UPPER BURMA RULINGS

BEING THE

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VOLUME II

1914—1916

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UPPER BURMA RULINGS.

1914—16.

VOLUME II.

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1914—16.

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NGA CHOK G v. MI PWA ON.

Tin Ya v. *Subbaya Pillay* that the District Court was not acting illegally in giving the creditors an opportunity of showing bad faith.

Tin Ya v. *Subbaya Pillay*, 6 L.B.R., 146.

Mi Bu v. *Po Saung*, U.B.R., 1910-13, 84.

This is an appeal against an order under section 43 (2), Provincial Insolvency Act, sentencing Appellant to two months' simple imprisonment on the ground of having "transferred" fraudulently certain property which was in his possession at the time he was arrested before he applied to be declared an insolvent. The only witness he had who was able to give any evidence about the property in question was his sister-in-law, and from her statements I think it is clear that the Appellant had an interest in the property, or, as the learned Judge of the District Court said, it was his in part. She said that she and her mother and her sister, the Appellant's wife, and Appellant carried on business together. They lived and worked together. She had her stall in the Zegyo and her sister outside, and they shared profits. Sometimes they sold goods in Mandalay, and sometimes they went about to other places selling. The particular goods in question were being taken by Appellant to his mother-in-law who was at Sinbyugyun, and they were to be sold at any festivals there might be. Appellant was to help to sell these things, and he would share the profits.

I do not understand the learned Judge's use of the word "transfer". There was no transfer of the property. Appellant with his brother was taking the goods to Sinbyugyun on the steamer when he was arrested, and he made them over to his brother to take to their destination when he had to leave the steamer at Myingyan with the Bailiff's Peon. A transfer means what a transfer is defined to be in the Transfer of Property Act, *e.g.*, a sale, a mortgage, or a gift.

But the Appellant, in the schedule of property attached to his application under section 11 of the Provincial Insolvency Act, made no mention of the property in question, and I think it must be inferred that in omitting to mention it he fraudulently or vexatiously concealed the property within the meaning of section 43 (2) (*b*). He did not make any attempt to conceal the property at the time of his arrest, (compare the Peon's statement that first he said "What am I to do with the goods"), and at his examination on the 13th of June in cross-examination, he admitted that he was taking the goods to his parents-in-law at Sinbyugyun and that he was going to sell them. But he represented that they belonged to his sister-in-law or his parents-in-law and that he had no interest in them, which, as I have found, was not true.

It has been urged on Appellant's behalf that having parted with the property before the presentation of his petition he was under no obligation to mention it in his schedule, that property transferred before petition is dealt with under section 36, and that section 43 (2) does not contemplate transfers, concealments, etc., made before presentation of petition. But, as I have said

already, there was no transfer and the concealment was made at and after the presentation of the petition.

Exception has also been taken to the procedure of the District Court in "making it a rule" in all cases to give creditors an opportunity of showing bad faith, etc., in view of the Lower Burma decision in *Tin Ya* v. *Subbaya Pillay* (1). It has been asserted that this Lower Burma Ruling conflicts with *Mi Bu* v. *Po Saung* (2), but I do not think it does. It appears rather to supplement the last mentioned decision. No attempt has been made to show that it is incorrect, and in my opinion it is consistent with the provisions of the Act. It follows therefore that the procedure of the District Court cannot be justly objected to.

The concealment of property by a debtor applying for a declaration of insolvency is a serious matter, and the sentence of two months' simple imprisonment cannot be regarded as excessive.

The appeal is dismissed with costs. Costs two gold mohurs.

Before Sir G. W. Shaw, Kt., C.S.I.

Criminal Revision No. 995 of 1914. March 3rd.

ISMAIL *v.* A. H. NOLAN.

Mr. L. K. Mitter—for Applicant.

Criminal Procedure—437.

Section 437, Code of Criminal Procedure, not applicable to proceedings under Chapter VIII.

Q. E. v. *Imam Mondal*, I. L. R., 27, Cal., 662.
Dayanath Taluqdar v. *Emperor*, I. L. R., 33 Cal., 8.
Aung Myat v. *Q. E.*, U. B. R., 1897-01, I., 100.
Po Gaung v. *K. E.*, U. B. R, 1897-01, I., 96.

Proceedings were taken against the applicant, Ismail, under section 3 of the Burma Opium Law Amendment Act, 1909, before the Western Subdivisional Magistrate, who, after taking evidence on both sides, discharged the applicant. The District Magistrate then directed further enquiry to be made before the Eastern Subdivisional Magistrate, holding that the Western Subdivisional Magistrate had "improperly discharged the accused".

I am now asked to interfere in revision on the ground that the District Magistrate's order was illegal. In the circumstances, the District Magistrate might very well have instructed the Government Prosecutor to support his order, but he has not done so.

Proceedings under Chapter VIII of the Code of Criminal Procedure are of a special character. Section 117 prescribes that where a preliminary order requires security for keeping the peace, the enquiry is to be made as nearly as may be practicable in the manner prescribed for summons cases, and where the

(1) 6 L.B.R., 146. (2) U.B.R., 1910-13, 84.

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order requires security for good behaviour, in the manner prescribed for warrant cases, except that no charge need be framed. In a warrant case, the order which the Western Subdivisional Magistrate would have passed would have been one of acquittal under section 258 of the Code of Criminal Procedure, but according to section 119, where it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the enquiry is made should execute a bond, the final order which the Magistrate is to make is one of discharge, whatever stage the proceedings may have reached.

Two questions then arise. First, whether, assuming section 437 to be applicable to proceedings under Chapter VIII, an order of discharge passed after the evidence for the defence has been taken should be regarded as an order of acquittal, and secondly, whether section 437 at all applies to proceedings under Chapter VIII. On the second point, there are two decisions of the Calcutta High Court, *Q. E.* vs. *Imam Mondal* (*1900*) (1) and *Dayanath Taluqdar* v. *Emperor* (*1905*) (2). The first of these was a precisely similar case to the present, as far as the report shows. In both it was held that section 437 does not apply to proceedings under Chapter VIII; that in section 437 a complaint means a complaint of an offence, and an accused person who has been discharged, a person who has been accused of an offence. On consideration, it appears to me that this interpretation of section 437 is correct. Throughout the whole of Chapter VIII, it is to be observed that the word "accused" is nowhere used. It is indeed studiously avoided. This fact coupled with the provisions of section 119, before referred to, by which in proceedings of this kind the final order must always be one of discharge where a case for requiring security is not made out is sufficient, in my opinion, to show that the Legislature did not intend section 437 to apply to proceedings under Chapter VIII. As pointed out in the Calcutta cases, it is always open to the District Magistrate to institute fresh proceedings on entirely fresh materials.

In the foregoing circumstances, the District Magistrate's order cannot be sustained. In another respect it was open to objection. The District Magistrate made it without giving notice to the Applicant, although the propriety of giving notice has been declared in the published rulings of this Court after a consideration of all the High Court decisions on the subject (see *Aung Myat* v. *Q. E.* (3) and *Po Gaung* vs. *K. E.* (4).

The District Magistrate's order directing further enquiry is set aside.

(1) I.L.R., 27, Cal. 662. (3) U.B.R., 1897-01, I. 100.
(2) I.L.R., 33, Cal. 8. (4) U.B.R., 1897-01, I. 96.

Before Sir G. W. Shaw, Kt., C.S.I.

Criminal Revision No. 23 of 1914, March 23rd.

KING-EMPEROR *v.* MI MEIN GALE.

Penal Code—317.

Abandonment of child by mother giving birth unassisted. Questions which arise.

Mi Ma v. *King Emperor.*—Criminal Appeal No. 20 of 1906 (unpublished).

Mi Mein Gale, the accused in this case, was a woman of 20. The Sessions Judge described her as powerfully built, but repulsive-looking and of a low type. He noted that according to the evidence she was perfectly sane and that on her trial she displayed undoubted sagacity in defending herself. She had never been married but had had one child two years before, and she was charged here with causing the death of another child she had just given birth to, and abandoning it.

The Sessions Court found her not guilty of murder and culpable homicide (sections 302 and 304, Indian Penal Code), but convicted her of leaving the child in a bush by the road side, with the intention of wholly abandoning it (section 317, Indian Penal Code), and sentenced her to five years' rigorous imprisonment.

The Sessions Judge referred to an unpublished decision of this Court *Mi Ma* vs. *K. E.* (1) as having afforded him much help. Cases of the kind are rare in Upper Burma, but they do occur, and the information collected in *Mi Ma* vs. *K. E.* from Lyon's and Taylor's works on Medical Jurisprudence, on points which commonly arise when women are charged with causing the death of their children or abandoning them, is no doubt likely to be of assistance to Magistrates and Sessions Judges. A copy of the judgment is therefore attached. There were many circumstances which combined to make it doubtful if Mi Ma was guilty of any criminal offence.

Here the facts were different. The accused was not a *primipara*. The position in which the child was found showed that she must have deliberately thrown it into a thorn-bush without regard for its safety or comfort. Making all allowance for the condition of a woman delivering herself away from help, it is difficult to reconcile this conduct with any intention but that of abandoning the child wholly, and this inference is confirmed by her subsequent conduct.

She was unusually strong, she walked nearly a mile and a half immediately after giving birth to the child and throwing it into the thorn-bush, and although displaying signs of distress, was able to give a false account of her condition to her companions, and to dispense with any assistance even after she reached home. She also denied having given birth to a child, when she was questioned by the Headman next morning, and she never asked after the child's welfare at any time, or showed any solicitude on the subject.

(1) Criminal Appeal No. 20 of 1906.

K.-E. v. Mi Mein Gale.

I am of opinion that the learned Sessions Judge was right in finding the accused guilty under section 317, Indian Penal Code. In acquitting her on the charges of murder and culpable homicide he went, as far as the evidence justified him in going, in her favour. The punishment was by no means excessive. She has not appealed and I have dealt with the case in Revision. There is no ground for interference.

The proceedings are returned.

Criminal Appeal No. 20 *of* 1906.

MI MA *v.* KING-EMPEROR.

Judgment.

Appellant, Mi Ma, an unmarried girl of 16, has been convicted under section 317, Indian Penal Code, and sentenced by the Sessions Court to seven years' rigorous imprisonment.

On the 22nd August last, Appellant gave birth to a child in the jungle, close behind the hut of a tari climber named Nga Pu. She covered it with some palm leaves and walked home a distance of 350 yards (or nearly $\frac{1}{5}$th of a mile). Almost immediately Nga Pu heard the child cry, and went to where it was lying. He then left it in charge of another tari climber, and ran to the village to report to the Headman, telling everybody he met on the way. One of the persons he told was Mi Dinga, Appellant's aunt, who at once suspected Appellant and went to her father's house and asked her if the child was hers. By this time Appellant had been received by her step-mother, Mi Lan, and was being attended to by her and an aunt, Mi Gyan Tha. These women had suspected what had happened when they saw her come in weak and perspiring, and had taken her to her room; and almost immediately, as I gather from the statements of the witnesses, Nga Pu had arrived with the report of what he had found. Appellant is the Headman's daughter. Mi Lan and Mi Gyan Tha hearing the report asked Appellant if this was her child. She answered that it was, and begged them to go and fetch it. Next, Mi Dinga arrived, and asked the same question, and Appellant made the same reply. All these incidents seem to have succeeded one another at very short intervals. The child was brought home promptly and properly attended to. It seemed to be in good health and lived till the 26th. On that day, in the morning, it was attacked by what the Burmese call "child's disease," and died in the afternoon. The death was at once reported to the Police and the body sent to the Hospital. The Hospital Assistant examined it the same day. His evidence is that the skull bones in two places were depressed and pressing on the brain, injuries likely to cause death in four or five hours. He also found a scratch, and what he supposed to be finger-marks, on the neck. The learned Sessions Judge refused to accept this evidence as sufficient to support a charge of murder, but he held that it gave a much more serious complexion to the case as tending to show

that Appellant had not done her best for the child. He thought that in leaving the child in the jungle and walking home without any attempt to send for it, she must have intended to abandon it wholly, and that her treatment of it probably accelerated its death.

The witnesses deny that there were any marks of injury on the child, and say that it suffered from nothing but child's disease or fits.

I am unable to detect in the evidence any trace of annoyance or displeasure on account of the child's existence in any of the Appellant's relations.

In the circumstances detailed above, the probability of any one deliberately doing the child to death by injuring its head or sqeezing its throat appears to me to be extremely remote.

The Sessions Judge also took this view.

I have referred to the records of the only two cases of a similar kind to be found in this Court, and I have also examined Lyon's and Taylor's works on Medical Jurisprudence. In the latter I have found what appears to me to be most important and helpful information.

The two previous cases differed considerably from the present.

In the first (see Criminal Appeal No. 62 of 1904 of this Court) the accused was a woman of 24, a Manipuri, who had had two husbands and had borne two children before. She gave birth to a child in the jungle early in the morning and abandoned it *in situ*, walking home a distance of 350 yards. She said nothing to anybody about it. It was accidently found dead by a Policeman at 7 a.m. One of its eyes had been pecked out by a crow, and it might have suffered from hæmorrhage from the navel cord. The mother's defence was that the child was born dead, which was proved to be false. The child was illegitimate, and having regard to all the circumstances, it was held that the accused abandoned the child deliberately with the intention of causing its death, and her conviction under section 302, Indian Penal Code, was upheld, though the sentence was reduced to transportation for life.

In the second case (see Criminal Appeal No. 108 of 1905 of this Court) the accused was a Burman woman of 26, but recently married, and the child was illegitimate. It was born at home and taken and left in the jungle soon after sunrise, and was found about 4 P. M. the same day, and brought home alive. With care it might have lived. It died of convulsions two days later. The accused had had another (illegitimate) child before. She was sentenced to six years' rigorous imprisonment under section 317, by the Sessions Court, and the conviction and sentence were upheld.

In the present case we have a young girl of 16, without any previous experience. There is nothing to show that her story is untrue, that she was delivered suddenly and unexpectedly when out gathering palm leaves alone. As I have already remarked,

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no appreciable time seems to have elapsed between her arrival at her father's house and the arrival of Nga Pu with his report, immediately after which Appellant confessed that the child was hers.

We have therefore as against her nothing but the facts that she did not get assistance for the child on her way home, that she did not immediately tell her relations what had happened, and that the Hospital Assistant found at h is *post mortem* examination of the child's body what he believed to be marks of violence deliberately used to cause the death of the child.

The following remarks and information taken from the second volume of Taylor's works, above cited, seem to me to deprive these facts of all value as evidence of Appellant's criminal intention. On page 392 in connection with the danger of suffocation to a new-born child, we find quoted from W. Hunter:—"An unhappy woman delivered by herself, distracted in her mind and exhausted in her body, will not have strength or recollection enough to fly instantly to the relief of the child" and "a *primiparous* female may faint or become wholly unconscious of her situation, or if conscious, she may be ignorant of the necessity of removing the child."

Again on page 398 in connection with death by drowning in cases of sudden and unassisted delivery:—"Alone and unassisted, the mother of an illegitimate child may be placed under circumstances of the greatest suspicion, although innocent of any attempt to destroy the life of her child."

And although cases often occur in which women exhibit a remarkable power of exertion immediately or very soon after delivery,—instances are given on page 407, where it is remarked "A firm resolution, with a strong desire to conceal her shame enable a woman to perform immediately after her delivery acts connected with the disposal of the body of her child, which, from ordinary experience, might appear to be much beyond her strength,"—these are exceptions to the general rule.

At pages 406 *seqq*. Taylor deals with cases of sudden delivery and gives numerous instances, among *primiparæ*, as well as other women, and says "a woman may be thus suddenly and unexpectedly delivered while in the erect posture, although this is not common among *primiparous* women, and several injuries may thus be accidentally produced on the head of a child." In such cases the child falls to the ground with or without injury and the umbilical cord is ruptured. Fractures of the skull are rare but may occur, *e.g.*, in one case (of a *primipara*) the result was a soft tumour 2 or 3 inches across on the left parietal bone, slightly ecchymosed, and the child recovered; in another, mentioned as published by Swayne, there was merely the appearance of a bruise on the head, and the cord was ruptured three inches from the navel. "The child did not suffer from the fall and continued well until six days after its birth, when it was seized with convulsions and died." A fissure one and half inches long was found in the upper part of the left parietal bone, a clot

pp. 405 and 400.

of blood between the *dura mater* and the bone, and congestion of the vessels of the membranes. In another case death was caused by effusion of blood on the brain, without fracture of the bones of the skull: in another by a large fissure on the right parietal bone, with great effusion of blood. Other cases are mentioned of parietal fissures in which the children recovered.

On pages 402 and 403 cases are dealt with of injury to the head attended with marks of violence (fractures or tumours with effusion of blood) from mere uterine pressure, and in one instance death occurred only 23 days after birth.

On page 413 it is explained that similar injuries may be caused accidentally by the mother in effecting self-delivery.

And Taylor observes (on page 403) that there are no certain signs by which fracture before death can be distinguished from fracture recently after death.

On page 404 he explains that fractures caused by the expulsive efforts of the uterus are generally slight,—merely fissures in the bones beginning at the sutures, and extending for an inch or less.

At page 329 he says, "In general when children are murdered, the amount of violence inflicted is considerably greater than that which is required to destroy them—whereby satisfactory proofs are occasionally obtained"; and on page 406: "In cases of murder by violence on the head, the injuries are commonly much more severe (than in the case of injuries from uterine pressure). The bones are driven in, the brain protrudes, and the scalp is extensively lacerated."

Then on pages 416 *seqq.* we have an account of marks simulating violence on the neck, which are accidentally produced.

I may quote finally a remark with which Taylor introduces the subject of infanticide (page 319). "The strongest motive for destroying the infant appears to be shame or the disgrace of having an illegitimate child. *The crime is only attempted where pregnancy has not been discovered, and where delivery is effected in concealment.*"

To apply this information to the circumstances of the present case.

First the medical witness's description of the head injuries is that there were contused wounds (or contusions), one on the sagittal suture three inches by three inches, the bones depressed half an inch and pressing on the brain, but not fractured, the other on the occipetal bone, on the right side of the middle line two inches by two inches, the bones depressed one-third inch. Externally there was a red circular swelling, in each place. It appears to me that in their general features, these injuries resemble those described in Taylor as occurring either from uterine pressure, or from violence in self-delivery, or from the fall in sudden delivery in the erect posture. The medical witness was a Hospital Assistant of 12 years' service, who had never made a *post mortem* examination of an infant before. It might have been useful to examine the Civil Surgeon with reference to the Hospital Assistant's

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descriptions of the injuries, and the injuries referred to in Taylor. Unfortunately this was not done. In the absence of such expert evidence on the point, and having regard to all the circumstances, I think that there is a distinct probability that the head injuries were caused accidentally at the time of delivery, and that they were not so immediately dangerous as the Hospital Assistant supposed, but led to the child's death after four days (*cf.* the case from Swayne above mentioned). This view is supported by the evidence of Mi Pwa Su, the first woman who went to the child's assistance. According to her the navel cord was about four inches long and untied; facts consistent with rupture by the fall in delivery in the erect posture. The marks on the neck are described by the Hospital Assistant as a slight scratch and "two reddish depressions (one) on either side of the throat apparently caused by the pressure of fingers."

These do not differ materially from the marks referred to by Taylor as being often accidentally produced.

It may be noted that the Hospital Assistant's opinions in regard to delivery in the erect posture are shown by Taylor's work to be wrong. It follows that the injury found by the Hospital Assistant cannot be considered as evidence against Appellant, even to the limited extent admitted by the Sessions Court.

And I think it is impossible to infer with reasonable certainty from Appellant's failure to seek assistance on her way to the village that she intended to abandon her child. She was not actively doing away with the child. She was not therefore actuated by resolution and other strong feelings which according to Taylor give abnormal strength to women in such a conjuncture. The exertion of walking 350 yards must have told upon Appellant. The evidence showed that she arrived at the house perspiring and unwell. Having regard to the remarks quoted above from W. Hunter, it would be unfair to infer that Appellant was guilty, from her silence at and before this time. If she had continued to keep silence after she had had time to recover strength and when she was clearly able to speak about what had occurred, the case would be different. But as we have seen Nga Pu's report was made very shortly after Appellant's arrival, and she then admitted, when asked, that the child was hers and begged that it might be sent for. The fact that Appellant had concealed her pregnancy cannot be taken into consideration as evidence against her in this case. It proves nothing.

For these reasons I am of opinion that grave doubt exists as to the guilt of the Appellant, and I set aside the conviction and sentence and direct that she be acquitted and released.

Before Sir G. W. Shaw, Kt., C.S.I.

Civil 2nd Appeal No. 374 of 1914. March 2nd.

MI HMAT TOK AND 6 OTHERS *v.* NGA KYWE HLA AND 2 OTHERS.

Mr. *C. G. S. Pillay*—for Appellants.

Mr. *S. Mukerjee*—for Respondents.

Transfer of Property—108 (*h*).

Held,—Applying the rule contained in section 108 (*h*), Transfer of Property Act, as a rule of equity, justice and good conscience, that a tenant is entitled to compensation for mango trees he has planted.

Nga O v. *San Ko.*, U.B.R., 1892—95, II, 548.

Po Chein v. *Mi Pwa Thein*, U.B.R., 1907—09, II, Civil Procedure, 21.

These are cross-appeals under section 13 of the Upper Burma Civil Courts Regulation. I deal with them together and refer to the parties simply as Plaintiffs and Defendants. Plaintiffs sued for possession of 20 mango trees standing on 1·54 acres of land, Holding No. 55, Kyegyaung-kwin. They alleged that the land belonged to them and that they had let it, or rather that their predecessor had let it to the father of the Defendants 20 years before suit; that the Defendants and their father planted the mango trees on the understanding that they would hand over the trees with the land when the lease was determined, but that when Plaintiffs demanded the return of the land with the mango trees, the Defendants made over the land only and refused to give up the trees. Plaintiffs valued the trees at Rs. 96.

The Defendants said that the land belonged to the joint ancestor of the parties and was never let to their father, Nga Pein. They denied also that the trees were planted with the Plaintiffs' permission in the circumstances alleged, and denied that they returned the land. They valued the trees at Rs. 461.

The Courts below agreed in finding that the land belonged to the Plaintiffs exclusively and was let to the Defendants as alleged, that the Plaintiffs received rent and that they got back the land. They also agreed that the value of the trees was as the Plaintiffs alleged, and not as the Defendants alleged. In those findings I entirely concur.

The only point remaining for decision is as to whether the Defendants were entitled to compensation for the mango trees. The authorities cited by the Township Court in support of its view that the Defendants were not entitled to compensation were not authorities to that effect. As the learned Additional Judge of the District Court observed, the case of *Nga O* v. *San Ko* (1)

(1) U. B. R., 1892—96, II, 548.

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was a case of a usufructuary mortgage. Under the Transfer of Property Act, section 108 (*h*), the rule in respect to leases is different. On this point Dr. Gour says in his commentary "The term 'attached to the earth' is defined in section 3, and therefore all things which come within the purview of that definition may be removed by the tenant. Thus, for example, trees, shrubs, ... planted . . . . . by the tenant may be removed by him, but they must be removed before the determination of his tenancy, after which he cannot be allowed to sever them. In England the lessee would at no time be entitled to remove these which would there be usually treated as permanent fixtures . . . But it may be here mentioned that this rule was never followed in India even before the passing of the Act. Thus in the Full Bench case decided as far back as 1866, it was laid down that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their being attached to the soil, become the property of the owner of the soil. The general rule is that, if he who makes the improvements is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building, if it was allowed to remain for the benefit of the owners of the soil, the option of taking the building or allowing the removal of materials remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess. And this rule is, it may be stated, at least as old in India as the corresponding contrary rule in England." He proceeds to quote from the Hindu and Muhammadan laws in support of this statement and refers to a similar rule in *Justinian's Institutes* and goes on "The principle of the maxim *quio quid plantatur solo solo cedit* has then no sanction in either the text or case law of this country . . . . . and it is sufficient to say that the rule now sanctioned by the Legislature has been uniformly followed in this country, both on account of its being consistent with the sacred texts, as with justice, equity and good conscience."

The Lower Appellate Court did not condescend to cite any authority for holding that the Defendants were entitled to any compensation, but I think that the quotation which I have just made from Dr. Gour's commentary furnishes ample authority for following the rule stated in section 108 (*h*) of the Transfer of Property Act as a rule of justice, equity and good conscience.

It follows that the decision of the Lower Appellate Court was right, and that the cross-appeals must both be dismissed.

As the Courts below have both found that the Defendants returned the land to the Plaintiffs, and as this finding is supported by the evidence, I do not consider it necessary to allow the Plaintiff to amend the plaint. In view of the foregoing

findings on the facts, reference to *Po Chein* v. *Mi Pwa Thein* (1) is irrelevant. MI HMAT-TOK v. NGA KYWE-HLA.

The Lower Appellate Court ordered the parties to bear their own costs, and I think that in view of the course which the case took, this was a proper order. The parties will bear their own costs in the present appeals.

Before Sir G. W. Shaw, Kt., C.S.I.

Civil II Appeal No. 432 of 1914. March 27th.

MIRZA HIDAYAT ALI BEG *v.* NGA KYAING.

Mr. K. K. Roy—for Appellant. | *Mr. A. C. Mukerjee*—for Respondent.

Paper Currency Act, 23-24.

Evidence 57 (i) 115.

Contract 23.

Negotiable Instruments Act, 120.

Held,—A promissory note containing an undertaking to pay a sum of money on demand to a specified person, or order or bearer (*sic*) is in contravention of section 24 of the Paper Currency Act, III of 1905, and the agreement is therefore void under section 23, Contract Act.

Po Tha v. *D'Attaides*, 5 L. B. R., 191.
Jetha Parkha v. *Ram Chandra Vithoba*, I. L. R. 16 Bom., 689.
Dhanji G. Desmane v. *Taylor*, 4 Sind Law Reports, 44.
Attorney-General v. *Birkbeck*, 12 Q. B. D., 605.
Bensley v. *Bignold*, 5 B. N. A., 335.
Nga Waik v. *Nga Chet*, U. B. R. 1907—09, II, Evidence, 5.

Plaintiff-Appellant sued for Rs. 1,414 being the balance of principal and interest due on a promissory-note. The Subdivisional Court dismissed the suit on the ground that the promissory-note was payable to bearer on demand, and therefore contravened section 24, Paper Currency Act, III of 1905, an objection taken by the Defendant-Respondent in his written statement. The learned Judge relied upon the Lower Burma Case of *Po Tha* v. *D'Attaides* (2).

The Plaintiff-Appellant on appeal to the District Court contended that the promissory-note was not payable to bearer, that the Defendant-Respondent was estopped by section 115 of the Evidence Act from setting up an illegal act of his own as a defence; also that Plaintiff-Appellant was entitled to a decree on the Defendant-Respondent's admission. The District Court found against the Plaintiff-Appellant on all these points and dismissed the appeal.

Plaintiff-Appellant now comes up in second appeal under section 100, Civil Procedure Code. On his behalf several objections are taken. First, it is contended that the promissory-note is not payable to bearer on demand. The actual wording of the document was "On demand I, the undersigned so and so, promise to pay

(1) U. B. R., 1907—09, II, Civ. Pro., 21.
(2) 5. L. B. R., 191.

MIRZA HIDAYAT ALI BEG v. NGA KYAING.

"to Mirza Hidayat Ali Beg . . . . . or order or bearer the sum "of Rs. 1,000 only, etc." The learned advocate argues that the words "or order" govern the interpretation of the words "or bearer" and therefore "or bearer" means the bearer of the order, in other words, the meaning is just the same as if "or bearer" had not been added. He is unable to cite any case in which a promissory-note worded in this manner has been interpreted, in the way in which he wishes the present document to be interpreted, and the authorities which he cites do not, in my opinion, support his contention at all. Properly speaking a document, say a cheque, may be made payable to "so and so or order" or else may be made payable to "so and so or bearer." It is not correct to make it payable to "so and so or order or bearer," but if this incorrect wording is used, I think that clearly the words "or bearer" make it a document payable to bearer.

The next point is one raised tentatively by Farren, J. in *Jetha Parkha* v. *Ram Chandar Vithoba* (1892) (1) to the effect that the provisions of section 24, Paper Currency Act, do not prevent the payee of a promissory-note made payable to "so and so or bearer on demand" from recovering on the document. This suggestion was followed and given effect to by the Judicial Commissioner of Sindh in the case of *Dhanji G. Desmane* v. *Taylor* (2). The full report is not available, but the case is quoted in Indian cases, Volume VII, page 604. The learned Judge apparently held that neither the consideration nor the object of the agreement was unlawful. Farren, J. in his remarks had admitted that in an English case, *Attorney-General* v. *Birkbeck* (3) a contrary opinion had been held by the Court of Queen's Bench, but the report of that case is not available. The Lower Burma case cited in the lower Courts however clearly held that the contract was one forbidden by law, and that consequently, the Plaintiff could not recover upon it, and another English case *Bensley* v. *Bignold* (4) was cited as authority for this view. The report of this last mentioned case is not available. But it appears to me that the provisions of section 23, Contract Act, are clearly against the Plaintiff-Appellant. The consideration for the loan of Rs. 1,000 or for the Plaintiff-Appellant's forbearing to sue for an old debt of Rs. 1,000 whichever it may be, is the Defendant-Respondent's promise to pay Rs. 1,000 on demand to the Plaintiff-Appellant or order or bearer, and that promise being, as I have just held, in contravention of section 24, Paper Currency Act, it is forbidden by law. The entire agreement therefore is void as expressly declared in the last clause of section 23, Contract Act.

Next, it is contended on behalf of the Plaintiff-Appellant that section 120 of the Negotiable Instruments Act debarred the Defendant-Respondent from pleading that the document was void. On this point, section 120 is confined to suits by a holder

(1) I. L. R., 16 Bom., 689.
(2) 4 Sindh Law Report 44.
(3) Q. B. D., 605.
(4) 5, B. N. A., 335.

in due course, and as far I can understand a holder in due course does not include the payee of a negotiable instrument payable to bearer. Apart from this moreover, it seems to me that, on the face of the promissory-note in question, the Courts are bound to take judicial notice of the provisions of section 24, Paper Currency Act, without the Defendant-Respondent having raised the objection in his defence at all (section 57 (1), Evidence Act).

The last point raised is that apart from the promissory-note, the Plaintiff-Appellant was entitled to a decree on the original consideration. This question was exhaustively dealt with in *Nga Waik* v. *Nga Chet* (1). The conclusion there come to was that where a loan exists independently of the bill or note, that is, where a promissory-note is executed for a debt which already exists, the Plaintiff can succeed on the original consideration. In the present case, it was admitted on both sides in the plaint and written statement that the Defendant-Respondent borrowed money from the Plaintiff-Appellant years before the execution of the promissory-note in question on interest, and paid principal and interest on account, leaving a balance of Rs. 1,000 at the time of execution of the promissory-note in question. Provided the Plaintiff-Appellant's suit was within limitation, he was therefore entitled to a decree apart from the promissory-note. This matter was not gone into.

The decrees of the Lower Courts are set aside, and it is directed that the case be remanded to the Court of first instance under O. XLI, r. 23, read with O. XLII in order that the Court may go into the question of the Plaintiff-Appellant's claim on the original consideration and come to a fresh decision apart from the promissory-note. The Plaintiff-Appellant should, at the outset, be allowed to amend his plaint by the addition of a prayer for a decree on the original consideration, and any allegations of facts on which he may rely for his contention that the suit is within time. Costs will abide the final result.

A certificate will be granted to the Plaintiff-Appellant under section 13, Court Fees Act.

(1) U. B. R., 107—09, II, Evidence 5.

Civil Revision No. 92 of 1914. June 25th.

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

BHAI KHAN *vs.* DES RAJ.

Mr. A. C. Mukerjee—for *Applicant.*

Mr. J. N. Basu—for Respondent.

Civil Procedure—O. XXXVIII, r. 5.

Attachment before judgment.

Held,—that a Civil Court has not power to attach before judgment property situate outside the local limits of its jurisdiction, and that the Code of 1908 has effected no change in the law in this respect.

Kin Kin vs. *Nga Kyaw We and two others*, U. B. R., 1907-09, II, Civil Procedure Code, 13.

Haji Jiva Nur Mahomed vs. *Abubakar Ibrahim Memam*, 8 Bom. H.C.R. O. C. J., 29.

The question for decision in this application is whether a Civil Court has power to issue a warrant of attachment before judgment on property situated without its jurisdiction.

In Kin Kin vs. *Nga Kyaw We and two others*, [1] it was held that Courts had not this power under the Code of 1882, but the learned District Judge has held that there has been an alteration of the law.

The words "within the jurisdiction of the Court" which appeared in section 483 of the Code of 1882 have been omitted in O. XXXVIII, *r.* 5 of the present Code, and it is urged that as the word "property" is now not qualified in any way, it must include both property within and property without the jurisdiction of the Court, and that the deliberate omission of the words mentioned shows that the Legislature intended to alter the law.

But if the matter be gone into a little deeper, this reasoning does not appear to be sound. The word "property" appears in many sections in the Code without any qualification and yet clearly meaning property within the jurisdiction of the Court, *e.g.*, in O. XXI, rr. 11, 12, 21. The Legislature have gone back in this respect to the language of the Codes of 1859 and 1877, under which Codes it was held that the property which a Court could attach before judgment was property within its jurisdiction. This was held in *Haji Jiva Nur Mahomed* vs. *Abubakar Ibrahim Memam*, [2] overruling a previous decision of the same Court to the opposite effect, and the reasons given for the decision appear to me to be very weighty. The learned Chief Judge said "*Primâ facie* when we look to enactments relating to the powers of a Court over the property of litigants we should expect to find those enactments concerned with property, whether it be moveable or immoveable, which is situated within their local jurisdiction. Even Courts of Equiry in England and America, which exercise

(1) II U.B.R., 07-09. C.P.C., 13.
(2) 8 Bom. H. C. R. O. C. J., 29.

the widest jurisdiction do not attempt to operate directly in *rem* when the *res* is beyond their local jurisdiction but act in *personam* only" . . . . "If the original Court has not power immediately to execute its own decrees in the district of another Court, and execution of them can only be obtained by the intervention of the latter, we should require some very distinct language on the part of the Legislature to show that it intended that the Court in which the suit is brought can make or execute any order of attachment before judgment of property situate beyond the local limits of its jurisdiction."

The omission of the words "within the jurisdiction" certainly at first sight makes it look as if the Legislature did intend to alter the law, but they have reverted to the language of the Civil Procedure Code of 1859, and if it were held that the word property included property outside the Court's jurisdiction merely because it was not qualified, the same argument could be applied to other sections in which this word occurs, and the omission of the words "within the jurisdiction" in one section would lead to an interpretation of other sections which, certainly, was not intended. It is to be noted that the Legislature considered it necessary to add to section 16 of the present Code an explanation of the word property used in that section as "property situate in British India." One would have thought that if they intended the word "property" in O. XXXVIII, *r.* 5, to have the same meaning they would have said so.

It has been urged that the Report of the Select Committee on the Civil Procedure Code of 1908 shows clearly that there was an intention to remove the restriction imposed by the words "within the jurisdiction," but the question is rather what the Legislature have done than what they intended to do, and for this reason it has been held by the Privy Council that a Court is not justified in referring to the proceedings of the Legislature which resulted in the passing of an Act as an aid to the construction of any of its provisions.

I am of opinion therefore that a Court has not power to attach before judgment property situate beyond the local limits of its jurisdiction.

The order of the District Court, Mandalay, is accordingly set aside with all costs.

Advocate's fee, two gold mohurs.

Criminal Revision No. 88 of 1914. June 9th.

Before Sir G. W. Shaw, Kt., C.S.I.

JUGARAM *v* NGA TUN BAW.

Mr. *L. K. Mitter*—for Applicant.

Workmen's Breach of Contract—2.

Where Complainant told Respondent to do no more work and came to an agreement with Respondent for the repayment of the balance of the money advanced.

Held,—that the Workmen 's Breach of Contract Act did not apply. In the matter of *Anusuri Sanyasi*, I.L.R., 28, Mad 37. *A. L. M. S. Subramonien Chetty* v. *Gangaya*, 4, L. B. R., 365.

The District Magistrate has submitted the proceedings in this case for orders in Revision, being of opinion that the Subdivisional Magistrate misunderstood the Workmen's Breach of Contract Act and the Contract Act.

After perusing the record I agree with the learned District Magistrate.

The Complainant called no witnesses. On the other hand there was evidence which the Magistrate believed on the side of the Respondent, Tun Baw, to the effect that Complainant told Respondent not to do any more work but to repay the balance, and that a settlement was arrived at by which Complainant accepted a pony and other things in part payment and agreed to waive Rs. 60, leaving a balance of Rs. 100, for which Respondent mortgaged and promised to make delivery of a piece of land worth Rs. 60, and to pay Rs. 40, in *Nayôn* 1276.

Respondent would seem to have failed to deliver the land as promised. But I do not think that failure brings the case back under the Workmen's Breach of Contract Act. By his own act Complainant in my opinion took it out of the Act when he told Respondent to do no more work, and after that, and after the settlement, the Respondent's liability was purely a civil liability. [*C.f.* In the matter of *Anusuri Sanyasi* (1)]

The Subdivisional Magistrate relied upon the Lower Burma case of *A. L. M. S. Subramonien Chetty* v. *Gangaya* (2). But that was not a case under the Workmen's Breach of Contract Act, and therefore cannot be taken as an authority for applying the Workmen's Breach of Contract Act in the circumstances of the present case.

The order of the Subdivisional Magistrate is set aside and the complaint is dismissed. If the Complainant wishes to take proceedings for the recovery of the balance due to him, he must go to the Civil Court.

(1) I. L. R. 28 Mad., 37.—(2) 4 L. B. R., 356.

Before Sir G. W. Shaw, Kt., C.S.I.

Criminal Revision, No. 102 of 1914. June 23rd.

NGA SAW KE AND 4 OTHERS *v.* KING-EMPEROR

Mr. H. M. Lütter —for Applicants.

Mr. R. G. Aiyangar—for the Crown.

Criminal Procedure,—155, 190 (*1*) (*b*).

There is no authority in the Code of Criminal Procedure for examining a Police Officer submitting a police report in a non-cognizable case under section 190 (*1*) (*b*) of the Criminal Procedure Code as if he was a complainant. The Magistrate receiving the report may order an investigation under section 155, Criminal Procedure Code, if he has reason for doubting its correctness.

King-Emperor v. *Nga Thaung*—Upper Burma Rulings, 1904-1906, I, Criminal Procedure 25.

* * * * *

The Magistrate who first dealt with this case entertained it on a police report by a head constable. He proceeded to examine the head constable on oath as if he was a complainant, and then ordered a police investigation. As explained 10 years ago in *King-Emperor* v. *Nga Thaung*, (1), a police report in a non-cognizable case is a police report within the meaning of section 190 (1) (*b*), Criminal Procedure Code, and there is no authority in the Criminal Procedure Code for examining a Police Officer submitting a police report under section 190 (*1*)(*b*), as if he was a complainant.

It was, however, open to the Magistrate to order an investigation under section 155, and this appears to be the proper course for a Magistrate to take, when he receives a police report in a non-cognizable case and has reason for doubting its correctness.

Before Sir G. W. Shaw, Kt., C.S.I.

Civil Revision, No. 6 of 1914. June 17th.

CAPTAIN HODGKINSON LACK, I.M.S. *v.* P. GALLAGHER.

Mr. R. G. Aiyangar—for Applicant.

Contract 9—*Implied Contracts.*

Claim by a Civil Surgeon, an officer of the Indian Medical Service for two professional visits to the wife of a Government servant at Rs. 16 a visit where no agreement had been come to as to fees.

Held—that it was for the Court to decide whether the claim was reasonable and that it was reasonable.

Rawlins vs. *Daniel*, 2 Agra, 56.

Plaintiff-Applicant who is the Civil Surgeon of Bhamo sued to recover Rs 32 being his fees for two professional visits to the Defendant-Respondent's wife.

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(1) U. B. R., 1904-1906, I. Crl. Pro. 25.

CAPTAIN HODGKINSON LACK, I.M.S. v. P. GALLAGHER.

The Small Cause Court gave him a decree for Rs. 4 only and directed that this sum should be paid by monthly instalments of Rs. 2 and further the Court refused the Plaintiff-Applicant costs.

The Judge relied upon a case *Rawlins* v. *Daniel*, (1) quoted in Woodman's Digest, where it was held that (under the circumstances of that particular case) one-fifth of the monthly income of the Defendant was the fair amount to which the Plaintiff was entitled for his professional attendance on the family of the Defendant (who was a public servant) for a year.

The Judge also held that Plaintiff-Applicant was not entitled to claim fees for his second visit because he made it without being specially summoned, and as the Plaintiff-Applicant said, in the ordinary course of his work to see how his patient was progressing; that the Plaintiff-Applicant was not justified in refusing Rs. 10 which were sent to him by Money Order, and that his conduct in attempting to charge the Defendant-Respondent's family individually was most reprehensible. The Plaintiff-Applicant admitted that he refused to accept a Money Order for Rs. 10 sent by Defendant-Respondent's wife, and that when Defendant-Respondent objected to the charge made for the second visit, and begged Plaintiff-Applicant to reduce his claim on the ground of Defendant-Respondent's small income, he wrote a letter to Defendant-Respondent pointing out that on the occasion of both visits he was asked to attend to a child, and enclosing a 'modified bill' charging Rs. 32 more for attendance on the child or Rs. 64 in all, and he explained that he sent the modified bill merely to show Defendant-Respondent that the first bill was not excessive.

The Defendant-Respondent apparently did not file a written statement, but the Judge examined him at the first hearing, and he then admitted that no fees had been mentioned between Plaintiff-Applicant and him, and said that his salary was Rs. 80 a month, that his mother, wife and child were dependent on him, and that he wished to pay by small instalments; in other words, he did not deny his liability, or dispute the correctness of the amount, which the Plaintiff-Applicant claimed.

The Agra case quoted in Woodman's Digest cannot be followed here. The full report of it is not available. The case was decided by the old High Court of Agra between 1866 and 1868. There is no means of knowing what sum the Plaintiff claimed or what the Defendant's income was—the claim may have been for thousands of rupees—and the Defendant's monthly salary may have been in four figures. But we do know that remuneration for a year's attendance was claimed, and that was not at all what Plaintiff-Applicant sued for in the present case. The only point of resemblance would seem to have been that no agreement had been come to expressly about the fees to be paid, and consequently it fell to the Court to give the Plaintiff a decree for a reasonable sum. A contract of this kind is what is called an "implied"

(1) 2 Agra, 56.

contract, where the implication is of fact. It is not an "implied" contract, which is a legal fiction, a "constructive" contract or "quasi" contract, the class of cases referred to in sections 68 to 72, Contract Act; it is a real contract where the promises are not expressed in words but are to be gathered from the conduct of the parties and the surrounding circumstances. This description of contract is also spoken of in the books as an "inferred" or "tacit" contract. An instance given is that of a customer eating something exhibited for sale in a shop, say a pastrycook's shop. There is an implied or inferred promise on the part of the shopkeeper to sell the article to the customer for the notified price or a reasonable price, and there is an implied or inferred promise on the part of the customer to pay the notified price or a reasonable price. (See Addison on Contract, 10th Edition, pages 412 *seqq.*, Pollock on Contract, 8th Edition, pages 11 *seqq.*, also section 9, Contract Act, and Cunningham and Shephard's and Pollock's notes to that section.)

