasundram Chetti was merely agent of Narayanan Chetti that Sumasundram's power had been withdrawn, and Narayanan had subsequently, when returning to Madras, appointed him (Merappa) to be his agent; that Kolandan had attached the property "adhering to" (*ahmi pyu ywe*) the mortgage, but the proclamation of sale contained no notice that the sale would be held "adhering to" the mortgage. He prayed therefore that a proclamation might be issued containing a statement that the principal Rs. 3,000 of Sumasundram Chetti's mortgage had not yet been paid off and that the buyer would own the

property in continuance (*set let*) on payment of the mortgage principal Rs. 3,000, and that the sale might be held after explaining these facts to the buyer.

On this the Judge issued a notice to the decree-holder and judgment-debtor to show cause why the property should not be sold subject to the mortgage. The order to issue the notice is in English; the words used in the notice itself are *apaung kan ko ma lut ma kin*, which mean literally "not free from the mortgage".

The parties made no objection, and the Judge directed on 19th May that the theatre should be sold by auction subject to the mortgage. A third proclamation for sale on 27th May was published on 20th May. The printed form was again disregarded, and the proclamation contained a note that as the property was mortgaged to certain Chettis for Rs. 3,000, purchasers might buy on paying the Chetti Rs. 3,000.

The theatre was sold on 27th May for Rs. 3,035. The Bailiff in his report describes the property, but says nothing about the mortgage in the description.

A petition by Shwe Seik, dated 19th June, recites that Merappa Chetti had put in a petition praying that the sale proceeds be paid to him (I can find no trace of this on the record), that Shwe Seik had already paid Rs. 1,960 towards the principal and interest due on the mortgage, that the Court had no jurisdiction to determine the amount due on the mortgage until the mortgagee obtained a foreclosure decree; and he prayed that after Kolandan Chetti's decree was satisfied the surplus sale-proceeds be paid to him.

On 20th June the Judge wrote on this petition, "Put up to-morrow with all the proceedings", but nothing was done on 21st.

On 26th June Merappa Chetti presented a petition setting out the previous petitions and orders relating to selling the property subject to the mortgage, and stating that petitioner demanded from the auction purchaser Rs. 3,000, but the purchaser had paid him only Rs. 2,275, saying that he had paid Rs. 760 into Court under the orders of the Court; he prayed that the balance might be paid out to him.

On 27th June the Judge passed the order now sought to be revised, in which he states that the theatre was sold subject to the mortgage, and referring to Maung Shwe Seik's petition of 19th June, he holds that Shwe Seik is not entitled to the money and rejects his petition. He makes no reference to Merappa's petition, but holds that he is entitled to the Rs. 3,000. On Merappa's petition he wrote the order "Pay" on 1st July.

The Bailiff's report of sale shows the price as Rs. 3,035, one-fourth of this, Rs. 760 received, Bailiff's commission Rs. 77 deducted, and the balance Rs. 683 paid into the Treasury. He further shows Rs. 3,000 as payable to the mortgagee, and therefore Rs. 42 to be paid into Court by the decree-holder!

On 6th July the diary shows Rs. 683 paid to Merappa and Rs. 77 to the Bailiff.

It is obvious that the dispute which has occasioned this application for revision would never had arisen had the Judge exercised ordinary

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care and intelligence in dealing with the case. He seems to think that selling subject to the mortgage means selling free of the mortgage, which is exactly the contrary.

But the initial error lay in the Judge's failure to pay any attention to the terms of the application for execution. Nothing could be clearer than the words in which the decree-holder desired that the theatre should be sold free of the mortgage and that the mortgagee should have the first claim on the sale-proceeds. This course requires the consent of the mortgagee under section 295, proviso (*b*). Therefore the Judge should at once have issued notice to the mortgagee to ascertain whether he assented. Instead of doing so he issued a proclamation of sale in terms which might safely be relied on to create future disputes between the purchaser, the mortgagee and the parties to the suit.

When passing orders on Merappa's first petition, if the Judge really thought that the effect of his order would be that the mortgagee would have the first claim on the sale-proceeds, he ought not to have issued the third proclamation, but ought to have explained to Merappa that the second proclamation was all right. If the mortgage was to be extinguished out of the sale-proceeds, there was no reason why the purchasers should know anything about the mortgage. If, on the other hand, his order to sell subject to the mortgage meant what it says, he should have taken care that the proclamation was properly worded, and that the Bailiff explained to bidders that he was only selling the judgment-debtor's right to redeem, and that the mortgagee still retained his right to realize his money by sale of the theatre. The note on the proclamation which he actually signed leaves it to purchasers to guess whether the Rs. 3,000 is to be taken out of the price or is to be paid in addition to the price.

The order of 27th June, in which it is declared that because the property was sold subject to the mortgage, therefore the mortgagee is entitled to the sale-proceeds, is, when taken literally, a flat violation of proviso (*a*) to section 295. The only inference is that the Judge meant exactly the contrary of what he wrote. There are plenty of indications of a similar confusion of mind in the parties. The purchaser's extraordinary action in paying three-fourths of the purchase money to the mortgagee instead of into Court indicates clearly that the terms of the proclamation led him to believe that the mortgage money was to be taken out of the sale-proceeds. The theatre was improperly stated in the proclamation to be worth Rs. 3,000, and it is extremely unlikely that the purchaser was willing to pay Rs. 6,035.

Therefore, although the order complained of is, when taken literally, wrong and indefensible, I am not at all sure that it is not in accordance with what Maung Shwe Seik believed that he was assenting to on 19th May. To reverse it now would be likely to create more hardship and more litigation than leaving it untouched.

The petition is therefore dismissed, but I make no order for costs.

In the petition for revision Sumasundram is wrongly named as respondent instead of Narayanan. Merappa is the agent of Narayanan, and Sumasundram has no *locus standi* in the matter.

Before the Hon'ble C. E. Fox, Offg. Chief Judge, and Mr. Justice Irwin, C.S.I.

Civil 1st Appeal No. 30 of 1906.

September 6th, 1906.

LEONG AH FOON *v.* THE ITALIAN COLONIAL TRADING COMPANY.

Higinbotham—for appellant (defendant). | *Connell*—for respondents (plaintiffs).

Company Law—Foreign Company suing in British Court—description of plaintiff company in plaint—practice.

A foreign company may sue in a British Court in its corporate name according to the law of its country, but it must prove that it is a company duly incorporated under the laws of that country.

Newby v. *Von Oppen*, (1872) L. R. 7 Q. B., 293, referred to.

A plaint was filed in the District Court of Amherst in which the plaintiff was described as follows:—"The Colonial Trading Company of Trieste, (Limited), formerly carrying on business as the Italian Colonial Trading Company in Moulmein by their duly authorised agent A. N. Stathacopulos."

The plaint was somewhat ambiguous, and the learned Judge may be excused for having taken the suit to be one to recover Rs. 5,117-10-9 due, for principal and interest upon a promissory note. The suit, however, was really to recover the balance of an account stated and agreed to by the defendant, together with interest on that balance. The defendant had been given credit in the account for the amount due for principal on the promissory note. The account was of the amounts paid to the defendant as advances for buying paddy and of the brokerage he had earned, and it was alleged that the amount (Rs.5,000) of the promissory note had been advanced to the defendant irrespective of the paddy transactions, but that at his request it was brought into this paddy account. The defendant appeared to the suit, and amongst other defences contested the Court's jurisdiction. He applied for stay of proceedings on the ground that he had filed a suit against the plaintiff company in this Court for an account of what was due to him in respect of his dealings with it in paddy, claiming that about Rs. 50,000 would be found due to him. His suit in this Court is against "The Italian Trading Co., 'Limited', a Company registered with limited liability and having its chief registered office at Rangoon". The District Judge refused to stay the suit in his Court. The defendant did not further appear in it, and it was finally heard and determined in his absence. He appeals to this Court upon, amongst other grounds, the ground that the plaintiff company has no existence as a company, and there was no one authorised to represent it.

From a petition filed in the process record, it would appear that A. N. Stathacopulos produced to the Registrar of the Court a power of attorney said to be from the plaintiff company. This power of attorney does not appear to have been laid before the Judge. The Registrar endorsed on the petition "Leave given to verify". The Registrar evidently acted in ignorance of the complications which are self-evident on the description of the plaintiff company in the plaint. By the use of the word "Limited" in the description, it would at first sight appear as if the plaintiff company were a British company, or a

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company of some British Colony or of India. By the law of England, India, and, I understand, of British Colonies, the word "Limited" must be used as the last word in the name of every trading company formed on the principle of having the liability of its members limited to the amount unpaid on their shares, or to such amount as members, respectively, undertake to contribute to the assets of the company in the event of the company being wound up. I am not aware, and it is unlikely that any nation of which the language is not English, requires companies under its laws to add an English word with a technical meaning to its name. Another striking thing about the description of the plaintiff company arises on the words "formerly carrying on business as the Italian Colonial Trading Company." Under English law the name of a company is an essential: a company cannot change its name or trade under any other than its registered name.