Cunningham and Shephard in their commentary on section 9, Contract Act, say:—"Where a relation exists between two parties which involves the performance of certain duties by one of them, and payment of reward to him by the other, the law implies a promise by each party to do what is to be done by him".

Pollock in his notes on the same section says:—"There is a class of cases of considerable importance in England, where parties are presumed to have contracted with tacit reference to some usage well known in the district or trade, and whatever is prescribed by that usage becomes an additional term of the contract if not contrary to the general law or excluded by express agreement. Such terms are certainly implied as resulting not from words used, but from general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances."

In reality the present case perhaps fell within this class. But no usage was actually alleged or proved, by which medical officers in the position of the Plaintiff-Applicant are in the habit of charging Rs. 16 a visit.

The decision therefore had to go on the general principles before explained.

The question was whether the sum which Plaintiff-Applicant claimed was reasonable. The Judge of the lower Court assuming the decision in *Rawlins* v. *Daniel* to lay down a general rule, calculated the proper fee for a visit in the present case to be 1 anna 3 pies, but he saw himself that such a charge for one or two visits would be inadequate. A medical officer in the position of Plaintiff-Applicant is a technical expert, who has gone through a long and expensive course of training and obtained diplomas implying a high degree of professional skill and knowledge, and his services therefore are deserving of substantial remuneration. A sum of Rs. 4 for a visit was, in my opinion, almost as inadequate here as 1 anna 3 pies would have been. I consider that Plaintiff-

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Applicant's claim of Rs. 16 per visit was not only reasonable, but ordinary and moderate.

In England claims by medical practitioners are dealt with under the Medical Acts and the bye-laws framed by professional Colleges. Here there are no Medical Acts. The Government might no doubt lay down rules as to the fees which Medical Officers in its service should charge to paying patients, but except in regard to Chiefs of Native States it has not done so. On the contrary, in paragraph 152 of the Medical Manual it is expressly declared that all questions which may arise regarding the amount of remuneration for professional services will be left to private adjustment.

Paragraphs 150 and 151 of the same Manual enjoin upon Medical Officers to come to a clear understanding when first called in about fees, but direct them to respond unhesitatingly when called upon, and to leave the question of fees for consideration after the first visit.

Paragraph 150 also says that in the absence of a special agreement on the basis of a yearly payment it shall be fair to assume that a medical officer's professional services will be paid for by the visit.

Here the Plaintiff-Applicant disregarded the injunction to arrive at an understanding when first called in or after the first visit. But he did what the same rule declares to be proper in charging by the visit.

In paying a second visit and charging for it, although not specially summoned again, I think that Plaintiff-Applicant was acting in accordance with what everybody knows to be the general practice of medical men, and that he was fully justified in doing so.

I do not think that Plaintiff-Applicant's letter enclosing the modified bill was in very good taste or displayed the kindness and consideration which one is accustomed to meet with in dealing with the family doctor.

I also do not think that the Plaintiff-Applicant ought to have refused the Rs. 10 that were sent him. The fact that the money order was sent by Defendant-Respondent's wife was not a good reason for refusing to accept it; it was accompanied too by a promise of Rs. 10 or more next month.

But I do not consider that these circumstances were sufficient to justify the Court in refusing costs to the Plaintiff-Applicant.

He was under no obligation to accept a part payment, and the fact that he only claimed Rs. 32 showed his explanation of the "modified bill" to be correct.

The Judge's remarks on Plaintiff-Applicant's conduct were unduly severe.

In overlooking the fact that Defendant-Respondent did not dispute the correctness of Plaintiff-Applicant's claim, and in reducing the amount claimed to Rs. 4 on the authority of *Rawlins* v. *Daniel* the Judge of the Small Cause Court in my opinion failed duly to consider either the facts or the law and was therefore

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guilty of illegality or material irregularity, and his judgment was not in accordance with law.

The decree of the lower Court is set aside. Defendant-Respondent will pay Rs. 32 to Plaintiff-Applicant with costs. He may pay by monthly instalments of Rs. 10.

The money order and the promise accompanying it show that Defendant-Respondent can afford to pay Rs. 10 a month.

Criminal Revision No. 574 of September 22nd, 1914.

Before Sir. G. W. Shaw, Kt., C.S.I.

NGA TUN E *vs.* MI CHON.

Mr. S. Mukerjee—for Applicant. *Mr. Vasudevan—for Respondent.*

Evidence, 112—Criminal Procedure, 488.

The presumption created by section 112, Evidence Act, is not rebutted unless it is proved that there has been no opportunity for sexual intercourse between the husband and wife at any time when the child could have been begotten. If the husband has had access, adultery on the wife's part will not justify a finding that another man was the father.

A question of paternity under section 488, Criminal Procedure Code, is governed by section 112, Evidence Act, and not by the Buddhist Law.

Manugyè section 80, Richardson's Edition, page 319.

Respondent applied for maintenance for a child of which she alleged the applicant to be the father. She was a married woman living with her husband, Nga Pauk Kyaing, to whom she had been 20 years married without getting a child. Then as she says, she fell in love with the Applicant in 1270 B. E., and two months afterwards became pregnant by him of the child in question. She continued to live with her husband until two months after the birth of the child when the husband divorced her. She stated in evidence that from the time when she began to have intercourse with the Applicant, she did not allow her husband to approach her.

He, Nga Pauk Kyaing, examined as a witness on Respondent's behalf, said that he did not approach his wife from the time she became pregnant though she continued to live in his house, and again that from the time Respondent and Applicant were accused of having intercourse with each other, Respondent would not allow him to approach her, and that this was before Respondent was pregnant. He also stated that Respondent continually told him that the child with which she was pregnant was not his, and that (after the birth of the child) he tried to catch the Applicant and watched and caught him sleeping with the Respondent in his house when Applicant said "This is my wife and son, what has it got to do with you," that the Headman told him not to take the matter further, and that he accepted Rs. 25 from the Applicant as damages.

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The midwife stated that the Applicant promised to pay for her services when the child was born, and told her not to ask for money from the husband as the child was his, Applicant's. This witness is a cousin of Respondent's.

Applicant admitted that he had intercourse with the Respondent when the child was one year old but not before that, and he denied that he was the father of the child, but admitted that he had to pay, as he said, Rs. 100, to the Respondent's husband, Pauk Kyaing. This was all the evidence in the case which it is necessary to mention.

The Magistrate found that Applicant was the father of the child. He was assisted to this conclusion by the remarkable similarity of feature which he observed between the child and the Applicant. He did not refer to section 112 of the Evidence Act.

It is now contended on behalf of the Applicant that the provisions of section 112 of the Evidence Act were opposed to the Magistrate's finding, and also that there was no clear and conclusive evidence as to the Applicant having been the father of the child.

It is unnecessary to discuss the evidence as to Applicant being the father. Section 112 of the Evidence Act in my opinion must be held to decide the case. It reproduces a rule of the English Law, and the principle on which it is based has been stated to be that it is undesirable to enquire into the paternity of a child when the mother is a married woman and her husband has had access to her. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy. The presumption created by the section can only be rebutted by proof of non-access, and to prove non-access, the evidence must be such as to exclude all doubt. Unless it is proved that there has been no opportunity of sexual intercourse between the husband and wife at any time when the child could have been begotten the presumption is not rebutted. The authorities for these statements are given in Messrs. Amir Ali and Woodroffe's notes to section 112 and need not be cited here.

It has been contended on behalf of the Respondent that the husband was impotent. On the other hand, Field's commentary on section 112 has been referred to on behalf of the Applicant, where it is suggested that section 112 does not permit, as the English Law does, proof of impotence. But on this point, Messrs. Amir Ali and Woodroffe in their commentary say, "There can be as little access when the husband is impotent though present as when he is capable though absent. It is clear that there was no intention to depart from the English rule on the point." This is a reasonable interpretation, and I am of opinion that proof of impotence would be equivalent to proof of non-access. But there is no proof of impotence here. It cannot be inferred from the fact that Respondent and Pauk Kyaing had been married for 20 years without children that Pauk Kyaing was impotent. Phaenomena of this kind are met with every day where there is no impotence.

The point for determination then is simply whether it was proved that the Respondent's husband had no opportunity of sexual intercourse with her at any time when the child might have been begotten. The only evidence on the point is that of Respondent herself and her husband which I have summarised above. According to English Law this evidence would not have been admissible, but the Evidence Act does not exclude it. It is however in my opinion insufficient. Assuming it to be true, it is to be inferred from what both the witnesses say that sexual intercourse between Respondent and her husband continued until the time when Respondent began to allow intercourse to the Applicant, and the pregnancy was recognized within two months of that time. It is obvious from this fact that the husband might perfectly well have been the father. But I find it difficult to credit the statements made by the witnesses as to Pauk Kyaing not having approached the Respondent during the many months—some 10 or 11 months—it must have been—they professed to have lived together without such intercourse. The opportunity was manifestly there, and the presumption is that there was intercourse. In short, non-access was not satisfactorily proved. This settles the point.

On behalf of the Respondent, it has been further contended that according to the *Manugyè*, section 80,* the child in question being a child begotten secretly in adultery, the wife remaining with her husband is not entitled to inherit and therefore must be held not to be the child of the husband The contention is that the Buddhist Law being applicable to questions of marriage and inheritance, section 112 of the Evidence Act must be held to have no application. On this point, Messrs. Amir Ali and Woodroffe in their commentary on section 112 have some remarks (*see* 5th Edition, page 703 and note). Apparently when the point for decision is one of evidence only, the case would be governed by section 112 and not by the personal law of the parties. But here in my opinion there is no doubt; the question is not only one of evidence as to paternity, it is not one of succession, inheritance, marriage or caste or any religious institution or usage, the only cases in which the Buddhist Law is applicable (*see* Burma Laws Act, 1898, section 13). The marriage between Respondent and Pauk Kyaing being still subsisting at the time when the child was born and it not being shown that the husband had no access to his wife at the time when it might have been begotten, the law does not allow enquiry to be made as to the child's paternity, and the finding of the Magistrate that the Applicant was the father cannot be sustained.

The Magistrate's order is set aside and the Respondent's application is dismissed.

* Richardson's Edition, page 319.

Civil 2nd Appeal No. 21 of 7th September 1914.

Before Sir. G. W. Shaw, Kt., C.S.I.

NGA HLA GYAW and one *v.* MI YA PO and four [others.

Mr. *C. G. S. Pillay*—for Appellants. | Mr. *L. K. Mitter* and Mr. *D. Dutt*—[for Respondents.

Arbitration.—A suit to enforce an award is not an application to file an award.

A party to a submission cannot revoke it unless for good cause shown.

If a party gives notice of his withdrawal to the arbitrators the arbitrators are not bound to give him notice of further hearings.

Nga Pu vs. *U De Wainda*, U.B.R , 1892—96, II., 11.

Kyan Pôn vs. *Yan Nyein*, U.B.R.., 1897—01, II., 10.

Mi Hla Win vs. *Shwe Yan*, U.B.R., 1897—01, II., 293.

Pestonji Nasarwanji vs. *Manukji*, 12 Moore's I.A., 112.

Subraya Prabhu vs. *Manjunath Bhakta*, I.L.R., 29, Mad., 44.

Plaintiffs-Appellants sued to enforce an award of arbitration, in other words for specific performance of an award. The plaint was quite plain. It did not mention Schedule II, clause 20, Civil Procedure Code, or ask that the award might be filed in Court, but prayed that the award might be enforced, and a decree pronounced in accordance with it. The procedure laid down in the Civil Procedure Code is not obligatory. Instead of applying that an award may be filed a party may institute a regular suit to enforce the award.

The distinction is important. The court fee on an application to file an award is eight annas; the Court fee in a suit to enforce an award is *ad valorem* on the value of the property in dispute [section 7 (x) (*d*), Court Fees Act].

In the case of an application to file an award the period of limitation is six months and there are stringent restrictions on appeal [*See* Schedule II*cl.* 21(2) and section 104(2), Civil Procedure Code]. In the case of a regular suit to enforce an award the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal and second appeal.

The courts below were in error in not observing this distinction and in speaking of the case as an application to file an award. There is the less excuse for them that the matter was explained long ago in *Nga Pu* vs. *U De Wainda* (1), *Kyan Pôn* vs. *Yan Nyein* (2) and *Mi Hla Win* vs. *Shwe Yan* (3).

In the present case the parties on the 15th February 1912 by a written submission, referred the partition of their inheritance to arbitrators, Tha Do and Po Se. On the 22nd April, the arbitrators pronounced an award in favour of Plaintiffs-Appellants.

(1) U.B.R., 92—96, II., 11. | (2) U.B.R., 97—01, II., 10.
(3) U.B.R , 1897—01, II., 293.

Before the hearing of the case, the Defendants-Respondents gave the arbitrators notice that they withdrew from the reference, and they did not attend the hearing or the delivery of the award. The arbitrators on receiving the notice proceeded *ex-parte* without replying to the Defendants-Respondents' notice.

The defence to the Plaintiffs-Appellants' suit was that the award was invalid because it dealt with a piece of land which was not included in the reference, because Defendants-Respondents had no notice of the date on which the arbitrators intended to proceed with the case (*ex-parte*), and because Defendants-Respondents had withdrawn from the reference.

The Subdivisional Court found against the Defendants-Respondents on all points, and ordered the award to be filed (*sic*) and a decree to issue in accordance therewith. The District Court, on appeal, set aside that order and decree, and "dismissed the suit" (*sic*) with costs.

The grounds on which the District Court came to this decision were that the arbitrators had omitted to reply to the Defendants-Respondents' notice or to make them aware of the date of the *ex-parte* hearing, and that the arbitrators did not discuss in the presence of the parties what award they were going to make. This last ground was not raised by the Defendants-Respondents and was entirely unsustainable. The arbitrators were in no way bound to discuss in presence of the parties what award they were going to make. They deposed that they discussed the matter together, and that one of them, Tha Do, drew up the award and signed it and sent it for signature to the other arbitrator, Po Se, who then signed it. This was a perfectly legitimate method of preparing the award.

On the other point also the Lower Appellate Court's decision cannot be supported. As the learned Additional Judge observed "when parties have agreed to submit a dispute to arbitration, no party can revoke the submission unless for good cause shown, and a mere arbitrary revocation is not permitted." This was laid down by the Privy Council in *Pestonji Nasarwanji* vs. *Manukji* (4). The subject is fully explained in Banerji's Law of Arbitration in India, 1908, at page 118.

It has also been clearly laid down that the omission to give notice of the meeting of the arbitrators to a party who has, prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate the award. The case of *Subraya Prabhu* vs. *Manjunath Bakhta* (5) where this was declared to be the law was very like the present case.

The Defendants-Respondents had no right to withdraw; they have never attempted to show that they had. It was their business to attend before the arbitrators, and when they failed to do so it was not incumbent on the arbitrators to give them any further notice.

(4) 12 Moore's I. A., 112. | (5) I.L.R., 29 Mad., 44.

NGA HLA GYAW v. MI YA PO.

This was the position on general principles and apart from any special stipulation in the reference. The reference in the present case, however, expressly provided that if either party failed to appear before the arbitrators, the arbitrators might proceed *ex-parte*.

The decree of the lower Appellate Court is set aside, and the Plaintiffs-Appellants are granted a decree in terms of the award as prayed.

Defendants-Respondents will pay the Plaintiffs-Appellants costs.

Criminal Appeal No. 162 of 29th September 1914.

Before Sir G. W. Shaw, Kt., C.S.I.

NGA KAN HLA *v.* K.-E.

Mr. *J. N. Basu*—for Appellant.

Mr. *H. M. Lutter, Government Prosecutor*—for the Crown.

Penal Code—84.

Youth ordinarily an extenuating circumstance in cases of murder.

Apparent unsoundness of mind not coming within section 84, Indian Penal Code, inferred from the nature of the crime and the circumstances under which it was committed.

Sentence for murder in such cases.

Tha Kin v. *K.-E.*, U. B. R., 1910—13, 87 (explained).
Q.-E. v. *Lakshman Dagdu*, I. L. R., 10 Bom., 512.
Nga Tin v. *Q.-E.*, Criminal Appeal No. 170 of 1909 (unreported).
Q.-E. v. *Venkata-ami*, I. L. R., 12 Mad., 459
Taylor's Medical Jurisprudence, 6th Edition, Volume I, page 878.

ORDER.

Appellant Kan Hla, 17, has been convicted under section 302 of the Indian Penal Code and sentenced by the Sessions Court of Sagaing to death for the murder of Mi Kan Shi, a girl of 15, his betrothed, on the 23rd June last at Myintagyi.

The facts really admit of no doubt. There was an eye-witness, Mi Tha Mi, a woman of 36, who was on a *tama* tree plucking leaves between 300 and 400 yards from the spot and saw Appellant striking the deceased two or three times with some weapon and saw the deceased fall. She swears that she was under no sort of doubt as to the identity of the Appellant, and she immediately went to the village and gave information, as well as telling people she met on the way.

Appellant was at once searched for, and found at the house of his natural father at Tetkaung. (He lived ordinarily with his adoptive father at Myintagyi.) On being arrested by the headman, he confessed to him that he had killed the deceased. On the next day, the 24th June, at Yeu, Appellant made a full

confession to the Subdivisional Magistrate which was recorded after the prescribed preliminary enquiry. This preliminary enquiry was not as full or intelligent as it might and ought to have been, but it was sufficient to make the confession admissible.

In the Sessions Court, Appellant alleged that he confessed because he was threatened by the Sub-Inspector of Police, Po Hla, and Constable, Tha Kun. The Sessions Judge enquired into this allegation and came to the conclusion that it was unfounded, and that the confession was voluntary. In this finding I concur.

The Appellant in his confession said that he quarrelled with the deceased because she would not go with him to open some water channels, and wished that a viper might bite him; that this enraged him so much that he went to the village (1,100 odd yards distant) and got a *dama* with which he proceeded to kill the deceased, and that he "did not know what happened to his mind." He delivered several cuts on deceased, one of which severed the head from the body all but a bit of skin, and another penetrated the abdomen and pierced the liver. There can be no doubt that the offence falls within section 300, and unless any exception general or special applies, amounts to murder punishable under section 302, Indian Penal Code.

The Sessions Judge referred to *Tha Kin* v. *K.-E.*[1] and, as I understand his remarks, came to the conclusion that in spite of Appellant's age the circumstances of the case were such that he ought to be hanged. He was of opinion that there was no indication whatever of mental unsoundness, that Appellant was well developed and normal physically and mentally, and should be held fully responsible.

It is argued on his behalf before me that Appellant's story of going to the village for the *dama* is extremely improbable on the supposition that Appellant was in a normal condition of mind and was probably untrue, and that if it was true, it argues a serious derangement of mind; the motive for Appellant's anger being so trivial and inadequate that if he was a person of really sound mind, he could not have gone all the way to the village and back without cooling down. It is suggested therefore that either Appellant made use of a weapon which was ready to his hand on the spot and acted without premeditation and on the spur of the moment in the heat of passion, or else, if he went to the village for the *dama*, he was the victim of homicidal mania. Reference is made to Lyon's Medical Jurisprudence, 3rd Edition, page 350 *seqq.*, where symptoms of homicidal mania are enumerated absence of motive, absence of any attempt at concealment, absence of accomplices, absence of elaborate preparation, etc., etc., and where cases are given of homicidal mania in which there had been no previous manifestation of mental derangement.

In brief it is not contended that any of the special exceptions

(1) U. B. R., 1910—13, 87.

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applied, and the only general exception touched upon is that contained in section 84, Indian Penal Code.

With regard to Appellant's age, the effect of the decision in *Tha Kin's* case above cited was to explain that ordinarily youth is itself an extenuating circumstance. I do not think that there is any room for misapprehension on this point. At the same time, the ruling was not intended to lay down, and it did not lay down, that in every case of murder where the accused is under a certain age, the lesser penalty must be awarded. I am not therefore disposed to hold that the learned Sessions Judge was wrong in the view which he took that the Appellant's age was not a sufficient ground for exempting him from the death penalty.

But the question of mental unsoundness remains Here I think that the contentions of the learned Advocate are not without support. There seems to be no reason to doubt the correctness of Appellant's statement that he went to the village for the *dama*. But the case is somewhat similar to the English cases mentioned by Taylor in his Medical Jurisprudence,[1] and referred to in *Q.-E.* v. *Lakshman Dagdu*,[2] where there is practically nothing to show that the accused was insane except the nature of the crime and the manner in which it was committed. But as pointed out in *Lakshman Dagdu's* case, the question of Appellant's responsibility must be decided according to the test prescribed in section 84 of the Indian Penal Code. As I understand it, the law requires that a man shall be held responsible for his acts although he may be suffering from mental derangement in cases where that mental derangement falls short of the unsoundness of mind described in the section. As far as one can judge, the Appellant was not incapable of knowing the nature of his act or that it was wrong or contrary to law. He made himself scarce and he did not tell any one what he had done until he was arrested. He then related what he had done and gave explanations. There have been one or two cases in this Court in which the same question arose. The last one which I have traced was in many respects a close counterpart of the present. This was *Nga Tin* v. *K.-E.* [3]. There the accused, one Nga Tin, aged 17, was convicted and sentenced to death for the murder of his wife, Mi Mi. The facts admitted of no doubt. The accused without any apparent reason whatever suddenly picked up a *dama* and cut his wife with it several times. One cut falling on the throat severed the carotid artery and so caused instant death. The next day the accused made a full confession to the Subdivisional Magistrate in which he said that he "did not know what became of his mind" and that he cut his wife "because his mind had gone astray." According to the evidence, the accused had never exhibited any signs of insanity at any time.

[1] Medical Jurisprudence, 6th edition, Volume I, page 878.
[2] I. L. R., 10 Bom., 512.
[3] Unreported Criminal Appeal No. 170 of 1909 decided on 16th November 1909.

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I held that there was no ground for ordering further enquiry into the accused's mental condition, and that he was not entitled to be acquitted, but that the case was one where the lesser sentence was sufficient to meet the ends of justice, following in this respect the view taken in *Q.-E.* v. *Lakshman Dagdu* already cited and also the later Madras case of *Q.-E.* v. *Venkatasami*.[4] It appears to me that the present case calls for a similar finding.

The appellant's conduct suggests that there was present a certain degree of mental unsoundness, although it was not sufficient to bring him within section 84 of the Indian Penal Code, and on this ground I am of opinion that the lesser sentence should be passed, apart from the question of his age.

The conviction is maintained and the sentence is reduced to transportation for life.

Before Sir G. W. Shaw, Kt., C.S.I.

Criminal Revision Case No. 566 of 1914, September 15th.

NGA MYO *vs.* NGA KYAN AND 2 OTHERS

Mr. J. N. Basu—for Applicant.

Mr. L. K. Mitter—for Respondent.

Criminal Procedure—250.

So long as an accusation is frivolous or vexatious, the fact that it is also false is no bar to an order for payment of compensation under this section.

Beni Madhub Kurmi vs. *Kumud Kumar Biswas*, I. L. R., 30 Cal., 123 (followed).

ORDER.

The Applicant presented a complaint charging Respondent, Nga Kyan, a Revenue Surveyor, with having taken a bribe of Rs. 100, and Respondents, Aung Tha and Thet Le, with having given this bribe to him.

The District Magistrate framed charges against Respondent, Nga Kyan, under section 161 and the other two Respondents under sections 161 and 114 of the Indian Penal Code, but in the end acquitted all three and directed the Applicant to pay Rs. 50 to each of them as compensation under section 250 of the Code of Criminal Procedure.

I am asked to interfere in revision on the ground that the order was illegal because the Magistrate found the Applicant's charges to be false, and because Rs. 50 is the maximum prescribed by the section. A further objection is also taken on the ground that the Magistrate at the same time made an order to the effect that in default of payment, Applicant should undergo simple imprisonment for one month.

[4] I. L. R., 12, Madras 459.

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The last mentioned order was of course wrong as a perusal of clause (²) of section 250 is sufficient to show, but as the money has been paid, the mistake is immaterial.

As regards the maximum, the learned Advocate must have misconstrued clause (¹) of the section, the language of which is quite plain and free from ambiguity. It authorises a Magistrate to order compensation not exceeding Rs. 50, to be paid to each of the accused where there are more than one.

As regards the first point, the subject was fully considered by a Full Bench of the Calcutta High Court in *Beni Madhub Kurmi* vs. *Kumud Kumar Biswas* (1902). (1) Four of the five Judges composing the Bench held that as long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of section 250. On consideration, I am of opinion that this ruling deserves to be followed. In the present case the charges being of giving and receiving a bribe were not frivolous, but if false, as the Magistrate found, they were undoubtedly vexatious. It is to be noted that section 250 of the present Code speaks of "frivolous *or* vexatious" accusations and not as one of the previous Codes had it "frivolous *and* vexatious."

No objection has been taken in the application to the order of acquittal, and after referring to the proceedings, I am of opinion that no ground has been made out for the interference of this Court in revision with that order.

The application is dismissed.

Civil 2nd Appeal No. 331 of 1914, November 13th.

Before Sir G. W. Shaw, Kt., C.S.I.

MI SA BWIN *v.* NGA SAN NYUN.

Mr. C. G. S. Pillay—for Appellant. | *Mr. J. N. Basu*—for Respondent.

Buddhist Law—Divorce.

Held—that the decision of the Privy Council in *Nga Pe* v. *Mi Lon Ma Gale* (1) did not affect the ruling in *Chit Nyo* v. *Mi Myo Tu* (2).

1 U. B. R., 1910—13, 30.
U. B. R., 1902—03, II, Buddhist Law—Divorce 6.
U. B. R., 1904—06, II Buddhist Law—Divorce 3.
6 L. B. R., 18.

Plaintiff-Appellant sued for divorce on the ground of the Defendant-Respondent's misconduct. The original plaint was written by a petition-writer and prayed for bare divorce. At the first hearing Plaintiff-Appellant having obtained the assistance of an Advocate applied for an adjournment in order to file an amended plaint, the Advocate no doubt being aware that a suit

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(¹) I. L. R., 30 Cal. 123.
(¹) 6 L. B. R., 18. | (²) I. U. B. R., 1910—13, 30.

for bare divorce according to the ruling of this Court in *Chit Nyo* v. *Mi Myo Tu* (1) would not lie. Plaintiff-Appellant accordingly filed an amended plaint. This was not very well expressed, but I think it was intended to contain a prayer for divorce with partition. In paragraph 4 the plaintiff said that in view of the defendant's misconduct, she was entitled to divorce "either according to the method of divorce where the defendant is in fault, or according to the method of divorce by mutual consent" and in paragraph 5 that there was joint property according to the schedules attached, and in paragraph 6, that "if divorce were granted according to the method of divorce by mutual consent, the joint property should be divided equally." The prayer also ran "Therefore the plaintiff prays for a decree against defendant for divorce either according to the method of divorce where there is fault (on the part of the defendant) or according to the method of divorce by mutual consent, together with costs." The amended plaint also had annexed to it schedules of property and debts.

All this seems to indicate clearly an intention to claim partition according to the rule of Buddhist law applicable to the particular circumstances of the case. If the Township Court had any doubt on the point it ought to have required the plaintiff at once to amend the plaint.

The defendant-respondent in his written statement admitted that there was joint property as alleged by the plaintiff-appellant though he denied some items, and filed a schedule of his own.

The Additional Judge of the Township Court framed two issues both badly expressed:—(1) "Is there any fault on the part of defendant to entitle plaintiff to a decree for divorce" and (2) "are the schedules presented by the plaintiff and the defendant true?

The first of these issues shows that the Additional Judge had not grasped the principles of the Buddhist Law of Divorce as explained in the Rulings of this Court. It ought of course to have been:—was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case where the defendant is the offender (that is where the whole of the joint property goes to the plaintiff) and then there ought to have been another issue; was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case of mutual consent [the rule applicable where the fault is less serious as in the case of *Nga Pye* v. *Mi Me* (2)]. The plaintiff might still have sued for a divorce with partition resigning all the property to the defendant in the case where there was no fault on the part of the defendant (*Mi Kin Lat* v. *Ba So*) (3). But she did not ask for this.

(1) I U. B. R., 1910—1913, 30.
(2) U. B. R., 1902-03, II Buddhist Law—Divorce 6.
(3) U. B. R., 1904-06, II, B. L., Divorce—3.

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The Township Court found that there was no joint property and that "therefore a suit for bare divorce would lie" and holding that there was ill-treatment, granted a decree for bare divorce. This finding involved a misapprehension of what, as already explained, the actual nature of the suit as disclosed in the amended plaint was probably intended to be, and is not intelligible on the face of the pleadings and the evidence, or consistent with the Rulings already referred to.

The defendant-respondent appealed to the District Court on the grounds that according to the evidence of both parties, it was clearly proved that there was joint property, that a suit for bare divorce without partition would not lie, and that the Court of first instance was wrong in granting a decree in favour of the plaintiff without any fault on defendant's part. The Lower Appellate Court citing *Chit Nyo's* case held that a suit for bare divorce would not lie, and therefore "following that ruling" the Additional Judge allowed the plaintiff to amend the plaint by adding a prayer for partition and directed the plaintiff to pay the costs of the appeal. The learned Additional Judge besides failing to notice that the amended plaint was apparently intended to claim a divorce with partition as already explained allowed himself to be misled by the final order in *Chit Nyo* v. *Mi Myo Tu* as given in the printed report of the case. He omitted to observe that in that case the Courts below had not only granted a decree for divorce, but had decided which rule of partition was to be applied, and he failed to observe that his order allowing the plaintiff to amend the plaint could not be a final disposal of the appeal in the present case where there had been no finding as to the method of partition to be applied. The order however as it stands is a final order and it was followed by a decree, and therefore the present second appeal undoubtedly lies in this Court.

The grounds on which the plaintiff-appellant comes here are that a suit for bare divorce does lie according to the ruling of the Privy Council in *Nga Pe* v. *Mi Lon Ma Gale* (2), and that the Lower Appellate Court ought to have decided the appeal on the merits and confirmed the decree of the Court of first instance.

On the first point, the learned Advocate for the plaintiff-appellant as will be evident from what has gone before, seems to have misapprehended the real nature of the plaintiff-appellant's amended plaint, but he has also entirely failed to appreciate what points were in dispute before Their Lordships of the Privy Council and what they actually decided.

If the view which I take of the amended plaint in the present case is correct the question does not really arise. But as the plaint is not as clear as it ought to be it seems necessary to explain the Ruling in *Nga Pe* v. *Mi Lon Ma Gale*, and to come

(2) 6 L. B. R. 18.

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to a decision as to whether it affects the Ruling in *Chit Nyo* v. *Mi Myo Tu.*

There had been a suit for bare divorce which had proceeded to decree, and the successful party had followed it up by a second suit for partition. It was this second suit which was before the Judicial Committee of the Privy Council. The plaintiff of course maintained that the decree in the first suit was a valid one, and the defendant took the ground that the first decree being valid, the second suit was barred by O. II, r. 2. It was not therefore the case of either party that the first suit was incompetent and the point for determination in the appeal before the Privy Council was, whether, *assuming the first decree to have been valid*, the second suit was barred by O. II, r. 2. Their Lordships decided that O. II, r. 2, did not apply to a case of the kind, and they made some general observations in regard to divorce and partition which probably apply to most systems of marriage law, but are not consistent with the peculiar provisions of the Burma Buddhist Marriage Law, which were explained in *Chit Nyo* v. *Mi Myo Tu.* Those provisions were not brought to the notice of the Privy Council. They were not put in issue by either party and Their Lordships did not consider them or come to any decision upon them. It follows that the intervention of the Privy Council was invoked on a point which as explained in *Chit Nyo's* case cannot arise in a suit for divorce between Burman Buddhists. This is an unfortunate circumstance for which the parties in the Lower Burma case or their Advocates are responsible. But the result is that the decision in *Nga Pe* v. *Mi Ion Ma Gale* does not affect the decision of this Court in *Chit Nyo* v. *Mi Myo Tu.*

The decree of the Lower Appellate Court is set aside. The plaintiff-appellant is required now to amend the amended plaint slightly so as to make it quite clear that she is praying for divorce and partition, and the case is remanded under O. XLI, r. 23, read with O. XLII to the District Court for disposal of the appeal on the merits.

A certificate will be granted under section 13. Court Fees Act.

Costs will abide the final result.

Criminal Revision No. 86 of 1914 October 10th.

Before Sir G. W. Shaw, Kt., C.S.I.

NGA TUN E *vs.* KING-EMPEROR.

Mr. J. C. Chatterjee for the Applicant.

Penal Code—322 and 325.

The provisions of section 322 Indian Penal Code, are very precise and incapable of misconstruction. A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused but if it has been caused whether the accused intended or knew himself to be likely to cause grievous hurt. If he

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intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under section 325.

Applicant, Tun E, was convicted under section 325 of the Indian Penal Code of voluntarily causing grievous hurt to one Ba Gyaw, and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50 or, in default, two months' further rigorous imprisonment. The Sessions Court on appeal confirmed the conviction and sentence.

I think the Magistrate was right in finding that Applicant struck Ba Gyaw. Two independent witnesses corroborated Ba Gyaw to that extent, and although their statements in some respects were not satisfactory, there was actually no credible evidence to the contrary. The other witnesses who were present and were related to the Applicant took care not to say how Ba Gyaw came to fall. They must have seen what happened and the only explanation is that Applicant struck Ba Gyaw.

The witnesses for the defence were not worthy of credit, and it was doubtful whether they were present at all.

The medical witness, the Sub-Assistant Surgeon, stated that the injuries might have been caused by a fall, but he was not questioned precisely as to whether all the injuries could have been caused by one fall. There were actually two contused wounds and one contusion on the back of the head and behind the left ear. Assuming it to be possible for all these injuries to have been caused by one fall, this possibility does not nullify the evidence that Applicant struck with a stick.

As regards the weapon used, Ba Gyaw said that it was the Exhibit I, a "washing-bat" 21½ inches long and from 1 inch to 2 inches wide, weighing 50 tolas. A Policeman's truncheon weighs 36 tolas. The stick belonged to the house where the assault took place, but there was no evidence besides Ba Gyaw's own statement to show that Applicant used this stick.

Mi Thet Su said that Applicant struck with a stick, but she could not say what stick it was.

Mi Shwe Mi also implied that a stick was used, but did not say what stick it was.

I do not consider therefore that the Magistrate and the Sessions Court were justified in finding that the weapon which the Applicant used was the Exhibit I. But if it was used, I still do not consider that it necessarily followed that Applicant was liable to punishment under section 325.

The Magistrate said that the hurt was grievous because the injuries endangered Ba Gyaw's life. But there was no evidence whatever to show that Ba Gyaw's life was endangered. The Magistrate examined the medical witness very imperfectly; he allowed him to say that slight bleeding from the left ear, the left nostril and the mouth and deafness and a discharge of air from the left ear *might* be due to fracture of the base of the skull. He did not ask him whether such symptoms necessarily implied a fracture of the skull or could be explained otherwise. If the

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Sub-Assistant Surgeon was unable to express an opinion on this point, the Magistrate ought to have examined the Civil Surgeon who had inspected the injuries and, any how, could have given an expert opinion on the point whether there was or was not a fracture of the base of the skull. Actually there was no evidence that a fracture was caused and the Sessions Court was not justified in finding that there was a fracture.

Again, assuming that there was a fracture of the skull, this was not sufficient in itself to constitute an offence under section 325. As I have to point out almost every day to Magistrates and even to Sessions Judges, the provisions of section 322, Indian Penal Code, are very precise and incapable of misconstruction. A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under section 325. There is nothing to show that the Applicant intended to cause grievous hurt, and I do not think that there is sufficient material to justify a finding that he knew himself to be likely to cause grievous hurt even if he used the stick, Exhibit I, which, as I have said already, is in my opinion open to doubt.

The conviction is altered to one of voluntarily causing hurt, section 323, Indian Penal Code.

The Applicant suffered two months' imprisonment before he was released on bail. The sentence of imprisonment is reduced to the imprisonment already undergone.

Before Sir G. W. Shaw, Kt., C.S.I.

Civil 2nd Appeal No. 125 of 1914. October 19th.

NGA E *vs.* NGA AUNG THEIN (minor) by his guardian, NGA THWE.

Mr. Lütter—for Appellant.

Mr. S. Mukerjee—for Respondent.

Buddhist Law—Inheritance.

Claim of the eldest son to ¼th. Right of the widow.

Held,—the eldest son being a minor the right to claim ¼th did not accrue, and the whole estate was the property of the widow.

U.B.R., 1892-96, II, 581.

2. L.B.R., 292.

1. I U.B.R., 1910-13, 125.

On the 14th May 1913 Appellant, Nga E, instituted a suit in the Township Court against Nga Kaung and three minor children of his deceased wife, Mi E Me, as Mi E Me's legal representatives and by guardian *ad litem* to recover Rs. 265-8 on two

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promissory notes purporting to be signed by Nga Kaung and Mi E Me.

The Court granted the Appellant a decree for the amount claimed directing that half should be paid by Nga Kaung and half by the estate of Mi E Me. This on the 28th May 1913.

On the 2nd June 1913 Appellant applied for execution by the attachment of a house. On the 4th June the house was attached and on the 5th August following it was sold. Meanwhile on the 2nd June 1913 Plaintiff-Respondent by his next friend Po Thwe instituted a suit against his step-father, Nga Kaung, and his minor brother and sister for a share of inheritance claiming among other things a half of three-quarters of the house already mentioned which he valued at Rs. 200.

The Township Court excluded the house from the estate liable to partition on the ground that it was under attachment. This on the 30th July 1913.

On appeal by the Plaintiff-Respondent against the Township Court's findings in respect to the house the Lower Appellate Court directed the Appellant to be joined as a Defendant and remanded the case for issues to be tried as to whether the house was attached for a lawful debt. The Township Court then joined the Appellant as a Defendant and tried issues, *viz.*, "for whose debt was the house attached" and "what amount was realized by the sale of the house" and found that the deceased, Mi E Me, raised loans jointly with Nga Kaung in order to cover the expenses of litigation in which Nga Kaung was engaged, and that the amount realized by the sale was Rs. 170.

The Lower Appellate Court then modified the Township Court's decree by directing that Nga Kaung and the Defendant-Appellant should pay Rs. 42-8 to the Plaintiff-Respondent as his share of the price of the house.

The learned Additional Judge's reasoning is not very easy to follow. With an old Lower Burma Ruling in his mind instead of *Mi Min Tha* vs. *Mi Naw* (1), he said that Mi E Me had an absolute right to dispose of a half share of the house and consequently her creditor would be justified in attaching that half share, but that as regards the other half she had only a right to take care of it and could not sell it except for her children's benefit: hence as the debt she contracted was not for the children's benefit the Defendant-Appellant could not attach it. He then proceeded to say that if Mi E Me had left the house intact and without any debt, then Plaintiff-Respondent and his brother as children of the first marriage would have been entitled to $\frac{3}{4}$ths of the house, but that if Nga Kaung and his son were allowed $\frac{1}{4}$th of the remaining half, an injustice would be done to Plaintiff-Respondent and his brother. For "had it not been for Nga Kaung's mischievous acts Plaintiff-Respondent and his brother would have got $\frac{3}{4}$ths of the whole house" He therefore allowed Plaintiff-Respondent the value of $\frac{1}{4}$th of the house.

(1) U.B.R., 92-96, II, 581.

The first point for determination is whether Plaintiff-Respondent as the eldest son had a right to ¼th. If he had, Mi E Me of course could not have alienated that ¼th: and after her death the creditors could not attach and sell that ¼th as estate left by Mi E Me.

I think it is clear on a perusal of the texts contained in section 30 of the Kin-Wun Mingyi's Digest, Volume I, that where the Dhammathats give the eldest son a right to ¼th as against the mother on the death of the father they refer to the *Orasa* son, or in others words the eldest capable son (*see Tun Myaing* vs. *Ba Tun*) (2). It follows that where all the sons are minors there is no *Orasa* son, and the right in question does not accrue. That is the case here. Plaintiff-Respondent, the eldest son, was a minor.

The next point is as to the right of the widow. If the Plaintiff-Respondent had been the *Orasa*, Mi E Me would have had full power to dispose of the remaining ¾ths. This was laid down authoritatively in *Mi Min Tha* vs. *Mi Naw*,(3) already cited, and the point was recently investigated anew and the previous conclusion affirmed in *Mi Saw Myin* vs *Mi Shwe Thin*(4). And when Mi E Me died without alienating that share it would have come down to her heirs. But her creditors proceeding against her estate would have been at liberty to attach and sell it. The Additional Judge was altogether in error in supposing that Mi E Me could only dispose of her property for the benefit of her children, and still more so in supposing that a creditor proceeding against her estate could not attach and sell the property unless the debt was incurred for the benefit of the children.

As Plaintiff-Respondent had no right to ¼th the whole of the house was Mi E Me's and descended to her heirs, and there was nothing to prevent Defendant-Appellant from attaching and selling the whole of it. It follows that Plaintiff-Respondent could not claim any share of the house or any part of the sale-proceeds from Defendant-Appellant. His rights along with his brother as a child of the former marriage as against his step-father so far as the house was concerned did not arise, as the whole house having been sold and the whole proceeds of the sale having been exhausted in satisfying Defendant-Appellant's debt nothing remained for partition between the children of the former marriage and their step-father.

In this view of the case it is unnecessary to touch upon other points that have been raised.

The decree of the Lower Appellate Court is set aside and Plaintiff-Respondent's claim so far as regards the house is dismissed.

Plaintiff-Respondent will pay Defendant-Appellant's costs.

(2) L.B.R., 292. (3) U.B.R., 92-96, II, 581.
(4) U.B.R. I 19 0-13, 125.

Civil Appeal No. 61 of 1914, October 19th.

Before Sir G. W. Shaw, Kt., C.S.I.

MI HLAING *vs.* MI THI and 3.

Messrs. Lütter and Tha Gywe—for Appellant.

Mr. A. C. Mukerjee—for Respondents.

Buddhist Law—Inheritance.

Claim of eldest daughter against her mother after father's death for one-fourth, the mother not having re-married held to be unsustainable.

U.B.R., 1892—96, II, 581.
U.B.R., I 1910—13, 125.
S.J.L.B. 115.
Ibid 212.
Ibid 378.
I. L.B.R. 23.
II. *Ibid* 255.
Ibid 292.
4. L.B.R. 181.
U.B.R., 1897—01, II, 79.
U.B.R.1904—06, II, Buddhist Law, Inheritance, 11.

Plaintiff-Appellant sued her mother, brother and two sisters for one-fourth of the estate left by her father on his death.

The only point for determination is whether Plaintiff-Appellant as the eldest child and the eldest daughter is entitled to claim one-fourth of the estate from her mother, there being in existence other children including a brother. It has been alleged before me on behalf of Plaintiff-Appellant that her brother, Defendant-Respondent, Nga Thein, was a minor at the time of the father's death four years before suit, but there is no material on the record to show what the age of the Defendant-Respondent, Nga Thein, was, and the Plaintiff-Appellant did not sue him as a minor. As the point seems to me to be immaterial it need not be further referred to.

The learned Judge of the Lower Court on the authority of *Mi Min Tha* vs. *Mi Naw* * and *Mi Saw Myin* vs. *Mi Shwe Thin*, † and some Lower Burma cases, and after referring to section 31 of the Kin Wun Mingyi's Digest, Volume I, decided against the Plaintiff-Appellant.

On behalf of Plaintiff-Appellant the following cases have been referred to:—

(1) Mi Saung *vs.* Mi Kun (1882).
(2) Po Lat *vs.* Mi Po Le (1883).
(3) Mi On *vs.* Shwe O (1886).
(4) Seik Kaung *vs.* Po Nyein (1900).
(5) Mi Thin *vs.* Mi Wa Yon (1904).
(6) Tun Myaing *vs.* Ba Tun (1904).
(7) Tha Tu *vs.* Nga Bya (1906).
(8) Mi Po *vs.* Mi Swe Mi (1897).
(9) Mi Min Din *vs.* Mi Hle (1905).

* U. B. R., 92—96, II, 581. † U. B. R., 1910—13, 125.
(1) S. J. L. B. 115. (2) *Ibid* 212. (3) *Ibid* 378.
(4) I. L. B. R., 23. (5) II. L. B. R., 255. (6) *Ibid* 292.
(7) IV. L. B. R., 181. (8) U. B. R., 1897-01, II, 79.
(9) U. B. R., 1904-06, II, Buddist Law-Inheritance, 11.

(1) was a case in which the only point decided was that no children other than the eldest can claim a share of inheritance from the surviving mother on the death of the father. It was not decided in that case whether an eldest daughter can claim a one-fourth share.

In (2) also the right of an eldest daughter to claim a one-fourth share was not decided.

(3) was the decision of the Special Court, Lower Burma, declaring that on the death of one of the parents, the eldest son or daughter may claim a share and that the rest of the property vests in the surviving parent for himself or herself and the remaining children, etc. It was dissented from by Mr. Burgess in *Mi Min Tha* vs. *Mi Naw* above cited. It did not declare that the eldest daughter is entitled to claim a one-fourth share from her mother.

(4) was a suit by an eldest son for a one-fourth share against his father who had married again. The right of an eldest daughter to claim a one-fourth share from her mother under any circumstances was not an issue and was not decided.

(5) was a suit by an only daughter, the only child, claiming a one-fourth share from her mother, on the mother's remarriage, after the father's death. It affirmed the right of the daughter on the authority of section 44 of Kinwun Mingyi's Digest. The present case is distinguishable because not only is the Plaintiff-Appellant not an only child, but it is not alleged that the mother was remarried or intends to remarry.

(6) had to do with the claim of a grandson, the son of the *Orasa* son and discussed the status of the *Orasa* son. It does not help to a decision of the present case. The incidental remarks contained in it, to the effect that "it is settled law that on the death of one parent, it is only the eldest child that can claim a one-fourth share" cannot be regarded as an authority in support of the Plaintiff-Appellant's case.

(7) had to do with a claim by the eldest daughter to one-fourth of property inherited by her deceased mother against her father on his remarriage. That was an entirely different situation from that of the present case.

Mi Min Tha vs. *Mi Naw* is decidedly against the Plaintiff-Appellant. The plaintiff in that case was the eldest daughter, and she was held to have no interest in the property of her deceased father during the life time of her mother, who was the heir of her deceased husband and not any of the children (but the eldest son who had a right to claim one-fourth) till the mother's death.

The question of the eldest daughter's right as against the mother was very fully investigated anew in Mi Saw Myin *vs.* Mi Shwe Thin with the result already stated. In the course of this investigation the texts contained in section 31 of the Kinwun Mingyi's Digest, Volume I, were examined, as well as several Lower Burma Rulings.

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The sections of the Kinwun Mingyi's Digest on which the Plaintiff-Appellant relies are 30, 31, 32, 33 and of these section 31 only is directly applicable. It has been stated in argument however that the Plaintiff-Appellant has been living separately and that assertion has not been contradicted. If it is correct the section precisely applicable would seem to be section 36 and the texts contained in it are all against the Plaintiff-Appellant. But if the Plaintiff-Appellant has not been living separately and section 31 applies, I am of opinion that as was held in Mi Saw Myin's case the texts contained in that section when carefully examined, furnish no support for the claim put forward by the Plaintiff-Appellant.

None of them give the eldest daughter the right to claim one-fourth.

The contention of the learned Advocates for the Plaintiff-Appellant is that the only advantage the eldest son has over the eldest daughter is that he can claim one-fourth whether he is the eldest child or not, whereas the eldest daughter can only claim one-fourth where she is also the eldest child. But I am unable to find in the texts of the Dhammathats any substantial support for this contention.

The rules relating to the eldest son's or eldest daughter's right to one-fourth must clearly be understood in both cases to refer to the *Orasa* son, *i.e.*, the eldest capable son, and the *Orasa* daughter, *i.e.*, the eldest capable daughter (*see Mi Min Din* vs. *Mi Hle*) (1). But this is not the point. The point is that the texts giving the *Orasa* daughter the right to claim one-fourth do not authorize her to claim one-fourth from her mother at least where her mother has not married again.

This being so it is unnecessary to consider whether the existence of other children and especially of a brother makes any difference.

The Plaintiff-Appellant did not base her claim on the rules contained in section 31 of the Digest giving the eldest (*Orasa*) daughter the right to a share of slaves, buffaloes, etc.

These rules also were not to be applied except in certain circumstances, and are scarcely applicable at all to modern conditions of life.

My conclusion is that the Lower Court was right and that Plaintiff-Appellant's claim against her mother for a one-fourth share is unsustainable.

The appeal is dismissed with costs.

(1) U. B. R. 1904-06. II B. L. Inh. 11.

Before Sir G. W. Shaw, Kt., C.S.I.

Criminal Revision No. 691 of 1914, October 15th.

KING-EMPEROR *vs.* NGA NYAN U.

Mr. H. M. Lütter, Government Prosecutor, for the Crown.

Penal Code—215.

Held,—following *Twet Pe* vs. *K.E.* and the Madras and Allahabad High Courts, that a double conviction and sentence under sections 379 and 215 are not sustainable.

Twet Pe vs. *K.E.* 4 L. B. R., 199. Weir's Criminal Law, Volume I. page 196. *Q.E.* vs. *Muhammad Ali.*, I. L. R., 23 All., 81.

Regina vs. *King.* 1, Cox 36.

The Subdivisional Magistrate convicted the accused, Nyan U, under section 379, Indian Penal Code, of the theft of a bull and sentenced him to two years' rigorous imprisonment for that offence, and at the same time convicted him under section 215 and sentenced him to two years' further rigorous imprisonment under that section for having agreed to accept a gratification of Rs. 30 for the return of the bull to the owners.

On appeal the Sessions Court upheld the double conviction, but reduced the sentence under section 215 to one year. The Sessions Judge overlooked the Lower Burma Ruling in *Twet Pe* vs. *K. E.* (1) (1901), while referring to the previous Lower Burma decisions on the subject.

The Government Prosecutor has now been heard. In addition to the decisions mentioned in the Lower Burma Case, he has drawn my attention to the case of the accused *Kudumbam* (2) (1895), where a Bench of the Madras High Court came to the same conclusion as that afterwards arrived at in *Q. E.* vs. *Muhammad Ali* (3) (1900), and in *Twet Pe* vs. *K. E.* already cited, namely, that section 215, Indian Penal Code, is not intended to apply to the thief himself, and that where a man is convicted of the theft, he ought not to be also convicted under section 215 of taking a gratification to restore the stolen property.

It is a remarkable fact that there should have been so few decisions on the subject, since it must have been a very common practice both in England and in this country for thieves to take money for restoring stolen property. But according to the learned Chief Judge of the Chief Court 'the English Decisions . . . . . are all in cases in which a person other than the actual thief was prosecuted for taking a gratification.' This is the more remarkable because in Regina *vs.* King (4), the judgment of the Chief Justice in which is quoted in Russell on Crimes, 5th Edition, Volume II, page 492, it would appear that the English Law does not really exempt from liability the actual thief.

(1) 4, L. B. R., 199.
(2) Weir's Criminal Law, Vol. I, page 196.
(3) I.L.R., 23 All., 81.
(4) 1, Cox, 36.

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On the face of section 215, Indian Penal Code, I should have been disposed to say that the object of the legislature in the clause "unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence" was to exempt from liability to punishment a person who is acting honestly and not to exempt the thief. But I do not feel justified in going against the weight of authority embodied in the decisions above cited.

I must therefore hold that the double conviction of Nyan U was wrong. I set aside the conviction and sentence under section 215, Indian Penal Code.

Before Sir G. W. Shaw, Kt., C.S.I.

NGA SHWE MYO *v.* KING-EMPEROR.

Criminal Revision No. 587 of 1914, December 1st.

Mr. L. K. Mitter—for applicant. | *Mr. H. M. Lütter*—Government Prosecutor for the Crown.

Criminal Procedure—112 and 118.

In imposing restrictions and limitations on sureties, Magistrates must be reasonable and must not act arbitrarily.

U.B.R. 1897-01, I, 228.
I.L.R. XX. All., 206.
4 C.W.N., 797.
No. 24 Punjab Record, 1900.

Applicant, Shwe Myo, has been ordered to be bound over under section 17 of the Gambling Act, read with section 110 of the Code of Criminal Procedure, for one year in Rs. 100 with two sureties in the like amount, the sureties being respectable house-owners of Tèbingan.

The applicant offered one surety, Po Min, who lived at Migyaungyè, and another surety, Nga Tun, his brother-in-law. The Magistrate rejected the first because he did not live at Tèbingan, and the second because he was applicant's brother-in-law.

The applicant seeks the intervention of this Court in revision on two grounds, first, that the evidence recorded was inadmissible, and, secondly, that the limitations and restrictions imposed on the sureties and the reasons assigned for rejecting the sureties offered were unauthorized and improper.

On the first point, the Magistrate undoubtedly recorded some evidence that was inadmissible. He has not paid due attention to the distinction explained in *Nga Hok* v. *K.-E.* (1) and the Calcutta case there cited. But there was ample admissible evidence on the record to justify an order requiring security.

On the second point. The question whether Magistrates are authorized to impose restrictions and limitations on sureties offered under sections 107, 109 and 110, Code of Criminal Procedure, has formed the subject of several decisions of the Indian High Courts. They are not all quite in agreement on the

(1) U. B. R. 1897—01, I., 228.

surface. In some it has been held that it is not improper to specify the place of residence of the sureties, *e.g.* *Q.-E.* v. *Rahim Bakhsh* (1) (1898) where Sir John Edge, *C. J.*, said "It seems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety", adding however "of course Magistrates must not act arbitrarily in these cases; they must be guided in each case by the facts of the case." In others it has been held that a Magistrate was not justified in refusing the sureties because they lived at a great distance and therefore could not be able to exercise due supervision, *e.g.*, *Abinash Malakar* v. *Empress* (1900) (2) where Justices Prinsep and Stanley said "Cases may constantly occur in which a person who is in a position to give security to any amount on behalf of another may live at a considerable distance and yet he may be prepared to pledge his property or some assurance received from that other person. It is not necessary that he should live in the neighbourhood and always keep his eye on the principal."

On consideration my opinion is that there is no real conflict.

There is a general consensus that, as Sir John Edge said in the case just quoted, Magistrates must not act arbitrarily, as for example, by requiring sureties to live within one mile of the residence of the person for whom they are to stand surety or that they are to be landholders or that they are not to be relations. The circumstances of each case must be considered, and any restrictions or limitations must be reasonable.

As it has been said in connection with the amount of security, "the imprisonment is provided as a protection to society against the perpetration of crime by the individual and not as a punishment for a crime committed, and being made conditional on default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required condition of security" [*see Barkat* v. *Empress of India* (1900) (3).]

In the present case, I do not think that the Magistrate was justified in requiring that the sureties must be residents of Tèbingan, and I also consider that he ought not to have refused to accept either of the two sureties on the grounds stated.

So much of the order as restricts the sureties to residents of Tèbingan is set aside, and the order rejecting the sureties abovenamed is also set aside. The Magistrate is directed to accept them and cause a bond to be signed, and the applicant released.

(1) I. L. R. XX., All. 206.
(2) IV C. W. N., 797.
(3) No. 24, Punjab Record, 1900, quoting from Prinsep's Commentary on section 118, Code of Criminal Procedure, itself based on the authority of several decisions of different Courts.

Civil 2nd Appeal No. 261 of 1914, November 17th.

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

MI THE O *v.* MI SWE AND *MI, HLA MI MAUNG PO SAING, MA PAN HMON, MAUNG THA TU.*

Mr. Tha Gywe—for appellant. | *Mr. A. C. Mukerjee*—for respondents.

Buddhist Law—Inheritance.

Held—That after the death of her father, the eldest daughter cannot claim one-quarter of the estate from her mother even though the latter marries again.

S. J. L. B., 378.
P. J. L. B., 48.
3 B. L. T., 45.
U. B. R., 1910—13, p. 125.
2 L. B. R., 255.

The plaintiff-appellant sued for the redemption of some land which she alleged had been mortgaged by her grandmother, Ma Swe Mi. She is the only child of Ma Swe Mi's deceased son, Maung Lu Pe. The Lower Appellate Court dismissed the suit on the ground that as her mother, Ma Yo, was still alive the plaintiff-appellant had no such interest in the land as would entitle her under section 91, Transfer of Property Act, to redeem it.

The plaintiff-appellant has appealed to this Court, and it is urged in the first place that as Maung Lu Pe's eldest daughter she has a vested interest in his estate and secondly that as her mother, Ma Yo, has married again plaintiff-appellant has a right to an immediate partition with her mother and has therefore a right to redeem. It has been pointed out that it was held by the Judicial Commissioner of Lower Burma in *Me On and others* v. *Ko Shwe O* (1) and in *Ma Me* v. *Ma Myit* (2) that on the death of one parent the eldest child, whether son or daughter, could claim one-quarter of the estate from the surviving parent and that in *Ma Gyi and four others* v. *Maung Po Hmyin and nine others* (3) it was practically held that not only the eldest child but the younger children obtain an interest in their parents' estate on the death of one parent—an interest which will be recognized by the Courts.

The arguments on which these rulings are based are however vitiated by the fact that mistranslations of the texts from the Dhammathats were relied on, as I pointed out in *Ma Saw Myin and another* v. *Mi Shwe Thin and another* (4).

The rule as to when the eldest son or the eldest daughter can claim one-quarter of the bulk of the estate has been clearly pointed out by Chan Toon and is as follows: On the death of the father, the eldest son, if competent to take his father's place, can claim one-quarter of the bulk of the estate, because he is so

(1) S. J. L. B., 378.
(2) P. J. L. B., 48.
(3) 3 B. L. T., 45.
(4) I. U. B. R., 1910—13, p. 125.

competent. But (as he cannot replace her), if his mother dies before her husband, he cannot claim one quarter of the bulk of the estate but only certain specified property. Similarly it is only when the mother dies first that the eldest daughter can claim one-quarter of the bulk of the estate : against her mother she can only claim certain specified property as I pointed out in *Ma Saw Myin's* case.

There is ample authority that the rule is as stated. I pointed out some of the authorities in that case and I shall incidentally refer to others when dealing with the next point. I have so far been referring to cases where the surviving parent does not marry again. When there is a remarriage the case is not so simple. In the present case Ma Yo is said to have married again, and the question is whether her only daughter can on that account claim a share of property which her father inherited during the marriage. Of course if Maung Lu Pe had predeceased his mother, Ma Yo would have no claim to the latter's property and the plaintiff-appellant would be the sole heir, but it is clear that Maung Lu Pe died some years after his mother and so his share of her estate became the *lettetpwa* of himself and his wife.

The learned Counsel for the plaintiff-appellant relies on *Ma Thin and another* v. *Ma Wa Yon* (1) in which a Full Bench of the Lower Burma Chief Court held that a daughter being an only child was entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter re-married after the father's death. The judgment was delivered by Mr. Justice Birks and he clearly indicated that the question was by no means an easy one. He said that the matter was dealt with in section 44 of U Gaung's Digest in which texts from 12 Dhammathats were collected and that of these seven Dhammathats allowed the daughter to claim a share whilst the Manukye, Manu and Amwebon were against this rule. I think it likely that there is a misprint in the judgment. There does not appear to be such a Dhammathat as the Minja and though there is a Dhammathat called the Kaingza no text from it appears in section 44 and I think it not unlikely that "Kaingza, Minja" is a misprint for "Kungyalinga." Thus six only of the texts collected in section 44 are apparently in favour of a partition on the mother's marrying again. Mr. Justice Birks apparently overlooked the Dhamma when he said that the Manukye, Manu and Amwebon seemed to say that the eldest daughter was merely entitled to a quarter share of the father's clothes and ornaments. So of the 12 texts collected in that section six are in favour of a partition and four against one : the other two do not refer to daughters at all. Furthermore these six texts do not agree amongst themselves as to whether all the children can claim a partition or only the eldest daughter. Mr. Justice Birks also referred to the Vilosa, Rasi and Kyetyo Dhammathats and said that as according to texts from them collected in section 31 the eldest daughter was entitled to one-fourth of the estate on the

(1) 2 L. B. R., 255.

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death of her father, whether her mother married again or not, no texts from these Dhammathats appeared in section 44. I shall refer to these Dhammathats later.

Mr. Justice Birks did not explain what induced him to accept the rule laid down by the six Dhammathats referred to above rather than that laid down by the other four Dhammathats; he did not say that he would decide according to the numerical majority and he did not go into the question of the weight to be attached to the individual Dhammathats and the Manukye which by common consent has greater weight than any other Dhammathats is one of the minority.

After referring to section 44 of the Digest Mr. Justice Birks quoted at length section 159 of the Attasankhepa Dhammathat which is certainly in favour of a partition on either parent marrying again, and apparently it was this text that proved the deciding factor, though Mr. Justice Birks did not say so. Beyond saying that as a matter of fact partition of property was usually effected on a second marriage, he gave no reason at all for selecting one rule rather than the other. He merely said "there is certainly ample authority in the Dhammathats for holding that a single daughter is entitled to claim one-fourth share of the joint estate from her mother on the death of the father when the mother remarries. This is quite correct, but unfortunately there is also ample authority in the Dhammathats for holding the contrary, and the question is what principles are to be followed in choosing between contradictory texts.

The Attasankhepa Dhammathat was compiled by the late Kinwun Mingyi, U Gaung, and is entitled to much weight. No doubt the law as administered when it was compiled was not exactly the same as it was when the earliest Dhammathats were written 1,000 years previously. Nevertheless, I believe it is correct to say that the various Dhammathats do not really lay down the case law as it stood at the time they were written, but the opinions of the compilers as to what the law had originally been. Every now and then we come across indications that this is so. There is one in section 44 itself. In the Yazathat the compiler after laying down the rule that the eldest daughter can claim one-fourth of the estate and that the younger children can only get their shares on the death of the surviving parent, goes on to say "Although the above is the statement of the law in the Dhammathats, yet as the surviving parent has not remained single controlling the children as he or she ought to do, the younger children should be given half the deceased parent's share". Thus the compiler first states the law as he believes it to be according to ancient authorities and then says how in his opinion the law ought to be altered. Unfortunately there is nothing to show whether his opinion was adopted; the instances of case law are few and probably for the most part legendary. Consequently the date of a Dhammathat furnishes practically no clue to its authority and the Attasankhepa cannot therefore claim special

authority merely because it is the most modern of all the Dhammathats. In the "introduction" to the translation it is stated that the work contains the views of U Gaung on the law as it actually stood at the time of its compilation, but as it is also stated that it was prepared on consideration and comparison of all the available texts, it would appear that the compiler's views were based not on practice but on theory, not on case law but on ancient texts. The unknown author of this introduction goes on to say "It (the Attasankhepa) is not to be regarded as the ultimate authority on questions of Buddhist law, but the Courts will find it useful as a work of reference and it may fitly be consulted as explanatory of the older Dhammathats".

Now if section 159 of the Attasankhepa be read in the light of these remarks, it will be seen that it is an attempt to reconcile numerous very conflicting texts. It must be considered as a commentary and not as an authority in itself and in my opinion the attempted reconciliation of the conflicting texts is not successful.

How conflicting those texts are was I think hardly realized by the learned judges who decided *Ma Thin and another* v. *Ma Wa Yon*.

For instance the text from the Panam cited in section 44 runs as follows "Children can claim partition of inheritance, when after the death of the father the mother marries again." But the text from the same Dhammathat given in section 38 runs "The daughter living with the mother shall inherit the estate on the death of the mother. She has no right to protest should the estate be exhausted by the mother during her lifetime in the maintenance of herself and *her subsequent husband*." Of course the most natural attempt to reconcile these two texts would be to assume that the first of them refers to children living apart from their parents, and a distinction *is* drawn in the Attasankhepa between children who continue to live with their mother after her marriage and those who live separately, but the rules laid down there apparently have no place in any of the other Dhammathats, they are an agglomeration of contradictory texts with the addition of other rules invented apparently for the purpose of harmonizing them. Anyone attempting to reconcile these two contradictory texts from the Panam as suggested above would find on reading section 36 of the Digest that his attempt was a failure, because the text from the Panam in that section runs as follows: "On the death of the father, the daughter living separately from the parents shall get such property as ornaments and cups used in the performance of a ceremony and given her by both parents at the time of performing it. She should be given a dowry commensurate with the means of the parents when she is given in marriage and she leaves the parental roof with her husband." Clearly she is not to get one-fourth of the estate.

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To take some other Dhammathats relied on by Mr. Justice Birks. The following four texts are from the Vilasa:

Section 34, "Children other than the eldest child are entitled to partition of inheritance only when both parents are dead."

Section 36, "On the death of the father the rule of partition between the mother and daughters living separately is as follows: The daughter shall get the property such as gold.....given her.....when she was young..... On the death of the father the mother alone is entitled to all the property. The daughter living separately can get only what is given her by the mother through affection."

Section 38, "On the death of the father the mother gets the whole estate. The daughters living with the mother shall not get anything while the mother is still living. The mother has the right of use of the estate for life for the maintenance of herself and *her subsequent husband*."

Section 46, "After the death of the husband the wife shall not say to her children that partition shall be made only on her death. The children shall have their inheritance, although she may not marry again."

It will be seen that these texts all from the same Dhammathat are hopelessly conflicting: there is no possibility of reconciling them. The Rasi on which Mr. Justice Birks also relied is not a whit more consistent. On the other hand the Dhammathats which Mr. Justice Birks rejected, *viz.*, the Manukye, the Dhamma, the Manu and Amwebon are not self-contradictory and agree with each other. To the texts from these Dhammathats quoted in section 44 may be added the following text from the Dhammathatkyaw given in section 36: on the death of the father the rule of partition between mother and *eldest* daughter, who lives apart from the parents is as follows:

"The daughter shall get such property as necklaces, anklets, bracelets, earrings, hair-pins, gold, silver and slaves and bullocks, buffaloes, lands, etc., given her by both parents, when she was young, at the ceremony of placing her in the cradle, of first tying the hair into a knot, and at the time of her marriage. Such property has become her separate property. She shall also get the property given her when she set up a separate establishment. On the death of the father the mother obtains all the property. Should it be exhausted by her on her maintenance or on that of herself and her subsequent husband or in the performance of works of merit let it be so: the children living with her are entitled to the residue if there is any".

It must be recognized that it is impossible to reconcile the different Dhammathats and I think that those of them should be rejected which are inconsistent with themselves. This is obviously necessary, because if it were decided to rely on one of them it would be impossible to decide which of the contradictory texts to accept as binding. The other Dhammathats are not self-contradictory and they agree very well with one another and it is

a matter of satisfaction that one of them should be the Manukye which has generally been considered to have special authority.

The rule then appears to be as follows :—

1. The eldest daughter can only claim one-fourth of the bulk of the estate, if her mother dies first and she is capable of replacing her mother in the household.

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share of the estate during the lifetime of both parents. In that case she has no further claim on the estate.

3. If this has not happened the eldest daughter on the death of her father is entitled to certain specified property and her mother gets the bulk of the estate as explained in *Ma Saw Myin and another* v. *Mi Shwe Thin and another*.

4 If on the death of her father the mother marries again the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate.

In the Manukye Dhammathat there is a further provision that if the mother marries again the eldest daughter's share of the whole estate shall be publicly made known and shall be kept in the custody of the mother. This clearly indicates that the eldest daughter cannot claim this share during her mother's lifetime, and there are so many texts permitting the mother to exhaust the whole of the property in maintaining herself and her second husband, that it seems clear that the eldest daughter does not obtain a vested interest as defined in section 19, Transfer of Property Act, in this share until her mother's death. It looks as if this provision was meant to safeguard the eldest daughter's share as against her own brothers and sisters and the possible offspring of the second marriage.

I am therefore of the opinion that the plaintiff-appellant has not such an interest in the property sought to be redeemed during the lifetime of her mother as is contemplated in section 91, Transfer of Property Act, and that therefore the decision of the Lower Appellate Court is correct.

The appeal is accordingly dismissed with costs.

Criminal Revision No. 894 of 1914. 2nd March 1915.

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

NGA SHWE HMUN *v.* KING-EMPEROR.

Mr. C. G. S. Pillay—for Applicant.

Criminal Procedure—419, 421.

Held,—that when an Advocate files a petition of appeal, a reasonable opportunity for hearing the Advocate cannot be said to have been given when he is called upon forthwith to support the appeal.

I. L. R., 36 Calcutta, 385.
Bom. L. R., VII, 89.

Four persons were convicted on a charge of stealing a cow and calf and sentenced to two years' rigorous imprisonment each. On the 29th October 1914 an appeal was presented in the Sessions Court by Maung Pe, second grade Advocate, on behalf of Maung E Maung, second grade Advocate for the Appellants. On the same day the Sessions Judge passed the following order:—"The petition of appeal was presented by second grade Advocate Maung Pe of Meiktila on behalf of second grade Advocate Maung E Maung of Yamèthin. Maung Pe has nothing to say in support of the appeal. As he appears on behalf of Appellants' Advocate, I consider that a reasonable opportunity of being heard has been given. The judgment shows that the four Appellants were all caught redhanded. It is not necessary to send for the record. The appeals are summarily dismissed."

Section 421 of the Code of Criminal Procedure requires that no appeal presented under section 419 shall be dismissed unless the Appellant or his Pleader has had a reasonable opportunity of being heard in support of the same. There is ample authority for holding that reasonable opportunity is not given when the Advocate who appears is required to support his appeal on the same day, *Ramtohal Dusadh* vs. *Emperor* (1) and *Emperor* vs. *Gurshida Balapa Jati* (2). *A fortiori* when the Advocate who files the petition of appeal is not himself the Advocate for the Appellant, a reasonable opportunity for hearing the Advocate cannot be said to have been given when he is called upon forthwith to support the appeal. In this instance, moreover the case was tried in one district and the Advocate who presented the appeal was practising in another district. The appeal again set out that the witnesses were not credible, and it was clearly a case in which the record should have been called for before orders were passed.

The order of the Sessions Judge is set aside, and he is directed to re-admit the appeal and give the Appellants' Advocate an opportunity of being heard after notice.

(1) I. L. R., 36 Calcutta, 385.
(2) Bombay Law Reporter, VII, 89.

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

Criminal Revision No. 7 of 1915. 9th March.

HASAN CHANEA *v.* MI SIN.

Mr. S. Mukerjee—*for Applicant.*

Mr. A. C. Mukerjee—*for Respondent.*

Criminal Procedure—488.

Held,—where a husband contended that he was no longer liable to pay maintenance on the ground that he had divorced his wife, it was the duty of the Magistrate to entertain and consider such plea.

Held also,—that Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *Talak*.

I. L. R., 5 All., 226.
I. L. R., 19 All., 50.
I. L. R., 33 Mad., 22.
U. B. R., 1904—06, I. Crl. Pro., 23.

The Applicant having been required by an order under section 488 of the Code of Criminal Procedure to pay Rs. 25 monthly by way of maintenance to the Respondent who was his wife, applied to the Magistrate to cancel the order on the ground that he had been divorced from her. The Magistrate held that the divorce had not been shown to be duly effected, and declined to cancel the order. The Applicant now comes to this Court in revision.

The application purported to be made under section 489 of the Code of Criminal Procedure. It is suggested that that section has no application, since the change of circumstances referred to in it is a change in the financial circumstances of the parties and not in their status. This appears to have been the view held in the matter of *Din Muhammad*, (1) but it was held by a majority of the Judges in the Full Bench case of *Shah Abu Ilyas* vs. *Ulfat Bibi*, (2) that where a husband contended that he was no longer liable to pay maintenance on the ground that he had divorced his wife, it was the duty of the Court to entertain and consider such plea, and whatever may be the exact meaning of the words of sections 488, 489 and 490 of the Code of Criminal Procedure, it appears clear that this is the case.

In *Ma Tin* vs. *Maung An Gyi*, (3) it was pointed out that where a wife who had obtained an order for maintenance returned and lived with her husband, the effect was to cancel the order for maintenance with effect from the date of her return, and it appears to be obvious that where the husband alleges that he is no longer liable to pay maintenance, he is entitled to have his allegation enquired into. This is not a matter for a civil court as the Magistrate apparently was inclined to hold: where a divorce

(1) I. L. R., 5 All., 226.
(2) I. L. R., 19 All., 50.
(3) U. B. R., 1904-06, I. Crl. Pro., 23.

HASAN CHANEA v. MI SIN.

is alleged and denied it is the duty of the Magistrate to hold an enquiry and come to a decision. Here, the Applicant who is a Muhammadan and who claims to be a member of the *Hanafi* sect, states that he has divorced his wife by pronouncing *talak* three times.

The Magistrate has held that only one witness deposes that the Applicant is a *Hanafi Suni*, and that although he states he is not under the influence of his uncle, the latter is living with him in the same house. The significance of this last remark is not clear without a reference to the previous proceedings in which the Applicant sought to show that he had divorced the respondent, and in which it was found that he was a minor and was acting under the influence of his uncle. In the present proceedings, the Applicant has given his age as 21 ; there appears to be no reason for doubting the truth of this statement which was not contradicted. It is true that he is living with his uncle, but his uncle was away at the time that the application was filed, and there is no evidence that he was acting under compulsion from his uncle. A person who is of age cannot be presumed to be acting under the influence or compulsion of his relations with whom he is living in the absence of any evidence, and the mere statement of the Respondent that he was induced by his uncle to divorce her is not sufficient proof.

Whether the Applicant is a *Hanafi Suni* or not appears to be only material if compulsion has been proved or if the divorce was communicated to the Respondent by a third party. There is evidence that the Applicant drew up a deed of divorce in which the *talak* was pronounced and sent it by the witness, Ismail, to the Respondent who refused to listen to it. He also sent her a post-card on which the words "*Talak*" were written in Burmese in red ink, but the Respondent refused to accept it. But besides this, it is proved that during the course of the proceedings while the Respondent was in the Court-house, the Applicant pronounced the *talak* in her hearing three times, and he repeated the word again in her presence in Court. There is no doubt that his intention to divorce her has existed for some time and has been deliberate, and apart from any other evidence the pronouncement of the *talak* in the Court was a sufficient divorce. Muhammadan law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *Talak*. The law in the case of Muhammadans belonging to the *Hanafi* sect is clearly stated in the case of *Ashi Bibi* vs. *Kadir Ibrahim Rowther*. (1)

In the absence of any rebutting evidence, I am of opinion that the Magistrate was not justified in holding that the Applicant was not entitled to divorce the Respondent in accordance with the *Hanafi* law, that in accordance with either the *Hanafi* law

(1) I. L. R., 33 Mad., 22.

or the Muhammadan law applying generally to *Sunis* the divorce has been clearly proved and that the Respondent is not entitled to further maintenance with effect from the 23rd November 1914, the date on which the applicant pronounced the divorce in Court.

Criminal Revision No. 928 of 1915. 30th March.

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

MI THI HLA *v.* MI KIN.

Mr. *J. N. Basu*—for Respondent.

Criminal Procedure—349, 380, 562.

Held,—that a Magistrate to whom proceedings are submitted as provided by section 562 of the Code of Criminal Procedure, may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him.

IV L. B. R., 277.

The accused was convicted of stealing a pig. The second class Magistrate recorded a formal finding convicting the accused under section 379 of the Indian Penal Code, and submitted the proceedings to the Subdivisional Magistrate under section 562 of the Code of Criminal Procedure with a view to the accused being released on security. The Subdivisional Magistrate on a perusal of the evidence came to the conclusion that the accused should not have been convicted, and thereupon acquitted her.

It is now suggested that the Subdivisional Magistrate had no power to pass an order of acquittal. It was pointed out in the case of *Morali* vs. *King Emperor*, (1) that the provisos to section 562 and section 380 are similar to section 349 of the Code of Criminal Procedure, but that the proviso to section 562 refers to the case of an offender who is convicted by a Magistrate of the third class or a Magistrate of the second class not specially empowered by the Local Government in this behalf, whereas section 349 deals with the case of an accused person who has not been actually convicted, but in respect of whom a Magistrate of the second or third class records the opinion that he is guilty. There is no doubt that where an accused person is forwarded to a District Magistrate or Subdivisional Magistrate in accordance with the provisions of section 349 of the Code of Criminal Procedure, such Magistrate may acquit the accused.

I am of opinion that it was not the intention, in a case in which a conviction has been formally recorded under section 562, that the Magistrate to whom the accused is sent should not have the same powers as he undoubtedly has in the case of an accused person sent to him under section 349. The words of section 380 are sufficiently broad. It is distinctly stated that a Magistrate to whom proceedings are submitted as provided by

(1) IV L. B. R., 277.

MI THI HLA v. MI KIN.

section 562 may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. He could obviously have acquitted a person tried by him on a charge of theft, and if it had been intended that he should not have had this power when a case tried by a subordinate Magistrate was submitted to him, this provision of law would, it appears to me, have been otherwise worded. If this view is not correct, it would appear to follow that even if the Subdivisional Magistrate considered that the accused was clearly not guilty, he was still bound either to pass sentence or to bind over the accused under section 562 of the Code of Criminal Procedure. The only alternative apparently would be to submit the case to the District Magistrate or to the High Court in revision.

I agree with Mr. Justice Irwin in thinking that it is difficult to suppose that this was the intention of the Legislature. I have no doubt that the Subdivisional Magistrate was justified in passing an order of acquittal.

On the merits, I see no reason to interfere.

The application is dismissed.

Civil 2nd Appeal No. 194 of 1915. 5th March.

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

MI NGE MA *v.* NGA TALOK PYU.

Mr. *S. Mukerjee*—for Appellant | Mr. *J. N. Basu*—for Respondent.

Evidence—32—91.

The necessity for a strict compliance with the rules of Evidence as laid down in the Evidence Act and explained in the Rulings of this Court insisted on.

U. B. R., 1892—96., II, 350.

This was a suit to recover land in the possession of the Defendant-Respondent on the ground that it had been mortgaged by the Plaintiff-Appellant's father. The Court of first instance gave the Plaintiff a decree which was set aside upon appeal, and the Plaintiff now comes to this Court under section 13 of the Upper Burma Civil Courts Regulation.

The land had admittedly been in the possession of the Defendant for a great many years, and as the mortgage was denied, the burden of proving it was on the Plaintiff-Appellant. So far the Court of first instance was correct, but in recording and dealing with the evidence, the Court appears to have overlooked not only the provisions of the Evidence Act but the numerous rulings of this Court explaining those provisions.

The Plaintiff offered herself as a witness and said that her father had told her that he had mortgaged the land: Her father was dead, and this evidence could only have been admitted if it was admissible under the provisions of section 32 of the Evidence Act. It was not a statement against the pecuniary or

proprietary interest of the person making it, nor does it come under any of the provisions of that section, and this evidence was therefore inadmissible.

The next witness was U Kywe who said that he was present when the original mortgage was concluded, and that it was recorded in a *parabaik* document. A *parabaik* document was produced in Court, and under section 91 of the Evidence Act no evidence of the terms of the mortgage was admissible except the document itself. The document was not shown to the witness nor was he asked to identify it, and his evidence was therefore inadmissible.

The next witness was a man who had been husband to the Plaintiff. He deposed that he was present when a subsequent advance of Rs. 10 was taken by the mortgagor. His evidence was uncorroborated. He said that he did not know whether a document was written or not, that no one else was present, and his evidence was of very little value.

The next witness was Maung Hme who produced the exhibit mortgage deed, a *parabaik*. He says that he found it among the papers of one of the original mortgagees. Documents of this kind do not prove themselves, and unless they are admitted by the other side, it is necessary to prove them. This may be done by calling a witness who was present when the document was executed and testifies in Court that the document produced is that which was executed. This has not been done. It is also possible in certain cases to make certain presumptions with reference to ancient documents, that is to say, documents purporting or proved to be 30 years old, under section 90 of the Evidence Act. The Court of first instance does not suggest that any presumption should be drawn in the case of the document produced. The necessity for caution in making presumptions as to ancient documents in Upper Burma has been insisted on repeatedly in the rulings of this Court, for instance, *Ma Lon and 3 others* vs. *Naung Myo*. (1)

Maung Hme, the witness who produced the document, is admittedly on bad terms with the Defendant-Respondent.

The document which recites the transaction by which Rs. 50 is supposed to have been advanced upon the land concludes with the words " total amount of the mortgage money Rs. 60." It is not suggested that the amount of the mortgage money was raised to Rs. 60 until the year 1252 B. E., that is less than 30 years ago, and if the whole document was written at that date, no presumption could be made with regard to it.

The very fact that these concluding words are in the document, apparently in the same handwriting and of the same date as the rest, shows how easy it is to alter or concoct these documents. The law does not require the Court to draw any presumption: on the contrary as explained in the rulings of this

(1) U. B. R., 1892—96, II, 350.

MI NGE MA v. NGA TALOK PYU.

Court the presumption should not be drawn as a matter of course or without great caution. In the present case the document was produced in Court by a person who says he got it from proper custody but who was shown to be on bad terms with the other side and whom it was not safe to believe. The document itself has either been wholly written or has had additions made to it at a date later than the date on which it purports to have been written. No presumption can clearly be drawn with regard to it and it has not been proved.

As the Plaintiff relied upon a document produced by her but not proved, she was precluded by the terms of section 91 of the Evidence Act from giving other evidence of the transaction.

The admission deposed to by the 4th and last witness for the Plaintiff was so vague as to be clearly valueless.

There is therefore no evidence worth the name upon which the Plaintiff-Appellant could possibly hope to succeed.

The Defendants had admittedly been in possession for at least 34 or 35 years, and there is a long series of rulings of this Court laying down that a long and peaceable possession should not be disturbed except upon substantial and satisfactory evidence.

It should not have been necessary to repeat these elementary rules of law. Cases however constantly come before this Court in which not merely the parties and Advocates but the Judges fail to distinguish between evidence which is admissible and that which is not. All that can be done is to repeat the more important of these rules in the hope that they will sooner or later be learnt and understood.

The appeal is dismissed with costs.

Civil Revision No. 70 of 1914. March 10th, 1915.

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

NGA TIN AND ONE *v.* NGA SAW.

Mr. D. Dutt—for applicant.

Mr. J. C. Chatterjee—for respondent.

Civil Procedure—Order XLI, Rule 22.

Held,—that a respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant.

I.L.R., 26 Cal., 114.
I.L.R., 30 Cal., 655.
I.L.R., 23 All, 93.
15 W.R., 26.
16 C.W.N., 612
I.L.R., 37 Bom., 511.

Plaintiff sued the 2 Defendants to recover Rs. 124, the balance of a sum advanced for purchase of plantains and obtained a decree against the 2nd Defendant. The 2nd Defendant

appealed. The Plaintiff in the lower Appellate Court filed a cross-objection in which he claimed a decree against the 1st Defendant. The 2nd Defendant's appeal was dismissed, and the lower Appellate Court gave Plaintiff a decree against the 1st Defendant. This application for revision states that the Lower Appellate Court should not have given a decree against the 1st Defendant in the absence of a separate appeal by the Plaintiff.

It has been further argued that the present Applicant was not a party to the appeal and he was not present, and that there was no evidence upon the record to justify the finding of the Lower Appellate Court.

The provision of law which enables a respondent to take a cross-objection to a decree which has been appealed against is contained in Order XLI, Rule 22 of the Code of Civil Procedure. The first paragraph of this rule corresponds, with no material difference, with the first paragraph of section 561 of the old Code of Civil Procedure. There are a number of rulings under the old Code which lay down that a respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant. The matter was considered at length in *Bishun Churn Roy Chowdry* v. *Jogendra Nath Roy* (1), and the rule of law was there laid down that it was only by way of exception to the general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. This has been quoted with approval in subsequent cases, *e.g.*, *Shabiuddin* v. *Deomoorat Koer* (2). The same view was taken by the Allahabad High Court in *Kallu* v. *Manni* (3), though in the latter case, the opinion appears to have been based partly upon the words contained in paragraph 3 of section 561 of the old Code, which required the Respondent to show that the Appellant or his pleader had received a copy of the objection. These words do not appear in the present Code, the words "the party who may be affected by such objection" being substituted for "Appellant." In the case of *Shabiuddin* v. *Deomoorat Koer* following the observations of the Judges in *Anwar Jan Bibee* v. *Azmut Ali* (4), which were quoted with approval, it was held that the cross-appeal cannot reopen any questions which have been decided between the co-respondents, but must have reference to the appellant, and the points which are in dispute between the respondent who takes the cross-appeal and the appellant. "It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions would be opened up as between the co-respondents

(1) I.L.R., 26 Cal., 114.
(2) I.L.R., 30 Cal. 655.
(3) I.L.R., 23 All., 93.
(4) 15 W.R., 26.

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which would otherwise have been decided, and it is also possible where interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondent." But that is not the case in this litigation. It seems clear that if it had been intended that Order XLI, Rule 22, should give a respondent an opportunity to take a cross-objection to the decree not only as against the appellant but as against all the other respondents, this intention would have been expressed unequivocally. But in the present case the Applicant was not even a respondent in the appeal. He had successfully contested Plaintiff's claim in the first Court and had not been made a party to the appeal until the Plaintiff attempted to make him a party by filing a cross-objection. It is clearly unreasonable in a case where a plaintiff had sued two defendants who had no common ground of defence and has been successful against one only, and where that defendant appeals, that the plaintiff should be heard in the same appeal to prove his case against the other defendant. This view has more recently been reaffirmed in the case of *Jadunandan Prosad Singh* vs. *Deo Narain Singh* (1) and *Nursey Virji* vs. *Alfred H. Harrison* (2).