Counsel for the plaintiff company was not able to give very definite information as to either the constitution or the name of the company if one exists at all. It would appear, however, from the headings on some of the later letters filed that the real name of the company on whose behalf the suit purported to be brought is "Societa Anonima Coloniale di Trieste", and that there is another company whose name is "Societa Coloniale Italiana". In an affidavit filed in the suit in this Court by Michael Emmanuel Sevastapulo, who described himself as the Manager in Burma of the Colonial Trading Company of Trieste, Limited, he says that he was formerly the Manager of the Societa Coloniale Italiana, Limited, which, though it had ceased to carry on business in Burma, continues to carry on business at Milan and elsewhere. On one of the occasions on which the suit was on the board for hearing, Mr. Eddis for the plaintiff company stated that the plaintiff company had ceased to exist, its business having been acquired by the Societa Anonima Coloniale di Trieste.

The one certainty to be evolved out of these statements and the description of the plaintiffs in the plaint in the suit in the Amherst Court is that such description is entirely wrong. There are no companies bearing the names "The Colonial Trading Company of Trieste, Limited," and "The Italian Colonial Trading Company".

Mere misdescription of a plaintiff might be matter for amendment, but there are other matters which go to the root of the plaintiff company's claim in this case. Assuming the suit to have been intended to be brought on behalf of the "Societa Anonima Coloniale di Trieste", there was nothing before the Court to show that this institution is an incorporated company under the laws of Italy. If it is only a firm, then, according to the law of India, the names of the parties constituting the firm must be stated in the plaint.

If it is a corporate body under the law of Italy, then undoubtedly it could as such sue under its corporate name in British Courts throughout the world. In *Newby* v. *Von Oppen* (1) Lord Blackburn said: "There can be no doubt since the cases of *Dutch West India Co.* v. *Van Moses* and *Henriques* v. *Dutch West India Co.*, which was a

(1) (1872) L.R. 7 Q.B., 293.

proceeding against the bail of the defendant in the other case, and was affirmed in the House of Lords, that a foreign corporation can sue as plaintiff. Lord Raymond, in a note, tells us that the original cause was tried at *nisi prius* before Lord King, when Chief Justice of the Common Pleas in 1734, when it appeared that the cause of action accrued in Holland; and adds 'and upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there."

Lord Blackburn went on to say, "It must often be a nice and difficult question whether a continental company is really, by the law of its own country, a corporation or not."

Professor Westlake remarks in his work on Private International Law that "the right of foreign and Colonial corporations to carry on business in England, without any authority to that effect from Parliament or Government, has now passed unquestioned for so long that it may be considered to be established; it is a very exceptional instance of liberality."

If this is so, and our laws are exceptionally liberal in allowing a foreign company to sue at all in our Courts, it is not demanding too much from them if we ask them to give some proof that they are corporations under the laws of their own country, and that they are such bodies as those to which we of all nations are exceptionally liberal. No doubt it may cause some trouble to get together the necessary evidence of incorporation, but it cannot be dispensed with. One foreign Company trading in India apparently considered it necessary to obtain an Act of the Indian Legislature to meet the difficulties which might arise. I refer to the Comptoir National D'Escompte de Paris, Act 1890 (Act VII of 1890).

In the case at present before us there is no evidence whatever to show whether the "Societa Anonima Coloniale di Trieste" is a company incorporated under the laws of Italy or not.

A further difficulty arises in connection with the statement that this company formerly carried on business as the Italian Colonial Trading Company, or more properly the "Societa Coloniale Italiana." According to an English lawyer's ideas of companies, it could scarcely be that such statement was correct, and, from Mr. Sevastopulo's affidavit in the suit in this Court and Mr. Eddis' statement, it is not correct.

If it is the case that the Societa Anonima Coloniale di Trieste has acquired the Burma business of the Societa Coloniale Italiana, proof of this should have been given in the suit in the Amherst Court.

The defendant's contracts in respect to which the cause of action arose were (1) the contract of employment as a paddy broker, evidenced by the letter of the 8th July 1901, and (2) his promissory note of the 15th September 1903.

The original letter shows that it was written by Mr. Sevastopulo on behalf of the Italian Colonial Trading Co., Limited. The promissory note is in favour of the same company. It is not endorsed to the Colonial Trading Company of Trieste or to the Societa Anonima Coloniale di Trieste. If the suit were a suit on the promissory note, as the

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learned Judge thought it was, the plaintiff company could not succeed without the note having been endorsed to it. The suit being one on an account stated between the Italian Colonial Trading Company (properly the Societa Coloniale Italiana) and the defendant, the plaintiff company had to show how it was entitled to recover from the defendant an actionable debt due to another company. There was an entire absence of evidence as to this, and under the circumstances the plaintiff could not succeed.

I would allow the appeal and dismiss the suit with costs and order the plaintiff company to pay the defendant's costs of this appeal.

Irwin, J.—I concur.

Criminal Revision No. 625 of 1906.

September 4th, 1906.

Before Mr. Justice Irwin, C. S. I.

KING-EMPEROR *v.* {1. PHA LAUNG. 2. MAH NI. 3. LAING RON. 4. BAH RAM. 5. YON SHE. 6. HTAUNG RHINE.

Common intention—act done by several persons in furtherance of—Penal Code, s. 34—abetment and being present at commission of offence—Penal Code, ss. 114, 324.

Section 114, Penal Code, does not apply to any person who would not be punishable as an abettor if he were absent. A person who would be so punishable is, if present at the crime, punishable not as an abettor but as a principal.

When several persons unite with a common object to commit a crime, all who assist in the accomplishment of that object are guilty of the principal offence, not of abetment—section 34, Penal Code.

The appeal of these six persons was summarily dismissed by the Sessions Judge.

The finding that the 3rd, 4th, 5th and 6th acoused abetted the offence of voluntarily causing hurt with spears and thereby committed an offence under sections 324 and 114, Penal Code, is a contradiction in terms, for section 114 enacts that a person shall in certain circumstances be deemed to have committed, not abetment, but the principal offence. Therefore, if section 114 applied, these persons ought to have been convicted simply of voluntarily causing hurt with a spear.

But section 114 does not apply, because it is clear from the judgment that none of the four would, if absent, have been liable to be punished as an abettor.

The Magistrate did not expressly find, as he ought to have done, what acts each of the accused committed. The material part of the complainant's story as set out in the judgment was that accused 3, 4, 5 and 6 beat him with their hands and he fell on the ground and was unable to do anything. Then 4th accused sat on his breast, and 6th accused pressed his left hand with the leg. Then 4th accused called the 1st accused to spear the complainant. First and 2nd accused both speared him. Then help came and all the accused ran away.

Assuming that the Magistrate held all this to be proved, and that the 4th and 6th accused held the complainant while the 1st and 2nd speared

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him, the spearing must be held to have been done in pursuance of the common intention of those four persons, and the 4th and 6th accused are guilty of voluntarily causing hurt with a spear, not under section 114 but under section 34, Penal Code.

As for the 3rd and 5th accused, there is no ground whatever for assuming that they assisted in the spearing, nor that the common intention of them and the other accused went beyond beating the complainant with their hands. Their conviction for abetment of spearing was illegal. For beating the complainant with their hands they are guilty of voluntarily causing hurt, under section 323, Penal Code.

I alter the convictions of No. 3 Laing Ron, and No. 5 Yon She accordingly, and I reduce their sentences to six months' rigorous imprisonment, which has almost expired.

Before Mr. Justice Bigge.

Criminal Revisio No. 1041 of 1906.

MYA THI *v.* HENRY PO SAW.

November 19th, 1906.

Pennell—for applicant. | *McDonnell*—for respondent.

Defamation—irrelevant and malicious statements in oral evidence, pleadings, applications or affidavits—Indian Penal Code, s. 499, Exception 9.

Litigants are not absolutely privileged to insert any matter they please into their pleadings, applications and affidavits, or to make any statements they like when giving evidence. Such statements, if irrelevant and defamatory, may fall within the scope of section 499 of the Indian Penal Code, and questions regarding them must be exclusively decided by reference to the provisions of that section.