I am of opinion that the Plaintiff was not entitled to file a cross-objection in this appeal against the 2nd Defendant whose case was that he was not concerned in the transaction in question and who, the Court of first instance had found, had not in fact been a party to that transaction.

In this particular case moreover, there appear to be other reasons why this Court should interfere in revision. The third paragraph of Rule 22 requires that unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection of having received a copy thereof, the Appellate Court shall cause a copy to be served on him. The cross-objection did not show that a copy had been served, and there is nothing on the record to show that this was done. Further, the record does not show that the present Applicant was present. The objection again appears to have been filed on the 17th of February and the appeal came on for hearing on the 24th of February. It would appear that even if a copy was served on the Applicant, the time allowed must have been entirely insufficient.

Again upon the merits, it does not appear that the Lower Appellate Court had any clear conception of what the question in dispute was. It appears from the evidence that the plantains which were sold were the produce of the 2nd Defendant's garden. Upon the pleadings, it was clearly a question whether, supposing the 1st Defendant to have taken any part in the transaction, he was acting merely as an agent for the 2nd Defendant or as a partner with him, and the judgment of the Lower

(1) 16 C.W.N. 612. (2) I.L.R. 37 Bom. 511.

Appellate Court does not show that this point was considered or that the Judge considered it proved that he was a partner.

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The application is allowed, and the decree of the Lower Appellate Court, so far as it affects the 2nd Applicant, is set aside with costs.

As far as 1st Applicant, Maung Tin, is concerned the application is dismissed.

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

U TILAWKA *v.* NGA SHWE KAN AND 5 OTHERS.

Civil 2nd Appeal No. 41 of 1914, December 21st.

Mr. *A. C. Mukerjee* for Appellant | Mr. *San Wa* for Respondents.

A Buddhist monk is prohibited by his personal law from engaging in any monetary transaction and is therefore debarred from suing for redemption of a mortgage.

II U.B. R., 1897-01, page 54.
II Chan Toon's L. C. 236.

JUDGMENT

The Plaintiff-Appellant, who as I have already held, must be taken to be a *Rahan*, sued to redeem some land which he alleged he, another *Rahan* and a woman had jointly mortgaged in 1245. He further alleged that he had inherited a share of the land from his father. The woman (Ma Po) was dead and Plaintiff-Appellant was the sole Plaintiff.

An objection was taken in the written statement that the Plaintiff had been a monk for 40 years and that he could therefore have no claim to the land. The point was noticed in his judgment by the Township Judge, but it was not adequately dealt with. The Township Judge gave Plaintiff a decree for redemption.

On appeal the lower Appellate Court held that the alleged mortgage had not been proved and dismissed the suit.

In this appeal the first question to be decided is whether the suit is not bad *ab initio*.

In *Ma Pwe* v. *Maung Myat Tha*, (1) it was held that a Burman, on becoming a Buddhist monk, ceased to have any interest in the property of which he had up to then been the owner. The first Court held that this ruling did not apply as the Plaintiff-Appellant was already a monk when he mortgaged the land.

The land in suit is alleged to have descended from the Plaintiff-Appellant's father, but there is no evidence as to when the latter died. The land is alleged to have been mortgaged by him, redeemed by the Plaintiff-Appellant and two others and

(1) II U. B. R., 1897—1901, page 54.

U TILAWKA v. NGA SHWE KAN.

remortgaged by them to the Defendant-Respondent's parents. There is also nothing to show when the Plaintiff-Appellant became a monk, except the allegation in the written statement that at the time the suit was brought he had been a monk for 40 years, a statement which has not been contradicted. If he became a monk after his father's death then the ruling cited above would apply, and it would be clear that the Plaintiff-Appellant had no right to redeem the land and that he had no interest which he could mortgage. If however at the time of his father's death he was already a monk, the question would arise as to whether a monk can inherit from a layman. This question was raised in *Ma Taik* v. *U Wiseinda*, (1) and was decided in the affirmative, but it is questionable whether that decision was not *obiter* because in that case the Plaintiff left the priesthood during the trial of the suit and it seems to have been held that that fact removed the legal difficulty.

Of course assuming that the Plaintiff-Appellant has no title, that fact would not necessarily disentitle him to a decree. If the mortgage were proved and it was shown that the Defendant-Respondent's predecessors were let into possession by him, the Defendant-Respondents would be estopped from denying his title. But the question is a broader one than a mere question of title or estoppel. The question is whether a Buddhist monk is capable of entering into a valid contract such as a mortgage not on behalf of the *Sangha* but for his personal profit. A further difficulty arises that the mortgage is said to have been effected in 1245 B.E. and consequently the Indian Contract Act is not applicable, and though the *Dhammathats* show that as the late Mr. Burgess said "In modern times the Burman Buddhist monk's vows of poverty sit lightly on him" and provide rules for the distribution of property acquired by a monk by trade or usury, I have been unable to find anything to show that such contracts would have been given effect to by the Burmese Courts prior to the annexation or that they were recognized as valid by Burmese Jurists. The existence of such property could not be ignored and consequently rules were framed for its disposal and it was provided that it was to be inherited by the monk's lay relatives and not by members of the Order "because it is not property given him by others as a religious gift". (*Yazathat*, section 409, U Gaung's Digest, Volume I), a passage which clearly indicates that a monk was debarred by the rules of his order from possessing property other than that given as a religious gift, either to him, another monk, a *Gana* or the *Sangha* and that the Jurists recognized this rule as of force in their legal system. The text from the *Kyannet* given in section 152 of U Gaung's Digest, Volume II, shows that in the compiler's opinion the ordinary law was subject to the rules of the Order, and that though a layman might have a certain

(1) II Chan Toon's L. C., 235.

legal right that right could not be enforced by a monk if it was opposed to the rules of the Order.

There can be no question at all but that the idea of a Buddhist monk buying and selling or mortgaging land for his own benefit is totally opposed to the rules by which Buddhist monks profess to be governed.

In the beginning they were ascetics who gave up the pleasures of the world in order to gain the peace of a soul that had no desires of any kind, and there can be no doubt but that even at the present day they profess to live on charity. That many of them owing to the piety of laymen as a matter of fact live in greater comfort than they would have done had they not embraced the religious life in no way affects the question. They are not supposed to ask for anything and I believe this rule is nearly always kept, but on the other hand they cannot ordinarily refuse to accept a gift because to do so would be to deprive the intending donor of merit in the next world.

When a dispute between two monks is referred at the present day to *Gaing Gyoks* or the *Thathanabaing* it is decided as far as possible according to the rules contained in the *Vinaya* and it seems to me clear that the personal law of Buddhist monks is to be found there and nowhere else, and that it cannot be said to have been modified to any extent by custom, as custom does not form part of the rules of decision adopted by the Ecclesiastical authorities.

The fact that many monks have so far strayed from the rules originally laid down by the Buddha as to trade and buy and sell land, therefore, is no reason for holding that they are subject to the same law of contract as laymen, and I think it is clear that a monk is debarred by the rules of his Order from mortgaging property descended from his ancestors, and indeed from owning such property. No doubt the *Dhammathats* recognize that the flesh is weak and that monks do not always conform to the rules laid down for their guidance, and they therefore lay down rules for the succession by lay relatives in such cases, but those rules do not affect the personal law of the monks at all. That their personal law forbids trading and mortgaging land and so on, I think, there can be absolutely no doubt. The late Mr. Burgess in *Ma Pwe* v. *Maung Myat Tha* showed clearly enough that on becoming a monk a Buddhist severs himself from the world and forsakes riches to practise poverty, but I would supplement his remarks by citing the following texts:—

"Whatsoever *Bhikku* shall receive gold or silver or get someone to receive it for him or allow it to be kept in deposit for him—that is a *Pâkittiya* offence involving forfeiture".

"Whatsoever *Bhikku* shall engage in any one of the various transactions in which silver is used—that is a *Pâkittiya* offence involving forfeiture".

"Whatsoever *Bhikku* shall engage in any one of the various kinds of buying and selling—that is a *Pâkittiya* offence involving

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forfeiture" (*Pâtimokkha Nissagiya Pâkittiya Dhamma*, sections 18, 19 and 20).

Thus a trading transaction was not only an offence requiring expiation, it was void, and the *Bhikku* was deprived of any profit he might have made. The translators of the *Vinaya*, Messrs. Rhys Davids and Oldenberg, describe the method of procedure on a breach of these rules. The guilty *Bhikku* had to give up the gold or silver to the *Sangha*, and a lay servant of the *Bhikkus* would either buy ghee or oil with it for the *Sangha* or would throw it away.

When dying the Buddha said that after his death the *Sangha* might, if it so wished, revoke all the lesser and minor precepts, and a certain number of *Bhikkus* wished that certain of the more irksome precepts might be done away with or altered, but a difficulty arose as to what were lesser or minor precepts, and so it was decided at the Council of *Râgagaha* that none of the precepts should be abolished or altered.

"Then the venerable *Maha Kassapa* laid a resolution before the *Sangha* 'Let the venerable *Sangha* hear me. There are certain of our precepts which relate to matters in which the laity are concerned. Now the laity know of us that such and such things are proper for you *Samanas* who are *Sakyaputtiyas* and such and such things are not'. If we were to revoke the lesser and minor precepts it will be said to us 'a set of precepts was laid down for his disciples by the *Samana Gautama* to endure until the smoke should rise from his funeral pyre. So long as their teacher remained with these men so long did they train themselves in the precepts. Since their teacher has passed away from them, no longer do they now train themselves in the precepts' ".

"If the time seems meet to the *Sangha* not ordaining what has not been ordained and not revoking what has been ordained, let it take upon itself and ever direct itself in the precepts according as they have been laid down. This is the resolution—whosoever of the venerable ones approves thereof let him keep silence. Whosoever approves not thereof let him speak. The *Sangha* has taken upon itself the precepts according as they were laid down. Therefore does it keep silence. Thus do I understand". (*Kullavagga* Bk. XI., i., 9).

Then again at the Council of Vesâlî to which was submitted the question whether on ten points the rules laid down for the monkhood should be relaxed, it was decided that they should not. One of these was the rule against accepting gold and silver and another was as to whether a precedent could be taken as an excuse for not conforming to the rules. It was decided before 700 *Bhikkus* that the rule as to gold and silver should not be relaxed and that a precedent was no excuse for doing what was forbidden. (*Kullavagga*, XII, 2., 8.)

I am of course well aware that many monks in modern times disregard part of the 18th *Nissaggiya Pâkittiya*, and though they do not actually handle gold and silver themselves accept

money through a '*Kappiya*' who keeps it for them, but as a precedent is to be no excuse and as such conduct does not appear to have been sanctioned by the *Sangha* as a whole, it must be held that monks who act thus break the rules of their Order and are liable to have the money confiscated to the *Sangha*.

As showing to what length some monks are willing to go in disregard of their vows, I would mention that at the hearing of this appeal it was stated that some years ago a Buddhist monk brought a suit in the District Court of Mandalay for restitution of conjugal rights, though sexual intercourse is the first of the four cardinal sins which a monk can commit. It is to be presumed that that monk was refused relief, and it must, I think, be held in the present case that the Plaintiff-Appellant is entitled to no relief. If the Contract Act had been in force at the time, the alleged mortgage would have been void so far as Plaintiff-Appellant is concerned under section 23 as defeating the Plaintiff's personal law, and although the Contract Act cannot be applied, as the question for decision is one regarding religious usages, the Buddhist law must form the rule of decision, and I think it must be held that so far as the Plaintiff-Appellant is concerned the alleged mortgage was void, just as it would certainly be held that a Buddhist monk could not contract a valid marriage or sue for restitution of conjugal rights so long as he remained in the priesthood.

Further, assuming that the mortgage was valid because Ma Po was one of the mortgagors and that the Plaintiff-Appellant was entitled to inherit from his father because he became a monk before the latter's death—a point which I am not prepared to admit—he must still be debarred from suing for redemption as one having an interest in the mortgaged property, because a monetary transaction such as a redemption is forbidden by his personal law.

No doubt this decision may have very wide consequences, but a Buddhist monk who has taken vows of poverty and who professes to have abandoned the pleasures of the world, bringing a suit for his own personal profit is not an edifying spectacle, and I do not think such monks have any cause for complaint, if their vows are regarded by the Courts in a more serious light than they regard them themselves. I cannot conclude this judgment better than by quoting the late Mr. Burgess:

"But there can be no doubt that such relaxation of ancient austerity has to be confined within reasonable limits, and that it does not extend to the renunciation of the world involved in the formal adoption of the religious life. The service of God and Mammon cannot be combined. To retain the sensual enjoyments of the secular and at the same time to pretend to the sanctity of the sacred life would be to turn the whole thing into a sham and farce, and would be unquestionably offensive to popular sentiment."

I accordingly hold that the Plaintiff-Appellant cannot succeed in his suit and dismiss the appeal with all costs.

Civil 2nd Appeal No. 153 of 1914. April 22nd, 1915.

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

NGA LU DAW AND 1 *v.* MI MO YI AND 1.

Mr. *S. Mukerjee*—for Appellants.

Mr. *C. G. S. Pillay*—for Respondents.

Buddhist Law—Inheritance—Property inherited during marriage—Definition of Auratha son.

A Burman Buddhist married three wives in succession.

Held,—that of the property inherited by him during marriage the children of the marriage during which it was inherited were entitled to a double share.

4 L.B.R., 189, dissented from.
U.B.R., 1904-06, II, Buddhist Law—Divorce—19.
U.B.R., 1892-96, II, 159.
P.J., L.B., 361.
U.B.R., 1897-01, II, 185.

The Plaintiffs-Appellants are the grand-children of Maung Hnin, who married three wives in succession, namely, Ma Ngwe, Ma Kye U and Ma Kywet O. The Plaintiffs-Appellants are sons of Maung Ne Kya, son of Maung Hnin by his first wife, Ma Ngwe, who predeceased his father.

The 1st Defendant-Respondent, Ma Mo Yi, is daughter of Maung Hnin by his second wife, Ma Kye U. Her sister, Ma Mo Hmi, was not made a party to the suit as she had been given in adoption to others.

The 3rd Defendant-Respondent is Maung Hnin's daughter by his third wife, Ma Kywet O.

The Plaintiffs-Appellants alleged that Maung Hnin had left six pieces of land the plans of which are marked ခ, ဂ, ဃ, င, ဇ and ဈ.

The total area of these lands is 13·17 acres. The Plaintiffs-Appellants claimed the whole of ခ, ဂ, ဃ and ဍ, two-thirds of င, and one-sixth of ဈ, total 9·23 acres. Why the lands should be divided in that way they did not explain, and the matter is made still more obscure by the 5th paragraph of the plaint in which it is stated that as all the lands were acquired during their mother's coverture they were entitled to one-half and the Defendants-Respondents to one-fourth each. No attempt was made to obtain an explanation.

The defence was (1) that all the lands had been inherited by Maung Hnin during Ma Kywet O's coverture from his father, Maung Kathè, (2) that the land ခ had been mortgaged by Maung Hnin to one Maung Paw Kye and that the 2nd Defendant-Respondent was working it as his tenant, (3) that Maung Hnin had mortgaged the lands ဂ and ဃ and the 1st Defendant-Respondent had redeemed them for Rs. 61-8-0, (4) that the Plaintiffs-Appellants were not entitled to inherit as they had been guilty of unfilial conduct and (5) that if they were held entitled to inherit they should be held liable for their share of the expenses of Maung Hnin's funeral which amounted to Rs. 73-12-0.

When the case came to trial a further defence was set up to the effect that Maung Hnin had given the lands ၀ and ၀၀ to the 1st Defendant-Respondent and the lands ၀, ၀ and ၀၀ to the 2nd Defendant-Respondent.

The Township Judge found that the lands ၁, ၀, ၀ and ၀၀ had been inherited by Maung Hnin from his mother during his first wife, Ma Ngwe's coverture and that he had inherited the lands ၁ and ၀၀ during his third marriage from his father.

He further found that the land ၀ had been mortgaged to Maung Paw Kye, and that the lands ၀ and ၀၀ had been redeemed by the 1st Defendant-Respondent for Rs.61-8-0. He also apparently held that the alleged gifts had been proved, and that they were valid, but he dismissed the suit on the ground that the Plaintiffs-Appellants were not entitled to inherit as they had not assisted in maintaining their grandfather, Maung Hnin, who for several years before his death was lame and blind.

On appeal, the learned District Judge found that the alleged gifts had not been proved and that the mortgage to Maung Paw Kye could not be proved as it had been effected by an unregistered mortgage-deed. He overlooked the questions of the redemption of the lands ၀ and ၀၀ by the 1st Defendant-Respondent and of the funeral expenses; he found that the Plaintiffs-Appellants had not been guilty of such conduct as would debar them from inheriting; he declined to go into the question whether Maung Hnin had inherited the lands during his first, second or third marriages, because he imagined that the inherited property must be '*payin*,' and following *Maung Gale* v. *Maung Bya* (1), he held that if Plaintiffs-Appellants' father had not predeceased Maung Hnin they would have been entitled to one-third of the lands, but that as they were out-of-time grandchildren they were entitled to one-twelfth and he accordingly gave them a decree for a one-twelfth share.

Both parties have appealed to this Court, the Plaintiffs on the ground that they should have been given a bigger share, and the Defendants on the grounds that the Lower Appellate Court should have held that the lands had been inherited during the third marriage, that the Plaintiffs-Appellants were debarred by their conduct from inheriting and that the gifts were proved.

As regards the gifts I would say that, even if proved, the gift of the lands ၀, ၀ and ၀၀ to the 2nd Defendant-Respondent would be invalid as she was living with her father at the time. A text from the *Kaingza* runs: "A gift made, though not *in extremis*, is invalid if delivery of possession has not taken place before the death of the donor and it shall revert to the estate; but if there has been delivery of possession the co-heirs cannot claim it.

"The above rules refer to children living apart from the parents. *As regards children living with the parents a gift*

(1) 4 L.B.R., 189.

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does not take effect even when there has been delivery of possession, because children living with the parents are still under parental control." The same rule is given by the *Kandaw, Vannadhamma, Râsi* and *Pânam Dhammathats* and has, I think, generally been accepted.

There is some evidence that the 1st Defendant-Respondent lived with the 2nd Defendant-Respondent and therefore with Maung Hnin, in which case the gift of the lands ၀ and ၈၀ would be invalid too, but in any case I do not think the evidence is such as to establish that Maung Hnin really and finally divested himself of his property. He apparently merely allowed the 1st Defendant-Respondent to redeem these two pieces of land so that she might help to maintain him with its produce. I am of opinion therefore that there was no gift.

As regards the mortgage to Maung Paw Kye, the Lower Appellate Court is wrong. In the first place Maung Paw Kye says that the mortgage was first effected verbally and that later its terms were reduced to writing. If possession were given in the first instance the transaction was complete, and the fact that a document was subsequently executed would not bar oral evidence of the original transaction. In the second place the 2nd Defendant-Respondent was admittedly in possession of the land ၁ as Maung Paw Kye's tenant, and consequently as Maung Paw Kye was not a party to the suit this piece of land should not have been included in the decree.

The Township Judge found that the lands ၀ and ၈၀ had been redeemed by the 1st Defendant-Respondent for Rs. 61-8-0. He also found that the accounts of Maung Hnin's funeral had been settled. These findings have not been challenged in this Court by either side and therefore they may be accepted.

With regard to the contention that the Plaintiffs-Appellants are debarred by unfilial conduct from inheriting from Maung Hnin, I agree with the Lower Appellate Court. The presumption is that they are entitled to inherit and the burden of proving unfilial conduct is on the Defendants-Respondents. The facts that Maung Hnin for many years before his death was lame and blind, and that the Plaintiffs-Appellants took no part in maintaining him are not sufficient. The Defendants-Respondents apparently maintained their father out of his own property, none of which was in the Plaintiffs-Appellants' possession, and there is no evidence that the latter were ever called upon to render services and refused, or that they were on other than the best terms with their grandfather.

The learned District Judge clearly does not properly understand what '*payin*' property means. It means property already owned by a person when he or she marries, whether he or she has actually obtained possession or not. Property inherited by a person during marriage is not '*payin*' but '*letletpwa*,' although on divorce the principle of *nissayo* and *nissito* is applied to it

(*Mi Myin* v. *Nga Twe and two others*) (1). The lands in suit were not admitted to be Maung Hnin's *payin* property, on the contrary the Plaintiffs-Appellants alleged that it was all *lettetpwa* of the first marriage and the Defendants-Respondents alleged that it was *lettetpwa* of the third marriage.

Of course if *Maung Gale* v. *Maung Bya* was rightly decided it would not matter whether the lands were inherited during the first or the third marriage, because it was held that the rule that the children of a marriage during which property was acquired get, when that property is partitioned, double what the children of other marriages get, did not apply to property inherited during a marriage.

I am however unable to agree with that ruling. The principle that a child who has a claim through both parents gets double what a child who claims through one parent only gets, was laid down in *Ma Sein Nyo* v. *Ma Kywe*(2), *Ma Min E* v. *Ma Kyaw Thin and two others*(3) and *Maung Tun Gyaw and Maung Hlaw* v. *Ma Balo*(4). The principle is clearly discernible in many texts, it is a most reasonable one and it was not disputed in *Maung Gale* v. *Maung Bya*. But it was there held that it only applied to property acquired by the joint exertions of husband and wife and not to inherited property because such property was acquired without exertion.

I do not think this is a sufficient reason for differentiating between property inherited during a marriage and other *lettetpwa* property.

Property given to a married couple could not be said to have been acquired by the joint skill or labour of both, and yet obviously the principle in question would have to be applied to such property.

There would have been nothing unreasonable in a rule that property inherited during a marriage was the separate property of the spouse who inherited it, but that was not the rule adopted.

Furthermore, the ruling in question seems to me to be directly opposed to the texts that specifically provide for the case in point.

Mr. Justice (now Sir Henry) Hartnoll says, "The texts lay down no general rule. The *Kungya* does not differentiate between hereditary and other acquired property. The *Dhamma* gives the son of the first marriage preference over the other two. The *Manukyé* gives preference to the son of the marriage during the continuance of which the hereditary property was acquired, because he has the right to inherit the property through both parents. In section 246 the *Cittara* says '. . . . The mother's separate property shall be divided equally among all the three sons. . . .' The meaning of this text would seem to be that the mother's hereditary property is to be divided equally amongst

(1) U.B.R., 1904-06, II, Buddhist Law—Divorce—19.
(2) U.B.R., 1892-96, II, page 159. (3) P.J., L.B., 361.
(4) U.B.R., 1897-01, II, page 185.

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the sons of the three marriages." Apparently he considered that the texts were so contradictory that no general rule could be deduced from them and that therefore the fairest thing to do was to divide inherited property equally amongst all the children and he thought that the passage from the *Cittara* cited, favoured such a distribution. I venture the opinion that the learned Judge was wrong on both points.

The *Kungya* it is true gives a rule which is to be found nowhere else. It is one of the oldest *Dhammathats* reputed to have been compiled in the year 788 B.E. and the rule which it gives was very likely the rule then in force, but it seems to have been altered later. The texts from the other *Dhammathats* collected in section 245 of U Gaung's Digest which are all probably 300 years nearer the present time and probably only a little more than 150 years old can be easily reconciled.

The rule appears to be, as I have said above, that the child who claims through both parents gets a double portion both of inherited and of other *lettetpwa* property. The *Dhamma* lays down that where three wives are married in succession "the hereditary property of the father shall be divided into three shares; the son of the first wife shall receive two shares and the two sons by the second and third wives shall receive the remaining share between them." The remark that the *Dhamma* gives the son of the first wife preference over the other two seems to me hardly to express the case. This text obviously refers to the case where the property has been inherited during the first marriage, and that is why the son of that marriage gets more than the sons of the other marriages. Moreover the compiler of the *Dhamma* has clearly made a mistake which is pointed out by the compiler of the *Manukyè*. In the case of two marriages only, the son of the marriage during which property was acquired would of course get two-thirds and the son of the other marriage would get one-third under the general rule. In applying this rule to a case of three marriages the compiler of the *Dhamma* still gives the son of the marriage during which the property was acquired two-thirds and consequently each of the other sons only get one-sixth. The compiler of the *Manukye* says that this is wrong. "As regards the father's hereditary property the statement that if it is acquired during the first marriage and taken to the subsequent marriages during which no property was acquired, it shall be reckoned as property belonging to the first marriage, and that the son of the first marriage shall take two shares and the son of the subsequent marriage one share, refer to the case where there are only two wives and there is a son by each. In the present case, as the three sons are of the same father though by different mothers the whole of the father's hereditary property shall be divided into four shares: the son of the first wife shall receive two shares and the sons by the second and third wives one share each. Debts, if any, shall be liquidated similarly. The same rule shall, *mutatis mutandis*, apply if the father comes

into the possession of the hereditary property while living with the second or with the third wife, or if debts are contracted then . . . . A son is given two shares out of the property acquired during his mother's life-time, because he has the right to inherit the property through both parents."

This text is as clear as it can possibly be and no distinction whatever is made between property inherited by the father during marriage and property acquired otherwise during the same period.

The text from the *Rājabala* at first sight appears to distinguish between hereditary property and other *lettetpwa*. The English translation runs: "All property other than hereditary property, acquired during the life-time of each mother, shall be divided into four shares and her son shall take two shares and the son of each of the other two mothers one share each." But this is a mistranslation. The text should run: "All property other than the wife's hereditary property, etc." The excepted property has been dealt with in the preceding line which lays down that the son of each mother shall succeed to her hereditary property.

None of the other texts in this section refer specifically to property inherited by the common parent, but they all agree with the *Manukyè* as to the distribution of *lettetpwa* between the three children of three different marriages, and if there had been any question of a different rule for property inherited during marriage by the common parent and other *lettetpwa*, one would have expected that the rule would be given.

The passage from the *Cittara* cited by Mr. Justice (now Sir Henry) Hartnoll cannot bear the meaning which he placed on it.

The texts cited in section 246 of the Digest provide for the converse case where a woman marries in succession three husbands and has a son by each. The text in question lays down that her *separate* property shall be divided equally amongst all the three sons, it does not say that property inherited by her during one of the marriages is to be so divided. The first passage from the *Cittara* given in section 245 of the Digest—it is not translated in the English translation—shows clearly enough that property inherited by the father during one of the marriages is not to be divided equally amongst the sons of the three marriages.

I am of opinion therefore that if Plaintiffs-Appellants' father, Maung Ne Kya, had been living he would have been entitled to inherit one-half of the property acquired during his mother, Ma Ngwe's marriage, a quarter of the property inherited by Maung Hnin during either of the other two marriages and one-third of Maung Hnin's '*payin*' brought to the first marriage.

It is therefore necessary to decide when each of the lands in suit were acquired, with the exception of the land ɔ which is not shown by the Plaintiffs-Appellants to have been in Maung Hnin's

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possession when he died and which must, under the circumstances of the case, be taken to be, as alleged, under mortgage to Maung Paw Kye and incapable at present of partition.

There is evidence that ○ was given to Maung Hnin by his father, Maung Kathè. I see no reason to disbelieve this evidence, and as there is none on the other side I accept it. But the Plaintiffs-Appellants' contention that the gift was made during Ma Ngwe's coverture cannot be accepted in view of the evidence that this land was given to Maung Hnin on the occasion of his novitiate. The presumption is that he was not yet married, and that he took this piece of land to his first marriage as his '*payin*.' Maung Ne Kya if living would therefore be entitled to one-third of this piece of land.

According to the witnesses, Ma Pôn Nyo and Maung Kyaw Nya, the lands ○, ○ and ∞ were inherited by Maung Hnin from his mother during his first marriage and the lands ○ and ∞ were inherited from his father, Maung Kathè, *i.e.*, during the third marriage as Maung Kathè died after Maung Hnin had married Ma Kywet O.

The only evidence on the other side is that of the witnesses Maung Hmu and Maung Te Naung, who say that all the lands were inherited from Maung Kathè. They are much less definite than Ma Pôn Nyo and Maung Kyaw Nya, and they were disbelieved by the Township Judge, and therefore I think the evidence given by Ma Pôn Nyo and Maung Kyaw Nya should be taken as correct.

If he had been living therefore, Maung Ne Kya would have been entitled to one-third of the land ○, one-half of the lands ○ and ∞ and one-fourth of the lands ○ and ∞. It remains to be considered whether the Plaintiffs-Appellants are entitled to these shares or as out-of-time grand-children to one-fourth of these shares.

The learned District Judge in awarding the Plaintiffs-Appellants a one-twelfth share of the lands overlooked the rule that out-of-time grand-children, if they be the children of the *auratha* son, receive the same share as their youngest uncle or aunt.

The question of the definition of the *auratha* son, however, remains. The eldest son is generally but not necessarily the *auratha* son. The son who in case his father dies or becomes incapacitated is competent to take his place in the family is the *auratha* son. If the eldest son be blind or otherwise incapacitated his younger brother, if competent, and not he is the *auratha* son, *vide* the text from the *Dhammathatkyaw* and other texts collected in section 62 of the Digest, Volume I. Consequently I take it that until the eldest son reaches the age of discretion there can be no *auratha* son in the family. Again, though the eldest son cannot claim one-fourth of the estate from his father on the death of his mother he can claim that share from his mother on the death of his father, because he then takes his father's place

in the family, he nevertheless, if competent to replace his father in case of the latter's death, becomes the '*auratha*' son as soon as he becomes so competent and does not have to wait until his father's death to attain that position. I think this is clear from the texts collected in section 162 of Volume I of the Digest, of which I would particularly mention that from the *Dhamma*, which is more emphatic in the original Burmese than in the English translation. The Burmese runs: "If the eldest, the *auratha*, son dies whilst his parents are still living . . . " thus clearly indicating that the eldest son may attain the position of an *auratha* son whilst his father is still alive.

It is not suggested that Maung Ne Kya was in any way incapacitated from taking his father's place; he married and had children and therefore must have attained the age of discretion and in fact only predeceased his father by ten years. He was therefore the *auratha* son.

It is not necessary to go into the question whether it is only the eldest son of the *auratha* son that can get the same share as the latter's youngest brother, because Maung Ne Kya's eldest son is still alive and he and his brother—the two Plaintiffs-Appellants—can obviously only get their father's share between them.

Lastly, as I have held that the lands ๐ and ๐๐ were redeemed by the 1st Defendant-Respondent for Rs. 61-8-0, it is obvious that the Plaintiffs-Appellants must pay their share of this debt before they can get their share of the inheritance.

One final difficulty remains. The lands ๐ and ๐๐ were mortgaged and redeemed as one parcel, but the Plaintiffs-Appellants are entitled to one-third of ๐ and to one-fourth of the land ๐๐ and the question is how the redemption money is to be apportioned between these two lands. The area of ๐๐ is slightly more than five times that of ๐ but its value according to the 1st Plaintiff-Appellant is only five-fourths of the value of ๐ and this valuation has not been disputed. I think it is fairer to apportion the charge according to the value of the lands than according to the area. The Plaintiffs-Appellants must therefore pay four-ninths of Rs. 61-8-0 = 27-5-4.

The decree of the Lower Appellate Court is accordingly modified as follows:—Upon the Plaintiffs-Appellants paying into Court within six months of this date the sum of Rs. 27-5-4 the lands ๐, ๐๐, ๐, ๐ and ๐๐ will be partitioned and a one-third share of ๐, a one-fourth share of the lands ๐ and ๐๐ and a half share of the lands ๐ and ๐๐ will be given to the Plaintiffs-Appellants, *i.e.*, 4·65 acres altogether. There will be no order as to costs as the Plaintiffs-Appellants claimed about double what they were entitled to.

Civil Appeal No. 81 of 1914. April 27th, 1915.

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

MI CHAN MYA AND ONE—APPELLANTS *v.* MI NGWE YON—RESPONDENT.

Mr. *C. G. S. Pillay*—for Appellants.

Mr. *R. K. Banerjee*—for Respondents.

Buddhist Law—Inheritance.

Held,—That the children of a first marriage were on the death of their father who had married again after the death of their mother, entitled to three-fourths of the *lettetpwa* of the first marriage taken to the second marriage and the widow was entitled to one-fourth.

I, L.B.R., 273.
U.B.R., 1897-01, II, 135.
U.B.R., 1892-96, II, 22.
Ibid, 176.
IV, L.B.R., 110.

JUDGMENT.

The 1st Defendant-Appellant is the widow of Maung Po, deceased, and the 2nd Defendant-Appellant is their infant son. The Plaintiff-Respondent sued them for a three-fourths share of Maung Po's estate alleging that she had been adopted by Maung Po and his first wife, Ma Hla Dun, as their *keitima* child, and that the whole of the estate had been acquired by Maung Po before he married the 1st Defendant-Appellant and had been taken by him to that marriage.

The defence was that the Plaintiff-Respondent was not Maung Po's *keitima* daughter, that even if she were she had not maintained filial relations with him and that in any case she was not entitled to get three-fourths of the estate.

The Courts below found the adoption proved and awarded Plaintiff-Respondent three-fourths of the property taken to the 2nd marriage and one-eighth of the *lettetpwa* of that marriage. The Defendants-Appellants have now appealed under section 100, Civil Procedure Code, on various grounds.

The first ground is that the findings of the Lower Appellate Court as to adoption are contrary to the provisions of Buddhist law, inasmuch as (1) there was little or no evidence of publicity and notoriety, and (2) there was no evidence as to whether the adoption was *keitima* or *apaddittha*. Reliance is placed on *Ma Pwa* v. *Ma The The and 7 others* (1), as to adoption being a mixed question of fact and law. I have no doubt as to the correctness of this contention, but of course this Court cannot go into the credibility of witnesses in an appeal under section 100, Civil Procedure Code, unless the Lower Appellate Court has committed some error of law or procedure in believing or disbelieving the witnesses; and that is not urged in the present case.

Now apart from evidence of repute there is the direct evidence of Maung Shwe Lun (Plaintiff-Respondent's natural father), Maung Tun U, Maung Pi (Maung Po's brother) and Maung Kyi

(1) I, L.B.R., 273.

Maung that the Plaintiff-Respondent was adopted and that a ceremony to which monks were invited was held. Maung Shwe Lun on cross-examination gave evidence which contradicted the Plaintiff-Respondent and went to show that there had been a rupture of the filial bond, but on re-examination he contradicted his previous statements. The Courts below discarded the whole of his evidence on the ground that he was a paralytic. I do not think their action can be called in question in an appeal under section 100, Civil Procedure Code. The other witnesses, if believed,—and their credibility cannot be questioned now—conclusively prove the adoption and prove that it was a public one. Moreover there is evidence of later repute, *e.g.*, that given by the witnesses, Maung Kyaw Za, Maung Shan Gyi and the important documentary evidence that the Plaintiff-Respondent was entered in *thathameda* assessment rolls as Maung Po's daughter. I would add that the circumstantial evidence corroborates the direct evidence of the adoption, but it is unnecessary to refer to it because the direct evidence which cannot now be challenged proves the adoption.

As to there being no evidence as to whether the adoption was a *keitima* or an *apaddittha* one, I would say in the first place that the point, if taken at all, should have been taken in the Court of first instance. To allow the evidence to be recorded without asking a question on the point and then to urge on appeal for the first time that there was no evidence as to the kind of adoption was not fair to the Plaintiff-Respondent. I thoroughly agree with the learned Divisional Judge that it must be taken that when the witnesses spoke of an adoption they meant a *keitima* adoption. Moreover the evidence points to a *keitima* adoption and not to an *apaddittha* one. An *apaddittha* son is described in section 16 of U Gaung's Digest as "a foundling brought up in the family" (*Manu*). "A foundling adopted casually and brought up in the family" (*Waru*). "A child casually adopted and brought up in the family of the adoptive parents, being abandoned by his natural parents" (*Kaingza*). "A child casually adopted whether its parents or relatives are known or unknown" (*Dhamma* and *Manukyè*). "Son casually adopted through compassion" (*Kandaw*). "Son casually adopted" (*Vinicchaya*). "A foundling brought up in the family" (*Pakasani*). "Foundling or destitute child casually adopted" (*Manu*). "Foundling casually adopted" (*Panam* and *Kungyalinga* and *Amwebon*). It is clear that there is a very great distinction between such an adoption and a *keitima* adoption. In the latter kind of adoption there must be a distinct occasion on which the adoption takes place, it must be public and there is very often though not always a ceremony. The object of the adoption is generally to provide the adoptive parents with an heir. The reason for an *apaddittha* adoption is pity for the child, who is destitute, an orphan or abandoned by his parents. The adoption though perhaps not necessarily so is at any rate usually a gradual process, so that it is generally impossible to say at what precise moment a child

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taken into a family became an *apadditha* child. All idea of a ceremony in such an adoption is excluded by the language of the definitions.

In the present case Maung Po and his first wife, Ma Hla Dun, were childless and no doubt wished for an heir to inherit their wealth. The Plaintiff-Respondent was Ma Hla Dun's own niece, there was a ceremony and after she was taken into the family she was treated as a *keitima* daughter would have been.

The next ground of appeal is that the Lower Appellate Court contravened the provisions of the Evidence Act in that "whilst discarding all evidence of the document it admitted oral evidence of Maung Pi and Maung Kyi Maung, who spoke to the execution of a deed of adoption."

But the learned Divisional Judge did not rely on the contents of the deed deposed to, he relied on the evidence given by these witnesses that there was a public ceremony at which the Plaintiff-Respondent was adopted. An adoption, like a marriage, is not a mere contract, nor is it a grant or other disposition of property, nor does the law require an adoption to be in writing and therefore the fact that a deed of adoption was drawn up does not preclude other evidence of the adoption.

The next two grounds of appeal are that the Lower Appellate Court should have found that the filial tie, if one had ever existed, had been ruptured and that as separate living was proved it should have placed the burden of proof on the Plaintiff-Respondent.

To take the last point first, it was held in *Maung Shwe Thwe* v. *Ma Saing and others* (1) that in the case of a *keitima* son living apart from his adoptive parents the burden of proving that he had maintained filial relations and that there had not been a severance of the adoptive tie was on him. But in that case the rulings *Maung Aing and one* v. *Ma Kin* (2) and *Ma Gyan and another* v. *Maung Kywin and another* (3) were approved. In the former case the late Mr. Burgess held that the requirement of joint residence could be safely relaxed in the case of an adopted child who was also a blood relation, and in the latter case he said "the real issue for determination in such cases is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not." This passage was quoted with approval by Mr. Justice (now Sir Herbert) Thirkell-White. In *Maung Shwe Thwe* v. *Ma Saing and others*, there is nothing to show whether the Plaintiff was a blood relation of his adoptive mother or not, but he had been living apart from her for eleven years and during that time she had only visited him once and he had only paid her one visit and that was immediately before her death. It was held that the circumstances of the case indicated clearly an intentional severance of the adoptive tie. In *Maung Aing* v. *Ma Kin* the adopted child after marriage

(1) U.B.R. 1897-01, II, page 135.
(2) U.B.R., 92-96, II, page 22. (3) *Ibid*, page 176.

lived in a house in the same compound as the adoptive parents and it was held that the requirements of the *Dhammathats* in respect of the joint living were practically fulfilled. In *Ma Gyan and another* v. *Maung Kywin and another*, also, the adoptive daughter lived after her marriage not in her adoptive parents' house but in a house close by, and it was held that she was entitled to inherit.

In the present case, a year after her marriage the Plaintiff-Respondent lived in a granary in her adoptive father's compound, except for one year when she lived in her father-in-law's house, and for certain months in every year during which she lived in a field hut for the purpose of cultivating Maung Po's fields. Following *Maung Aing and one* v. *Ma Kin* and *Ma Gyon and another* v. *Maung Kywin and another*, I hold that so far as joint living is concerned the requirements of the *Dhammathats* were sufficiently complied with, and consequently the burden of proving that the Plaintiff-Respondent was by undutiful conduct debarred from inheriting was on the Defendants-Appellants.

Now it appears from the evidence that the Plaintiff-Respondent on one occasion unearthed some money which Maung Po had buried and apparently misappropriated some of it and was turned out of the house in consequence, and it is alleged that the adoptive tie was then ruptured. But when turned out Plaintiff-Respondent went and lived not with her natural parents but in her father-in-law's house and she subsequently returned and again lived in Maung Po's compound. It is clear from the evidence that they were reconciled before Maung Po married the first Defendant-Appellant, and I agree with the learned Divisional Judge that the circumstances do not point to a severance of the adoptive tie or disentitle Plaintiff-Respondent from inheriting.

The next ground of appeal is that the Lower Appellate Court erred in relying upon the *thathameda* roll for 1906-07, in which Plaintiff-Respondent is shown as Maung Po's daughter, whereas in the roll for 1908-09 she is shown as living separately and assessed accordingly.

1908-09 was apparently the year during which Plaintiff-Respondent lived with her father-in-law. Three extracts from *thathameda* rolls were filed, *viz.*, for 1906-07, 1907-08 and 1909-10, in each of which the Plaintiff-Respondent is shown as Maung Po's daughter and is assessed with him as one household. The extract from the roll for 1909-10 is in accordance with the evidence that Plaintiff-Respondent after being driven out of the house by Maung Po went and lived a year in her father-in-law's house and then returned and lived with Maung Po again, *i.e.*, in his compound.

The next ground of appeal is that the Lower Appellate Court did not consider all the evidence for the defence. The witnesses for the defence tried to make out that the Plaintiff-Respondent went to live in Maung Po's house as servant and that at the end she was his tenant and worked his land.

But it is quite certain that if Plaintiff-Respondent had merely gone to live in Maung Po's house as a servant the occasion would

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not have been celebrated by a ceremony to which *pongyis* were invited and Defendants-Appellants' own witness, Maung So, admitted that there was such a ceremony. A tenancy might explain Plaintiff-Respondent's living in Maung Po's field-hut but it would not be a sufficient explanation of her living in his compound.

The last ground of appeal is that the share awarded to the Plaintiff-Respondent, *viz.*, three-fourths of the property taken to the second marriage and one-eighth of the *letletpwa* of that marriage, is contrary to Buddhist law as there is a son of the second marriage. It has not however been stated what the correct share is.

Texts from many *Dhammathats* dealing directly with this question are collected in section 229 of U Gaung's Digest, Volume I. These texts however are by no means unanimous and it is very noticeable that no text from the *Manukyè* is included amongst them, and I have not been able to find any text in that *Dhammathat* bearing on this question. The text from the *Yazathat* quoted in section 229 gives the children of the first marriage one-half of the property taken to the second marriage, and the widow and the children of the second marriage a quarter each, but the great majority of the *Dhammathats* are divided into two schools, of which one gives the children of the first marriage three-fourths of the property taken to the second marriage, and the widow one-fourth, and the other gives the children of the first marriage the larger share, the widow a share and the children of the second marriage a share, and the more numerous texts give these shares as five-eighths, two-eighths and one-eighth respectively. Apparently the latest ruling on the point is *Ma Leik and others* v. *Maung Nwa and others* (1). In that case a a bench of the Chief Court of Lower Burma held that as the majority of the texts cited in section 229 of U Gaung's Digest were in favour of the children of the first marriage getting three-fourths of the property taken to the second marriage that rule should be adopted, it was however apparently not noticed that most of the texts that give this rule do not specifically state that this rule applies where there are children of the second marriage. The rule generally stated is that the children of the first marriage get three-fourths and the widow one-fourth and no reference whatever is made to the children of the second marriage. Section 220 of the *Attasankhepa Dhammathat* runs as follows: "Let the property brought by the father or mother be divided into four shares and let the children of the former marriage take three shares and the step-father or step-mother one share. This rule applies when there is no issue by the second marriage. If, however, children are born after the second marriage, let the property brought by the father or mother be divided into eight shares, and

(1) IV, L.B.R., 110.

let the children of the former marriage take five shares, the step-father or step-mother two shares and the children of the second marriage one share." The *Attasankhepa Dhammathat* was compiled by the late Kinwun Mingyi, U Gaung, the compiler of the *Digest*. He was learned in Buddhist Law and had experience of its application and his opinion is entitled to very great weight. Unfortunately this particular work of his is dogmatic. No authorities are cited; throughout the work there is evidence of attempt to reconcile contradictory texts of the older *Dhammathats* without any hint of the method of reconciliation, and the tendency is to elaborate intricate rules of division of property, which are never followed in practice, *e.g.*, the rule given in section 161.

Now it is obvious enough that the rules given in the older *Dhammathats* for partition of property brought to a second marriage between the children of the first marriage, the widow and the children of the second marriage are contradictory, and putting aside a few of the texts it looks at first sight as if the rule given in section 220 of the *Attasankhepa* successfully reconciled the majority of them, because the majority do not mention children of the second marriage when giving the rule regarding the partition of property taken to that marriage, and consequently it might be assumed that the rule of three-fourths and one-fourth only applies where there are no children of the second marriage, and that when there are such children the rule of five-eighths, two-eighths and one-eighth given by the other *Dhammathats* applies. But in the first place it seems to me impossible that the compilers of the former *Dhammathats* can have overlooked the point that there might be children of the second marriage, seeing that they proceed immediately to refer to such children when considering the partition of the *lettetpwa* of the second marriage, and in the second place the text from the *Manuyin* after giving the rule of three-fourths of the *atet* property to the children of the first marriage and one-fourth to the widow continues, "such property shall not be given to the offspring of the second union," and the text from the *Dayajja* says "The mother having died, the father marries again and dies leaving issue by the second marriage. The children of the former marriage shall get three out of four shares of their own parents' property and the remaining share shall be given to their step-mother." It is further to be noted that the *Dhammathats* that give the five-eighths, two-eighths, and one-eighth rule are much older than the *Manuyin* and the *Dayajja*.

Finally, the rule of three-fourths to the children of the first marriage is perfectly intelligible as was pointed out by Mr. Justice Moore in ***Ma Leik and others*** v. ***Maung Nwa and others.*** The children of the first marriage get their own mother's share, *viz.* one-half, and they get their father's share, in all three-fourths. The children of the second marriage get nothing because their mother is still living, but on her death they get her share.

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As regards the *lettetpwa* of the second marriage the texts are almost unanimous that the children of the first marriage get one-eighth and this rule has not been disputed.

I thus agree with the Lower Appellate Court on all points and dismiss the appeal with costs.

Civil Revision No. 176 of 1913. April 30th, 1915.

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

NGA TWE AND ONE *v.* NGA BA.

Mr. *Tha Gywe*—for Applicants.

Mr. *C. G. S. Pillay*—for Respondent.

Limitation—20.

Held,—That to save limitation the payment towards interest must be the payment of interest as such, *i.e.*, there must be an intention on the debtor's part that the money should be paid on account of interest and something to indicate that intention.

I.L.R. 31 All., 495.
U.B.R., 1892-96, II, 466.

The defence of the Defendants-Applicants to this suit on the ground of non-execution and non-receipt of consideration was merely foolish, and though the Lower Court's judgment barely complied with the provisions of the law, I think under the circumstances it may be accepted as complying. But on the question of limitation, both the Courts below appear to have gone wrong. The Lower Appellate Court considered the point and appears to have thought that as the payments made by the Defendants were appropriated to interest, limitation was thereby saved. But it was pointed out in *Maung Hlaing* v. *Maung Et Gyi* (1) that to save limitation the payment towards interest must be the payment of interest as such, in other words, there must be an intimation by the Defendant that the payment made by him is to be appropriated to interest. The point was clearly explained in *Muhammad Abdulla Khan* v. *Bank Instalment Company, Limited, In Liquidation* (2). It was there explained that the payment of interest will save limitation when the payment is made as such, that is to say, when the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate such an intention. The mere appropriation by the creditor of these payments to interest is not such an indication as would enable a Court to hold that payments were made towards interest as such by the debtor.

It is suggested for the Plaintiff-Respondent that the payments were made towards principal and that the endorsements may have been in the handwriting of the Defendant. But this was

(1) U.B.R., 1892-96. II, 466.
(2) I.L.R. XXXI, All., 495.

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not the Plaintiff's case. The amounts paid were apparently less than the interest due upon the dates of payment, and from the calculations given in the plaint, none of the principal has yet been paid.

I do not think it is necessary to remand the case to the Court of first instance inasmuch as there was an issue on the question whether the Defendants-Applicants made payments towards principal and interest. The promissory-note having been executed on the 23rd February 1910, and the suit filed on the 26th March 1913, the claim was barred by limitation, and the Plaintiff's suit must be dismissed with costs.

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

Civil Appeal No. 219 of 1912. May 10th, 1915.

MI SA U—APPELLANT *v.* NGA MEIK AND ONE—RESPONDENTS.

Mr. *S. Mukerjee*—for Appellant.

Mr. *F. C. Chatterjee*—for Respondents.

Civil Procedure, 47—Future *mesne* profits. *Resjudicata.*

In a suit for immoveable property and *mesne* profits future *mesne* profits were claimed but were not granted.

Held,—that notwithstanding that in the present Code the penultimate paragraph of section 244 of the Civil Procedure Code, 1882, had been omitted, the plaintiff was entitled to bring a fresh suit for *mesne* profits which accrued due after the institution of the fresh suit.

U.B.R., 1904-06, II, Civil Procedure, 50.
I.L.R. 21 Allahabad, 425.

In a previous suit the Plaintiff-Appellant sued the Defendants-Respondents and others for possession of some land of which she alleged the Defendants-Respondents were in wrongful possession. In her plaint she claimed *mesne* profits which had already accrued, *viz.*, for the years 1269 and 1270 and also future *mesne* profits.

She won her suit in the District Court and she was awarded *mesne* profits for the years 1269 and 1270, but the decree was silent as to future *mesne* profits.

She then brought the present suit for *mesne* profits for 1271 and 1272 which she estimated at Rs. 975. The only defence raised was that the suit was *res judicata*. On appeal the Lower Appellate Court held on the strength of a passage in Messrs. Amir Ali and Woodroffe's Civil Procedure Code that the suit was *res judicata* and dismissed it.

Had the Plaintiff not claimed future *mesne* profits in her previous suit there can be no doubt that under the Code of 1882 she would have been entitled to bring a separate suit for them, *Nga Lu Pe* v. *Nga Shwè Yun* (1), but the Lower Appellate

(1) U.B.R., 1904-06, II, Civil Procedure Code, 50.

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Court has held that the fact that she did claim them and the omission in the present Code of certain words which appeared in section 244 of the Code of 1882 make a difference. In my opinion they do not.

The following words appeared in section 244 of the Civil Procedure Code of 1882, *viz.*, " nothing in this section shall be deemed to bar a separate suit for *mesne* profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree." In the corresponding section, 47 of the present Code, these words have been omitted. In referring to this omission in their notes to Order XX, Rule 12, Messrs. Amir Ali and Woodroffe say " the penultimate section (*sic*) of section 244 of the last Code has not been re-enacted, and probably any claim made and not expressly granted in the decree will be deemed to have been refused within the meaning of Explanation V of section 11." It was on this passage that the Lower Appellate Court relied. As the Lower Appellate Court says the opinion of the learned authors is entitled to very great weight but not to the same weight as would have attached to it had it been delivered from the bench after the point had been argued before them.

Now it was not section 244 of the last Code that enabled a separate suit for *mesne* profits accruing due after institution of the suit to be brought. Section 244 (*b*) laid down that where such *mesne* profits *had been* granted bythe decree any matter respecting them should be dealt with by the executing Court, and not in a separate suit, and the words referred to laid down that, where such *mesne* profits had not been dealt with in the decree this section would not bar a separate suit, but they did not specifically sanction such a suit, they did not lay down that in spite of what appeared in other sections of the Code such a suit might be brought. Though these words implied that such a suit might be brought, therefore, the right to bring such a suit did not depend upon these words but existed independently.

The omission of these words, therefore, could not by itself effect any change. The words were no doubt omitted because clause (*b*) was omitted. If such a suit as the present one would not have been barred by section 13 of the Code of 1882, there appears to be no reason why it should be barred under the present Code, because Explanation 3 to section 13 of the Code of 1882 is identical with Explanation V of section 11 of the present Code.

The Allahabad High Court held under the old Code in *Ram Dayal* v. *Madan Mohun* (2) which was a suit for possession of immoveable property and for *mesne* profits both before and after suit, that the mere omission of the Court to adjudicate upon the claim for future *mesne* profits would not by reason of section 13, Explanation III, operate as a bar to a subsequent suit for *mesne* profits accruing due after the institution of the former suit. In

(2) I.L.R. XXI, Allahabad, 425.

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referring to this ruling, apparently with approval, Messrs. Amir Ali and Woodroffe quote the following passage from the judgment: "The words 'relief claimed' apply only to something which forms part of the 'claim' strictly so called, that is, something which the Plaintiff may claim as of right, something included in his cause of action and which if he establishes his cause of action the Court has no discretion to refuse. They do not include something which the Plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise even if the cause of action is fully established." These words express better than any words of mine could do my exact view, and I would only add a Court has a discretion to refuse to include future *mesne* profits in a decree for possession of immoveable property merely because they are not yet and never may be due, and that therefore to bar on this ground a fresh suit for such profits after they have become due would be to deny the Plaintiff his obvious rights.

The amount of *mesne* profits has not been denied.

In Civil Appeal 165 of 1911, however, it was held that the Plaintiff-Appellant was entitled to two-thirds only of the land. The decretal amount should therefore be Rs. 650.

The decree of the Lower Appellate Court is set aside and the Plaintiff-Appellant is granted a decree for Rs. 650 and proportionate costs in all Courts.

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

Civil Miscellaneous No. 44 of 1915. August 30th.

NGA SAN CHEIN *v.* SO OKARAM AND ONE.

Mr. *Dutt*—for Applicant.
Mr. *A. C. Mukerjee*—for Respondent.

Criminal Procedure—439, 476.
Civil Procedure—115.

Held.—That when a Civil Court takes action under section 476 of the Code of Criminal Procedure the High Court cannot interfere under section 439 of that Code in revision, as the power of revision is expressly confined to the records of Criminal Courts; but the High Court can interfere in the exercise of its Civil jurisdiction under the provisions of section 115 of the Code of Civil Procedure.

I.L.R. XL Cal.—477.
L.B.R., IV, 339.
U.B.R., 1907—09, I, Crl. Pro. 1.

The Applicant was sued by the Respondent in the District Court and a decree for Rs. 2,047-4-0 was obtained against him. The decree took the form of a preliminary mortgage decree and directed the Judgment-Debtor to pay the sum mentioned on or before the 24th November 1914, failing which the mortgaged property was to be sold. The mortgaged property apparently consisted of bullocks, buffaloes and ponies. The money was not paid and a notice was served upon the Judgment-Debtor

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requiring him to appear before the Court and produce the mortgaged property. The notice was served, but the Judgment-Debtor did not appear and did not produce the property. On the 26th April 1915 the Judge passed the following order:—"Notice returned duly served on Judgment-Debtor who has not complied with the orders of this Court, *i.e.*, not produced the mortgaged property. Mr. Mukerjee asks the Court to take necessary action under section 225 (*b*) of the Indian Penal Code; let this be done." A copy of this order was sent to the Eastern Subdivisional Magistrate who recorded the following order:—"Case received from District Judge's Court. As the case is under section 225 (*b*), Indian Penal Code, section 476, Criminal Procedure Code, does not apply. Complainant will have to be examined. Summon complainant. I think a clerk of the District Judge's Court who knows the facts of the case can be a complainant." The District Judge's Bench Clerk was then examined as complainant, and the Magistrate passed the following order:—"The case falls under section 174, Indian Penal Code, and sanction is required. Proceedings submitted to the District Judge for orders." Upon this the District Judge passed the following order:—"Under section 195, Code of Criminal Procedure, I sanction the prosecution under section 176 of the Indian Penal Code of Maung San Chein, Judgment-Debtor, in Case No. 161 of 1913 of the Court of the District Judge, Mandalay, in that he refused to obey the lawful order of a public servant, to wit, the District Judge, passed in Civil Execution No 13 of 1915 that he produced (sic) before Court certain property." Upon the receipt of this order, the Magistrate directed the issue of summons to the Accused and witnesses. The Accused has now come to this Court to revise this order.

The application was first filed as an application in revision upon the criminal side, but it has been amended and treated as a civil miscellaneous application. No Act or section is quoted in the application, but it appears to be intended that it should be treated as an application under section 195 (6) of the Code of Criminal Procedure, this Court being the High Court to which appeals from the District Court, Mandalay, lie within the meaning of section 195 (7) of the Code of Criminal Procedure.

The first objection taken by the Respondent is that the order of the District Judge was not a sanction within the meaning of section 195 of the Code of Criminal Procedure. Before recording the order of sanction under section 195 of the Code of Criminal Procedure referred to above, the District Judge recorded an explanation of his action which is not very clear, but in which it would appear that he considered that the complaint by his clerk was not a complaint of a public servant within the meaning of section 195; it was a complaint which required sanction. As was pointed out in *Nga Paw U* v. *K.E.* [1] a sanction implies that some one wishes to prosecute. The Code does not contemplate a Court

[1] U.B.R., 1907—09, I, Crl. Pro., 1.

or public servant giving sanction where no application for sanction has been made. There appears to have been a confusion of ideas. If the clerk was complaining as a private individual, before his complaint was received or entertained by the Magistrate, he should have applied to the District Judge for and obtained sanction. It appears probable that the Judge intended to take action under section 476 of the Code of Criminal Procedure. If this is the case, it is argued for the Respondent that the application should be on the criminal side for revision under section 439 of the Code of Criminal Procedure.

There has been a considerable diversity of opinion as to the power of a Criminal Court to interfere in revision with the proceedings of a Civil Court which takes action under section 476 of the Code of Criminal Procedure. It was held in *San Gaing* v. *K.-E.*[1] that a High Court could not interfere under section 439 of the Code of Criminal Procedure in revision with the proceedings of a Civil Court taken under section 476 of the Code of Criminal Procedure, on the ground that section 439 must be read with section 435 of the Code of Criminal Procedure, and that the power of revision is expressly confined to the records of inferior criminal Courts. The matter has been examined at length in the recent Full Bench Case of *Emperor* v. *Har Prasad Das*,[2] in which the same view was taken by the Calcutta High Court after an examination of all the Indian authorities. It appears to me that the view there taken is correct, and if the order of the District Judge was an order passed under the provisions of section 476 of the Code of Criminal Procedure, it can only be interfered with by the High Court in the exercise of its civil jurisdiction under the provisions of section 115 of the Code of Civil Procedure. Whether therefore the District Judge was acting under section 195 or 476 of the Code of Criminal Procedure, this Court has power to interfere upon the civil side, though, if the District Judge was acting under the provisions of section 476 of the Code of Criminal Procedure, the power of interference is limited by the terms of section 115 of the Code of Civil Procedure.

I think it is clear in the present case that both under section 115 of the Code of Civil Procedure and under section 195 of the Code of Criminal Procedure, this Court would be justified in interfering to set aside the order of the District Judge. It is clear that in directing action to be taken under section 225 (*b*) of the Indian Penal Code, the District Judge acted without due consideration since the terms of that section could not possibly be applied to anything which it is alleged or suggested that the Judgment-Debtor did. Similarly, in ordering or sanctioning the prosecution of the Judgment-Debtor under section 176 of the Indian Penal Code, I think the District Judge has acted in the exercise of its jurisdiction with material irregularity inasmuch as

[1] L.B.R., Vol. IV, 339.
[2] I.L.R., XL. Cal., 477.

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the provisions of section 176 also obviously do not apply to the offence, if any, which was committed by the Judgment-Debtor. It is possible that section 174 of the Indian Penal Code applies, and it is also true, as has been urged by the Respondent, that section 195 (5) of the Code of Criminal Procedure authorizes a Court which takes cognizance of a case to frame a charge of any offence referred to in that section when sanction is given in respect of any offence referred to in that section. This authority however does not relieve the sanctioning Court of the necessity to exercise due care and consideration before it orders a criminal prosecution. It does not appear that it was the failure of the Judgment-Debtor to appear in Court in person which the District Judge considered should be punished, but his failure to produce the property that he was ordered to produce, and neither section 174 nor section 176 would apply to such failure. It is necessary that the District Judge should have a clear idea in his own mind as to what it is for which he considers the Judgment-Debtor should be prosecuted, and that he should express that idea in a comprehensible manner. No notice was issued to the Judgment-Debtor to show cause why he should not be prosecuted. It is true that sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice. But notice should ordinarily be issued, and in a case of non-attendance where a person may be prevented from attending by illness or any other sufficient cause, it appears to be clearly desirable that notice should issue.

The order of the District Judge sanctioning or directing the prosecution of the Judgment-Debtor is therefore set aside.

Criminal Revision No. 261 of 1915. July 6th.

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

NGA PO HMI *v.* KING-EMPEROR.

Mr. *D. Dutt*—for Applicant.

Criminal Procedure—110 (*a*), (*f*).

Held—that an order under section 110, Code of Criminal Procedure, cannot be made against an accused person who has been imprisoned for failure to furnish security under that section until he has had time after his release either to retrieve his character or to show that he has no intention of doing so.

I.L.R. 31 Cal., 783.
I. L. R. 28 All., 306.

There was no evidence on the record to justify the order requiring the Applicant to furnish security. The material part of the Subdivisional Magistrate's order is as follows:—"It is about eight or nine months since the accused has come out of jail, and his conduct during his release has not been beyond suspicion. It is generally believed that the accused was implicated in the robbery and murder of Ma Pyu which took place quite recently." It would appear that proceedings were really taken against the Applicant because he was suspected of

complicity in this murder, though there was no evidence to justify his being charged with it. The witnesses repeat one after another, "since the release of the accused from jail, I have not heard anything against him except the case of Ma Pyu."

It has frequently been laid down that an order under section 110 of the Code of Criminal Procedure cannot be made against an accused person who has been imprisoned for failure to furnish security under that section until he has had time after his release either to retrieve his character or to show that he has no intention of doing so—see, for instance, *Jumat Ali* v. *Emperor* (1) and *Emperor* v. *Ramjit* (2). It is obvious that if this were not the case a person who had once been imprisoned for failure to furnish security might be kept in jail for the rest of his natural life upon evidence that he bore a bad character before the first order against him was made.

In other respects, moreover, the Magistrate has failed to observe the instructions contained in the rulings of this Court. The evidence of a number of different *thugyis*, none of them belonging to the Applicant's village, was not sufficient alone to justify an order, nor should the irrelevant evidence as to the association of the Applicant with bad characters have been admitted.

The statement in the District Magistrate's order that "at this time it is highly desirable that he should be placed on security" is not understood. The law must be observed so long as it is the law. The order for security should not have been restricted to sureties who are inhabitants of one village.

The order is set aside, and the bail bond is cancelled.

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

Civil Appeal No. 466 of 1915. 16th August.

MI MAN AND ONE *v.* MAUNG GYI AND THREE OTHERS.

Maung Su—for Appellants.

Mr. A. C. Mukerjee—for Respondents.

Buddhist Law—Adoption.

Held—that an adoption made shortly before death is not opposed to Buddhist law.

On the death of Maung Hmyin, the Appellant, Ma Man, applied for letters of administration. Her great-grandfather was Maung Hmyin's grandfather's brother. As her mother, Ma Shan, was living she had no *locus standi*. Ma Shan was added as a joint Applicant, but Ma Man's name was not struck off as it should have been.

The application was contested by the Respondents on behalf of their sons, Maung Gyi and Maung Ngè, who they said were adopted by Maung Hmyin shortly before his death.

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(1) I.L.R. XXXI Cal., 783. (2) I.L.R. XXVIII All., 306.

MI MAN v. MAUNG GYI.

The District Judge found the adoption proved and dismissed the application.

The adoption was effected by a document a month before Maung Hmyin's death. The Appellants have appealed on the grounds that apart from the document there was no evidence of the taking of the children with a view to their inheriting, that strict proof should be required, and that the document relied on was invalid.

I think that proof of the execution of the document wherein it was recited that the children had been brought up by Maung Hmyin's first wife, Ma Saing, and that he wished to adopt them in order that they might be his heirs, was all that was required to prove the adoption.

On the second point I would say that the document was executed in the presence of the Ward Elder and two other witnesses against whose credit nothing has been suggested.

On the last point it has been urged, first that Maung Hmyin was under the influence of Maung Law, the natural father of the children, and secondly that the deed of adoption was on the analogy of death-bed gifts invalid as tending to defeat Maung Hmyin's personal law.

Maung Hmyin and Maung Law were no doubt very friendly; the latter lived in the former's compound and cooked his meals for him, but there is not the slightest reason for supposing that Maung Law was in a position to dominate Maung Hmyin's will.

The personal law which it is said the adoption tended to defeat is the supposed rule that a Burman Buddhist may not dispose of any part of his estate by will. It has been held for the last 35 years that Burman Buddhists have not this right, but though the *Dhammathats* lay down that death-bed gifts are invalid, I do not know of any express rule forbidding Burman Buddhists to dispose of their estate by will, and as there are some texts which directly declare that such disposal must be given effect to, it may be that the question will some day have to be reopened.

But it is unnecessary to reopen it now because, assuming that Burman Buddhists have no testamentary powers, that would not make the present adoption invalid; the adoption of a child though it no doubt affects prejudicially the expectations of the prospective heirs cannot on that account be considered invalid any more than the marrying of a second wife could be. Moreover the adoption of a child with a view to his inheriting is recognized, and there appear to be no restrictions whatever as to persons or occasions. I know of no texts forbidding a so-called "death-bed" adoption, and therefore such an adoption must be held to be valid. Moreover, there cannot be the same objection to such an adoption as there is to a "death-bed" gift from the standpoint of Buddhist law (assuming that it is averse to testamentary adoption), because a death-bed gift would enable a person to

disinherit his own children in favour of a stranger, whereas a death-bed adoption if there were natural children would merely have the effect of diminishing their portion.

Finally I would say that the evidence does not show that Maung Hmyin was expecting death at the time he executed the the deed of adoption. He was unwell but not apparently seriously ill to his knowledge; he got better and then suddenly got fever, of which he died. It is not clear that the indisposition from which he was suffering at the time of the adoption had anything to do with his death.

The appeal is dismissed with costs.

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

Civil 2nd Appeal 328 of 1915. 3rd September.

MI HLA YIN *v.* MI HMAN AND SIX OTHERS.

Mr *R. K. Banerjee*—for Appellant.

Mr. *S. Mukerjee*—for Respondents.

Mortgage.

Explains what is meant by the transfer of a mortgage.
U.B.R., 1897—1901, II, 473.
U.B.R., 1904—06, II, Limitation, 9.

The Plaintiff-Respondent, Ma Hman, and two others sued to redeem some land which they alleged had been mortgaged by Maung Paing, the deceased husband of Ma Hman, to Maung Shwe Maung and had been redeemed from his heirs after his and Maung Paing's death by the Defendant-Appellant, Ma Hla Yin.

Ma Hla Yin is the daughter of Ma Nyet Thu, daughter of Maung Paing by his first wife. She therefore is entitled to a share of the land and thus had a right under section 91, Transfer of Property Act, to redeem it. The Township Judge accordingly held that the suit for redemption must fail and that the Plaintiff's remedy was to sue for partition.

On appeal the learned Additional Judge of the Lower Appellate Court held that by Mi Hla Yin's redemption, the mortgage had been transferred and not extinguished, and that the Plaintiffs therefore had a right to redeem. He cited *Maung Po Myin* v. *Ma Daw and Maung Shwe Lok* [1] as his authority, but it apparently did not strike him to consider why one heir should have a better right to possession than another. He has failed to understand the ruling he cited and has gone astray.

In Maung Po Myin's case the persons who redeemed the land were the son and daughter-in-law or daughter and son-in-law of the mortgagors, and they redeemed during the life-time of the mortgagors. They were not entitled to do this in their own right, and they did it with the permission of the mortgagors and

(1) II, U.B.R., 1897—1901, page 473.

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not in opposition to them, and therefore the mortgage was transferred and not extinguished.

In the present case Mi Hla Yin had a right to redeem, and she redeemed in exercise of that right, and therefore the mortgage was extinguished.

When a mortgage is redeemed by the mortgagor or by some one having a right under section 91, Transfer of Property Act, to redeem, the original contract is completed and all the mortgagee's rights created under it cease. The contract of mortgage is no longer in existence and the mortgage is said to be extinguished.

The same thing happens when the mortgagor's rights are invaded and some one having no right to redeem redeems in opposition to the mortgagor *Maung Kyaw Dun* v. *Mi Min Sin*[1]. The mortgage is then extinguished because the mortgagee recognizes the title of the person redeeming and allows redemption in view of the terms of the original contract, he does not give up his rights of his own free will, but because he thinks that by the terms of his contract he is legally bound to do so. The contract is therefore at an end and the rights created by it cease.

But a mortgagee may either sell or mortgage his rights under the contract. When he mortgages them the transaction is a sub-mortgage and the mortgagee may redeem his right so long as the mortgagor does not exercise his paramount right of redemption. When the mortgagee sells his rights those rights do not cease to exist; they become the rights of the purchaser; the original contract is still in force just as in the case of the negotiation of a negotiable instrument. The mortgage is then said to be transferred. This is what happens when a person having no right to insist on redemption redeems either with the permission of the mortgagor or without such permission but recognizing the mortgagor's title. He merely purchases the mortgagee's rights.

In the present case Mi Hla Yin redeemed in her own right and the other Defendants could not have legally resisted redemption by her. The original contract therefore was at an end and the mortgage was extinguished and the suit was not maintainable.

It has been urged that the suit instead of being dismissed should be turned into a partition suit.

It is not improbable that such a suit would involve fresh parties and the bringing into hotch potch of other property, and the rule usually followed is not to allow an amendment of the plaint of such a character at this stage, but over and above this objection there is a further one that is insuperable. The land is now under mortgage to a stranger who is not a party to the suit. The land cannot be partitioned until that mortgage has been redeemed. The Plaintiff's remedy is to sue Maung Than for redemption.

The decree of the Lower Appellate Court is set aside and the suit is dismissed with costs.

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(1) II, U.B.R., 1904—06, Limitation, 9.

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

Criminal Revision No. 503 of 1915. 5th August.

NGA KYAW ZAN *v.* NGA KYI DAN.

Mr. Mitter—for Applicant.
Mr. Banerjee—for Respondent.

Criminal Procedure—195, 476, 537.

The term "sanction" within the meaning of section 195, Code of Criminal Procedure, implies an application for sanction and not a mere vague and general order.

I.L.R. 18 All. 213.

U.B.R., 1907—09, I, Cri. Pro., 1.

The Applicant has been convicted under section 182 of the Indian Penal Code, on a charge of giving false information to a public servant intending to injure another public servant.

Upon the merits there appear to be no grounds for interference. The Magistrate found, and I think was entitled to find, that the only object of the Applicant was to injure the Village Headman against whom he made a complaint and that the complaint was false. The complaint should of course have been filed in the proceedings. The whole proceedings, however, have been referred to as an exhibit though they are not filed as such.

An objection is taken on the ground that there was no valid sanction to the prosecution. This appears to have been the case. The complaint of the Applicant was originally referred to the Subdivisional Officer to be enquired into by him, and upon his report the Deputy Commissioner passed the following order:—"The complaint is summarily dismissed. The Thugyi is at liberty to prosecute the Complainant if he so wishes." This, if it meant anything, was an intimation to the Thugyi that if he applied for sanction it would be granted to him. It was certainly not a sanction within the meaning of section 195 of the Code of Criminal Procedure. Such a sanction implies an application for sanction and not a mere general and vague order—in the matter of a petition of *Banarsi Das*[1] In the case of *Nga Paw U* v. *K.-E.*[2] a similar procedure appears to have been followed, and it was there remarked that the Deputy Commissioner's so-called sanction to the prosecution of Nga Lat appears to have been really a complaint. The Deputy Commissioner's sanction was not in question in those proceedings, but I do not think that it is possible to treat it as a complaint by which presumably is meant an order within the meaning of section 476 of the Code of Criminal Procedure. That section while it authorises the sending of a case for trial by a Civil, Criminal or Revenue Court of its own motion, gives no authority to a Deputy Commissioner. The proceedings of the Subdivisional Officer in his enquiry were not a judicial proceeding, nor did they

[1] I.L.R. 18 All., 213. [2] U.B.R., 1907—09, I Cri. Pro., 1.

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come before the Deputy Commissioner in the course of a judicial proceeding. There was therefore no valid sanction.

In an order dated 22nd January 1915, a copy of which is filed in the diary of these criminal proceedings, the Deputy Commissioner as District Magistrate has referred to the case of *Nga Paw U* v. *K.-E.* quoted above, and has extracted from it the conclusion that a public servant is not obliged to obtain sanction to prosecute. This order was presumably recorded in haste without due consideration, for it is obvious that the public servant referred to in section 182 of the Indian Penal Code, with which alone we are concerned, is the public servant to whom the information is given and not the public servant whom it is sought to injure, and it is the former whose sanction is required by section 195 (1) (*a*) of the Code of Criminal Procedure.

Apparently the irregularity was noticed early in the proceedings, and it was open to the Applicant to bring it to notice and apply for orders setting the sanction aside.

I am of opinion that no failure of justice has occurred within the meaning of section 537 of the Code of Criminal Procedure, and it is unnecessary to interfere.

The application is therefore dismissed. The applicant must now be committed to prison to undergo the unexpired portion of his sentence which, under the circumstances, was not severe.

Civil Appeal No. 381 *of* 1915. *November 4th.*

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

NGA SAN BAW AND 5 OTHERS *v.* NGA LU E AND ONE.

Mr. *J. C. Chatterjee*—for Appellants.

Mr. *D. Dutt*—for Respondents.

Civil Procedure—Order 41, Rule 31.

Held,—that the provisions of Order XLI, Rule 31, Civil Procedure Code, were not applicable in their entirety to an appeal dismissed under Order XLI, Rule 11, but that the Judge of the Appellate Court should at least show that he understood the case and had considered the grounds of appeal, and that in cases involving a decision of a question of fact he should read the record and write a full judgment.

I.L.R., 25 Cal., 97.
I.L.R., 30 All., 319.
I.L.R., 36 Bom., 116.
I.L.R., 37 Bom., 610.
13 C.W.N., 1631.

The Plaintiffs-Respondents sued for Rs. 148 compensation for damage caused to their plantain trees by a dam raised by the Defendants-Applicants.

The Township Judge granted Plaintiffs-Respondents a decree for Rs. 111 and costs.

The Defendants-Applicants appealed and the learned District Judge after hearing Defendants-Applicants' advocate dismissed the appeal without giving notice to the Plaintiffs-Respondents or sending for the record.

Nga San Bin v. Nga Lu E.

The Defendants-Applicants have now applied for revision. The application will be taken as a memorandum of appeal under section 100, Civil Procedure Code, because an appeal lay as the suit was not cognizable by a Court of Small Causes as it fell under section 35 (i), Provincial Small Cause Courts Act.

The District Judge's judgment consisted of the four words, "I decline to interfere."

The question whether a Judge who dismisses an appeal under the Civil Procedure Code, summarily, is bound to write a judgment or not has been considered several times by the High Courts of India and the decisions on the point are not unanimous.

It was held in *Rani Deha* v. *Brojo Nath Saikia*[1] that an Appellate Court which dismissed an appeal under section 551 of the Civil Procedure Code of 1882, which corresponded with Order XLI, Rule II, of the present Code was bound to write a judgment that conformed to section 574 (Order XLI, Rule 31). In *Sami Hasan* v. *Piran*,[2] the Allahabad High Court held that the provisions of section 574 of the Code of 1882 were not applicable in their entirety to the case of an appeal dismissed under section 551 of that Code. In *Pachi Dassi* v. *Bala Das*,[3] the learned Judges who heard the appeal differed as to whether section 574 of the Code of 1882 applied to an appeal dismissed under section 551 or not. In *Tanaji Dagde* v. *Shankar Sakharam*,[4] which is apparently the latest published decision on the point, it was held that in dismissing an appeal under Order XLI, Rule 11, it was not obligatory on the Appellate Court to write a judgment.

I think the best opinion is that expressed by the Allahabad High Court, *viz.*, that the provisions of section 574, Civil Procedure Code of 1882 (Order XLI, Rule 31, of the present Code), are not applicable in their entirety to the dismissal of an appeal under section 551 (Order XLI, Rule 11, of the present Code) and that every case must stand on its own merits. I think it is clear that Order XLI, Rule 11, provides for a special case in which an appeal may be dismissed analogous to a dismissal for default and that Rule 11 stands by itself and is not governed by any other rule; but on the other hand, I am strongly of opinion that the discretion given by Rule 11 is not an arbitrary discretion but a judicial discretion. If the words "I decline to interfere" were held to be a sufficient judgment in all cases, and it could not be urged as a ground of second appeal that they were not, there would be a danger that lower Appellate Courts might shirk their duties and that the High Court would be practically turned into a Court of First

[1] I.L.R., 25 Cal., 97.
[2] I.L.R., 30 All., 319.
[3] 13 C.W.N., 1631.
[4] I.L.R., 36 Bom., 116.

(4) This case has been superseded by *Hanmant* v. *Annanji Hanmanta*, 37, Bom., p. 610, in which it was held that the rules issued by the Bombay High Court required a judgment to be written in every case in which an appeal was dismissed summarily.

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Appeal from Township and Subdivisional Courts, with the result that the work of that Court would be greatly increased and litigants would be deprived of the right given to them by the Civil Procedure Code and would have to pay court fees twice over. The whole scheme of appeals would be altered and it would be better to eliminate the Court of First Appeal altogether.

I can imagine a case in which the judgment of the Court of first instance was all that a judgment should be and in which the grounds of appeal were obviously untenable. In such a case it would be unnecessary for the Appellate Court to write a judgment. Many jail appeals in criminal cases are of this nature. But the present case was quite different. Suits for compensation for damage caused by obstructions of water-courses are by no means always simple cases. I think the District Judge was bound to give reasons for dismissing the appeal because the reasons were not obvious. He should have at least shown that he understood the case and that he had considered the grounds of appeal. One of the grounds of appeal was that the damage was caused not by the Defendants-Applicants' dam but by *vis major*. If the District Judge had sent for the record he would have seen that this defence was raised in the written statement, where it was alleged that the Plaintiffs' land was always inundated when there was heavy rain, dam or no dam, and that no issue had been framed on the point. The Defendants-Applicants might have had no right to obstruct the watercourse but their interference with a public right would not give the Plaintiffs-Respondents a right of suit. They had to prove special damage or trespass. The suit was not properly tried and the words "I decline to interfere" do not meet the case at all.

When the points urged on appeal are points of law only and they have all been considered by the first Court, then if an Appellate Court dismissed an appeal in the words used by the District Judge, the inference would be that he took the same view of the law as the Judge of the Court of first instance and adopted his reasons. But when a question of fact is involved the matter is different. In an appeal under section 100, Civil Procedure Code, concurrent findings of facts by the Courts below if based on proper evidence are binding on the 2nd Appellate Court, but of what value can a finding of fact by a Judge of a Lower Appellate Court be when he has not read the evidence? I have disposed of a very large number of criminal appeals and I have dismissed a great many of them summarily, but I have dismissed very few indeed without reading the record. In Civil Appeals in which findings of fact are challenged the danger of accepting the findings of the Court of first instance is much greater than in criminal cases. It is rare for even an inexperienced Magistrate to convict without any evidence, but cases constantly come before this Court in which a Township Judge has deprived a Defendant of land, of which he may have been in possession for 50 years,

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without a particle of evidence of the Plaintiff's title. I believe it is the practice of this Court to admit an appeal if one of the grounds is that the decision is against the weight of evidence.

I am of opinion that the District Judge committed an error of procedure in omitting to give reasons for his decision and that error may possibly have affected the decision on the merits.

The decree of the Lower Appellate Court is reversed and the case is remanded to that Court in order that the appeal may be disposed of according to law.

The cost of this appeal (the application is turned into a memorandum of appeal) will follow the final result.

The Defendants-Appellants will be given a certificate under section 13, Court Fees Act.

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

Criminal Revision No. 786 of 1915. November 30th.

JAGGU *v.* PALA.

Mr. *R. G. Aiyangar*—for Applicant.

Mr. *L. K. Mitter*—for Respondent.

Criminal Procedure—195.

Penal Code—182—211.

Held,—that where a charge has been made to the Police and on investigation found to be false, if the same charge is repeated to a Magistrate by a complaint upon which he takes action, the person aggrieved cannot then ignore the Magistrate's proceedings and institute a prosecution in respect of the charge made to the Police.

I U.B.R., 1910—1913, 134.
VI L.B.R., 50.
I.L.R., 14 Cal., 707.
Criminal Revision No. 573 of 1914.

On the 27th of March last Applicant, Jaggu, made a formal complaint at the police station charging the Respondent, Pala, and another with theft. The Police came to the conclusion after investigation that the charge was false. On the 7th of April the complainant applied to the Senior Magistrate stating the facts and asking that the Police should be directed to send the case for trial. This application was transferred to the Eastern Subdivisional Magistrate for disposal, and in that Magistrate's Regular Case No. 127 of 1915, the Magistrate, after examining the applicant, sent for the Police papers and on the 19th of April recorded an order dismissing the complaint on the ground that the Police papers showed that it was false. On the 26th April Jaggu again filed another application before the Senior Magistrate stating the facts at length and repeating the charge. This was again sent to the Eastern Subdivisional Magistrate, who again sent for the Police papers and on the 3rd of May recorded the following order: "I have read through the Police papers. It is a false case and no further action is necessary. Inform petitioner." On the 16th of April Pala, the present Respondent, and one of the two persons charged with theft filed a complaint

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before the Senior Magistrate charging the Applicant, Jaggu, with having committed an offence under section 211, Indian Penal Code, in respect of his complaint to the Police which complaint was found by the Police to be false. This was transferred also to the Eastern Subdivisional Magistrate for disposal, and on the 29th April in his Regular Case No. 141 of 1915 the Magistrate examined Pala who filed a copy of the First Information to the Police, and directed a warrant to issue for the arrest of Jaggu. Jaggu surrendered in Court and was released on bail. He applied that the proceedings might be stayed to enable him to apply to the Sessions Judge for an order directing the Magistrate to enquire into his charge of theft. This was done. By order of the Sessions Judge the complaint of Jaggu was enquired into by the Headquarters Magistrate in his Regular Case No. 127 of 1915, Chetu and Pala were charged and on the 26th of August were acquitted. On the 27th August the Eastern Subdivisional Magistrate then took up the Respondent Pala's charge under section 211, Indian Penal Code. For Jaggu it was argued that the Magistrate had no jurisdiction to entertain the complaint for want of sanction under section 195, Code of Criminal Procedure. The Magistrate, on the authority of *Mi Ngue* v. *Mi Chit*,[1] held that no sanction was necessary and against this view of the matter Jaggu comes to this Court in Revision.

I may add here that on the 14th of May the Police brought a charge under section 182, Indian Penal Code, against the Applicant, Jaggu, in respect of the same information. Summons was issued to the accused but proceedings have been stayed, first to await the result of the trial of the charge of theft, and now to await the orders of this Court. These proceedings are Criminal Regular 143 of 1915 of the Eastern Subdivisional Magistrate.

The last mentioned case may be dealt with first. It is clear that the charge under section 182 and that under section 211, Indian Penal Code, are in respect of the same offence, namely, the false information or the false complaint to the Police. The applicant cannot be tried twice for the same offence and, as was pointed out in *Mi Ngwe's* case referred to above, the ordinary rule must be followed, and the charge under section 182 must be abandoned in favour of the more serious charge under section 211, Indian Penal Code. The learned advocate for the applicant urges that the complaint to the Police which forms the subject of the present proceedings was repeated before the Magistrate, that this was done before any application to prosecute the applicant was made and that on the authority of *Po Hlaing* v. *Ba E*,[2] where magisterial proceedings have followed Police proceedings in the same matter, and the complaint under section 211, Indian Penal Code, is not made until after magisterial proceedings have begun, such complaint must be sanctioned as

[1] I. U.B.R. 1910—13, p. 134.
[2] VI. L.B.R. p. 50.

required by section 195, Code of Criminal Procedure, before a Court can take cognisance of it. On the other hand the Respondent urges, on the authority of *Mi Ngwe* v. *Mi Chit*, that a man may make a false charge on more than one occasion and if he does so he is responsible for what he did on each occasion. In this Court's Criminal Revision No. 573 of 1914, *Khoda Bux* v. *Bahal Singh*, my learned predecessor held that when the complaint under section 211, Indian Penal Code, in respect of a charge brought to the Police was presented before the charge was repeated in Court, the Magistrate was bound to enquire into it and could not allow it to be withdrawn and that in such circumstances no sanction was necessary. If this view is correct it would appear possible that the somewhat anomalous position might be arrived at of **A** being convicted under section 211, Indian Penal Code, for having charged **B** falsely with theft before the Police, while B is also convicted of the theft upon **A** repeating his charge to the Magistrate. There appears to be no reason, it is true, why a person who deliberately repeats a false charge should not be punished for each repetition, but it appears to me that a person who asks a Magistrate to investigate himself a charge which the Police have found to be false ought not to be exposed to a double prosecution on that account. In the present case, however, it is not necessary to decide that point. There can, I think, be no doubt that in asking the Magistrate on the 6th April to order the Police to send the case up for trial, the Applicant, Jaggu, was making a complaint to the Magistrate, and in examining him upon oath the Magistrate was treating the application as a complaint (see also *Q.E.* v. *Ram Lall*.[3]) The first complaint under section 211 was made on the 16th April, and I am of opinion that the view expressed in *Po Hlaing* v. *Ba E* is correct, that in such a case the provisions of section 195, Code of Criminal Procedure, would to a large extent be rendered nugatory if the person complaining of a false prosecution were permitted entirely to ignore the proceedings before the Magistrate.