Queen v. *Mohunt Pursoram Doss*, (1865) 2 W. R., Cr., 36; *Queen* v. *Pursoram Doss*, (1865) 3 W. R., Cr., 45; *Greene* v. *Delanney*, (1870) 14 W. R., Cr., 27; *Augada Ram Shaha* v. *Nemai Chand Shaha*, (1896) I. L. R. 23 Cal., 867; *Kali Nath Gupta* v. *Gobinda Chandra Basu*, (1900) 5 C. W. N., 293; *Giribala Dassi* v. *Pran Krishto Ghosh*, (1903) 8 C. W. N., 292; *Haidar Ali* v. *Abru Mia*, (1905) 9 C. W. N., 911; *Isuri Prasad Singh* v. *Umrao Singh*, (1900) I. L. R. 22 All., 234; *Kirpa Ram* v. *Empress*, (1887) P. R. Crim., 41; *Fateh Muhammad* v. *Empress*, (1889) P. R. Crim., 129; *Kirpal Singh* v. *Hukam Singh*, (1889) P. R. Crim., 131; *Maya Das* v. *Queen-Empress*, (1893) P. R. Crim., 64; followed.

Baboo Gunnesh Dutt Singh v. *Mugneeram Chowdhry*, (1872) 11 Ben. L. R., 321; *Bhikumber Singh* v. *Becharam Sircar*, (1888) I. L. R. 15 Cal., 265; *Seaman* v. *Netherclift*, (1876) 2 C. P. D., 53; *Nathji Muleshvar* v. *Lalbhai Ravidat*, (1889) I. L. R. 14 Bom., 97; *Woolfun Bibi* v. *Jesarat Sheikh*, (1899) I. L. R. 27 Cal., 262; *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) I. L. R. 3 All., 815; *Queen-Empress* v. *Babaji*, (1892) I.L.R. 17 Bom., 127; *Queen-Empress* v. *Balkrishna Vithal*, (1893) I. L. R. 17 Bom., 573; *In re Nagarji Trikamji*, (1894) I. L. R. 19 Bom., 340; *Emperor* v. *Bindeshri Singh*, (1906) I. L. R. 28 All., 331; *In re Barket*, (1897) I. L. R. 19 All., 200; *Sullivan* v. *Norton*, (1886) I. L. R. 10 Mad., 28; *Maniaya* v. *Sesha Shetti*, (1888) I. L. R. 11 Mad., 477; *Hayes* v. *Christian*, (1892) I. L. R. 15 Mad., 416; *Raman Nayar* v. *Subramanya Ayyan*, (1893) I. L. R. 17 Mad., 87; *Queen-Empress* v. *Govinda Pillai*, (1892) I. L. R. 16 Mad., 235; *Kundan* v. *Ramji Das*, (1879) P. R. Civil, 421; referred to.

The very important question raised in these proceedings is whether the petitioner Maung Mya Thi is liable to prosecution under section 499, Indian Penal Code, for statements contained in his affidavit sworn on the 17th October 1905 and filed in support of his petition dated the 27th October 1905, praying for transfer of Criminal Regular No. 442 of 1905 in the Court of the Additional Magistrate of Nyaunglebin from that Court to the Court of some other Magistrate.

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The application for transfer was granted and the petitioner was acquitted and he is now being prosecuted in Criminal No. 144 of 1906 in the Court of the Special Power Magistrate of Pegu under section 499, Indian Penal Code, in respect of statements made in such affidavit.

It was assumed by Counsel for both parties that under English law such statements would be absolutely privileged under the rule that neither party, witness, Counsel, Jury nor Judge can be put to answer civilly or criminally for any words used orally or in writing in discharge of his respective functions. But it would seem from what is stated at page 227 of Odger on Libel and Slander that that rule may be subject to certain qualifications. The learned author says: "A re-"mark made by a witness in the box wholly irrelevant to the matter "of enquiry, uncalled for by any question of counsel, and intro-"duced by the witness for his own purposes, would not be privileged." So that it would seem that relevance to the issue on which, as will appear hereafter, so much stress has been laid by the Calcutta High Court, and good faith as required by the 9th exception to section 499, Indian Penal Code, may be important factors in determining whether a witness is protected or not.

In *Queen* v. *Mohunt Pursoram Doss* (1) it is clear that the learned Judges did not think that any absolute privilege existed, for they decided the case exclusively on reference to section 499, Indian Penal Code; and in *Queen* v. *Pursoram Doss* (2) in which the petitioner had been convicted under section 499, Indian Penal Code, for the words used by him in the witness-box, Glover, J., while stating that "English law gives great license to a defendant in the position of *Pursoram Doss*, and I suppose it may be conceded that by English law the petitioner would be privileged", decided that as he had not used the defamatory expressions complained of in good faith, he was not protected by the 9th Exception to section 499, Indian Penal Code, and that he had been properly convicted.

In *Greene* v. *Delanney* (3) Phear, J., said:—

> I think further that the Judge erred in looking outside the Penal Code itself for the purpose of ascertaining the criminal law of this country with regard to defamation. If the facts which are the subject of a complaint fall within the limits of the definition in section 499, construed as the section ought to be according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then, in my judgment, they amount to defamation quite irrespective of what may be the English law on the same subject.

It is clear from these cases that up to the 3rd August 1870 the Calcutta High Court was of opinion that such a question as that now under consideration must be exclusively decided by reference to the terms of section 499, Indian Penal Code.

On the 25th July 1872 the important decision in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) was pronounced by the Judicial Committee of the Privy Council. The appeal was in respect

(1) (1865) 2 W. R., Cr., 36.
(2) (1865) 3 W. R., Cr., 45.
(3) (1870) 14 W. R., Cr., 27.
(4) (1872) 11 Ben. L. R., 321.

of a suit for damages in respect of statements made by witnesses in a judicial proceeding, and at page 328 their Lordships said:

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that if it had been, strictly speaking, such an action, it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships held this maxim which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury.

In *Bhikumber Singh* v. *Becharam Sircar* (5), which was a suit to recover damages for slander, the statement complained of being alleged to have been made by the defendant while being examined as a witness in a case before a Magistrate, this ruling of their Lordships was referred to in the argument but not in the judgment. But the Court following *Seaman* v. *Netherclift* (6) held that the plaintiff disclosed no cause of action.

In *Augada Ram Shaha* v. *Nemai Chand Shaha* (7) it was held that a defamatory statement made in the pleadings in an action is not absolutely privileged. In their judgment the learned Judges dissented from the view taken by the High Court of Bombay in *Nathji Muleshvar* v. *Lalbhai Ravidat* (8) to which I shall refer when I review the cases on the point decided in that High Court. They referred to *Queen* v. *Pursoram Doss* (2) and *Greene* v. *Delanney* (3) in these words: "These rulings are, we think, binding upon us, as we do not think "it possible that a statement may be the subject of a criminal prose- "cution for defamation and at the same time may be absolutely "privileged as far as the Civil Courts are concerned".

As to *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) they said as follows:—

In the case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (11 B. L. R., P. C., 321, 328) the Judicial Committee said that they agreed with the High Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. And they stated the reason to be that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty they should incur, if they give evidence falsely, should be an indictment for perjury. This *dictum* is said to establish the proposition that the same absolute privileges exist in this country as in England, and that, as the pleadings in an action would be absolutely privileged in England, they must be so here. We do not think the *dictum* establishes anything of the kind. The Judicial Committee, in the course of their remarks, do not mention the Penal Code; but it does not follow from that that it was not present to their minds, and it may quite well be that the *dictum* in question was founded on the 9th exception to section 499, as the evidence given by a witness on oath would certainly be within that exception, whenever his statement was relevant to the question in issue.

It is clear then that on 29th of June 1896 the view of the Calcutta High Court was unchanged and that the learned Judges did not

(5) (1888) I. L. R. 15 Cal., 265.
(6) (1876) L. R. 2 C. P. D., 53.
(7) (1896) I. L. R. 23 Cal., 867.
(8) (1889) I. L. R. 14 Bom., 97.

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consider that *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) had established the absolute privilege contended for here, and which will be seen later, has been conceded by the High Court of Bombay in consequence of that decision.

Much stress was laid before me by petitioner's counsel on the words: "The Judicial Committee in the course of their remarks do not mention the Penal Code; but it does not follow from that that it was not present in their minds"; but from the very important words that follow, it seems clear that the learned Judges thought that their Lordships had in view the 9th exception to section 499, Indian Penal Code, and that evidence given by a witness, when relevant to the question in issue,—a most important qualification,—would be within such exception.

In *Woolfun Bibi* v. *Jesarat Sheikh* (9), it was held that when certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry—a most important qualification which it would seem was suggested by *Augada Ram Shaha* v. *Nemai Chand Shaha* (7)—such persons could not be prosecuted for defamation in respect of those statements. The petitioners had been convicted under section 500, Indian Penal Code, and the Sessions Judge, in referring the case for the orders of the High Court, referred to the authorities contained in the third paragraph of his letter, which is set out at page 263 of the report.

The judgment of the High Court is in these terms:

> It is clear that the statements alleged to be defamatory were made by the accused in the course of their evidence as witnesses in a Court of Justice, for these statements were relevant to the issue in the case under enquiry. Under these circumstances, upon the authorities cited by the Officiating Sessions Judge, we think that the accused cannot be prosecuted for defamation in respect of these statements.

The case of *Kali Nath Gupta* v. *Gobinda Chondra Basu* (10) was not quoted to me at the hearing. In it it was held that statements made by parties to the suit in the pleadings are not privileged and a charge for defamation is maintainable in respect of them. The learned Judges said:—

> It has been held by the Bombay High Court in the case of *Nathji Muleshvar* v. *Lalbhai Ravidat* (8) that no action for slander lies for any statement in the pleadings or during the conduct of a suit against a party or witness in it. That ruling has, however, been considered and expressly dissented from by this Court in the case of *Augada Ram Shaha* v. *Nemai Chand Shaha* (7). We think that we must follow that ruling. It has been sought to impress upon us that it was erroneous on the ground that there is, in principle, no difference between the case of a witness giving evidence in a suit, who is admittedly privileged, and a party making a statement in the pleadings; and it has been urged that the whole principle on which that case was decided was unsound. We are unable to take that view, and in particular it seems to us that there is a very obvious distinction between the case of a witness who is bound by law to say all that he knows on a particular subject, even though the consequence may be that his evidence will include defamatory matter, and a party conveying a perfectly unwarrantable and irrelevant insult in his plaint against the opposite party, as in this case.

(9) (1899) I. L. R. 27 Cal., 262. | (10) (1900) 5 C. W. N., 293.

In *Giribala Dassi* v. *Pran Krishto Ghosh* (11), which also was not quoted to me, it was held that "A person would be rightly convicted "under section 500, Indian Penal Code, for making a defamatory state- "ment in an affidavit, if the statement made was wholly irrelevant to the "enquiry to which the affidavit related". The learned Judges referred to *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) and proceeded to say :—

> It is obvious, upon a reading of the observations to which we have just referred, that the principle underlying those observations is inapplicable to the facts of the present case. Here, the petitioner was not examined in a Court of Justice; and he did not make the statement in answer to any question put to him either by any pleader or by the Court, but that he made the statement of his own accord, and most wantonly in respect to any inquiry where such a statement was wholly irrelevant.

In *Haidar Ali* v. *Abru Mia* (12), which again was not quoted to me, it was held that "The statement of the accused in the case of a "deposition was not privileged under section 132 of the Indian Evidence "Act, as it was a voluntary statement not relevant to the issue in the "case in which he deposed and was not elicited by the pleader putting "questions, and as, further, the accused was actuated by malicious "motives against *Haidar Ali*".

From the review of these cases it appears to me that the Calcutta High Court has really never swerved from the decision given in 1865, and that the latest utterances of that Court are against the contentions put forward on behalf of the petitioner.

Turning to the decisions of the Bombay High Court, it was held in *Nathji Muleshvar* v. *Lalbhai Ravidat* (8), which, as has been seen, was dissented from in *Augada Ram Shaha* v. *Nemai Chand Shaha* (7), that no action for slander lies for any statement in the pleadings or during the conduct of a suit against a party or witness in it. *Seaman* v. *Netherclift* (6) and *Gunnesh* v. *Mugneeram Chowdhry* (4) were referred to and followed, and at page 100 the learned Judges said [with *Abdul Hakim* v. *Toj Chandar Mukarji* (13) in view] :—

> We doubt whether there is anything in the circumstances of this country which makes it less desirable from the point of view of public policy as concerning the public and administration of justice as it is expressed by the Privy Council in the case above cited, that such statements, though false and malicious, should in no case be made the subject of civil action quite independently of the question as to their being criminally punishable.

Their Lordships, therefore, very largely qualified their judgment in reference to proceedings under section 499, and guarded themselves against expressing any opinion on the point one way or other.

In *Queen-Empress* v. *Babaji* (14), it was held that a witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. The learned Judges naturally laid great stress on *Gunnesh Dutt* v. *Mugneeram* (4) and quoted *Bhikumber Singh* v. *Becharam Sirkar* (5) with approval.

(11) (1903) 8 C. W. N., 292.
(12) (1905) 9 C. W. N., 911.
(13) (1881) I. L.R. 3 All., 815.
(14) (1892) I. L. R. 17 Bom., 127.

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But the most important case in favour of the petitioner is *Queen-Empress v. Balkrishna Vithal* (15), in which Fulton, J., in a most weighty judgment, in which Telang, J., though with much hesitation, concurred, decided that the protection of a witness for statements made in the witness-box is absolute and that he cannot be prosecuted for defamation for making such statements. The learned Judge after referring to "Maxwell on the Interpretation of Statutes" and to the decision in *Nathji Muleshvar* v. *Lalbhai Ravidat* (8) said :—

If, then, it must be admitted, as I think it must be, that public policy requires that witnesses shall not be harassed by the fear of suits for damages, it must, I think, be conceded that it is equally undesirable that they should be liable to be prosecuted for defamation.

I pause here to observe that the learned Judge appears to lay down the immunity from civil action more broadly than is recognised by the decisions of the Calcutta High Court.

To resume. He then proceeds to make some very pertinent remarks as to the protection afforded to witnesses from prosecutions for perjury by reason of express sanction of a Court cognizant with the facts of the case in which the false evidence is said to have been given being required, which would be wholly unavailing if it were open to any private individual to prosecute for defamation; and the conclusion he arrived at was that section 499 was not intended to include statements made in the witness-box.

Though Telang, J., concurred in this judgment, his remarks as to limiting the meaning of the words of section 499 so as to exclude therefrom any evidence given by a witness before a Court of Justice are worthy of very serious consideration.

In *In re Nagarji Trikamji* (16), in which a pleader who had referred to some witnesses as "loafers", was convicted under section 500, Indian Penal Code, and fined, it was held, reversing the conviction and sentence, that, in the absence of express malice, which was not to be presumed, he was protected by exception 9 to section 400, Indian Penal Code. In the course of their judgment the learned Judges said they were inclined to share the doubts expressed by Telang, J., in *Queen-Empress* v. *Balkrishna* (15) and referred with approval to *Greene* v. *Delanney* (3) and their words are certainly worthy of quotation :—

The extent of the witness's privilege is not as yet clearly settled—see Lord Bramwell's *dictum* in *Seaman* v. *Netherclift* (2 C. P. D. 53 at p. 60); and in *Queen-Empress* v. *Balkrishna* (15), Fulton, J., refrains from laying down that wholly irrelevant statements of a witness may not come within the scope of the enactment we are now considering. It would then be difficult, in the present state of the authorities, to state with reference to these decisions the limits of the privilege they concede to witnesses charged criminally for defamation. It would, however, in our opinion, be beyond the province of mere interpretation to engraft a new exception on the definition.

The legislature has enacted a general exception in favour of Judges,—to wit section 77 of the Indian Penal Code,—and in section 132 of the Indian Evidence Act has gone a certain length in protecting witnesses against the criminal law; it may be assumed that it had no intention of going further. As stated in Macaulay's Report

(15) (1893) I. L. R. 17 Bom., 573. | (16) (1894) I. L. R. 19 Bom., 340.

on the First Draft of the Penal Code, the requirement of 'good faith' was intentional in section 499. Without, however, importing into this carefully considered statute the rules of the Common Law of England based on public policy, we are of opinion that a witness in India is adequately protected by the exceptions 1 to 9 in section 499, where the defamatory statement is not untrue to the knowledge of the person making it. If, however, it be untrue to his knowledge the real offence committed is, as pointed out by the Privy Council in *Baboo Gunnesh* v. *Mugneeram* (*supra*) (4), that of false evidence; and the Court would not, when such is the offence, allow the *onus* of proof to be shifted by the prosecution having recourse to section 499, as that would be tantamount to dispensing with the salutary provisions of section 195 of the Code of Criminal Procedure, which are clearly based on public policy.