Where a charge has been made to the Police and on investigation found to be false, if the same charge is repeated to a Magistrate by a complaint upon which he takes action, I am of opinion that a person aggrieved cannot then ignore the Magistrate's proceedings and institute a prosecution in respect of the charge made to the Police. In this view of the case the application is allowed, and as the Magistrate has taken cognizance of the complaint without jurisdiction his proceedings must be set aside.

[3] I.L.R., 14 Cal., p. 707.

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

NGA NYO *v.* MI TE.

Mr. S. Mukerjee—for Appellant.
Mr. C. G. S. Pillay—for Respondent.

Civil 2nd Appeal No. 25 of 1915. October 8th.

Defamation—Damages for—

The true test of the right to maintain a suit for damages in consequence of defamation should be, whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured, and to inflict on him mental pain consequent on such belief.

B.L.T., VII, 253.
I.L.R., 28 Calcutta, 452.
I.L.R., 8 Madras, 175.
I.L.R., 26 Calcutta, 653.

There are concurrent findings of fact on the two issues that the parties had been divorced and that the words attributed to the Defendant were not true. There appears to be no reason to interfere with either of these findings. It matters little whether the parties had been divorced or not, since upon the finding that the story repeated by the Defendant was not true it was obviously malicious and not privileged. No husband is entitled to spread an untrue story that he has seen his wife sleeping with another man, and if the parties were no longer husband and wife his intention in spreading this story was still more clearly to do her an injury.

The Appellant urges that the Plaintiff-Respondent was not entitled to recover damages, except upon proof of special damage. This point was referred to in *Mi Mwe Hmon* v. *Mi Pwa Su*[1]. It was there stated that "according to the common law of England slanderous words imputing unchastity to a woman are not actionable without proving special damage. This rule however has not been imported into the law in India." This statement does not appear to be quite accurate. There is a conflict of authority, but the view that an action for slander will not lie, except in certain specified cases, without proof of special damage has been taken in a number of cases of which the latest appears to be that of *Bhooni Money Dossee* v. *Natobar Biswas*[2]. In that case a very large number of decisions were referred to and examined,[1] and the view was taken that the English Common Law should be followed. The material portion of the judgment was as follows:—"Where it is proposed to depart from the rules of English law which have been introduced into this country, it must be shown that those rules, if adhered to in this country, will work an injustice or a hardship. Here no injustice is worked by an adherence to those rules, because in cases where the person aggrieved is unable to prove that he has suffered actual damage, he can call in the criminal law to punish the

[1] B.L.T., VII, 253. [2] I.L.R. 28 Cal., 452.

wrong doer. *Primâ facie* there is nothing repugnant to justice, equity and good conscience in calling on a person, who is claiming pecuniary compensation for damage caused by a wrongful act, to prove that some damage has been caused to him by the act of which he complains."

The most important case upon the other side seems to be the case of *Parvatti* v. *Manar*[1]. It was there held that "beyond the difficulty of estimating mental pain, there is no greater reason for refusing a man compensation for a wrong resulting in such pain than for refusing compensation for a wrong resulting in other physical suffering or in pecuniary loss, and that the true test of the right to maintain the suit should be, whether the defamatory expressions were used at a time, and under such circumstances, as to induce in the person defamed reasonable apprehension that his reputation had been injured, and to inflict on him the pain consequent on such a belief;" and it was laid down there that where no pecuniary injury was shown while the principle of vindictive damages could not be admitted, a distinction should be drawn between cases where the slanderer acts from mere carelessness or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation or influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charges made in the former case, in the latter he is entitled to full compensation for the pain inflicted to him.

The difference between the two Courts appears to be attributable to the fact that in the Calcutta case already quoted it was held by Harington J. that the common law of England introduced into Calcutta by the Charter of 1726 was applicable unless it could be shown to be obviously unsuitable and likely to work an injustice or a hardship; while in the Madras case it was held that the common law of England was merely a guide, that though it was the practice of Judges in British India to regard the decisions of the English Courts with the highest respect, they were not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts.

There is no suggestion that the common law of England has been introduced into Upper Burma, and the latter view would appear to be the view which has been adopted here. It appears that the English law in the matter is extremely artificial. It has been examined in *Parvatti* v. *Manar* quoted above, and at greater length in a dissenting judgment by Ghose J. in *Girish Chunder Mitter* v. *Jatadhari Sadu Khan*[2]. The distinction between written and spoken slanders appears to have had its origin in part at least in the practice of the Ecclesiastical Courts in England, and it dates also from a time when the influence and permanence of the written word were probably greater beyond all comparison

[1] I.L.R., 8 Mad., 175.

[2] I.L.R., 26 Cal., 653.

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than in these days of a cheap and ephemeral press and widespread education. But even to the distinction between written and spoken slanders, there were certain well recognized exceptions in which an action was maintainable without proof of special damage, though the slander was not in writing or printed. These exceptions, which apply to cases where the slander imputed that the slanderer was guilty of a crime, or that he was suffering from certain diseases, or was guilty of misconduct or incompetence in the way of his business, were apparently supported on the ground that in such cases it was possible to place a money value upon the injury caused by the slanderer. In other cases it was held that the law could not value mental pain or anxiety. But it is pointed out in Pollock's Law of Torts that the view taken by the Courts in this particular was not merely narrow and calculated to cause injustice, but was inconsistent with the view taken of the power of Courts in other circumstances. The following passage occurs at page 239 of the 7th Edition: "The Courts might without violence have presumed that a man's reputation for courage, honour and truthfulness, a woman's for chastity and modest conduct, was something of which the loss would naturally lead to damage in any lawful walk of life." And at page 240: "The law went wrong from the beginning in making the damage and not the insult the cause of action; and this seems the stranger when we have seen that with regard to assault a sounder principle is well established." It certainly appears difficult to understand why a person should be entitled to recover damages against a defendant who has thrown water at him even if the water did not touch him, or has spat in his face causing him no material injury, while a woman may not recover damages though she is charged with unchastity, unless she can prove actual material damage. The Slander of Women's Act, 1891, appears to have been passed with the deliberate intention of rectifying an injustice sanctioned by the common law, and the effect of denying a Plaintiff's right to sue for damages where she has been falsely charged with unchastity would appear to be to place her in the position which she would have occupied in England before the passing of the Act, and to deny her the remedy which the passage of that Act would appear to show was demanded by justice, equity and good conscience.

I am of opinion therefore that the effect of following the old common law rule would not be consonant with the demands of justice, equity and good conscience, and that the present suit was maintainable.

Objection is taken to the amount of damages, but of this the Judge of fact is the arbiter. It has not been shown that the amount allowed was improper or unreasonable, and it is clear that the Judge considered the nature of the slander and the position of the parties.

I see no reason to interfere and the appeal is dismissed with costs.

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

Civil Appeal No. 89 of 1915. October 7th.

NGA BA SIN *v.* NGA PO HAN.

Mr. S. Mukerjee—for Appellant.
Mr. C.G. S. Pillay—for Respondent.

Letters of administration—objection by persons claiming as adopted children—Probate and Administration Act, section 23.

Held,—that when an objection to the grant of letters of administration is raised on the ground that the objector is an adopted son of the deceased, and the objector, if he proves the adoption, totally excludes the Applicant from the inheritance, then the question of the adoption must be gone into and decided.

5 L.B.R., 78.
Civil Appeal No. 266 of 1910.
Civil Appeal No. 270 of 1910.

The Respondent applied for letters-of-administration to the estate of his aunt, Ma Pa U. The application was opposed by the Appellant on behalf of the minor, Po Thit, on the ground that Po Thit was Ma Pa U's adopted son and that therefore the Respondent was not entitled to any share of the estate, and also by one Ma Saw I who claimed to be Ma Pa U's adopted daughter.

The learned Additional Judge held on the authority of *Ma Tok* v. *Ma Thi* [1] that it was unnecessary to go into the question of these adoptions and granted letters to the Respondent. The above ruling has been misunderstood more than once.

When the Applicant is entitled to a share of the estate, whether the caveator establishes his adoption or not, then it is not usually necessary to go into the question of adoption, because the Applicant has established his right under section 23, Probate and Administration Act, and that is what was held in *Ma Tok* v. *Ma Thi*. But where the caveator, if he establishes his adoption, totally excludes the Applicant from inheriting, that ruling does not apply, and the question of the adoption must be gone into, unless the Court thinks it unnecessary to grant letters-of-administration to any one.

I explained this in *Mi E Mya* v. *Nga Se* [2] and *Mi E Mya* v. *Nga Hmon*.[3]

In the present case the Respondent is a nephew of the deceased. Before letters-of-administration could be granted to him he had to prove under section 23, Probate and Administration Act, that he was entitled to some share of the estate. The Appellant by alleging that Ma Pa U had left an adopted son denied that the Respondent was an heir. It was therefore necessary to go into the question of the adoption in order to decide whether letters-of-administration could lawfully be granted to the Respondent.

The order of the District Court is set aside and the application is remanded to that Court in order that it may be disposed of according to law.

The costs of this appeal (Advocate's fee one gold mohur) will be paid out of the estate.

[1] 5 L.B.R., 78. [2] C.A. 266 of 1910. [3] C.A. 270 of 1910.

Civil 1st Appeal No. 240 of 1915. 13th December.

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

NGA CHIT WET *v.* KWANAN AND ONE.

Mr. *S. Mukerjee*—for Appellant.

Messrs. *Pillay* and *Swinhoe*—for Respondents.

Court Fees—7 (*iv*) (*c*), *Schedule II, Article* 17 (*c*).

In a suit for the cancellation of a conveyance of certain property on the ground that the Plaintiff signed it in the belief that he did so as a witness, but subsequently found that he was represented as the vendor and his signature was that of the sole vendor and not that of a witness, the prayer is for consequential relief and the plaint would require an *ad valorem* stamp according to the value of the subject matter.

Punjab Record, 1893, C. J., 109.
2 L. B. R., 266.

The Plaintiff sued the Defendants in the District Court upon a plaint which contained a prayer that the deed of sale referred to therein be delivered up and cancelled, that all necessary orders for the purpose be passed, and that such further or other relief be granted. The last prayer is not clear; possibly "such further relief as he may be found entitled to" was intended to be the meaning of the words. The suit was dismissed and Plaintiff now appeals.

The plaint and the petition of appeal has each been stamped with a Court fee stamp of Rs. 10. The Defendants raised a preliminary objection that this stamp was insufficient, and time has been given to the parties to argue this point.

The learned Advocate for the Plaintiff-Appellant contends that he is not desirous that the instrument in question be cancelled if he can be afforded relief in any other way. The Plaintiff-Appellant has been unwittingly party to a fraud, he has now discovered this, and his only object is to have his position made clear and to be saved from criminal proceedings or other consequences with which he conceives himself to be threatened. He has no interest in the property in question. The case of *Hakim and others* v. *M. M. Kone and another* (Punjab Record, 1893, Civil Judgment, 109) is relied on. In that case the Plaintiffs prayed that the Court should issue a declaratory decree that a certain will should, after the death of the widows, have no effect on the reversionary right of the Plaintiffs. It was held that the plaint which was filed upon a stamp of Rs. 10 was properly stamped under Article 17 (iii) of the Second Schedule of the Court Fees Act.

It was there pointed out that if the Plaintiffs prayed to have the will delivered up and cancelled in whole or in part and to set aside the document, the prayer would be for consequential relief, and upon the authority of the rulings quoted the plaint in that case would require an *ad valorem* stamp according to the value of the subject matter. But there was no allegation that

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the will was not genuine nor even that it was wholly inoperative. It was by implication admitted that the will was operative during the lifetime of the widows, and the only relief that could be granted was a declaration that the will shall not affect the Plaintiff's reversionary interests.

I am at a loss to understand how it can be argued that the facts of the present case bear any resemblance to those of this Punjab case. Here the Plaintiff-Appellant states in his plaint that he believed that he was signing a conveyance of certain property as a witness, that he now finds that he was represented in the document as the vendor and his signature is that of the sole vendor and not that of a witness. The only relief which can be of any use to him is the cancellation of the document and for that he prays. The case of *Maung Kyin* v. *Po Thein and one* (1) relied on by the Defendants-Respondents is clearly in point. The authorities are there set out The objection must be allowed.

The Plaintiff-Appellant states that he is not prepared to value the relief sought. But the plaint states distinctly that the Plaintiff values the suit for the purposes of jurisdiction at Rs. 20,000. This was the consideration stated in the document and it must be accepted. The appeal must be valued accordingly and a court fee must be paid accordingly within six weeks.

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

Civil Revision No. 8 of 1915. 10th January 1916.

NGA KYE *v.* NGA KYU AND ONE.

Mr. *A. C. Mukerjee*—for Applicant.

Mr. *J. C. Chatterjee*—for Respondents.

Civil Procedure,—115.

Where an application of a decree-holder to forfeit the security bond of a surety of a judgment-debtor, who, having been released in order to enable him to apply to be adjudged insolvent had failed to do so on the grounds of illness, was refused.

Held,—that the remedy of the decree-holder against the order of the Lower Court lay in an appeal and not in an application for revision under Section 115, Civil Procedure Code.

I.L.R. XV, Allahabad, 183.

The Applicant having obtained a decree against one Maung Kyu, proceeded to execute it by arresting the judgment-debtor. The judgment-debtor then signified his desire to apply for the protection of the Insolvency Court. He was released on security, Maung Lon Tu being the surety and undertaking to produce him on the 5th of September, that is to say, one month after the date of the bond. He did not apply to be declared insolvent, and the decree-holder then applied to the Court to proceed against the surety. Notice was given to the surety who showed cause by stating that the judgment-debtor was too ill to appear in Court,

(1) 2 L. B. R. page 266.

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and after recording evidence the Judge recorded an order that the surety's explanation was reasonable and the bond would not be forfeited. Against this order the decree-holder comes to this Court in revision.

The first question which was raised was whether the decree-holder should not have appealed against the order of the Township Court. The order of the Township Court directing the judgment-debtor to furnish security was issued under section 55(3) and (4) of the Code of Civil Procedure. It is contended for the Respondent that section 55 is to be read with section 145 of the Code of Civil Procedure that the bond was for the fulfilment of the condition imposed on the judgment-debtor, that the decree or order might therefore be executed against the surety to the extent to which he had rendered himself personally liable in the manner provided for the execution of decrees, and the surety should therefore, for the purpose of appeal, be deemed to be a party within the meaning of section 47.

The Applicant relies upon the case of *Banamal* v. *Jamnadas*(1) in which it was held that a surety for a judgment-debtor who had been released in order to enable him to apply to be adjudged insolvent was entitled to be discharged from his bond upon the judgment-debtor making such application, and the Court which executed the decree having refused to release the surety, the High Court interfered in revision holding that no appeal lay from the order of the Township Court. But this judgment was delivered in 1893 when the Code of Civil Procedure of 1882 was in force, and the High Court held that the only sureties who would be considered parties to the suit with reference to clause (*c*) of section 244, corresponding with section 47 of the present Code, were sureties who had rendered themselves liable for the amount of the decree. Section 336 of the Code of 1882 which corresponds with section 55 of the present Code provided in the case of a surety for a judgment-debtor who failed to apply to be declared insolvent, his security might be realized in the manner provided by section 253, and section 253, corresponding with section 145 of the present Code, provided that whenever a person had, before the passing of a decree in the original suit, become liable as surety for the performance of the same or of any part thereof, the decree might be executed against him to the extent to which he had rendered himself personally liable in the same manner as against the Defendant. It is clear that section 145 of the present Code amplifies very considerably the provisions which were contained in section 253 of the old Code, and in providing that a surety for the fulfilment of any condition imposed on any person renders himself liable to have the decree executed against him to the extent to which he has rendered himself personally liable and shall be deemed a party within the meaning of section 47, I think there can be no doubt that it was intended to extend the provisions of section 47 to a case like the present. It is noticeable

(1) I.L.R. XV Allahabad, 183.

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that the last sentence of section 336 of the Code of 1882 which provided the manner in which the security was to be realized has been omitted in section 55 of the present Code, the reason apparently being that this provision comes within section 145. This being so, I think it is clear that the Applicant's remedy lay in an appeal and that no application to revise the order of the Township Court under section 115 of the Code of Civil Procedure is maintainable.

The Applicant asks that his application may be returned to him for presentation to the Appellate Court. But no grounds for doing so have been shown, and there appears to be no reason why this should be done.

The application is dismissed with costs.

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

Civil Appeal No. 199 of 1915. Feby. 1st, 1916.

NGA KYET SEIN *v.* MI KYIN MYA AND ONE.

Mr. C. G. S. Pillay—for appellant. | *Mr. S. Vasudevan*—for respondents.

Slander—Abatement.

The Plaintiff-Appellant obtained a decree for damages for slander in the Court of first instance. The decree was set aside by the Lower Appellate Court. The Plaintiff-Appellant then filed a second appeal. Whilst this appeal was pending, the Defendant died.

Held,—that the appeal did not abate.

I.L.R., 26 Bombay, 597.
I.L.R., 26 Madras, 499.

The Plaintiff-Appellant sued Maung Chu Ni for damages for slander and obtained a decree for Rs. 100 and costs. On appeal this decree was set aside and the suit was dismissed. The Plaintiff-Appellant then appealed to this Court and after the appeal was filed Maung Chu Ni died and his legal representatives were brought on to the record. Their advocate now takes a preliminary objection that as the right to sue does not survive the appeal must abate.

It is contended on the other hand that as the Plaintiff-Appellant obtained a decree in the Court of first instance thereby potentially increasing his wealth he must have the right to get rid of the decree of the Lower Appellate Court which has deprived him of that benefit. Reliance is placed on *Gopal Ganesh Abhyankar* vs. *Ramchandra Sadashiv Sahasrabudhe*.(1)

In that case the position was reversed; the Plaintiff having lost in the first Court obtained a decree for damages in the Lower Appellate Court. One of the judges before whom the second appeal came was of the opinion that no distinction should be drawn between an appeal by a Plaintiff and an appeal by a Defendant and that in the case of an action for slander an appeal must abate on the death of one of the parties whichever side

(1) I. L. R., XXVI Bombay, 597.

NGA KYET SEIN v. MI KYIN MYA.

appealed, but the majority of the Judges held that though in such a case an appeal by a Plaintiff must abate an appeal by a Defendant did not because his estate was affected by the decree.

It seems to me that though the position is reversed the same principle applies in the present case. If the Defendant had died during the pendency of the first appeal his legal representatives would have been entitled to prosecute that appeal on the authority of the ruling above cited which was followed in *Paramen Chetty* vs. *Sundararaja Naick and another*,[2] and on their succeeding the Plaintiff-Appellant would undoubtedly have had a right to contest the correctness of the decision in this Court, because if the right to continue the appeal in the Lower Court survived it could not be extinguished by the judgment. I am unable to see on what principle the fact that the Defendant died after the second appeal was filed and not during the pendency of the first appeal can make a difference. In the Bombay case Fulton, J. interpreted "the right to sue" as the "right to seek relief." If therefore the "right to sue" in the case of the first appeal meant the Defendant's right to appeal against a decree which affected his estate, I do not see why in the present appeal the words should refer back to the original cause of action. The Plaintiff-Appellant is not now endeavouring to enforce his personal right of immunity from slander but to recover the benefit which accrued to his estate in consequence of the judgment of the Township Court and of which he has been deprived by the judgment of the Lower Appellate Court.

I am of opinion therefore that the appeal does not abate and it will now be heard on the merits.

Civil Appeal No. 529 of 1914. 26th Feb. 1916.

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

NGA YEIN AND ONE *v* NGA SO.

Mr. *D. Dutt*—for Appellants.

Mr. *Banerjee*—for Respondent.

Civil Procedure—Order IX-rule 13.

Held that a suit will lie to set aside an *ex-parte* fraudulent decree although no endeavour had been made to get the decree set aside and the suit revived under Order IX, rule 13, of the Civil Procedure Code.

Civil Revision No. 28 of 1914.
I L.R., 21 Calcutta, 605.
—— 24 Calcutta, 546.
—— 21 Calcutta, 437.
—— 11 Bombay, 6.
—— 38 Madras, 203.
16 C.W.N., 1002.

In Civil Regular Suit No. 89 of 1913 of the Township Court, Kanbalu, the present Appellants sued the Respondent to recover Rs. 135 and obtained a decree for that amount *ex-parte* on the

(2) I. L. R., XXVI Madras, 499.

28th June 1913. The decree was sent to the Township Court, Kawlin, for execution, and on the 12th January 1914 notice was issued to the judgment-debtor who paid the full amount into Court on the 18th March 1914. The amount paid in was Rs. 157-4-0 which was drawn out by the present Appellants. In Suit No. 124 of 1914 of the Township Court, Kanbalu, the Respondent instituted proceedings against the present Appellants on the 5th May 1914 to set aside the former decree on the ground of fraud and to recover the sum of Rs. 157-4-0 paid by him. The Respondent obtained a decree which was confirmed in appeal and the Defendants now come to this Court.

The application was first made in the form of an application for revision which was subsequently altered by the direction of the Court into a Second Appeal under section 100 of the Code of Civil Procedure.

The Respondent takes a preliminary objection on the ground that when the alteration was made the time for appeal was barred. There appears to be no force in this objection. When the application was filed it was within time and all the requirements of the law for a Second Appeal were complied with. I am of opinion that the fact that a particular section of the Code of Civil Procedure had been inserted in the application did not deprive the Appellants of their right to appeal. This view was taken in the case of *C. Abdulla Kaka v. Ya Sein and one*[1] and the objection is overruled.

The appeal proceeds upon two grounds, first that the decree which the Plaintiff-Respondent sought to set aside having been passed *ex-parte*, the Plaintiff's remedy was to apply under Order IX, rule 13, to the Township Court, Kanbalu, to set the decree aside, and that as he failed to take this course he cannot now file a separate suit. But this view does not appear to be sustainable. In *Abdul Mazumdar and others v. Mahomed Gazi Chowdhry and another*,[2] it was held that a suit will lie to set aside an *ex-parte* fraudulent decree although no endeavour has been made to get the decree set aside and the suit revived under Order IX, rule 13, while in *Pran Nath Roy v. Mohesh Chandra Moitra*,[3] it was held that a suit will also lie after an application made under Order IX, rule 13, has been dismissed. *Azizan v. Matuk Lal Sahu*[4] relied upon by the Appellants is not an authority to the contrary nor is the case of *Abdul Rahiman v. Khoja Khaki Aruth.*[5]

Plaintiff's case here was not that he had satisfied the decree and that the satisfacation had not been certified, but that before the decree had been obtained he had satisfied the Plaintiffs' claim on the understanding that the Plaintiffs would not proceed with the suit, and that in spite of this the Plaintiffs in the former suit had proceeded and obtained a judgment against them.

[1] Civil Revision No. 28 of 1914 of the Judicial Commissioner, Upper Burma.
[2] I.L.R., 21 Cal., 605.
[3] I.L.R., 24 Cal., 546.
[4] I.L.R., 21 Cal., 437.
[5] I.L.R., 11 Bom., 6.

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It is argued that the decision in the previous suit operated as *res judicata* and that the decree could not be set aside on mere proof that the previous decree was obtained by perjured evidence, *Munshi Mosuful Huq v. Surendra Nath Ray.*[1] The question of when and in what circumstances a Court may set aside a judgment on the ground of fraud was examined at some length in *L. Chinnayya v. K. Ramanna.*[2] It was there said, "The test to be applied is, is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud." Again on page 209, the following acts are referred to as constituting a fraud which would vacate a judgment; misrepresentation or tricks practised upon Defendant keeping him away from the trial, acting contrary to an agreement between the parties that the case should not be continued or that the action should be dismissed as the result of compromise or settlement. This is exactly the Plaintiff-Respondent's case in the present proceedings. He did not deny that he owed the money upon which the Appellants sued in the Township Court, Kanbalu, but he said that he paid this money before that suit came to trial, and that in consideration of such payment the Appellants agreed not to obtain a decree. Both the Courts below have found that this allegation has been clearly proved and these findings have not been questioned.

There can be no doubt that the Respondent was entitled upon these findings to a decree setting aside the decree of the Township Court, Kanbalu, and directing a refund to him of the amount paid in execution of those proceedings.

The present appeal must therefore be dismissed with costs.

Criminal Revision No. 387 of 1916. June 27th.

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

BARACHI *v.* KING-EMPEROR.

Mr. D. Dutt—for Applicant.

Mr. H. M. Lütter—for the Crown.

Criminal Procedure:—350 (1) (a).

Held,—that where a case after being part heard comes by transfer upon the file of another Magistrate who exercises jurisdiction, such Magistrate succeeds the first Magistrate, within the meaning of section 350, Code of Criminal Procedure, and the provisions of that section apply. The Accused should be made acquainted with the fact that he is entitled to have the prosecution witnesses recalled.

I. L.R., 35 Cal., 457.
——39 Cal., 781.
—— 32 Mad., 218.
U. B. R., 1897—01, I, 87, dissented from.

The Applicant has been convicted and sentenced to pay a fine of Rs 30 or suffer one month's rigorous imprisonment under section 24 of the Cattle Trespass Act.

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[1] 16 Cal. Weekly Notes, 1002. [2] I.L.R., 38 Mad., 203.

The grounds of this application are that the evidence did not satisfactorily establish the charge. On examining the proceedings it appears that the case was first taken up by the Township Magistrate but was withdrawn from him and transferred to the Subdivisional Magistrate by the District Magistrate acting, presumably, under section 528 of the Code of Criminal Procedure. Before the transfer was made the whole of the evidence for the prosecution had been recorded and the accused examined by the Township Magistrate. The Subdivisional Magistrate on receipt of the proceedings did not recall and examine the witnesses for the prosecution himself and after hearing the defence witnesses, convicted the Applicant and sentenced him as stated above.

It was held by this Court in *Q.-E. v. Nga Po Min* [1] that section 350 of the Code of Criminal Procedure does not apply to cases withdrawn under section 528 of the Code of Criminal Procedure and that the trial should have been begun afresh. This view has however been dissented from in *Munesh Chandra Saha v. Emperor* [2] which was followed by the Madras High Court in the case of *Palaniandy Goundan v. Emperor* [3] and has been reaffirmed in *Kudrutulla v. Emperor.*[4]

I think that the interpretation put upon section 350 of the Code of Criminal Procedure in these latter cases is correct, and that the words, "Ceases to exercise jurisdiction and is succeeded by another Magistrate," should not be confined to the case of a Magistrate who is transferred and whose place is taken by another Magistrate.

But while the view may be accepted that section 350 of the Code of Criminal Procedure is applicable to a case which, after being part heard, comes upon the file of another Magistrate who exercises jurisdiction, it is necessary that the proviso to section 350 should also be given effect to and the accused should have been made acquainted with the fact that he was entitled to have the prosecution witnesses recalled. This does not appear to have been done. The case appears to have been clearly one in which it was desirable that the Magistrate who passed judgment should have had an opportunity of seeing the witnesses.

The defence was that the prosecution case was entirely false, and that the charge was brought four days after the occurrence in answer to a charge of theft which had been made at once by a friend of the accused in respect of the same circumstances.

The delay in lodging the complaint was certainly an important matter which called for consideration, and I do not think the explanation given by the Magistrate can be accepted. The amount of resistance offered by the Accused-Applicant to the carrying off of the cow to the cattle-pound appears to have been slight and the Complainant would seem at once to have yielded up the cow. It is quite possible that the charge of rescue was an invention made in order to meet the charge of theft and that the

[1] U.B.R., 1897-01, I, 87.
[2] I.L.R., 35 Cal. 457.
[3] I.L.R., 32 Mad. 218.
[4] I.L.R., 39 Cal. 781

BARACHI v. KING-EMPEROR.

time which elapsed until the complaint was lodged was occupied in obtaining witnesses.

It does appear to me that there are grounds for holding that there has been a miscarriage of justice.

The conviction and sentence are therefore set aside and the fine must be refunded. In the circumstances, I do not think it necessary to order a retrial.

Civil 2nd Appeal No. 60 of 1915. August 6th, 1915 and May 31st, 1916.

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

NGA CHO AND 2 OTHERS *v.* MI SE MI AND 3 OTHERS.

Mr. J. C. Chatterjee—for Appellants.

Mr. C. G. S. Pillay—for Respondents.

Evidence Act, section 92 (6)—Interpretation of documents.

When the boundaries of land are described in a deed of mortgage and can be identified, they should be accepted as defining the area of the land affected by the deed.

Transfer of Property Act—63, 70— Accession—meaning of—

The only question in dispute between the parties is the area included in the mortgage and the area thereof which the Plaintiffs-Respondents are entitled to redeem.

The mortgage was executed by a registered deed on the 28th April 1902, and the part of the document which is material for this case runs as follows:—"Please accept under mortgage our *bobabaing* land called Thinseinbin yielding 800 baskets of paddy and situated on the north of Alinlogyaing-ywa. The amount secured by the document of 1258 is Rs. 627; the further advance on the 28th April 1902 is Rs. 475; total Rs. 1,102, for which sum of money, U Cho, Ma Shwe Mya and Maung Kan accept the said land under mortgage. The boundaries of the land are east, Ko Kyi's land, west, U Kyaw Gaung's land, south, U Meik's land, north, Ko Ngè's land." To the document was attached a plan which was filed in the Registration Office and a copy of which is Exhibit IV in this case.

The Plaintiffs' case is that the area mortgaged consists of what is now two holdings shown in the maps, Exhibits A and B, measuring 10·46 acres and 7·91 acres respectively. The Defendants' reply that the land shown in Exhibit A measuring 10·46 acres only was affected. Both the Courts below have admitted and discussed evidence to show whether the definition of the boundaries applies to existing facts. The Lower Appellate Court has also considered other evidence as to the probabilities of the case. Both Courts are agreed that the area mortgaged was the two holdings as claimed by the Plaintiffs. Defendants-Appellants now appeal.

The first two grounds of the appeal are that the mortgage deed on which the suit was based being admittedly defective in language, the Lower Courts erred in law in admitting evidence to supply its defects, and that the Lower Courts erred in law in

applying section 95 of the Evidence Act as the language used in the document was not plain in itself.

It is argued for the Appellants that as a map was made over with the mortgage deed, the redemption decree must be based on the map, and no evidence should be admitted to contradict the map.

There are also two other grounds of appeal as to the ownership of the land in dispute, which appear to be unimportant as it does not appear that either party adduced satisfactory evidence of previous ownership.

The Courts were not guided by the map because it was not referred to in the document. As far as appears from the copy, it was not signed or certified as correct by the parties to the mortgage, and I do not think it can be taken to be conclusive.

The Defendants-Appellants rely upon evidence that the holding shown in Exhibit A was alone known by the name of Thinseinbin, that the yield from this one holding was 800 baskets and that the map showed only the one holding. The Plaintiffs-Respondents rely on the statement of boundaries. I think it is clear that the language in the document was not necessarily defective or otherwise not plain in itself, and that it was open to the Courts below, and was, in fact, their duty to ascertain the meaning of the document. Section 96 of the Evidence Act provides that if the language directly describes two sets of circumstances but cannot have been intended to apply to both, evidence may be given to show to which set it is intended to apply. There is a considerable body of authority referred to in the fourth foot-note at page 513 of Ameer Ali and Woodroffe's Law of Evidence, 4th Edition, that where there is a description of land in a conveyance, lease or other document, such description setting forth the boundaries and then specifying the quantity, it is considered to be a mere false description if there is an error in the quantity and the land within the boundaries passes by the conveyance or lease whether it be less or more than the quantity specified, and of course upon the redemption of a mortgage, this will apply to the area to be reconveyed by the mortgagee.

I do not think that the Courts below have applied quite the right test in this case.

It appears to me that the first point to be considered is whether, in the absence of any other description, the description of the land mortgaged by boundaries is clear and identifiable beyond doubt. If it is so, it appears to me that such description must override the description by name, outturn, or by the map, in the circumstances. The outturn is clearly a vague method of defining a given area, and from the evidence of the witnesses, it would appear to be rather a nominal or theoretical outturn than a real outturn, though the real outturn may also obviously be used. The use of the name of the land and the map filed with the document are no doubt valuable and important evidence, and the question for decision will be whether the area mortgaged can be

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identified by the boundaries, if so, whether the land so identified should be accepted as the land mortgaged or not. In dealing with this question of boundaries, the Court of first instance stated that the boundaries on three sides were not disputed, "It is merely the north boundary declared to be Maung Ngè's land." It appears to me that this is hardly a correct or fair way of putting the case. It arises rather from an inference or an assumed inference from the pleadings. The two holdings are contiguous being that shown in Exhibit B combined with that shown in Exhibit A. The Defendants said that the northern boundary was not Maung Ngè's land on the north of Exhibit B but Maung Ngè's land on the north of Exhibit A, and if that is so, the eastern boundary which is given in the deed as Maung Ngè's land must be incorrect. The Judge is of opinion that the boundaries were correct but that the points of the compass were wrongly given. There is no evidence on the record at all from which it is possible to gather which is Maung Kyaw Gaung's land the western boundary. If Maung Kyaw Gaung's land cannot be identified or does not form a boundary of any of the land in dispute, we then have an area of land to find, of which the southern boundary is not in dispute, the western boundary cannot be identified, the northern boundary is doubtful and the eastern boundary touches a portion of the land on the east and a portion of the land on the north. If that is so, it appears to me that the boundaries will have to be discarded altogether as a means of identifying the land. If on the other hand, Maung Kyaw Gaung's land can be identified and if it is found to form the boundary of holding A or holdings A and B on the west between Maung Meik's land on the south and Maung Ngè's land on the north, I think a very strong case will have been made out for the Plaintiffs. It is possible that in that case the boundaries will exactly describe the whole of the land comprised in Exhibits A and B with the exception of the side of one field No. 887, which appears to be bounded by the land of one Maung Peik. If that is the case it will probably be necessary to discard the other descriptions of the land given in the document.

The case will now therefore be remanded to the Subdivisional Court to try the following issue:—Can the land known and described as U Kyaw Gaung's land in the document, Exhibit III, be identified? If so, does it form a boundary of the land shown in Exhibit A or the land shown in Exhibit B, and if so, where?

The proceedings will be resubmitted to this Court with the finding of the Subdivisional Court together with that of the Lower Appellate Court within six months.

6th August 1915.

Both the Courts below have now found that Maung Kyaw Gaung's land is the boundary only of the land shown in Exhibit A. This finding is undoubtedly correct. It is not permissible to attempt to correct the document or to say that the parties had made mistakes in the points of the compass describing the western boundary as partly on the west, partly on the north, and so

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on. The boundaries, as far as they are identifiable, coincide with the boundaries of Exhibit A.

It is urged for the Respondents that the land should be given as an accession within the meaning of sections 63 and 70 of the Transfer of Property Act. The area of Exhibit A is about 10 acres, and that of Exhibit B about 8 acres. Both appear to be paddy fields, and I think it would be stretching the interpretation of the word "accession" much too far to suggest that a mortgagee who is in possession of 10 acres of land and, while in such possession, brings 8 acres adjacent to it under cultivation, does so as an accession to the mortgaged holding.

The appeal must be allowed, and there will be a decree allowing the Plaintiffs to redeem the land shown in Exhibit A only for Rs. 1,102.

As the Defendants were all along willing to allow this, the Plaintiffs must pay the Defendants' costs throughout.

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

NGA KYAW ZAN HLA AND 4 OTHERS *v.* KING-EMPEROR.

Criminal Appeals Nos. 54 to 58 of 1916. June 27th.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Confessions.

Held,—that the suggestion that accused persons should for the ends of justice be encouraged to confess by the knowledge that if they do so they will receive lenient punishment is one which is likely to convey an entirely wrong impression and to be extremely mischievous.

The District Magistrate has said in his judgment: "It appears to me for the ends of justice that it is very desirable that confessions should be made and the Magistrate should in such cases pass more lenient sentences to encourage them." This is a remark which appears to be open to very grave exception. It appears to mean that the Magistrate thinks that accused persons should be encouraged to make confessions in order to secure the convictions of persons other than the confessing accused, and that this should be encouraged by the passing of lenient sentences. If this view is really held by the District Magistrate and becomes generally known, there can I think be little doubt that it will be held out, as an inducement for persons accused of serious crimes to confess, that if they do so they will be leniently punished. That an accused person confesses may be taken as an indication that he is not an entirely irreclaimable and hardened criminal. It may be an indication that the accused regrets the commission of the crime which he confesses to have committed, and an indication that he desires to make reparation. If that is so, no doubt the confession may and very properly should be taken into consideration in awarding punishment. The suggestion that accused persons should for the ends of justice be encouraged to confess by the knowledge that if they do so they will receive lenient punishment appears to be one which is likely to convey an entirely wrong impression and to be extremely mischievous.

Criminal Revision No. 69 of 1916. June 29th.

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

KING-EMPEROR *v.* NGA AUNG BA.

Mr. H. M. Lütter—for the Crown.

Evidence—24, 27.

Section 27 of the Evidence Act does not make a confession which would otherwise be inadmissible, admissible to prove the fact discovered in consequence of information contained in it, unless the person who confesses is a person accused of any offence and also in the custody of the Police.

Where a person goes to the spot where property taken in a robbery has been hidden or otherwise disposed of, and such property is recovered in consequence of the action of such person discovering it, such action amounts to conduct which may be proved under section 8 of the Evidence Act.

U.B.R., 1892-96, I, 83.
——1907-09, I, Evidence 3.
II. L.B. R., 168.
I.L.R., 31 All., 592.

Three persons, Nga Aung Ba, Nga Tun Tin and Nga E, were sent for trial before the District Magistrate, Meiktila, on a charge of robbery; the 1st accused, Nga Aung Ba, has been acquitted and the 2nd and 3rd accused have been discharged. The Local Government have now appealed against the order of acquittal in the case of the 1st Accused, Nga Aung Ba, and apply in revision against the order of discharge in the case of the 2nd and 3rd Accused, Nga Tun Tin and Nga E.

It appears that suspicion fell upon the accused, Nga E; he was offered a pardon by the Police and thereupon made a statement in the nature of a confession. In consequence of this statement he was taken to a certain place where a balaclava cap, part of the property taken in the robbery, was recovered, and subsequently an ear-ring case taken in the robbery was recovered within two or three furlongs of the place where the balaclava cap was found. Acting upon information given by this Accused, a ten-rupee note was recovered from a person who said he had obtained it from Nga E. Four ten-rupee notes had also been taken in the robbery. The District Magistrate recorded the following order:—"After examining the twelve prosecution witnesses and excluding the alleged confession of Maung E which is irrelevant in this proceeding (section 24, Evidence Act), I find no evidence on which to charge Maung E, and I consider it improper to ask him any question in view of the fact that an illegal inducement to confess has been made to him. Maung E is discharged." Nga Tun Tin was also discharged as there was no evidence against him except the identification by the Complainant, and Nga Aung Ba was acquitted because he produced two witnesses to prove that he obtained the *nagats* found in his possession and identified as property taken in the robbery, from Maung E. The Magistrate said "They are quite credible witnesses and I cannot reject their evidence."

Nga Aung Ba had been identified by one of the prosecution witnesses, and this identification was not discussed. The District Magistrate was evidently influenced by the fact that the Police

had given an improper inducement to the accused, Nga E, to cause him to confess.

The grounds of the appeal are that there was sufficient evidence to justify the conviction of the Accused, that the Magistrate overlooked the provisions of section 27 of the Indian Evidence Act and erred in ruling out important evidence which was admissible, and that the Magistrate should have held that the evidence adduced by the defence did not prove the innocence of the accused.

The grounds of the application for revision are much the same, and the application and the appeal may be dealt with together.

The District Magistrate does not appear to have considered the question whether so much of the statement of Nga E as led to the finding of the property taken in the robbery was admissible or not. It is clear that if the statement of Nga E amounted to a confession, it was induced by a promise of pardon and was not admissible under section 24 of the Evidence Act. The contention that section 27 of the Evidence Act is to be read as governing section 24 was held to be untenable in the case of *Nga San Ya and* 5 *v. K.-E.* [1] following the Lower Burma case of *K.-E. v. Nga Po Yin* [2] and the Upper Burma case of *Nga San Bwin v. Q.-E.* [3] I am bound to say that I am not very greatly impressed by the arguments in favour of restricting the application of the proviso in section 27 of the Evidence Act to section 26, or sections 25 and 26. The opposite view was taken in the Full Bench case of *Emperor v. Miseri* [4] and the argument for restricting the application of section 27 appears to lose sight of the principles underlying the restrictions placed by the Evidence Act upon the admissibility of confessions generally. The *reductio ad absurdum* relied upon by Sir Herbert White, C. J., as an argument for the view taken in *K.-E. v. Nga Po Min* appears to be applicable at least to some extent to whatever interpretation is placed upon section 27. It is not, however, necessary to consider this point since it appears that section 27 does not apply in the present case and that the statements made by Nga E, which were inadmissible under section 24 of the Evidence Act, cannot be made admissible by section 27 because the condition prescribed in section 27, that the person giving the information must be accused of an offence and in the custody of a Police Officer, has not here been fulfilled. It is admitted that at the time Nga E made his statement he was not in the custody of a Police Officer. The statement of Nge E must therefore be excluded.

But it appears that there is other evidence against Nga E which is not inadmissible and which was not considered by the District Magistrate. He appears to have accompanied the Police Officers to the place where the balaclava cap was recovered, and it was apparently due to his pointing out this place that the

[1] U.B.R., 07-09, I, Evidence 3.
[2] U.B.R., 92-96, I, 83.
[3] II. L. B. R., 168.
[4] I.L.R. 31 All., 592.

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cap was recovered. This is conduct on the part of an accused person proof of which is admissible under the provisions of section 8 of the Evidence Act. So also the evidence that a ten-rupee note had been obtained from Nga E was also admissible, and there appears to have been a case upon which Nga E should have been examined.

The case against all the three accused hung together and had to be considered together. The record shows signs of haste and it appears that the Magistrate was so disturbed by the improper conduct of the Police that he did not in fact consider impartially the evidence for and against the different accused. The evidence of the identification of Nga Aung Ba was not dealt with at all, and the evidence that the ear-rings were obtained from Nga E was considered without reference to the rest of the evidence. I am of opinion that this is a case in which the Magistrate gave inadequate reasons for acquitting Nga Aung Ba and that he improperly excluded evidence against Nga E which was also evidence to be taken into consideration against both Nga Tun Tin and Nga Aung Ba.

The order of acquittal is set aside and there will be an order directing the District Magistrate to hold a further enquiry into the cases of Nga Tun Tin and Nga E, and to commit all three accused to take their trial in the Sessions Court.

Civil Second Appeal No. 191 of 1915. June 30th, 1916.

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

MA NGE MA *v.* MA SHWE HNIT AND 2 OTHERS.

Mr. C. G. S. Pillay—for Appellant.

Mr. R. C. J. Swinhoe—for 3rd Respondent.

Limitation—12.

Held,—that Article 12 of the Limitation Act applies only to parties to the suit or to the execution proceedings arising from it and not to strangers.

I.L.R., 17 Mad., 316.
I.L.B.R., 53.
IV. L.B.R., 40.
I.L.R., 11 Bom., 130.

The Plaintiff-Appellant sued for a declaration that a certain well site was never the property of Ma Min Dwe and was not liable to be attached and sold in execution of a decree against Ma Min Dwe, and that the sale in execution to the 2nd Defendant and the subsequent transfer by the 2nd Defendant to the 3rd Defendant were void. She also asked for a decree directing the 3rd Defendant to deliver possession of the well site to the Plaintiff.

The Court of first instance dismissed the suit holding that it was governed by Article 12 (*a*) of the 1st Schedule to the Limitation Act, that the sale in execution of the decree referred to had taken place in the year 1901 when the Plaintiff was a minor, according to her plaint, the Plaintiff had attained her majority on or about the 16th January 1910, and that this suit having been filed on the

26th May 1913, it was barred by limitation according to the provisions of that article read with Section 6 of the Limitation Act. The suit was accordingly dismissed.

On appeal the Divisional Judge agreed with the District Judge that the case was governed by Article 12 (*a*) and dismissed the appeal. The Plaintiff now comes to this Court in second appeal.

The Plaintiff's case was that the well site in question had been given to her by a duly registered document by her uncle, Maung Lu Bein, in 1898 when she was a minor, that while she was living with her mother and guardian, Ma Min Dwe, the 1st Defendant, Maung Po Ya, obtained a decree against Ma Min Dwe and in execution thereof, sold the well which was bought by the 2nd Defendant who subsequently sold it to the 3rd Defendant.

The defence either denied the gift set up by the Plaintiff or denied all knowledge of the gift and put the Plaintiff to strict proof of the same.

The Plaintiff produced a copy of the copy of the deed of gift filed in the Registration Office, and this was accepted in evidence by the Court of first instance. The Divisional Court dismissed the appeal without calling on the Defendants and the 3rd Defendant-Respondent now challenges the decision of the Court of first instance that the copy relied upon was admissible in evidence. The Plaintiff-Appellant on the other hand contends that the application of Article 12 of the Schedule to the Limitation Act was incorrect, and that the suit was governed either by Article 142 or Article 144 and was therefore within time.

For the Respondent it is urged that if Article 12 did not apply, either Article 44 or Article 91 applied, that each of these articles allows three years and that the suit having been admittedly filed more than three years after the Plaintiff had attained her majority, was time-barred.

I think there can be no doubt that both the Courts below were in error in holding that Article 12 was applicable in the present case. The Divisional Judge apparently relied upon the case of *Subramanaya Pandya Chokka Talavar v. Siva Subramanya Pillai.*[1] It does not appear that the Judge had the judgment in that case before him. It would seem that the decree which it was sought to set aside in that case was one to which the minor had been a party. There appears to be no doubt that Article 12 applies only to parties to the suit or to the execution proceedings in question, and not to strangers, see *Hajee Goya Kaka v. S. A. Zaccheus,*[2] in which the question was fully examined and *Ahmed Ally v. Nga Shwe Thin and one.*[3] In the latter case it was pointed out that a stranger whose property is sold behind his back without his authority does not need to have the sale set aside at all. The case of *Vishnu Keshav v. Ramchandra Bhaskar*[4] was exactly similar to the present case and

[1] I. L. R. XVII Mad., 316.
[2] IV. L. B. R., 40.
[3] I. L. B. R., 53.
[4] I. L. R. XI Bom., 130.

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there can be no doubt that Article 12 has been wrongly held to apply.

The Judge of the Lower Appellate Court appears to have thought that the article applied because the Plaintiff-Appellant was represented by her mother who, she acknowledged, administered her property for her. But the Plaintiff-Appellant's case was that the property was sold in execution of a decree obtained against her mother not in her capacity as guardian, but in her private capacity, and that the mother had no authority to alienate the minor's property in the discharge of her own private debts. Before Article 12 could be applied it would have been necessary to find upon the evidence that the mother was acting for the minor in that litigation and what evidence there was was the other way. But although Article 12 of the 1st Schedule to the Limitation Act does not apply, it appears to me to be equally clear that Articles 142 and 144 do not apply. Article 142 deals with a suit for possession of immoveable property, when the Plaintiff, while in possession of the property, has been dispossessed. Here the Plaintiff was not in possession of the property but her mother was in possession, no doubt as her guardian, but the possession was the possession of the mother. Nor does Article 144 apply since this article only applies if there is no other article which specially provides for the case. And the same remark applies to Article 120.

It appears to me clear that so far as the suit is a suit to set aside the transfer of property by the guardian, Article 44 is clearly applicable, and that so far as it is a suit to cancel or set aside an instrument, Article 91 is applicable. Both these articles allow a limitation of three years, and the suit was therefore barred.

Upon the merits moreover, I think it is clear that the copy of the document relied upon by the Plaintiff-Appellant was not admissible in evidence. Under section 64 of the Evidence Act it was necessary to produce the document itself unless under section 65 (*c*) it was proved that the original had been destroyed or lost which was the case set up by the Plaintiff-Appellant. It was necessary for the Judge to satisfy himself before admitting the copy that the original had been lost.

Two witnesses were examined, one was Ma Min Dwe, Plaintiff-Appellant's mother, who has been stigmatised, quite rightly I think, by the trial Judge as a most unsatisfactory witness. She said "I do not know where the original is now. I have not seen it for about three years. I have looked for it without success."

Maung Tun Shin, husband of the Plaintiff-Appellant and son-in-law of Ma Min Dwe, said that he took the document with others out of Ma Min Dwe's possession without telling her about it four years ago; he put it into an iron box which was stolen by thieves about three years ago and he told Ma Min Dwe that the documents were stolen with the box. These are clearly contradictory statements. The District Judge held that the presumption was that the original was lost. No such presumption arose by law, but apparently what the Judge meant was, as he goes on

to say, that the Plaintiff would produce it if she could, and if she had sold her rights the holder of the original would have appeared on the scene either at the Court sale or on the institution of the proceedings. The Judge therefore thought that the document must be admitted. It is clear that this is not a sufficient reason for admitting a document. No doubt the Plaintiff would have produced the document if she could, but it is quite possible that she could not produce the document because she had abandoned her rights under it and it had been cancelled, and it cannot be assumed that the document would have been produced by any third party who might appear to be in possession of it. I do not think that any Court could reasonably hold upon the evidence that the document, the original of Exhibit A, had been satisfactorily accounted for and secondary evidence was therefore not admissible. This being so, no evidence of the gift was admissible and the Plaintiff's case was bound to fail not only as barred by limitation, but because she was unable to prove it.

The appeal is therefore dismissed with costs.

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

Civil Second Appeal No. 387 of 1915, June 9th, 1916.

MA ME *v.* MAUNG AUNG MIN.

Mr. Vakil—for Appellant.

Mr. S. Mukerjee—for Respondent.

Civil Procedure—O. XXI, r. 7, 47.

Held,—that under O. XXI, r. 7, Code of Civil Procedure, a Court to which a decree is sent for execution has no power to question the jurisdiction of the Court which passed the decree.

An order refusing to execute a decree is a decree within the meaning of section 47 of the Code of Civil Procedure and an appeal from such an order lies.

I.L.R., 28 Bom., 378.
——38 Bom., 194.
——38 Cal, 639 at page 668.
1. U.B.R., 1910-13, 82.

Plaintiff filed a suit in the Township Court, Salingyi, for a divorce and stated in the plaint that he was prepared to surrender the whole of the joint property. The plaint was stamped with a Rs. 10 stamp, and no value was apparently placed upon the property in the prayer. Paragraph 3 of the plaint stated that 10 ticals of gold and Rs. 700 worth of money had been made over to the Defendant, and the Plaintiff was willing to surrender the rest of the joint property. A decree was eventually passed granting the divorce and requiring the Plaintiff to surrender all the property admitted by him in the list filed by the Defendant. The Defendant then applied for execution. The original application in the Township Court has not been produced but apparently the Township Judge transferred the decree to the Subdivisional Court for execution on the ground that the amount of the decree exceeded Rs. 500, which was the limit of the Township Court's jurisdiction. The Subdivisional Judge held that although a Court to

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which a decree is transferred has no right to question the validity of the decree on any other ground, yet it has the power to enquire into the jurisdiction of the Court passing the decree, and holding that the Township Court had had no jurisdiction to pass the decree, the Judge declined to execute it. Upon appeal the District Court held upon the authority of *Bhagwantappa Bin Rungappa v. Vishwanath* [1] that an order such as that passed by the Subdivisional Judge, Yinmabin, cannot be appealed against.

It may be noted that the judgment relied upon by the Lower Appellate Court was passed in 1904 before the present Code of Civil Procedure came into force. The provisions of section 225 of the Code of Civil Procedure of 1882 have been reproduced in O. XXI, r. 7 of the present Code with the omission of the words "or of the jurisdiction of the Court which passed it," and the Bombay High Court has now held that the omission of the words referred to in O. XXI, r. 7 makes it clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution, *Hari Govind v. Narsingrao Konherrao.*[2] It appears clear that an order refusing to execute a decree is a decree within the meaning of section 47 of the Code of Civil Procedure and that an appeal from such an order lies.

It is suggested that as the decree of the first court was for a sum exceeding Rs. 500, it was a decree made without jurisdiction and that any Court before which such a decree comes is bound to treat it as a mere nullity, *Rajlakshmi Dasee v. Katyayani Dasee.*[3] But on the other hand on the authority of *Baijnath Singh v. Mi Gauk* [4] it is urged that a mere undervaluation does not of itself give an Appellate Court authority to set aside a decree for want of jurisdiction. It is not necessary for this Court to go into that question now since it does not appear that the suit was undervalued nor is it certain that the decree was for an amount in excess of the jurisdiction of the Court.

The Defendant filed a list of properties the possession of some of which the Plaintiff admitted, but it is not clear that the total value of the properties admitted by the Plaintiff, which were the only properties for which a decree was given, exceeded in value Rs. 500. It is urged further that where parties deliberately submit to the jurisdiction of a Court of limited pecuniary jurisdiction, they must be held to abandon by such submission that portion of the claim in excess of such pecuniary jurisdiction. It is not however necessary for this Court to decide whether this view is correct or not since the amount or value of the suit and the decree have not been determined.

The appeal is allowed and the District Court is directed to re-admit the appeal and dispose of it according to law.

The Respondent will pay the Appellant's costs.

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[1] I.L.R., 28 Bom., 378.
[2] I.L.R., 38 Bom., 194.
[3] I.L.R., 38 Cal., 639 at page 668.
[4] 1. U.B.R., 1910—13, 82.

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

Civil Miscellaneous No. 37 of 1916. 4th July.

W. CALOGREEDY, SECOND GRADE ADVOCATE.

Mr. H. M. Lütter—for Applicant.

Criminal Procedure—4 (r), 340.

Held—that every Magistrate has a discretion to permit a person, including a Pleader not otherwise authorized to practise in his Court, to appear for a person accused before the Court.

S. J. L. B. 260.

The Applicant who is a second grade Advocate whose license does not permit him to practise in the Sagaing District applied to the District Magistrate, Sagaing, on behalf of certain accused persons who were under trial before the District Magistrate, Sagaing, and the latter recorded an order to the effect that the Advocate could not act in the Sagaing District and the application therefore could not be granted. The Advocate has now applied to this Court and has obtained permission to appear in the particular case mentioned. He also submits that the order of the District Magistrate was illegal in view of the provisions contained in section 340 of the Code of Criminal Procedure which is reproduced and paraphrased in paragraph 295 of the Upper Burma Courts Manual.

The law relating to Advocates in Upper Burma is contained in sections 25 to 29 of the Upper Burma Civil Courts Regulation, 1896, and under section 25 (2) of that Regulation rules have been framed of which the first provides that Advocates of the second grade shall be entitled to appear, plead and act in any four Districts named in their license. Section 340 of the Code of Criminal Procedure lays down that every person accused before any Criminal Court may of right be defended by a Pleader, and "Pleader" when used with reference to any proceeding in any Court, is defined in section 4 (r) of the Code of Criminal Procedure as a Pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an Advocate, a Vakil and an Attorney of a High Court so authorized, and (2) any Mukhtar or other person appointed with the permission of the Court to act in such proceeding.

I think it is clear that an Advocate who is licensed to appear in a certain District or in certain specified Districts only, cannot be said to be authorized to practise in a Court beyond the limit of such District or Districts. On the other hand, there appears to be no reason why a Pleader who is not authorized to appear in any particular Court should not be appointed with the permission of the Court to act on behalf of an accused person, and so to become a Pleader within the meaning of the term as defined in the Code of Criminal Procedure. Reference may be made to, *In the matter of the petition of Mr. G. F. Travers Drapes*,[1] in which the question is discussed. I am of opinion that every Magistrate has a discretion to permit a person, including a Pleader not otherwise

[1] S. J. L. B., 260.

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authorized to practise in his Court, to appear for a person accused before the Court. This discretion should no doubt be exercised judicially and permission should be given sparingly and in such cases as the Magistrate or presiding officer considers that it is for the interest of the accused that it should be given.

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

Criminal Revision No. 356 of 1916. August 1st.

KING-EMPEROR *v.* NGA PAW E AND FOUR OTHERS.

Mr. H. M. Lütter—for the Crown.

Penal Code, 21—225A.

Held,—that there is no authority for holding that a villager required to bring an accused person into a police-station in arrest is a public servant within the meaning of section 21 of the Indian Penal Code.

I.L.R., 8 All., 201.

Five accused persons who are villagers of Kokkozi village in the Myingyan District have been convicted and sentenced to three months' simple imprisonment each under section 225 (A) of the Indian Penal Code on the ground that they being public servants legally bound as such to keep in confinement a certain person, suffered that person to escape from confinement. The facts are that one Nga Po Saw was arrested by the Headman of Kokkozi village on a charge of cattle theft. He was made over to the five villagers, accused, to take him to the police-station under arrest. On the way, owing no doubt to the negligence of the five accused, Nga Po Saw escaped.

The Magistrate who tried the case considered whether the accused persons were public servants or not and relied upon the following extract from the judgment in *Q.-E. v. Parmeshar Dat*[1] "I am of opinion that any person whether receiving pay or not who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities and is recognized as filling the position of a public servant must be regarded as one." This sentence is quoted in Gour's commentary on the Indian Penal Code.

It appears from a reference to the full report of the case that the accused person was a volunteer or apprentice clerk in the Tahsildar's office at Gorakhpur. He was in that capacity charged with the performance of certain duties and the contention apparently was that because he was not paid and his work was entirely voluntary therefore he was not a public servant. It was held that the test was not whether a man received a salary or not, but whether he took upon himself the duties and responsibilities belonging to the position of a public servant and performed those duties and accepted those responsibilities and was recognized as filling the position of a public servant, and the Judge went on to say, "It did not lie in the mouth of the accused who had been doing these things to say subsequently that, notwithstanding his

[1] I.L.R., 8 All., 201.

performance of public duties and the recognition by others of such performance, he was not a public servant."

I think the case differs very widely from the present case. There is no doubt that a clerk employed in the office of a Tahsildar may be properly described as an officer or as holding an office within the meaning of section 21 of the Indian Penal Code, and no question was raised in the case referred to as to whether the duties discharged did or did not constitute the accused a public servant within the meaning of section 21 of the Indian Penal Code. But it appears to me that this is not a good authority for holding that a villager required to bring an accused person into a police-station in arrest is a public servant. Apparently he would only be a public servant if he fell within the 7th or 8th clauses of section 21 of the Indian Penal Code. There appears to be no suggestion that he is what has been called, a statutory public servant. Clause 7 includes in the definition of a public servant every person who holds any office by virtue of which he is empowered to place or keep any person in confinement. I think it would be difficult to state or define what the office here was which the five persons, accused, were holding. The 8th clause includes every officer of Government whose duty it is as such officer to prevent offences, to give information of offences to bring offenders to justice etc. The five villagers here were certainly not officers of Government nor was it their duty as such officers to bring an offender to justice.

The necessity which existed in this case for the accused persons to take the prisoner into the police-station was one which was imposed upon them by section 11 of the Village Act, which required them to assist the Headman in the execution of his public duties, the duty of the Headman being, under section 8 (1) (*b*), to arrest any person whom he had reason to believe to have been concerned in the commission of any such offence as is referred to in section 8 (1) (*a*), in this particular case, cattle theft, and under section 8 (1) (*d*) to forward the person arrested as soon as may be to the nearest police-station. To hold that a villager assisting a Headman in the discharge of his duties is a public servant appears to me to be quite unjustifiable. The Headman has to perform very miscellaneous and varied duties and it would be a mere abuse of language to suggest that every time he calls upon a villager to assist him in the discharge of those duties the villager is converted into a public servant. If this were so it would apparently be possible to argue that a person who is called upon to assist a Magistrate or Police-officer demanding his aid under section 42 of the Code of Criminal Procedure or a person arresting an accused under section 59 was a public servant, a view for which I think there can be no justification.

I think there can be no doubt that the convictions were wrong and they must be set aside. The sentence of imprisonment had already been served.

Criminal Revision No. 565 of 1916. 14th September.

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

LAKANAW *v.* KING-EMPEROR.

Mr. K. Bonerjee—for Applicant.

Penal Code—379.

Criminal Procedure—439 (5), 562.

Held.—That where property is removed in the assertion of a *bonâ fide* claim of right, the removal does not constitute the offence of theft.

Where an appeal lies against a sentence a District Magistrate should not take action in revision to the prejudice of the accused until the period allowed for an appeal has expired and no appeal has been presented.

20 C.W.N., p. 1270.

The Applicant was convicted of theft by the Headquarters Magistrate and released upon security under section 562 of the Code of Criminal Procedure. The District Magistrate called for the proceedings and called upon the Applicant to show cause why the sentence should not be enhanced. Cause was shown and the District Magistrate considered that no further action was called for. The Applicant would then seem to have come to the Sessions Court in revision, and the Sessions Judge recorded an opinion that the Applicant had no dishonest intention and should have been acquitted. The Sessions Judge did not however think it was necessary to interfere because the Applicant had been released under section 562 of the Code of Criminal Procedure and had not appealed.

The Applicant comes to this Court in revision and asks that the conviction may be set aside in accordance with the opinion expressed by the Sessions Judge. The reason why the Applicant did not appeal is stated in his petition in the District Magistrate's Court showing cause against the enhancement of sentence. The District Magistrate called for the proceedings three days after the sentence was passed and the matter was not disposed of in his Court until after the period allowed for appeal had expired. Inasmuch as section 439 (5) of the Code of Criminal Procedure directs that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed, it is clearly desirable that District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for the proceedings and taking action upon them within the period allowed for appeal.

In view of the fact that the Applicant was not able to appeal owing to the action of the District Magistrate, it appears to me that it would be unfair to hold that Clause 5 of section 439 of the Code of Criminal Procedure precludes this Court from interfering, more especially as an examination of the proceedings appears to show that the conviction was not justified. If the Sessions Judge had submitted the proceedings there can be no doubt that this Court would have been entitled to deal with them in revision.

The facts of the case are that the Applicant had lost a female buffalo, that he came upon some buffaloes in the hands of some Kachins, who said they had found them straying. He claimed one of them as his own and took it away. Subsequently he cut off the tips of the horns. The Magistrate thought that in so cutting the horns he was acting dishonestly, possibly to make the identification by the Complainant more difficult, but in view of the defence evidence which the Magistrate apparently believed, this appears to me to be an unjustifiable assumption. It is clear that the Applicant had lost a buffalo which resembled very nearly the buffalo found with the Kachins. He took it away openly, and when questioned made no secret of where or how he obtained it. The Magistrate appears to have been aware of the necessity to prove a dishonest intention on the part of the accused to take property out of the possession of another person. The following remarks in *Arfan Ali* v. *K.-E.*[1] state the point which arises here clearly, and may be quoted:—"Where property is removed in the assertion of a *bonâ fide* claim of right, the removal does not constitute theft. The claim of right must be an honest one, though it may be unfounded in law or in fact. If the claim is not made in good faith, but is a mere colourable pretence to obtain or to keep possession, it avails not as a defence." And certain remarks of Sir Matthew Hale in his Pleas of the Crown (Vol. I, pp. 506, 509) are quoted:—"It is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If A, thinking he hath a title to the horse of B, seizeth it as his own, or supposing that B holds of him, distrains the horse of B, without cause, this regularly makes it no felony, but a trespass, because there is a pretence of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it."

Here the buffalo was not in possession of the owner but in the possession of certain Kachins who had found it straying and the Applicant was not acting secretly, nor on being charged with the goods, did he deny it. I think there was a distinct doubt to the benefit of which he was entitled.

The fact that a substantive sentence of imprisonment was not passed is not a good reason for refusing to interfere, since a conviction for theft is a serious matter, and if the conviction is wrong, the person who suffers by it is clearly entitled to have it set aside.

The order of the Magistrate is therefore set aside and the Applicant must be acquitted.

[1] 20 C.W.N. p. 1270.

Civil 2nd Appeal No. 41 of 1916. 15th September.

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

NGA TET PYO AND TWO OTHERS *v.* MA NGWE KA AND SIX OTHERS.

Mr. L. Pillay—for Appellants.

Mr. C. G. S. Pillay—for Respondents.

Civil Procedure—O. XLVII, r.4 (2) (b).

Pointed out that the provisions of O. XLVII, r. 4 (2) (*b*) are imperative and that a review of judgment on the ground of discovery of new matter or evidence cannot be granted without strict proof that such new matter or evidence was not within the knowledge of the party applying or could not be adduced by him at the trial.

The Plaintiffs sued to obtain a share in certain land which they claimed formed an undivided estate. Their claim was resisted on the ground that the land was not joint property. The Plaintiffs' suit was dismissed in regard to two out of three pieces of land. The Plaintiffs then applied for a review on the ground that they had discovered new evidence to prove that the lands were joint family property. This evidence consisted of copies of Settlement registers and maps. Notice was issued to the Defendants who objected to the application which was however granted, and the Court, admitting this evidence, proceeded to give the Plaintiffs a decree as prayed for. On appeal to the District Court the Defendants objected to the admission of the application for review. The District Court however dismissed the appeal and the Defendants, or three of them, now come to this Court in second appeal under section 100 of the Code of Civil Procedure.

It was a ground of appeal in the District Court, as it is a ground here, and as it was a ground of the Defendants' objection to the review, that there was no reason why the evidence which the Plaintiffs sought to produce after judgment had been delivered should not have been produced in the first instance. To this there appears to be no answer. Settlement maps and registers are public documents the existence of which is known to every one, and a careful litigant would certainly examine these registers and maps before embarking on litigation. O. XLVII, r. 4 (2) (*b*) expressly lays down that no application for review shall be granted on the ground of discovery of new matter or evidence which the Applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. There was here, not merely no strict proof of such allegations; there was no proof whatever; there was not even an affidavit. No witnesses were examined and the Judge was clearly committing a very serious illegality in admitting the application for review in defiance of the provisions of O. XLVII, r. 4. It is necessary that the provisions of O. XLVII should be strictly construed, and that parties should not be at liberty to make up, at any time, for indolence or carelessness before coming to Court, by

putting in evidence after judgment which they might have put in, if they had exercised due diligence at the trial.

The order allowing the review was clearly an improper order and must be set aside. There was, in the absence of the evidence adduced, no evidence to justify a decree in respect to two pieces of the land and the original decree of the Township Court must be restored with costs throughout.

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

Civil Appeal No. 200 of 1913. May 11th, 1914.

MI SAING *v.* NGA YAN GIN.

Mr. C. G. S. Pillay—for Appellant.

Mr. S. Mukerjee—for Respondent.

Buddhist Law—Divorce.

Held,—that when a couple re-unite after a divorce they revert to the *status quo ante*, and if when they married for the first time they had never been married before, they must be treated on a second divorce as *ngè lin ngè maya* and not as *eindaunggyis*. *Held—also*—that on a divorce by mutual consent between *eindaunggyis* the principle of *nissayo* and *nissito* is applied to *lettetpwa* property but not to *payin* property.

S.J.L.B., 14.
—— 175.
U.B.R., 1904-06, II, Budd. Law, Div., 19.
—— 1897-01, II, p. 39.
—— 1902-03, II, Budd. Law, Div., 6.

The Plaintiff-Appellant sued the Defendant-Respondent for a divorce and a partition of property on the ground of cruelty.

The latter is wealthy and the former is the daughter of poor parents. He married her when she was a young unmarried girl of 15. He was 38 years older and had been married before. This was in 1261 or 1262. Between then and the institution of this suit there were two divorces and reunions. The Defendant-Respondent appears to be a very uxorious person, to use a mild term, because in the course of these years he is said to have taken six wives, all of whom he divorced after a short time, and he admits having taken four girls to wife after the Plaintiff-Appellant. All of these were divorced and they got little or no property on divorce. They were probably daughters of poor parents like the Plaintiff-Appellant and made no fuss. Possibly they were concubines and not wives. If they were wives they must have been either very ignorant of their rights or exceedingly anxious to be quit of the Defendant-Respondent at all costs. The latter evidently hoped to be able to treat the Plaintiff-Appellant in the same way as he did them, and in fact did so on the occasion of the two previous divorces because he obtained her signature to documents by which she agreed to accept Rs. 100 on one occasion and jewellry worth Rs. 70 and clothes worth Rs. 30 on the other in full satisfaction of her claim for a partition of property.

MI SAENG v. NGA YAN GIN.

No doubt it was these facts that led the learned Additional Judge of the District Court to suspect that the Plaintiff-Appellant was not a wife but a concubine, and he therefore framed an issue on this point. But the issue was quite unnecessary. The Defendant-Respondent never explicitly denied Plaintiff-Appellant's allegation that she was his wife, and he subsequently admitted that she lived with him openly as his wife and that he treated her as such. The fact, however, that the Defendant-Respondent is rich and the Plaintiff-Appellant poor is no reason why she should not get the full rights to which she is entitled. The parties come within the description "Husband rich—wife poor" given in the Manukyé Dhammathat, and to quote that authority, "These different kinds of husbands and wives have been enumerated above that their separate classes may be known; but though the class be different, they have become man and wife, and the law makes no difference with regard to their separation. It must be noted that what has been said above regarding the separation of a man and wife, both the children of nobles, is the law for all."

Again with reference to one kind of slave wife, "Let the wife, the party not wishing to separate, take the whole of the property, animate and inanimate, acquired after they became man and wife, and let the husband pay the debts mutually contracted during the same time. Why is this?. . . Also, for another reason; because he voluntarily raised her to the rank of wife, with the full knowledge of her being a slave".

The last reunion between the parties lasted only 20 days. The Defendant-Respondent then beat the Plaintiff-Appellant and the latter left him and prosecuted him and he was fined Rs. 50.

The learned Additional Judge of the District Court has held that this last reunion must be taken as the starting point in determining the rights of the parties, that they must be treated as *eindaunggyis* and that as during the 20 days this marriage lasted no property was acquired there can be no joint property, and each party is entitled to take back what he or she brought to the marriage, and as the Plaintiff-Appellant brought nothing she is entitled to nothing. He followed *Mi Dwe Naw* v. *Maung Tu*[1], in which it was held that where there had been a divorce and a reunion, it was the date of the reunion that had to be taken as the starting point when determining the rights of the parties on a subsequent divorce and said "I must hold that where husband and wife both assent to divorce and no fault is proved, each is entitled to take back property brought at marriage." In this passage the learned Additional Judge adopted some of the exact words used in the ruling cited above, though they do not exactly apply in the present case, because the Plaintiff-Appellant's case was that the Defendant-Respondent had been guilty of cruelty, but no doubt as the Plaintiff-Appellant merely claimed that the cruelty had only been such as entitled

[1]S.J.L.B., 14.

her to a divorce as by mutual consent the difference between the two cases would not signify.

Mi Dwe Naw v. *Maung Tu*[1] was cited with approval in *Maung Shwe Lin* v. *Mi Nyein Byu*[2] which was also relied upon by the Additional Judge. He, however, overlooked the ruling *Mi Myin* v. *Nga Twe and two others*[3] in which after explaining the principle of *Nissayo* and *Nissito* the learned Judicial Commissioner said: "The rule of *nissayo* and *nissito* seems to be equally applicable to persons who have been married before." The rule just laid down was that in the case of persons, neither of whom had been married before, if they stood to each other in the relation of supporter and dependent, the latter on divorce obtained one-third of the former's *payin* property, and that when one spouse inherited property during marriage he was considered a *nissayo* in respect of that property. If that rule applies in its entirety to persons who have been married before, then even assuming that the parties in the present case are to be regarded as *eindaunggyis* the Plaintiff-Appellant must be entitled to one-third of the property, which the Defendant-Respondent brought to the last reunion.

But the remark of the learned Judicial Commissioner quoted above was an *obiter dictum*, because in that case the parties had not been married before. The principle of *nissayo* and *nissito* is clearly indicated in the texts collected in section 257 of U Gaung's Digest, Volume II, but it is applied differently. In the case of *eindaunggyis* the principle appears to be only applied to the property acquired after marriage, not to *payin* property. The only text which in the English translation appears to imply the contrary is the one from the Dhamma, which runs as follows: "If the husband and wife, both of whom have been previously married, mutually desire to divorce, neither of them being in fault, let each take his or her property brought to the marriage and liquidate his or her debt, if any, contracted before the marriage. The property acquired jointly shall, if they were equally matched at the time of marriage in respect of property and means, be divided equally between them. Debts, if any, contracted jointly shall be liquidated in the same way. If the husband alone brought property and debts to the marriage or inherited them after the marriage, *the whole of their property and debts* shall be divided into three shares: he shall take two shares and the wife one share. If the wife alone brought or inherited property and debts, she receives two shares and the husband one share." The words "the whole" however are an addition of the translator's. The translation ought to run "the husband shall take two-thirds of the property and good and bad debts." What property is meant is not stated explicitly, but seeing that it is with reference to the partition of the *lettetpwa* property that the words are used, it seems probable that it is that

[1] S.J.L.B., 14. [2] S.J.L.B., 175.
[3] U.B.R., 1904—06, II, Budd. Law, Div., 19.

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property that is meant. This text would then agree with the other texts, and the rules for partition on divorce by mutual consent between *eindaunggyis* would be—

(1) Each takes his or her *payin* property, always;

(2) if the parties were equally matched as regards property at marriage the property acquired after marriage otherwise than by inheritance is equally divided between them;

(3) if one of the parties brought much property to the marriage and the other little, then on the principle of *nissayo* and *nissito* the supporter gets two-thirds of the *jointly acquired* property and the dependent one-third;

(4) if one of the parties inherits property during the marriage he or she gets two-thirds of that property on the same principle.

If these rules are to be applied to the present case it is clear that the Plaintiff-Appellant can get little or nothing, as very little property can have been acquired during the 20 days that the last reunion lasted and there is no allegation that the Defendant-Respondent inherited any property during that period.

But the Lower Burma Rulings on which the Lower Court relied are merely based on general principles, no authority is given for the decisions. There are now available texts which were not available then.

The texts collected in section 323 of the Digest, Volume II, lay down that if a husband and wife reunite after a divorce and a partition of their property they commit no fault, and two of those texts have a direct bearing on the point now being considered.

The Wunnana lays down that in the case of such a reunion the parties shall possess exactly the same rights as they had originally without the slightest difference. ပိုင်ဆိုင်းရင်းမထင်းထည်ချိပိုင် ကြမြဲသည်. It is very emphatic. The text from the Rasi though not so emphatic appears to lay down the same thing.

Though no definite reference is made to property the words မထင်းထည်ချိ would be meaningless, if the parties only partially resumed their previous rights. It is clear that what is laid down is that there is to be a complete restoration of the *status quo ante*, and consequently if they had never been married before, at their first marriage they are to be regarded as *ngè-lin ngè-maya* on their reunion and not as *eindaunggyis*.

I think such a rule is perfectly intelligible and equitable and as there is the authority of two texts for it and no authority on the other side, that I am aware of except the two Lower Burma rulings cited above, which were based on general principles and not on texts, I think this rule should be followed.

The parties therefore must stand on the same footing as they would have done had there been no divorce.

Now as I have said the Plaintiff-Appellant was a maiden when she married the Defendant-Respondent, whereas the latter had been married before and there are no texts in the Dhammathats which provide for a divorce by mutual consent between two

such persons. The texts collected in section 261 of U Gaung's Digest, Volume II, refer to divorces against the will of one party and are evidently supplementary to the general rule that either party can claim a divorce against the will of the other on surrendering all the joint property and paying the joint debts and provide for the case, where no joint property has been acquired. In *Ma E Nyun* v. *Maung Tok Pyu* [1] it was held that in the case of a divorce between a man who had been married before and a woman who had not, the woman could not equitably be placed in a worse position than she would have been in had her husband not been previously married, and that therefore the divorce should be regulated by the rules prescribed for couples, neither of whom had been previously married. The reasons given for this decision appear to me to be very sound, and in the absence of any text opposed to the decision it certainly should be followed.

That the Plaintiff-Appellant is entitled to a divorce as by mutual consent there can be no doubt whatever. It appears that whenever the Plaintiff-Appellant has given birth to a child the Defendant-Respondent has insisted upon the child being at once given away to another, with the result that out of four children only one is now alive. That in itself was a crime against the maternal instinct and must have caused the Plaintiff-Appellant both mental and bodily pain. In the next place he has accused her of infidelity and has not substantiated his accusations. In the case of the only accusation that appears to have any substance in it, I would remark that if the child born in 1268 was not the Defendant-Respondent's, it must have been conceived during the period of the first divorce, at a time when the Plaintiff-Appellant owed no fidelity to the Defendant-Respondent. If this child were not conceived during the period of divorce there is obviously not the slightest reason for supposing that it was not the Defendant-Respondent's child. In this connection I would remark that the deposition of one Maung Ngè given in another case and the confession of one Pon Nya were wrongly admitted in evidence, as it was not shown that section 33, Evidence Act, in the one case or section 32, Evidence Act, in the other, applied. Finally the Defendant-Respondent has been guilty of violence towards the Plaintiff-Appellant and has on that account been convicted and fined by a Criminal Court, and has not even proved any extenuating circumstances. It was this violence, which led to the final separation and the present suit. The case is very similar to *Maung Pye* v. *Ma Me* [2] and in accordance with that ruling the Plaintiff-Appellant is entitled to a divorce as by mutual consent.

It follows that she is entitled on divorce to one-third of the property which the Defendant-Respondent brought to the marriage, when he married her for the first time in 1262 and to

[1] U. B. R., 1897—1901, II, page 39.
[2] U.B.R. 1902-03, II, Budd. Law, Div., 6.

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half of the property acquired during her coverture. If he acquired any property during the periods of divorce that property should, I think, in the absence of any authority on the point be treated as his *thinthi* property, as the Plaintiff-Appellant had no share in its acquisition.

As the Additional Judge held that the Plaintiff-Appellant was entitled to no property he did not go into these points, and therefore a remand is necessary.

The suit is accordingly remanded to the District Court for the trial of the following issues:

1. What property did the Defendant-Respondent bring to his first marriage with the Plaintiff-Appellant? And what is its value?

2. What property was acquired by the parties during their marriages? And what is its value?

3. How much of these two classes of property remained at the time the suit was instituted? And what is its value?

The proceedings to be returned with findings within two months.

Civil Appeal No. 82 of 1916, 18th September.

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

TULSILAL *v.* H. GIRSHAM.

Mr. S. Vasudevan—*for Appellant.* Mr. D. Dutt—*for Respondent.*

Provincial Insolvency Act.

Held,—that section 40(2), Provincial Insolvency Act, must be read with section 16(2) and section 60, Civil Procedure Code, and that the Court acting under section 40(2) cannot allow more than half the insolvent's salary for the maintenance of himself and his family.

XVIII C.W.N., 1032.

This is an appeal by a creditor against the order of the Additional Judge of the District Court, Magwe, directing that no part of the salary of the Respondent, who has been adjudicated an insolvent, shall vest in the receiver for distribution amongst his creditors.

It is objected on behalf of the Respondent that the order was passed under section 40(2), Provincial Insolvency Act, that the matter was within the discretion of the Court, and the creditors were not entitled to notice before the order was passed, and that the Appellant has no *locus standi*. It is obvious however that the Appellant may be aggrieved at the order and that he therefore has a right to appeal as he has received the leave of the District Court.

For the Appellant it is contended that under section 60, Civil Procedure Code, half the Respondent's salary was attachable and that the order appealed against is therefore erroneous. For the Respondent it is contended that section 60, Civil Procedure Code, is irrelevant as the Provincial Insolvency Act is a complete Code in itself.

Section 60, Civil Procedure Code, is referred to in section 16(2)(*a*), Provincial Insolvency Act, which enacts that the whole of the property of the insolvent save in so far as it includes such particulars (not being his books of accounts) as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree, shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors.

The Respondent's salary is Rs. 200 a month and therefore Rs. 100 only of this amount is exempt from attachment and therefore the remaining Rs. 100 a month vests in the receiver and the District Court's order to the contrary was *ultra vires*.

As for the contention that section 40 (2), Provincial Insolvency Act gave the District Court unlimited discretion to allow the Respondent to retain the whole of his salary for the support of himself and his family, I think it sufficient to cite the following passage in the judgment in *Ram Chandra Neggi v. Shyama Charan Bose*,[1] "It has been explained that in making an appropriation of income for the benefit of creditors, the Court acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance according to his condition in life. The Statute law in this country fixes this amount by section 60, Civil Procedure Code, read with section 16 (2), Provincial Insolvency Act."

The order of the District Court is accordingly set aside with costs (Advocate's Fee one gold mohur).

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

Civil Revision No. 195 of 1916, 15th September.

MAUNG THA U *v.* MAUNG HLA.

Mr. L. N. Pershad—for Applicant.
Mr. J. C. Chatterjee—for Respondent.

Co-operative Societies Act—section 19.
Civil Procedure—O. XXI, r. 58.

Musical instruments are not industrial implements or machinery and do not come within any other part of the category of articles referred to in section 19 of the Co-operative Societies Act, II of 1912. Nor are they artisans' tools and they are not exempt from attachment under section 60 (1) (*b*), Code of Civil Procedure.

A mortgagee who objects to an attachment under O. XXI, r. 58, cannot be said to be a representative of the Judgment-Debtor within the meaning of section 47, Code of Civil Procedure, and no appeal lies from an order dismissing an application.

U.B.R., 1897—1901, II, 276.
I.L.R., 1 Mad., 174.
I.L.R., 32 Bom., : 10.
8 Mad., H.C. R., 87.

The Applicant having obtained a money decree against one Maung Thin, a Burmese musician, proceeded to attach the

[1]XVIII C.W.N., 1032.

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"saing" or musical instruments of his Judgment-Debtor in execution. The Respondent filed an objection to the attachmen under O. XXI, r. 58 of the Code of Civil Procedure, on the ground that the musical instruments attached had been pledged or mortgaged to the Co-operative Society of which the objector was Chairman. The objector also urged that the musical instruments were not liable to attachment in view of the provisions of section 60, proviso (*b*), of the Code of Civil Procedure, and that the Society's rights were protected by section 21 of the Co-operative Societies Act, II of 1912. Section 21 of that Act clearly has no relevance, nor does it appear that section 19 of the Act gives the Society a prior claim to the attached property since musical instruments can certainly not be described as "industrial implements or machinery" and they do not come within any other part of the category of articles referred to in that section.

The Township Court after examining witnesses dismissed the objector's claim on the authority of *Narana Chetty v. Sit Kauk*;[1] but it is clear that that case had no application. The objector appealed to the District Court. The District Court allowed the appeal and set aside the attachment and sale of the property, and the Applicant now comes to this Court in revision.

The first ground of the application is that no appeal lay from the order of the Township Court, and the District Court was therefore exercising a jurisdiction not vested in it by law in admitting the appeal and setting aside the order of the Township Court.

It is urged that the Respondent as mortgagee of the Judgment-Debtor stepped into the shoes of the mortgagor, and that the order of the Township Court was in fact a decree having been passed under the provisions of section 47 of the Code of Civil Procedure. No authority for this view has been quoted and it appears to be unsustainable. The objection was not raised on behalf of the Judgment-Debtor. The application in the Township Court was clearly headed, "An application under O. XXI, r. 58," and so far as it was made on the ground that the properties attached were in the possession of the Judgment-Debtor on behalf of the objector, it is clear that the Court was acting under the provisions of O. XXI and that the objector's remedy, when he was unsuccessful, was by way of a separate suit. The objector was not, in short, the representative of the Judgment-Debtor within the meaning of section 47 of the Code of Civil Procedure, and that section did not apply. I think it is clear that the Lower Appellate Court had no jurisdiction to entertain the appeal.

It is urged that the order of the Lower Appellate Court should not be interfered with in revision because it is in fact a correct order. But this is a proposition which is extremely doubtful. It appears that the transaction between the Judgment-Debtor and the Respondent was not a mortgage but a pledge,

[1] U. B. R., 1897—1901, II, 276.

the goods having been delivered to the creditor who returned them to the debtor for a limited purpose, that is to say, to enable him to earn his livelihood, and on the authority of the cases quoted in the foot-note to section 172 of the Contract Act (Pollock and Mulla, 2nd edition), the pawnor having abused his authority and again pledged the goods to the Decree-Holder, the pawnee, that is to say the Respondent, was not entitled to them as against the Decree-Holder.

It is urged again that the goods were not liable to attachment since they were the tools of artisans and were therefore exempt under the terms of section 60, proviso (*b*). The meaning of the term " artisan " has been discussed at some length. It does not appear to be defined in any Act. There are a good many decisions as to what is not an artisan. For instance, *in ex-parte Poonen* [1] it was held that a washerman was not an artisan ; nor apparently is a person engaged to give instructions in fencing and wrestling, *Pylwan Jarkan v. Jenaka.*[2] In *Emperor v. Haj-Sheik Muhammad,* [3] it was held that the popular meaning of the term " artisan " is, as defined by Webster's Dictionary, one who is engaged in a mechanical employment, and a person engaged to drive an engine on board a steamer was said to be included within the expression. Whether a Burmese musician is or is not an artisan may be open to question. He is possibly engaged in a mechanical employment, but I do not think that it is possible to hold that the instruments on which he plays can be called his " tools." "Tools " are defined in Chambers's English Dictionary as instruments used by workmen, and I think it would be putting an unnatural meaning on the words to say that a musical instrument is the tool of the person who plays upon it.

The application for removal of attachment having been made under O. XXI, it has been disposed of in the summary method indicated in that order. The Township Judge's order was not an order which was open to appeal, nor was the Lower Appellate Court's order so manifestly right that this Court would be justified in overlooking the illegality and dismissing the application. The party aggrieved has his remedy in a regular suit, and to that he must be referred.