Despite the judgment of Fulton, J., on which naturally so much reliance has been laid, it cannot certainly be said that the Bombay High Court has spoken with a certain voice in favour of the petitioner's contention, and indeed there can be no doubt that the feeling of at least three of the learned Judges, as shown by the cases, was against it.

The Allahabad High Court has held in *Abdul Hakim* v. *Tej Chandar Mukarji* (13) that the law of defamation which should be applied to suits in India for defamation is that laid down in the Indian Penal Code and not the English law of libel and slander.

In 1900 the point came again before the same Court in *Isuri Prasad Singh* v. *Umrao Singh* (17), in which the Indian authorities were reviewed by Aikman, J., in whose judgment these words are to be found, which cannot be lightly disregarded :—

> It may be true that the principles of public policy which, according to English law and some Indian decisions, ought to guard the statements of counsel and witnesses, apply with equal force to the statements made by accused persons for their own protection. But, as was remarked in the case of *Abdul Hakim* v. *Tej Chandar Mukerji* (13), when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which the determination of cases like the present should be regulated. The Indian Legislature might, had it chosen, have so framed section 499 of the Indian Penal Code as to afford to parties, counsel, and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. This case, therefore, must, I hold, be decided according to the Indian Penal Code.

The case of *Emperor* v. *Bindeshri Singh* (18), in which it was held that "Where an accused person applies for the transfer of the case "pending against him to some other Court, supporting his application "by an affidavit, he cannot, or at least ought not, to be prosecuted "under section 193, Indian Penal Code, in respect of statements made "therein", does not seem to me to apply to this inquiry.

It was decided in reference to *In the matter of the petition of Barket* (19) in which it was held that "A person seeking by an appli-"cation in revision to get rid of a conviction standing against him is "incapable of tendering his own affidavit in support of such applica-"tion," and consequently that, if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein.

(17) (1900) I. L. R. 22 All., 234.
(18) (1906) I. L. R. 28 All., 331.
(19) (1897) I. L. R. 19 All., 200.

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The authority of the Allahabad High Court is absolutely against the petitioner's contention; that of the Calcutta High Court is also against it, while that of the Bombay High Court, while to a certain extent in its favour, is certainly not unanimously so. The authority of the Madras High Court, however, has been throughout almost consistently in favour of it.

In *Sullivan* v. *Norton* (20) the Court held that an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as an advocate.

In *Maniaya* v. *Sesha Shetti* (21), it was held that the statements of witnesses are privileged, and, if false the remedy is by indictment for perjury and not for defamation; the learned Judges basing their decision on *Seaman* v. *Netherclift* (6) and *Gunnesh* v. *Mugneeram* (4).

In *Hayes* v. *Christian* (22), it was held that when a person who was being defended by Counsel interfered in the examination of a witness and made a defamatory statement he was rightly convicted of defamation, as he had not used the words in the ordinary course of any legal proceedings, so that his words were not privileged, even under the English cases, and that he was not protected under any of the exceptions to section 499, Indian Penal Code. This case is not an authority in favour of the petitioner.

Raman Nayar v. *Subramanya Ayyan* (23), which decided that an action for defamation cannot be maintained against a Judge for words used by him while trying a cause in Court, even though such words are alleged to be false and malicious and without probable cause, is very "thorough" in its out and out application of English law, and strongly in favour of the petitioner, as in *Queen-Empress* v. *Govinda Pillai* (24).

Turning to the decisions of the Punjab Chief Court, it was held in *Kundan* v. *Ramji Das* (25) following *Gunnesh Dutt Singh* v. *Mugneeram* (4), that a suit for damages for defamation in respect of evidence given by a witness on oath in a judicial proceeding is not maintainable.

In *Kirpa Ram* v. *Empress* (26), the accused, who was a defendant in a civil suit pending before a Munsiff, in a written petition to the Deputy Commissioner, charged the Munsiff with conspiracy with the plaintiff to get up a false case in his Court and who failed to prove the charge, it was held that he had been rightfully convicted under section 500, Indian Penal Code.

In *Fateh Muhammad* v. *Empress* (27), it was held that the 9th exception to section 499, Indian Penal Code, must be construed as modifying what appears to be the accepted principal of English law, that parties to a judicial proceeding cannot be held liable either civilly or criminally for defamation on account of statements or imputations made in their capacity as litigants which affect the character of third persons.

(20) (1886) I. L. R. 10 Mad., 28.
(21) (1888) I. L. R. 11 Mad., 477.
(22) (1892) I. L. R. 15 Mad., 416.
(23) (1893) I. L. R. 17 Mad., 87
(24) (1892) I. L. R. 16 Mad., 235.
(25) (1879) P. R. Civil., 421.
(26) (1887) P. R. Crim., 41.
(27) (1889) P. R. Crim., 129.

In *Kirpal Singh* v. *Huham Singh* (28) the same point was decided with more elaboration.

In *Maya Das* v. *Queen-Empress* (29) it was held that, whatever may be the common law of England on the subject, there is nothing in section 499, Indian Penal Code, which contains the law of defamation in India that protects witnesses as a class in respect of statements made by them in that character. As the law stands, no defamatory statement made by a witness is protected unless it is made "in good faith" within the meaning of the exceptions to section 499, and the true test of immunity in the case of witnesses as of other persons is whether an exception to that section is established in its entirety.

I have now reviewed all the authorities which seem to bear on the point. It is to be observed at the onset that there is the high authority of Dr. Blake Odgers for doubting whether the absolute immunity which has been assumed to protect witnesses in England may not be subject to qualification.

The Calcutta High Court, as has been seen in *Queen* v. *Pursoram Doss* (2) and *Greene* v. *Delanney* (3), held strongly that the question must be settled by reference to section 499, Indian Penal Code, alone, and in *Ram Shaha* v. *Nemai Chand Shaha* (7) the rulings in these two cases were held to be binding on the Court. These words at page 871 are of the highest importance:—

> If the publication is within one of the exceptions it is not defamation at all and is neither an offence nor illegal under the Code; but if it is defamation, nothing but one or other of the reasons mentioned in the exceptions can prevent the publication from being criminal and consequently illegal. There is nothing in any one of the exceptions which can be strained so as to include any statement, whether relevant or not, which may be inserted in a plaint or written statement or application to a Court, though it well may be that a statement which is essential to the cause of action or to the defence is protected by the 9th exception.

It has already been seen that, in the opinion of the learned Judges who decided this case, their Lordships of the Privy Council in *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) were not unmindful of the 9th exception. It is to be observed that in this case, as in *Woolfun Bibi* v. *Jesarat Shaikh* (9), much stress was laid on the question of the relevancy of the statement complained of.

In *Kali Nath Gupta* v. *Gobinda Chandra Basu* (10) and in *Giribala Dassi* v. *Pran Krishto Ghosh* (11) the absolute privilege claimed was entirely repudiated, and it cannot be said that the learned Judges in so deciding had lost sight of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4), for they considered both *Nathji Muleshvar* v. *Lalbhai Ravidat* (8) and *Augada Ram Shaha* v. *Nemai Chand Shaha* (7), in which it is most pointedly referred to.

The guarded judgment in *Nathji Muleshvar* v. *Lalbhai Ravidat* (8) is to some extent in the petitioner's favour, but of course his strong point is the judgment of Fulton, J., in *Queen-Empress* v. *Balkrishna Vithal* (15). I have naturally studied that judgment with anxious care, and I am sure I shall not be deemed to be wanting in the

(28) (1889) P. R. Crim., 131. (29) (1893) P. R. Crim., 64.

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espect which is due to a considered judgment of a Judge of such eminence if I say that it seems to me to be inspired by a desire for symmetry and intolerance of the anomaly that while witnesses are protected from prosecution, except for perjury, within due limits by the provisions of section 195 of the Code of Criminal Procedure, they should be liable to prosecution for defamation at the will of any private individual. This is highly anomalous no doubt, but so is much of the law, but that is a matter for the Legislature rather than for the Judge who has to do his best to administer the law as he finds it, unsymmetrical and anomalous though it may be.

It must be borne in mind also that Telang, J., gave reasons full of weight for thinking that the question should be decided by reference to the exceptions to section 499, Indian Penal Code, and that in *In re Nagarji Trikamji* (16) the learned Judges said they were inclined to share his doubts. Even the decisions of the Madras High Court, though in the main in the petitioner's favour, are not unanimously so, for *Hayes* v. *Christian* (22) is decidedly against him. The Allahabad High Court as has been seen is wholly against the absolute protection claimed and so is the Punjab Chief Court, and I consider that the last two decisions of that Court referred to by me are a valuable contribution to the authorities on the point.

Authority then is strongly against the absolute immunity claimed for the petitioner, and so, in my opinion, is common sense and expediency, for it cannot be to the public advantage that litigants should be free to insert any matter they please into their pleadings, applications and affidavits, or to make any statements they like in the witness-box however irrelevant, scurrilous or insulting they may be, and then claim absolute privilege with success.

In this connection these words at the close of the judgment in *Kali Nath Gupta* v. *Gobinda Chandra Basu* (10) are worthy of the highest consideration :—

> It has been stated by the learned pleader for the petitioner as an argument in favour of the privilege of parties that in this country the pleadings in a civil suit habitually contain defamatory matter. All that we have to say on this point is that, if that is so, it is time that the practice was checked and we cannot regard it as affording a reason for declaring parties privileged to indulge in a practice as we are asked to do.

To so hold would render the Courts a privileged laboratory for slander and defamation, and it seems to me that the public interest lies in exactly the opposite direction, and that it is of the utmost importance that parties to proceedings in Court should know that if they indulge in defamatory words in their pleadings or anything connected with them or in the witness-box, they must take the consequence if their statements are irrelevant, or not made in good faith. In fact to put it in homely language, which is often the best, that so far as is consistent with the due presentment of their cases, they must keep civil tongues in their heads.

The question of the immunity of advocates is not before me, and I most carefully guard myself against it being supposed or suggested that I have expressed any opinion on it.

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I decide that the Special Power Magistrate of Pegu is not precluded by the objection that the statements contained in the petitioner's affidavit sworn on the 17th of October 1905 are absolutely privileged from proceeding to hear and determine Criminal No. 144 of 1906 in his Court, and that the question of the petitioner's innocence orguilt must be decided by reference to the provisions of section 499, Indian Penal Code.

Civil Reference.

Civil Reference No. 8 of 1906.

July 2nd, 1906.

Before the Hon'ble C. E. Fox, Offg. Chief Judge, and Mr. Justice Irwin, C.S.I.

HLA BAW AND ANOTHER *v.* S. K. R. MUTHIA CHETTY.

R. S. Dantra—for applicants (plaintiffs). | *P. N. Chari*—for respondent (defendant).

Execution of decree: application for sale of property free of mortgage—rights of mortgagee under s. 295 (b), Civil Procedure Code—duty of Court under s. 287—revisional power of High Court under s. 622—Civil Procedure Code, ss. 287, 295 (b), 311, 313, 622.

When an application is made alleging a mortgage on property liable to be sold in execution of a decree, and asking that under section 295 (*b*) of the Code of Civil Procedure the property be sold free from the mortgage and the mortgagee given the same rights against the sale-proceeds as he had against the property, the Court is not bound to grant such an application, and ought not to enquire into the merits of the alleged mortgage further than is necessary for the purposes of section 287.

If by an irregularity the mortgage is not mentioned in the proclamation of sale, the mortgagee's interests are not affected. The High Court will therefore not interfere in revision on his behalf where there has been such an irregularity.

Zeya v. *Mi On Kra San*, 2 L. B. R., 333, referred to.

Tiruchittambala v. *Seshayyangar*, (1881) I. L. R. 4 Mad., 383; *Sew Bux Bogla* v. *Shib Chunder Sen*, (1886) I. L. R. 13 Cal., 225; *Venkataraman* v. *Mahalingayyan*, (1886) I. L. R. 9 Mad., 508; *Viraraghava* v. *Parasurama*, (1891) I. L. R. 15 Mad., 372; *Purshotam Sidheswar* v. *Dhondu Amrit Danwate*, (1880) I. L. R. 6 Bom., 582; *Vishnu Dikshit* v. *Narsingrav*, (1882) I. L. R. 6 Bom., 584; cited.

The following reference was made to a Bench by *Hartnoll, J.*:—

It was objected by Mr. Chari that this case was not one in which there should be interference under section 622 of the Code of Civil Procedure in that the lower Court has discretionary powers under section 295, proviso (*b*), of the same Code, and that a mere exercise of discretion was not a ground for exercising the power of revision. In the argument the following cases were cited to me:—

Tiruchittambala v. *Seshayyangar* (1), *Sew Bux Bogla* v. *Shib Chunder Sen* (2), *Venkataraman* v. *Mahalingayyan* (3), *Viraraghava* v. *Parasurama* (4).

The grounds under which interference under section 622 is warranted and right have been the subject of long discussions in the different High Courts, and in this Court they have been fully discussed

(1) (1881) I. L. R. 4 Mad., 383.
(2) (1886) I. L. R. 13 Cal., 225.
(3) (1886) I. L. R. 9 Mad., 508.
(4) (1891) I. L. R. 15 Mad., 372.

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in the case of *Zeya* v. *Mi On Kra San* (5). I am bound by this latter ruling, and I would draw special attention to the words of the learned Chief Judge quoted at pages 339 and 340 of the Lower Burma Rulings, Volume II.

This case is also further complicated by the facts (1) that, on the 4th May 1906, the District Judge ordered that the sale might proceed as free from the alleged mortgage without giving the mortgagee a lien on the sale-proceeds, and (2) that the land has been sold—I conclude free of the mortgage.

But the first point for decision seems to be whether the refusal of the District Judge to enquire into the merits of the alleged mortgage was an illegality or material irregularity such as would warrant interference by this Court under section 622 of the Code of Civil Procedure. It is contended that section 295, proviso (*b*), merely gives discretionary powers, and so that when the District Judge passed the order he did, he was acting in the exercise of his discretion. Two cases have been quoted to me—*Purshotam Sidheswar* v. *Dhondu Amrit Danwate* (6); *Vishnu Dikshit* v. *Narsingrav* (7).

These cases seem to have been references on a question of jurisdiction, and they do not lay down that the Court must enquire into the merits of the alleged mortgage. I am in doubt as to whether, when an application is made under section 295, proviso (*b*), the Court is bound to enquire into the merits of the alleged mortgage, and as to whether, if it does not do so, an illegality or material irregularity is committed of such a nature as to warrant interference under section 622 of the Code. The confirmation of the sale of the land in dispute is stayed pending further orders, and under section 11 of the Lower Burma Courts Act, the following question is referred for the decision of a bench:—

"When an application is made under section 295, proviso (*b*) of the Code of Civil Procedure alleging a mortgage on property liable to be sold in execution of a decree, and asking that it be ordered to be sold free from such mortgage and that the mortgagee be given the same right against the proceeds of the sale as he had against the property sold, is the Court bound to enquire into the merits of the alleged mortgage, and is a refusal to do so such an illegality or material irregularity as will warrant this Court's interference under section 622 of the Code of Civil Procedure?"

The opinion of the Bench was as follows:—

Fox, Offg. C. J.—I would answer the questions referred as follows:—

Clause (*b*) of section 295 of the Code of Civil Procedure does not provide for a mortgagee or incumbrancer making an application that the attached property be sold free from his mortgage or charge, giving him the same right against the proceeds of sale as he had against the property sold. The clause merely says that when property liable to be sold in execution is subject to a mortgage or charge, the Court may with the assent of the mortgagee or incumbrancer sell it free from

(5) 2 L. B. R. 333.
(6) (1880) I. L. R. 6 Bom., 582.
(7) (1882) I. L. R. 6 Bom., 584.

the mortgage or charge, etc. There is nothing in this clause which indicates that there should be an enquiry as to whether the property is subject to a mortgage or charge. The section which indicates that an enquiry as to mortgages and other encumbrances should be made is section 287. That casts on the Court the duty of issuing a proclamation of sale which shall specify as fairly and accurately as possible, amongst other things, any incumbrance to which the property is liable. It also says that for the purpose of ascertaining the matters so to be specified, the Court may summon any person whom it thinks necessary and examine him in respect to any of the matters required to be specified, and may require him to produce any document in his possession or power relating thereto.

The provisions of the section are to guard the interests of purchasers at Court sales, and to ensure that such sales shall be as good and effective as possible. An omission to comply with its provisions may be ground for setting aside a sale under section 311, if the decree-holder or owner of the property applying under that section proves that he has sustained substantial injury by reason of the omission. A purchaser, however is only given a remedy by summary procedure when it is shown that the judgment-debtor had no saleable interest in the property sold —section 313.

Although clause (*b*) of the proviso to section 295 does not contemplate an application by a mortgagee of attached property to have the property sold free of his mortgage giving him the same right as against the proceeds of sale as he had against the mortgaged property, and although the Code nowhere gives a mortgagee the right to have this done, if a mortgagee does make such an application, he thereby gives notice to the Court of his claim as mortgagee, and in pursuance of the Court's duty under section 287, it should inquire into such claim with a view to inserting the particulars of it in the proclamation of sale, if it is determined that the property shall be sold subject to the mortgage.

If on inquiry there is no question about the claim being correct, the Court may well act under clause (*b*) of the proviso to section 295; but if the claim is disputed or is not admitted, action under the clause would not be appropriate, because in an inquiry under section 287 nothing can be settled definitely, and the rights of some of the parties might be prejudiced by proceeding under clause (*b*) of section 295.

When the mortgagee's claim is disputed or is not admitted, the appropriate procedure would appear to be to state in the proclamation of sale that the claim has been made, but that it is disputed, or it is not admitted, as the case may be. The fact of such claim being made would be a thing material for bidders at the sale to know, and even if the Court did not think the case fell under clause (*c*) of section 287, it should insert mention of it in compliance with clause (*e*). The further question arises whether, when a Court has not complied with section 287, this Court should interfere under section 622 of the Code. The Court has power to interfere when there has been any material irregularity in procedure, but section 311 provides a special remedy when there has been a material irregularity in publishing or conducting a sale in execution of a decree. The Court which ordered the sale is therefore the

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Court which the Legislature designed should in the first instance inquire into the irregularity and its effect, and consequently this Court should not interfere unless the special remedy provided by the Legislature has first been sought. That remedy is, however, only given to the decree holder and owner of the property sold.

Whether this Court should exercise its powers under section 622 on behalf of a purchaser when a Court has not complied with section 287, and he has been prejudiced thereby, need not be decided in this case.

The applicant in the present case was one who claimed a mortgage on the property to be sold.

As I have shown, the law gives him no right to have the property sold free of his mortgage giving him the same rights against the proceeds of sale as he has against the property.

It is left to the discretion of the Court to make an order under clause (*b*) of section 295.

If his mortgage is not inserted in the proclamation of sale his interests are in no way affected. If his mortgage is a good one the Court cannot affect his rights over the property, even if it sells the property as being unincumbered.

This being so, it appears to me that this Court should not exercise its revision powers on behalf of a mortgagee, even when there has been material irregularity in not setting forth in the proclamation of sale anything about his mortgage. Still less should the Court interfere to order an inquiry which a mortgagee cannot claim, or to order a Court to act under clause (*b*) of section 295.

Irwin, J.—I concur.

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riminal Revision No. 976 of 1906.

igust 22nd, 1906.

Before the Hon'ble C. E. Fox, Officiating Chief Judge.

SHWE KUN AND ANOTHER v. KING-EMPEROR AND PO KYA.

Burn—for applicants. | *Maung Thin*—for respondent (complainant).

Criminal trespass—Indian Penal Code, s. 447—Specific Relief Act, 1877, s. 9.

A sent his servant B to plough certain land. C thereupon prosecuted A and B for criminal trespass, and obtained convictions.

A had not entered personally upon the land. He could not, therefore, be convicted under section 447.

B entered on the land *bona fide* as A's servant, and not in order to annoy C. Section 447 does not apply to such a case.

Convictions and sentences set aside.

Where it is open to complainant to bring a suit under section 9 of the Specific Relief Act, 1877, to regain possession of land, a Magistrate should not entertain a complaint of criminal trespass on culturable land, unless it is made very clear upon the examination of the complainant that the alleged trespasser must have entered on the land with one of the intents mentioned in section 441, Indian Penal Code.

There was no evidence that Shwe Kun, the first accused, ever personally entered on the land. The Magistrate has only found that he rented it out to the second accused to plough. Constructive entry upon property by a servant is not an entry within the meaning of section 441 of the Code of Criminal Procedure. To constitute an offence under that section there must be an actual personal entry by the person

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accused. The conviction of and sentence upon Shwe Kun are set aside, and he is found not guilty of the offence charged against him. The fine paid by him will be refunded.

The second accused Po E entered the land because he was employed by Shwe Kun to plough it. Even if he knew that Kya Waing had cultivated the land last year, and if Kya Waing told him that he was going to work it this year, it does not follow that he committed criminal trespass upon his original entry or by remaining on the land.

To hold a mere cooly acting under the orders of his employer guilty of criminal trespass, and thereby to assign to him an intent to annoy a person who had a dispute with his employer as to the right to the land, would be an extravagant straining of section 447 of the Penal Code. The conviction and sentence of and upon Nga Po E are set aside, and he is found not guilty of the offence charged against him. The fine paid by him will be refunded.

The case should not have been entertained by the Magistrate. It was open to the complainant to regain possession of the land by instituting a suit under section 9 of the Specific Relief Act. Where this can be done, Magistrates should not entertain complaints charging criminal trespass on culturable land, except when it is made very clear upon the examination of the complainant that the alleged trespasser must have entered on the land with one of the intents mentioned in section 441 of the Penal Code.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR *v.* TAW PYU.

Criminal Revision No. 624 of 1906.

September 4th, 1906.

Plea of guilty—conviction on—Code of Criminal Procedure, s. 255—powers of Magistrate under s. 349, Code of Criminal Procedure.

There is no foundation for the view that an accused person cannot be convicted in a warrant case immediately on a plea of guilty, without being called on for his defence.

A Magistrate to whom a case has been submitted under section 349, Code of Criminal Procedure, has no power to return the case for the purpose of supplying omissions.

The accused was tried by a third Class Magistrate, and pleaded guilty to a charge of theft in a house. The Magistrate thereupon sent him to the Subdivisional Magistrate for sentence under section 349 of the Code of Criminal Procedure. The Subdivisional Magistrate recorded, "In warrant cases no accused can be convicted on his mere pleading guilty" and sent the case back to the third Class Magistrate to take the accused's defence.

The Subdivisional Magistrate was wrong. Section 255 of the Code of Criminal Procedure could not be plainer than it is, *viz.*: "If the accused pleads guilty the Magistrate shall record the plea, and may, in his discretion, convict him thereon". Up to the stage of framing the charge the Magistrate's procedure was perfectly correct, and on recording the plea of guilty he used his discretion quite properly in acting forthwith under section 349.

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Moreover, if there had been any need to take the accused's defence, the Subdivisional Magistrate ought to have done it himself. Section 349 does not give him any power to return the case to the third Class Magistrate for the purpose of supplying omissions. Sub-section (2) indicates the course he should adopt.

Criminal Appeal No. 547 of 1906.

December 4th, 1906.

Before the Hon'ble Mr. C. E. Fox, Chief Judge.

PAW THA *v.* KING-EMPEROR.

Trial—evidence for prosecution—separate trial for distinct offence—s. 233, Code of Criminal Procedure.

Seven persons were accused together of theft or dishonest receipt and disposal of stolen property. The Magistrate heard the evidence for the prosecution against all seven together, and after discharging two, decided that the acts of the remainder did not form part of one transaction. He therefore charged them in three separate groups and proceeded against them in three separate trials, but without re-hearing the evidence for the prosecution separately, although parts of it which were relevant against others of the accused had no connection with the case of the appellant.

Held,—that the word "trial" includes the hearing of the evidence for the prosecution, as well as the subsequent procedure laid down in Chapter XXI of the Code of Criminal Procedure for the trial of warrant cases, and that under section 233, Code of Criminal Procedure, the appellant was entitled to a separate trial from the beginning.

Subrahmania Ayyar v. *King-Emperor*, (1901) I.L.R. 25 Mad., 61, referred to.

The case for the prosecution was based upon the following facts having been proved. A case of umbrellas and a bundle or bale of gunny bags were removed from a railway wagon in which they were being carried. The theft must have been committed whilst the train of which the wagon formed part was in motion between two stations.

Some days after the theft the headman of a village near the railway line received information, in consequence of which he made enquiries, and subsequently went to the appellant's house, where he took possession of one new umbrella and six gunny bags. From the appellant's house the headman went to the house of one Po Han, and he there found an old gunny bag and a paper label with a trade mark on it which corresponded with the trade mark on the umbrella taken from the appellant's house. On the following day 80 umbrellas and two gunnies were found on a search being made in the jungle, and later on 178 gunny bags were found in a tank close to the place where the 80 umbrellas had been found. Later again two umbrellas and 18 gunnies were found in another place. Later again the appellant is said to have taken the headman to a nullah from which two more gunny bags were taken. The appellant is said to have later on shown the place where the deal case which had contained the umbrellas lay hidden.

More umbrellas and gunny bags were found from time to time in various places, and finally on further information the huts of a gang of railway coolies were searched, and umbrellas were found in or near to some of them.

Altogether seven persons were sent up by the police charged with theft in a building or dishonest receipt and disposal of stolen property.

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The Magistrate took evidence against all seven accused. He discharged the 3rd and 4th accused, the evidence against whom was directed to show that they had had to do with the property found in the jungle and tank. Coming to the conclusion that the disposals of the property by the appellants and the remaining accused did not form one transaction, he determined to frame separate charges and to try the appellant separately from Po Han, the 2nd accused, and to try the 5th, 6th and 7th accused, who belonged to the gang of railway coolies, in another separate trial.

It was apparent from the first that the appellant was not in any way connected with the receipt and detention of umbrellas by these coolies, but the Magistrate took all the available evidence against all seven accused in one proceeding, seemingly because the articles which the evidence connected each with, respectively, formed part of property which had been stolen in one theft. His view was that the evidence up to the framing of the separate charges had been taken under sections 252 and 253 of the Code, and that his trials of the accused would only commence from the time he framed the charges.

He directed separate trial records to be made for the case against the appellant, the case against the 2nd accused and the case against the 5th, 6th and 7th accused, and being of opinion that it was not necessary to hear again the evidence already recorded, he ordered his record of it to be filed in the appellant's case, intimating that he would refer to it in dealing with the cases against the other accused.

The Magistrate's procedure was not, in my opinion, correct, or justified by the provisions of the Code of Criminal Procedure.

The general rule laid down by section 233 of the Code gives an accused the right to be tried separately and on a separate charge for every distinct offence of which he is accused.

One of the exceptions to the general rule is when he is accused of an offence committed in a transaction to which another person or other persons is or are alleged to have been a party or parties. In such case the two or more may be tried at one trial.

At a trial only such evidence is admissible as is relevant. If the taking and recording of evidence up to the framing of the charge against the appellant was part of his trial, a large amount of evidence not connected with him has been admitted and he may have been embarrassed. The principles laid down in *Subrahmania Ayyar* v. *King-Emperor* (1) would appear to apply to the present case as strongly as they did in the description of case dealt with by their Lordships of the Privy Council. The question is whether the proceedings up to the framing of the charge against the appellant, or, as I prefer to put it, up to the time when under section 256 his plea of not guilty was recorded, formed part of his trial or not.

Some wording of the Code, which I shall hereafter refer to, tends to confuse the distinction between an "inquiry" and a "trial." In the draft Bill it was proposed to define a "trial" as meaning "the proceedings taken in Court after a charge has been drawn up, and

(1) (1901) I. L. R. 25 Mad., 61.

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includes the sentence (if any) on the offender. It also includes the proceedings under Chapters XX and XXII from the time when the accused appears in Court." This proposed definition, however, was abandoned, and the word "trial" is not defined in the Code as it stands. The word "inquiry", however, is provided for in the definition section as follows—"inquiry includes every inquiry *other than a trial* conducted under this Code by a Magistrate or Court". The words "other than a trial" were introduced by the Code of 1898. These words show that the Legislature recognised that what is done under procedure laid down for an inquiry may also be done under procedure laid down for a trial.

The first procedure in an "inquiry" under Chapter XVIII of the Code is practically the same as the first procedure on the "trial" of a warrant case under Chapter XXI. Section 251 says that "the following procedure shall be observed by Magistrates in the trial of warrant cases".

The meaning of this, it seems to me, is that the whole of the procedure laid down by the subsequent sections of the chapter forms part of the "trial" by the Magistrate, and consequently that the taking of evidence in support of the prosecution is not an inquiry within the definition of the word "inquiry" given in the Code.

This construction accords with the ordinarily accepted understanding of what is included in the "trial" of a person accused of an offence, and is, I think, the construction which must have been contemplated by the Legislature when it abandoned a proposed definition of "trial," which would have limited the actual trial in a warrant case dealt with by a Magistrate to the proceedings after a charge had been drawn up.

The words "claims to be tried" in section 256 no doubt give colour to the argument that no trial commences until after the accused refuses to plead, or does not plead, or claims to be tried; but the above words do not, in my opinion, really raise any doubt that a trial under Chapter XXI commences when the accused appears or is brought before a Magistrate under section 252.

Nor does the use of the words "fresh inquiry" and "further inquiry" in sections 436 and 437 in somewhat extended senses weaken what I think is the conclusion to be drawn from the definition of "inquiry", the heading of Chapter XXI and the wording of section 251.

In my judgment the appellant was tried with other accused when there was no justification in the Code for his being so tried, and I must hold that such trial was illegal.

I therefore set aside the conviction and sentence, and direct that the appellant be re-tried *de novo* according to law. The appellant will be detained as an under-trial prisoner unless he is under sentence for some other offence.

Before the Hon'ble Mr. C. E. Fox, Chief Judge.

MI MO DAH *v.* KING-EMPEROR.

Criminal Revision No. 1331 of 1906.

December 7th, 1906.

Gaunt—for applicant.

Appeal—alteration of finding—Criminal Procedure Code, 1898, s. 423—notice to appellant.

The Magistrate charged the accused persons under section 406, Indian Penal Code. He found them not guilty under that section, but, without framing a fresh charge, convicted them under section 417, Indian Penal Code. On appeal the Sessions Judge found that the convictions under section 417, Indian Penal Code, were irregular, but altered them to convictions under section 406, Indian Penal Code, without giving the accused an opportunity of showing cause against being convicted of offences punishable under that section.

Held,—that the Sessions Judge acted illegally. A rehearing of the appeal was ordered.

THE Magistrate charged the accused with offences punishable under section 406 of the Indian Penal Code. He found all of them not guilty of an offence under that section, but without framing any charge against them of having committed any other offences, he convicted some of them of offences punishable under section 417 of the Code.

The learned Judge held that the Magistrate had committed an irregularity in convicting of offences punishable under section 417, but he found that the evidence recorded disclosed that the appellants had committed offences punishable under section 406. He accordingly altered the findings and in one case reduced the sentence.

I cannot find on the record anything to show that the learned Sessions Judge gave any intimation to the accused, or to any advocate or pleader appearing for them of what he proposed to do, or that they had any opportunity of showing cause against being convicted by him of offences of which they had been acquitted by the Magistrate.

Under the circumstances the order of the Sessions Court cannot stand.

I set it aside and direct that the appeal of Mi Mo Dah and of Shwe Tha Aung and Aung Pru Kaing (if they appealed) be re-heard.

Before Mr. Justice Hartnoll.

PO SIN *v.* KING-EMPEROR.

Criminal Appeal No. 639 of 1906.

January 5th, 1907.

Ten-house gaung—police officer—Lower Burma Village Act—Indian Evidence Act, s. 25.

A ten-house-*gaung* appointed under the Lower Burma Village Act is a police officer within the meaning of section 25, Indian Evidence Act.

Crown v. *Po Hlaing*, 1 L. B. R., 65, referred to.

* * * * *

One other piece of evidence has been admitted against appellant and that is that the appellant admitted his guilt to the ten-house-*gaung* when the latter came up. This admission was, in my opinion, inadmissible in evidence under section 25 of the Evidence Act. A ten-house-*gaung* must, in my opinion, be held to be a police officer. His appoint-

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ment order is given at page 16 of the Lower Burma Village Manual. It runs:—

Under the authority of section 3 (4) of the Lower Burma Village Act, 1889, Maung son of is hereby appointed to be *sé-ein-gaung* of the village of in the township of the District.

The effect of this appointment order is to confer on Maung the powers, duties and privileges of a rural policeman as stated on the reverse of this order.

Then follow the powers, privileges and duties of *sè-ein-gaung*. They begin:—

The appointment certificate under the seal and signature of the Deputy Commissioner invests the *sé-ein-gaung* with the powers and privileges of a police officer under the Code of Criminal Procedure and under the Police Act.

His bounden duties follow. Five of them relate to criminal matters, one to registration of vital statistics, and one is a general one. Hence it appears that the main portion of his duties is connected with criminal matters. In the case of the *Crown* v. *Po Hlaing* (1) the status of ten-house-*gaungs* was considered but not definitely. The learned Judges described them as "persons who are themselves hardly to be regarded as technically police officers except in the wider sense which, following the Calcutta decision, we should probably consider applicable". Their status was not in question in that case but that of a village headman. For the reasons given above, I must hold a ten-house-*gaung* to be a police officer within the meaning of section 25 of the Evidence Act. The appellant's statement to him is in my opinion inadmissible in evidence.

(1) 1 L. B. R., 65.

G. B. C. P. O.—No. 33, C. C., L. B., 23-5-1907—906—W.S.S.