The application is allowed and the order of the Lower Appellate Court must be set aside with costs.

[1] I. L. R., 1 Mad., 174. [2] 8 Mad. H.C.R., 87. [3] I.L.R., 32 Bom., 10.

Civil Revision No. 162 of 1915. nd October 1916.

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

NGA SAN BALU AND ANOTHER *v.* MI THAIK AND ANOTHER.

Mr. S. Mukerjer—for Applicants.

Mr. C. G. S. Pillay—for Respondents.

Civil Procedure—O. XXI. rr. 58, 60, 61.

Held,—that though a Judge may refuse to make an investigation under O. XXI, r. 58, if he is of opinion that the applicati on has been designedly delayed, he cannot dismiss an application on that ground once he has made an investigation, but is bound to pass an order under r. 60 or r. 61.

The Township Judge after holding an investigation under O. XXI, r. 58, and reviewing the evidence dismissed the application without coming to any finding on the ground that it had been made too late.

Considering the circumstances of the case it certainly could not be said that the application had been designedly delayed and I should feel inclined to construe the word "unnecessarily" in the proviso to O. XXI, r. 58 (1), in a generous way. Be that as it may, if the Township Judge had only read this proviso he would have seen that it did not apply because the investigation had already been made. If a Judge is of opinion that an application under O. XXI, r. 58 (1), has been designedly or unnecessarily delayed he may refuse an investigation, but if he makes an investigation he is bound to pass orders under O. XXI, r. 60, or under O. XXI, r. 61, Code of Civil Procedure, and the dismissal of the application on the ground of delay after the investigation had been made was illegal.

On behalf of the Respondent it has been suggested that the investigation should have been made by the Subdivisional Court, but it is clear from O. XXI, r. 52, that it is the Court which has custody of the property and not the attaching Court that has to make the investigation.

The order of the Township Court is set aside and the application is remanded to that Court in order that it may be disposed of according to law. There will be no order as to costs as the Respondent was not responsible for the mistake made.

Civil Revision No. 129 of 1916. 23rd October.

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

MAUNG HME AND ANOTHER *v.* MAUNG TUN HLA.

Messrs. Chatterjee and Vakil—for Applicants.

Mr. H. M. Lütter—for Respondent.

Land and Revenue Regulation—53 (2) (x).

Held,—that the jurisdiction of Civil Courts is not barred by section 53 (2) (x), Upper Burma Land and Revenue Regulation, in respect of claims to a right to fish, or connected with, or arising out of, the demarcation or disposal of any fishery.

Civil Second Appeal No. 307 of 1915, page 151.

This is a reference by the District Judge to this Court under section 113 of the Code of Civil Procedure. The District Judge

MAUNG HME v. MAUNG TUN HLA.

has not stated precisely the question on which orders are required, but it appears that he is in doubt whether section 53 (2) (x) of the Upper Burma Land and Revenue Regulation was validly enacted. Apparently the District Judge has assumed that this provision of the Regulation bars the jurisdiction of the Civil Courts, but for the reasons stated in the judgment in Civil Second Appeal No. 307 of 1915 of this Court, I am of opinion that this is not the case. It is clear that clause (x) of sub-section (2) of section 53 must be read subject to the provisions of sub-section (1) of that section. It does not purport to bar the jurisdiction of Civil Courts to all claims to a right to fish, or connected with, or arising out of, the demarcation or disposal of any fishery, but only claims which the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. The provisions relating to fisheries which are contained in section 32 of the Regulation have been repealed, and the Local Government or a Revenue Officer is not therefore empowered by or under the Regulation to dispose of any such claim; that this is also the view adopted by the Local Government would appear to be the case from the foot-note to section 53 at page 27 of the Upper Burma Land and Revenue Manual published by the authority of Government in which it is stated that clause (x), section 53, sub-section (2) ceased to apply since the extension of the Burma Fisheries Act, 1905, to Upper Burma

Since the jurisdiction of the Civil Courts is not barred, under section 9 of the Code of Civil Procedure the Court is entitled to take cognizance of the matter. It may be added that this is a suit for damages for trespass on the Plaintiff's fishery, and there appear to be no provisions of the Revenue Law by which such a suit can be entertained or the order or decree of the Revenue Court enforced.

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

Criminal Revision No. 429 of 1916. 2nd November.

T. K. KESVAIER AND TWO OTHERS v. KING-EMPEROR.

Mr. Vasudevan—for Applicants.

Gambling—3 (1) (*b*), 3 (2), 13.

Held,—that a person conducting or promoting, etc., a raffle is punishable under section 13 of the Burma Gambling Act.

I.L.R., 13 Bom., 681.
U.B.R., 1892—96, I, 112.

The accused persons have been convicted and sentenced under section 13 (*a*) or (*c*) of the Burma Gambling Act, the first and second applicants to pay a fine of Rs. 15 or suffer 15 days' rigorous imprisonment each, and the third to pay a fine of Rs. 25 or suffer one month's rigorous imprisonment.

The offence alleged was that the third accused had raffled a walking stick, the other two accused helping him to circulate the list and collect subscriptions for tickets in the raffle.

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It is urged that a raffle is not a game of *ti* within the meaning of the Burma Gambling Act. It is urged that a raffle is not a game at all and the case of *Queen-Empress v. Narottamdas Motiram* (1) is relied upon.

I think there is no doubt that a raffle is not a game in the ordinary sense of the word. Various definitions are quoted in the ruling cited. For instance, Wharton in his Law Lexicon defines gaming or gambling as the art or practice of playing, and following up any game, particularly those of chance. And a game is defined by Johnson as sport of any kind, a single match at play, a solemn contest. But in section 3 (1) (*b*) of the Burma Gambling Act the expression "game of *ti*" is used and in section 3, sub-section (2) the words gaming and playing are defined as including taking part in the game of *ti* or in any other game or pretended game of a like nature. It is clear therefore that the word "game" is used here in a very special and restricted sense; it is descriptive of the Burmese word *ti* which governs it, and the effect of the words must be that for the purposes of the act *ti* is a game.

It is urged again that the Burmese word *ti* does not mean and include a raffle. It is however defined in Judson's Dictionary as "the 36 animals (Chinese) lottery, a raffle," and the Burmese equivalent for the word to raffle appears to be ထည့်တောတိ။. I think therefore that there are no good grounds for dissenting from the view expressed in *Maung Po Tha v. Queen-Empress* (2) that a raffle is a game or pretended game of the nature of *ti*.

It is possible that the Act was not intended to render a raffle penal, but it is for the Courts to interpret the provisions of the Acts which they apply according to the meaning of the words used in them, and in this view of the case I have no doubt that a person conducting, promoting, etc., a raffle is punishable under section 13 of the Burma Gambling Act.

But at the same time it is necessary in awarding punishment to exercise some discretion and to consider the circumstances of each case and the degree of guilt disclosed in awarding punishment.

It is possible that a raffle may be used as a means of gambling and that if the law did not make it punishable this method of disposing of property might be abused and injury might be done to the morals of the public. But I think it must be conceded that a raffle honestly conducted is not a very serious danger to the State, and where the property to be raffled is not grossly overvalued and the money received is properly accounted for the offence is little more than a technical offence.

There is nothing upon the record to show that the ivory-handled stick here raffled was overvalued, or that the money was not properly accounted for, or that the raffle was not conducted with perfect honesty and fairness.

The convictions must be maintained, but the fine in each case is reduced to Re. 1.

(1) I.L.R., 13 Bom., 681. (2) U.B.R., 1892—96, I, 112.

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

Civil Appeal No. 273 of 1916. 14th December

H. E. MANDARI *v.* R. MISSER.

Mr. H. M. Lütter—for Appellant.

Mr. C. G. S. Pillay—for Respondent.

U. B. Civil Courts Regulation—12, 13.

Held,—that an appeal from a District Court under O. XLIII lies to the Divisional Court and not to the Court of the Judicial Commissioner, whatever be the value of the subject matter.

The Respondent in execution of a decree for over Rs. 56,000 against the Appellant had two oil wells sold. The Appellant applied under O. XXI, r. 90, to have the sale set aside on the ground of material irregularity. The District Court set aside the sale of one well but confirmed the sale of the other. Against that order the Appellant has appealed to this Court.

I think it is clear that the appeal lies to the Divisional Court.

Section 12 (13), Upper Burma Civil Courts Regulation, runs: "An appeal from a decree of a District Court shall, when the value of the suit in such Court is Rs. 10,000 or upwards, lie to the Court of the Judicial Commissioner and in any other case to the Divisional Court . . . . . ." Thus it is only appeals against decrees that lie to this Court. The order appealed against though it relates to the execution of a decree in a matter arising between the parties is not a decree because an appeal lies against it as an appeal against an order [section 2 (2), Civil Procedure Code] under O. XLIII, r. (1) (*j*). The appeal therefore lies to the Divisional Court.

Reliance is placed on Civil Appeal 74 of 1916 between the same parties which related to the execution of the same decree, which was entertained by the learned Judicial Commissioner, but in that case the order appealed against was passed under O. XXI, r. 83, and an appeal did not lie as an appeal against an order and therefore the order was a decree.

The memorandum of appeal is returned for presentation to the Divisional Court.

The Appellant will pay the Respondent's costs in this Court.

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

Civil Second Appeal No. 260 of 1916. 22th December.

MAUNG SHWE MYAT *v.* MAUNG SHWE BAN AND TWO OTHERS.

Mr. C. G. S. Pillay—for Appellant.

Mr. J. C. Chatterjee—for Respondents.

Civil Procedure—section 47, O. XLIII.

Held,—that all orders that come under section 47, Civil Procedure Code, are not decrees but only those that are not appealable under O. XLIII.

I.L.R., XIX Cal., 683.
I.L.R., XXVI Cal., 539.

At a sale in execution of a decree the appellant purchased certain land. The decree-holders applied to have the sale set

MAUNG SEWE MYAT v. MAUNG SEWE BAN.

aside on the ground of material irregularity in conducting it. Their application having been dismissed, they appealed unsuccessfully to the District Court and then appealed to this Court. The appeal was admitted and heard and the case was remanded under O. XLI, r. 23, read with O. XLII as the allegations of material irregularity had not been enquired into. The Township Judge then enquired into these allegations and again dismissed the application. The decree-holders appealed and the District Court directed the sale to be set aside. The auction purchaser has now come to this Court in second appeal and a preliminary objection has been taken that a second appeal does not lie, as the appeal to the Lower Appellate Court lay under O. XLIII, r. 1 (*j*), Civil Procedure Code. For the appellant it is urged that the matter in dispute related to the execution of a decree and arose between the decree-holders and the representative of the judgment-debtor and therefore came under section 47, Civil Procedure Code, and that consequently a second appeal lies. Reliance is placed on *Prosunno Kumar Sanyal and another v. Kali Das Sanyal and others*[1] and on *Hira Lal Ghose v. Chandra Kanto Ghose.*[2]

At first sight it looks as if there were some inconsistency in the Civil Procedure Code, but if the matter be gone into the apparent inconsistency disappears.

In the first case cited above a suit was brought to set aside a sale on the ground of fraud, and it was held that the matter fell under section 244 of the Code of 1882 and that a separate suit did not lie. In the second case an application was made to have a sale set aside on the ground of fraud and material irregularity in conducting the sale, and it was held that as the matter came under section 244 of the Code of 1882, a second appeal did lie.

The judgment of Banerjee, J., in the latter case is illuminating. He held that a second appeal lay because the grounds on which it was desired to have the sale set aside were not entirely comprised in section 311 of the Code of 1882 inasmuch as fraud was alleged—it is to be noted that the words "or fraud" in O. XXI, r. 90, are new—and that therefore as part of the order did not fall under section 588 but did come under section 244 it was a decree and a second appeal lay.

In the present case the application was to have the sale set aside on the ground of material irregularity in conducting it and fell under O. XXI, r. 90, and an appeal lay to the Lower Appellate Court under O. XLIII, r. 1 (*j*). It undoubtedly was a matter relating to the execution and satisfaction of a decree and it arose between the decree-holders and the representative of the judgment-debtor. The order passed therefore came under section 47, Civil Procedure Code, but nevertheless it was not a decree. In section 2 a decree is said to include the determination of any question within section 47 but not to include any adjudication from which an appeal lies as an appeal from an order. It is

[1] I.L.R., XIX Cal., 683. [2] I.L.R., XXVI Cal., 539.

necessary to read this definition so as to exclude inconsistency and therefore it must be read as declaring that a decree includes the determination of any question within section 47, Civil Procedure Code, except a determination against which an appeal lies as an appeal from an order. The definition in the Code of 1882 runs as follows: "Decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such an adjudication so far as regards the Court expressing it decides the suit or appeal. An order rejecting a plaint or directing accounts to be taken or determining any question referred to in section 244, but not specified in section 588, is within this definition; an order specified in section 588 is not within this definition." It was thus clearly laid down that all orders that came within the wording of section 244 were not decrees and though the language used in the present Code is not the same, I do not think there has been any change in the law in this respect.

In the present case the order of the Township Judge, though it fell under section 47, Civil Procedure Code, was appealable as an order and was therefore not a decree, and consequently a second appeal does not lie.

It has been suggested that the memorandum of appeal should be taken as an application for revision, but none of the grounds are good grounds for revision.

The appeal is accordingly dismissed with costs.

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

Civil Appeal No. 308 of 1915.
27th October 1916.

NGA PO NYUN *v.* MI YIN.

Mr. J. C. Chatterjee—for Appellant.
Mr. R. K. Banerjee—for Respondent.

Transfer of Property—60.

Held,—that anomalous mortgages like other mortgages are subject to the rules contained in section 60, Transfer of Property Act, and that the insertion of a forfeiture clause in a mortgage bond does not make the mortgage anomalous but is merely of no effect.

U.B.R., 1907—09, II, Mortgage, 1.
I.L.R., 11 Bom., 231.
I.L.R., XXI Mad., 110.
I.L.R., XXVII Bom., 297.

The Plaintiff-Respondent sued to redeem a house and ground which she had mortgaged to the Defendant-Appellant for Rs. 50. The latter pleaded that a clause in the mortgage deed gave him the right to obtain a mutation of names in the Town Lots Office if the mortgage-money and interest were not paid within five months, that he had done so and the property had become his. The Plaintiff-Respondent alleged that

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she had made one tender to the Defendant-Appellant's wife and one to his Advocate and that the money had not been accepted. The Defendant-Appellant denied both tenders.

The learned District Judge held that the contract could not execute itself and that Plaintiff-Respondent was entitled to redeem. He found that the Plaintiff-Respondent had tendered the money due to the Defendant-Appellant's wife four months after the execution of the mortgage deed and held that Defendant-Appellant was not entitled to interest after that date. He gave Plaintiff-Respondent a decree permitting her to redeem the property for Rs. 51 erroneously calculating the interest at the rate of 6 per cent. per annum.

It is now contended that the mortgage was an anomalous one, that the parties are therefore bound by its terms and that in accordance with one of them the property had become the Defendant-Appellant's. This condition runs as follows: "When five months have elapsed if the principal and interest be not paid and the property redeemed, let the creditor go with this mortgage bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely." *Nga Kyaw and 3 others v. Nga Yu Nut and another* [1] was a very similar case. It was there held that such a contract was not intended to execute itself and that a further transaction was necessary before the land could become the property of the mortgagees. But it is contended that the language used in the document in that case differs from that used in the present case and that it was because of the words "if . . . . we fail to redeem, we will make over outright" that it was held that a further transaction was necessary, whereas in the present case nothing remained to be done by the mortgagor. I am unable to accept this view.

I think it is clear that section 98, Transfer of Property Act, must be read subject to section 60. It is one of the last sections in Chapter IV in which the rights and liabilities of the parties to the different kinds of mortgages described in section 58 are laid down, and enacts that when a mortgage does not come within the definitions of those mortgages and is not a combination of the 1st and 3rd kinds or of the 2nd and 3rd then the rights and liabilities of the parties must be determined by the contract itself. This does not in my opinion take anomalous mortgages out of the operation of section 60 which occurs at the beginning of the Chapter and is clearly meant to apply to all mortgages.

The following passage from Gour's Laws of Transfer in British India, 3rd Edition, page 729, is illuminating:—

"In the Civil Law the debtor was allowed to redeem the estate on payment of his debt at any time before the sentence passed, and this right he exercised in spite of a covenant to the contrary expressly made in the deed. The Civil Law always looked at the substance of the transaction and argued that since

[1] U.B.R., 1907—09, II Mortgage, 1.

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by mortgage the property is conveyed by way of security for the loan, the creditor was not entitled to the property, if the debtor could otherwise pay off his debt.

But this view was foreign to the English common law which rigidly enforced the covenant for forfeiture on breach of the condition. Following however the principles of the Civil Law, the Court of Equity readily recognized the severity of literally enforcing mortgage contracts. But while the debtors had the power to strike at the rigour of the law, the Courts of Equity in England possess no such powers. On the other hand, they professed to follow the law whilst mitigating its evils, and so in England, while holding that on breach of the condition the mortgagee had the legal estate, still as it was unreasonable that he should retain for his own benefit what was intended as a mere security, they allowed the mortgagor to redeem on payment of the mortgage-money and costs, notwithstanding the forfeiture at law. And this right which was the creature of equity and the object of its solicitude came to be designated the equity of redemption. Indeed to the Judges of common law it was an innovation which they struggled hard to oppose, but the Courts of Equity justified its intervention on the ground that the clause as to forfeiture was in the nature of a penalty which should be relieved against."

I think there can be no doubt that the Legislature deliberately embodied this equitable principle in section 60, Transfer of Property Act, and as it is an equitable principle, Courts of Equity are bound to follow it even where the Transfer of Property Act is not in force. The principle is that however the mortgage-bond be worded the right to redeem cannot be extinguished except by an order of the Court or an act of the parties, *i.e.* an act subsequent to the mortgage. In *Bapuji v. Senavaraji*,[1] it was explained that the rule "once a mortgage always a mortgage" meant that an estate could not at one time be a mortgage and at another time cease to be so by one and the same deed. In *Kanaran and another v. Kuttoby and another*,[2] it was held that a stipulation in a mortgage that if the mortgage money were not paid on the due date the mortgagor would sell the property to the mortgagee at a price to be fixed by an umpire was unenforceable as constituting a fetter on the equity of redemption. In *Kanhayalal Bhikaram and others v. Narbar Laxmanshet Vani*,[3] Chandavarkar, J., said "The law is well established that though once a mortgage always a mortgage, and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee," but though the District Judge had held that there had been a subsequent transaction, which the parties had for years treated as a sale, it was held that the right to redeem had not been extinguished because

[1] I.L.R., II Bom., 231. [2] I.L.R., XXI Mad., 110.
[3] I.L.R., XXVII Bom., 297.

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the parties had acted under the mistaken belief that the forfeiture clause was enforceable and their conduct had not been the consequence of a transaction independent of the mortgage. Several other rulings could be cited to the same effect.

It is obvious therefore that if a forfeiture clause turned a simple mortgage into an anomalous one, it would still be subject to the equitable rule contained in section 60, Transfer of Property Act, but I am of opinion that the mere insertion of a forfeiture clause in a mortgage-bond does not make the mortgage anomalous, the forfeiture clause is merely of no effect.

The Plaintiff-Respondent is therefore entitled to redeem.

The learned District Judge held that the Defendant-Appellant was entitled to interest for four months only because the Plaintiff-Respondent at the end of that time had tendered payment to Defendant-Appellant's wife. Apart from the question whether she could be considered her husband's agent—they are ponnas—the tender if made could have no effect because the bond provided for a mortgage to last five months and so the money had not yet become payable.

The Plaintiff-Respondent also alleged a tender to Defendant-Appellant's advocate two months before the institution of the suit. There is one witness on her side who deposes to this tender, but the advocate, called as a witness by Defendant-Appellant, denied it and stated that the Plaintiff-Respondent had asked for time.

There is nothing to show which of the two spoke the truth, and I must decide that the tender is not proved.

The interest due up to the institution of the suit is Rs. 39-6-4. The Plaintiff-Respondent could have saved further interest by depositing the redemption money in Court. As she did not do so she will pay interest at the rate of 12 per cent. per annum from the institution of the suit to the date of payment.

The decree of the District Court is modified accordingly.

There will be no order as to the costs of this appeal.

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

Civil 2nd Appeal No. 191 of 1916. 6th October.

MAUNG CHIT PU AND ONE OTHER *v.* MAUNG PYAUNG AND THREE OTHERS.

Mr. A. C. Mukerjee—for Appellants.

Mr. D. Dutt—for Respondents.

Civil Procedure—Order XLI, Rules 22, 33.

Held,—that where a party appeals against that portion of the decree in respect of which he has been unsuccessful, the Court is not ordinarily entitled without any formal cross-objection by the other side, to set aside so much of the decree as has been in favour of the Appellant.

I.L.R., 34 All., 32.

The Plaintiffs sued to eject the Defendants from certain land. The Plaintiffs' case was that they had bought the land in suit in

the year 1262 B.E. corresponding with the year 1900 A.D., that they had been in possession ever since, that the Defendants had entered on the land and in spite of their protest taken possession and built a house on it.

The defence was that the Plaintiffs had not purchased the land, that the land had been mortgaged to the mother of the Plaintiff Ma San Hmi, who was also mother of the 1st Defendant Maung Pyaung, and that Maung Pyaung had been permitted to occupy the land with the consent of his mother the mortgagee.

The Court of first instance held that the sale had not been proved but that the Plaintiffs had contributed Rs. 10 towards the mortgage money of Rs. 15 which had been paid to the mortgagor, that the Plaintiffs were therefore entitled to two-thirds of the land in suit and the Court accordingly gave the Plaintiffs a decree for two-thirds of the land. The Plaintiffs appealed and the District Court held that the suit was wrongly framed, that it should have been a suit for possession and that the Plaintiffs having failed to make out their case were not entitled to succeed at all, and the Court not merely dismissed the appeal but dismissed the Plaintiffs' suit. The Plaintiffs now come to this Court in second appeal.

The first ground of the appeal is that the Defendants-Respondents not having raised any objection to the decree of the Court of first instance, it was not open to the Lower Appellate Court to set so much of the decree aside as was in favour of the Plaintiffs-Appellants.

For the Respondents the provisions of O. XLI, r. 33 of the Code of Civil Procedure are relied upon. This is a new provision of law incorporated in the present Code of Civil Procedure for the first time, and whereas there appears to have been no doubt that under the old Code a Court would not have been entitled to pass such an order as has here been passed by the Lower Appellate Court, it is urged that the new rule gives the Court ample power to pass any decree which the case may require. It was however pointed out in *Rangam Lal v. Jhandu*[1] that in interpreting this Rule the Court should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court-Fees Act nor of the Law of Limitation. Rule 22 of the same order provides, "any Respondent though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him before the Courts below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his Pleader of notice of the day fixed for hearing of the appeal, or within such further time as the Appellate Court may see fit to allow." This rule clearly shows that it was intended that, *primâ facie* at least, a Respondent should not

[1] I.L.R., 34 All., 32.

MAUNG CHIT PU v. MAUNG PYAUNG.

be allowed to take exception to so much of a decree as was against him without complying with the provisions of the Rule.

The learned Judges went on to say, "in a case in which there is no sufficient reason for a Respondent neglecting either to appeal or to file objections, we think the Court should hesitate before allowing him to object at the hearing of the appeal filed by the Appellant."

I think that this view of the law may be accepted and that where a party appeals against that portion of the decree in respect of which he has been unsuccessful, the Court is not ordinarily entitled without any formal cross-objection by the other side to set aside so much of the decree as has been in favour of the Appellant. I think therefore that to this extent the appeal in the present case must succeed.

On the merits, the Appellants urge that they are entitled to a decree as prayed for. It is however clear that their suit was not one for ejectment. They alleged wrongful dispossession by the Defendants and the suit was one for possession. This is a mistake however which is very commonly made and might have been, and should probably have been, corrected by an amendment in the Court of first instance. But the evidence certainly does not show that the Plaintiffs have made out their case, and both the Courts below have apparently agreed in holding that the sale set up was not proved while the mortgage relied upon by the Defendants was proved. In view of this finding and of the fact that the mortgagee was the mother of one Plaintiff and mother-in-law of the other living upon the same land with the Plaintiffs, I think it was a natural inference that the Plaintiffs were not in possession on their own account. There is moreover evidence that the Plaintiffs gave the Defendants permission to build a house upon the land. It was at least as good evidence as that of the Plaintiffs' witnesses.

There are no grounds for allowing the appeal except in so far as the Lower Appellate Court has disturbed the finding of the Court of first instance. To that extent the appeal is allowed and the decree of the Court of first instance will be restored with costs.

Civil Appeal No. 117 of 1916. 5th December.

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

MA SHWE PU *v.* MAUNG PO DAN AND ANOTHER.

Mr. J. C. Chatterjee—for Appellant.

Mr. A. C. Mukerjee—for Respondents.

Arbitration—Award.

Held,—that a suit may be brought to set aside an unstamped instrument without duty and penalty being paid.

4 M. and W. 366.

The Plaintiff-Appellant brought a suit to have an award set aside on the ground of misconduct of the arbitrators.

The award was stamped with Rs. 5 and the learned District Judge directed the Plaintiff-Appellant to pay deficient stamp duty and penalty amounting in all to Rs. 2,832-8 as the award directed partition of property. As she failed to pay this sum her suit was dismissed.

I think the learned District Judge was clearly wrong. The award could of course not be acted upon unless stamp duty and penalty were paid, but the Plaintiff-Appellant did not want it acted upon, it was to prevent its being acted upon that she went into Court. Again it could not be admitted in evidence without stamp duty and penalty being paid, but of what could it be evidence? It could only be evidence of the decision of the arbitrators. The Plaintiff-Appellant did not necessarily want to prove that. She alleged that the arbitrators had taken Rs. 1,000 from the Defendants-Respondents as arbitration fees. That amounted to an allegation of corruption. Again she alleged that they had not examined her witnesses. If she proved these two things, that might be a sufficient reason for setting aside the award, whatever the contents of the award might be, and it would not be necessary for the District Judge even to see what those contents were. Thus she might succeed without the award being put in evidence at all. On the other hand the putting of the award in evidence might be vital for the Defendants-Respondents' case and then it would be for them to pay the stamp duty and penalty.

"The object of both the statute and the common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility"—*Coppoch v. Bower.*[1]

The decree of the District Court is reversed and the suit is remanded under O. XLI, r. 23, for a decision on the merits.

Costs of this appeal will abide the final result.

The Plaintiff-Appellant will be given a certificate under section 13, Court Fees Act.

[1] 4 M. and W., 366.

Civil Second Appeal No. 96 of 1916. 23rd October.

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

MA PYU *v.* MAUNG PO CHET AND TWO OTHERS.

Mr. C. G. S. Pillay—for Appellant.
Mr. H. M. Lütter—for Respondents.

Evidence—115.

Held,—that in order that an estoppel under section 115, Evidence Act, may be created, the thing which one person induces another to believe must be a fact in existence or past, and that a mere promise to do something in future will not create an estoppel.

I.L.R. 10 All., 433.

The 1st Defendant-Respondent is the grandson of the Plaintiff-Appellant. The 2nd Defendant-Respondent is the 1st Defendant-Respondent's wife and the 3rd Defendant-Respondent is his mother-in-law.

The Plaintiff-Appellant sued for possession of a house and ground alleging that the ground was hers, that she had built the house on it, the 1st Defendant-Respondent being entrusted with the superintendence of its construction, that the house had cost Rs. 1,500 of which she had furnished Rs. 1,050 and the 1st Defendant-Respondent Rs. 450, that after the house had been built she had permitted the Defendants-Respondents to live in it with her, and that now disagreements had arisen and they had refused to quit.

The defence was that the ground had been given to 1st Defendant-Respondent by the Plaintiff-Appellant out of natural love and affection, that he had built the house with his own money and that he had permitted the Plaintiff-Appellant to live with him.

The Subdivisional Judge found that the house belonged to Plaintiff-Appellant, but that the 1st Defendant-Respondent had furnished more than Rs. 450 for its construction, and gave the Plaintiff-Appellant a decree for possession on payment of Rs. 1,100.

On appeal the Lower Appellate Court held that it was for the Plaintiff-Appellant to prove that she had furnished Rs. 1,050 for the construction of the house, that she had failed to prove this and that there was accordingly no difficulty in believing the story of the gift of the land, but that the question of the gift was not essential to a determination of the suit. It reversed the decree of the first Court and dismissed the suit.

One of the grounds of this appeal is that the Lower Appellate Court erred in holding that the question whether the land on which the building was erected was given or not by the Plaintiff-Appellant to the 1st Defendant-Respondent was not essential, and that the only issue to be determined was whether the Plaintiff-Appellant had contributed Rs. 1,050 towards the building.

The land admittedly had belonged to the Plaintiff-Appellant and she was in joint possession of the house and paid the taxes. If she had stated nothing further the burden of proof would have

been on the Defendants-Respondents, but she stated that the 1st Defendant-Respondent had built the house for her as her agent and had expended money of his own on its construction. He was therefore entitled to remain in joint possession until reimbursed what he had expended under section 221, Contract Act. She thus admitted that she had not an unconditional right to turn the 1st Defendant-Respondent out of the house, and she therefore had to prove on what terms she was entitled to sole possession.

No doubt she was not in a position to prove the exact amount expended by the 1st Defendant-Respondent, but she was bound to make out a *primâ facie* case, and this she could have done by proving the approximate value of the building and that she had contributed Rs. 1,050. The payment of this sum therefore was part of her case, but it does not follow that her suit was bound to fail entirely if she failed to prove it. Unless there was a gift she remains owner of the land.

For the Defendants-Respondents it is urged that the maxim *quicquid plantatur solo solo cedit*, which means that anything affixed to land with the object of improving the inheritance becomes part of the realty and the property of the owner, whether it be affixed by him or by some one else, is not applicable. This rule is not part of the law of India, sections 51, 63 and 108 (*h*), Transfer of Property Act, have taken its place. The two latter sections do not apply because 1st Defendant-Respondent is neither a mortgagee nor a tenant. Section 51 does not apply either. If 1st Defendant-Respondent be a transferee, *i.e.*, if there were a gift of the land, then the land is his, he is not a transferee with an imperfect title. But assuming that Plaintiff-Appellant failed to prove that the 1st Defendant-Respondent was her agent and that she contributed Rs. 1,050 she certainly could not lose her land unless she be estopped, and I think the equitable rule contained in section 51, Transfer of Property Act, should be followed.

Now it is plain that there was no gift. No registered deed was executed and the Plaintiff-Appellant remained in possession of the land. If the evidence adduced by the Defendants-Respondents be true, it merely amounts to proof that Plaintiff-Appellant promised to give the 1st Defendant-Respondent the land. Estoppel was not specifically pleaded, but at the hearing of this appeal it was urged that, if on the faith of Plaintiff-Appellant's promise the 1st Defendant-Respondent built the house with his own money, Plaintiff-Appellant is now estopped from asserting her title to the land.

But what "thing" did Plaintiff-Appellant induce 1st Defendant-Respondent to believe to be true. Supposing that he believed that a promise to give amounted to a gift, it cannot be said that this belief was induced by the Plaintiff-Appellant, and, moreover, a proposition of law is not a "thing" within the meaning of section 115, Evidence Act. In that section a "thing" means a fact and a fact in existence or past. "The intent of a party is necessarily uncertain as to its fulfilment. No person has a right to rely on it. A person cannot be bound not to change his

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intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed." *Langdon v. Dond.*[1] There is thus no estoppel in this case; Plaintiff-Appellant may have truly intended to give the land at the time she made the promise, if she ever made it, and have subsequently changed her mind.

I am therefore of opinion that the 1st Defendant-Respondent cannot claim the house as his property as long as the Plaintiff-Appellant is willing and ready to reimburse him the money which he expended on it. It is therefore immaterial whether the 1st Defendant-Respondent built the house as Plaintiff-Appellant's agent or on the faith of her promise to give him the land, the only question is the amount which the Plaintiff-Appellant must pay before she can evict him.

The only direct evidence of any contribution by the Plaintiff-Appellant is that given by a casual visitor, a cooly who has worked for Plaintiff-Appellant for ten years. According to one of her witnesses she is poor, and there are serious discrepancies between her own evidence and that given by her witness, Maung Po Kyan. I am therefore unable to hold that the Lower Appellate Court was wrong in finding that it was not proved that she contributed anything towards the building, and if she did she has only herself to blame for not taking receipts and keeping accounts.

The evidence adduced by the Defendants-Respondents as to the amount spent on the construction of the house is very deficient. The Subdivisional Court found that the value of the house was Rs. 2,150. This finding was based on a report by the bailiff, which was apparently admitted in evidence with the consent of both sides. The opinions as to the value of the building expressed by some of the Defendants-Respondents' witnesses are valueless. The value, Rs. 2,150, has not been disputed in this Court and will be accepted.

The decrees of the Courts below are accordingly set aside, and the Plaintiff-Appellant will be given a decree directing that upon her depositing in Court within one month for payment to the 1st Defendant-Respondent the sum of Rs. 2,150, the Defendants-Respondents shall give her complete possession of the house and ground in suit.

As the parties have been both partly successful they will bear their own costs throughout.

[1] I.L.R., 10 All., 433.

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

Civil 2nd Appeal No. 307 of 1915. 23rd October 1916.

SONILAL SHEOSHANKA BY HIS AGENT RAM PERSHAD *v.* DELAWAR.

Mr. J. C. Chatterjee and *Mr. Vakil*—for Appellants.
Mr. H. M. Lütter—for Respondent.

Land and Revenue Regulation,—53 (2), (*ii*).

Held,—that clause (ii) to sub-section (2) of section 53 of the Upper Burma Land and Revenue Regulation, neither bars nor purports to bar the jurisdiction of Civil Courts over claims to the ownership or possession of any State land except in respect of such matters as the Local Government or a Revenue Officer is empowered by or under the regulation to dispose of; and inasmuch as the regulation does not empower Revenue Officers to dispose of claims between private persons to the ownership or possession of any State land more than one year after the date of the declaration by the Collector that the land is State, and does not give any authority to the Financial Commissioner to make rules for deciding such claims, the jurisdiction of the Civil Courts is not barred and they are entitled and bound to take cognizance of such claims.

U.B.R., 1897—1901, II, 207, 209, 211 dissented from.
Civil Appeal No. 195 of 1913 (unpublished).
Civil Appeal No. 372 of 1913 (unpublished).

The Plaintiff-Appellant sued the Defendant-Respondent in the Township Court and prayed for a mortgage decree. The Judge gave him a money decree and he then appealed to the District Court which gave him a mortgage decree as prayed for. The plaintiff then applied to execute this decree by sale of the mortgaged properties which included 4·83 acres of land. The Judge's order is by no means clear, but it appears that the Judgment-debtor had ceased to occupy the 4·83 acres which had been mortgaged; he would seem to have been in occupation of 1·79 acres of the area under a license from the Deputy Commissioner, and another area of 1·79 acres had been assigned to one Maung Po So by the Deputy Commissioner, and in each case the land was held under a license issued in accordance with the rules under the Upper Burma Land and Revenue Regulation. It would appear that the order cancelling the original license of the Judgment-debtor and ordering the issue of two licenses for 1·79 acres each was passed on the 5th May 1914, more than a month before the date of the decree which the decree-holder was seeking to execute. The Township Judge apparently refused to execute the decree against the land, and the decree-holder thereupon appealed to the District Judge who directed that as to the area of 1·79 acres only, standing in the name of the Judgment-debtor, the Township Court should allow the Judgment-debtor's interest in the land to be sold for the benefit of the decree-holder. Against this order the decree-holder now comes to this Court in appeal on the ground that the District Court erred in holding that 1·79 acres of land should be excluded from the execution of the Appellant's decree.

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In the course of the argument it appeared that the land in question was State land. It has been held in Upper Burma that the jurisdiction of the Civil Courts is barred in respect of claims to the ownership or possession of State land by the provisions of section 53 of the Upper Burma Land and Revenue Regulation. The validity of that section was called in question recently in two cases of this Court, Civil Second Appeal No. 195 of 1913, and Civil Second Appeal No. 372 of 1913, in which the Additional Judge held that section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation is not validly enacted, and the Civil Courts have power to try suits between private individuals for the possession of State land.

The learned Advocate for the Appellant has maintained this view in the present appeal, and as the question of jurisdiction went to the root of the matter, notice was given to the Local Government as representing the Secretary of State and Mr. Lütter has been heard on behalf of the Secretary of State in support of the validity of this section of the Act.

The view that section 53 (2) (ii) of the Land and Revenue Regulation bars the jurisdiction of the Civil Courts appears to have been first put forward in the case, *Maung Tha Aung v. Maung San Kè.*[1] This decision was followed in *Maung Nut v. Ma Mi*[2] and in *Maung Kè v. Maung Po Hmi.*[3]

Before considering whether the section in question was validly enacted or not, it appears necessary to consider whether the rule laid down in those judgments was correct, since if the jurisdiction of the Civil Courts is not expressly or impliedly barred, there can be no doubt that under section 9 of the Code of Civil Procedure the Court may take cognizance of and try all suits of a civil nature relating to State land. The material portion of the judgment in *Maung Tha Aung v. Maung San Kè* was as follows:—"Now in section 53 (2) of the Land and Revenue Regulation it is laid down that 'a Civil Court shall not exercise jurisdiction over any of the following matters, which shall be cognizable exclusively by Revenue Officers, namely . . . . . (ii) any claim to the ownership or possession of any State land'. . . . . Consequently this suit is barred in the Civil Courts."

Now it appears to me that a reference to the Regulation in question does not justify this view, and it could only be arrived at by taking a portion of the section in question out of its context and applying it as a general and absolute rule. Section 53 runs as follows:—"except as otherwise provided by this regulation (i) a Civil Court shall not have jurisdiction in any matter which the Local Government or any Revenue Officer is empowered by or under this regulation to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested

[1] U.B.R., 1897—01, II, 207. [2] U.B.R., 1897—01, II, 209.
[3] U.B.R., 1897—01, II, 211.

in it or him by or under this Regulation; and in particular .... (2) A Civil Court shall not exercise jurisdiction over any of the following matters which shall be cognizable exclusively by Revenue Officers, namely," and then follow fourteen clauses of which one was cancelled by Regulation 4 of 1896. The second of these clauses is that quoted above. The clause in full runs as follows:—"Any claim to the ownership or possession of State land, or to hold such land free of land revenue or at a favourable rate of land revenue, or to establish any lien upon or other interest in such land or the rents, profits, or produce thereof." It is clearly therefore necessary to interpret this clause in relation to the general rule laid down in sub-section (1) of section 53 of which it forms a particular instance. It is not a rule which bars the jurisdiction of a Civil Court over claims to the ownership or possession of any State land except in such matters as the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of. And the question therefore arises whether the Local Government or a Revenue Officer is empowered by or under the Regulation to dispose of any claims to the ownership or possession of any State land.

The second rule laid down in section 53, sub-section (1) barring the cognizance by Civil Courts of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under the Regulation does not apparently apply in the present case, but it is clear that it does not bar or purport to bar the cognizance by Civil Courts of the manner in which the Local Government or a Revenue Officer exercises its or his powers, except so far as those powers are vested in it or him by or under the Regulation.

For the purposes of the present appeal the only part of the Regulation with which we are concerned is that part contained in Chapter III which relates to State land. Section 23 contains a definition of State land. Section 24 (1) lays down that "any land ..... declared by the Collector to be State land shall be deemed to be such land until the contrary is proved." The only reference to claims to the ownership or possession of State land is contained in sub-sections (2), (3) and (4) of section 24. Sub-section (2) lays down that "a claim to the ownership or possession of any land with respect to which such a declaration" (as has been referred to in sub-section 1) "has been or may be so made, or to hold such land free of land revenue or at a favourable rate of land revenue, or to establish any lien upon or other interest in such land or the rents, profits or produce thereof shall be cognizable by the Collector only" ..... From the words of this sub-section, it would appear probable that the claims referred to are claims against the State, but, whether this is so or not, the following sub-section, which lays down that the period of limitation for a claim under the last preceding sub-section shall be one year from the date of the declaration made by the Collector,

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makes it quite clear that the provisions of this section do not apply to claims made more than one year after the date of the declaration. There is no suggestion that in the present case the claim of the Appellant falls within this period of limitation, and there must in fact be very little land in Upper Burma in respect of which a declaration under the provisions of section 24 (1) of the Regulation was not made very much more than a year ago. Sub-section (4) merely empowers the Collector to withdraw a declaration made under sub-section (1) before the passing of an order or any claim preferred under sub-section (2). Section 25 of the Regulation lays down some of the incidents of the tenure of State land. There is nothing in this section from which it can be held or inferred that the jurisdiction of the Civil Courts is barred in the case of a claim to the ownership or possession of State land. Section 26 gives power to the Financial Commissioner to make rules in respect of State land which is waste, and sub-section (4) of section 26 lays down that no person shall acquire by length of possession or otherwise any interest in land disposed of, occupied or allotted in pursuance of the rules made by the Financial Commissioner under clause (1) beyond such interest as is conferred by the rules.

The rules framed by the Financial Commissioner do not appear anywhere to lay down that the jurisdiction of a Civil Court is barred in case of claims to State land. Financial Commissioner's Notification No. 8, dated the 8th July 1889, directs that claims as against the State to the ownership or possession of any land with respect to which a declaration that it is State land has been made or may be made, shall be tried by Collectors only and that claims between private individuals to the occupation or possession of State land shall be tried by a Collector or by an Assistant Collector of the first or second class. But this notification does not purport to do more than define the class of Revenue Officer by which claims of different descriptions shall be tried, and neither from the notification nor from the rules or directions framed under the Act is it possible to infer that any such monopoly of the trial of claims to State land as is apparently recognized in the published rulings of this Court quoted above is either claimed or suggested.

If there were any doubt as to whether the 13 or 14 clauses included in sub-section (2) of section 53, Land and Revenue Regulation were intended to lay down an absolute rule without reference to sub-section (1), I think it would be laid at rest by a reference to some of the other clauses. For instance clause (ix) purports to bar the jurisdiction of a Civil Court over any claim connected with or arising out of any right in an irrigation work or any charge in respect of any land irrigated from such a work or any matter which the Collector is bound to ascertain and record under section 36.

Section 36 of the regulation has been repealed and the regulation now contains no provisions relating to irrigation.

works, which are dealt with in the Burma Canals Act II of 1905.

Similarly clause (x) bars the jurisdiction of a Civil Court in respect of any claim to a right to fish, or connected with or arising out of the demarcation or disposal of any fishery. The regulation now contains no provisions relating to fisheries, section 32 having been repealed by the extension of the Burma Fisheries Act (1905) to Upper Burma. The view that these two clauses depended on, and were restricted to, the other provisions of the regulation and did not lay down a general rule of law irrespective of those provisions, appears to be the view which has also been taken by the Local Government, since in the footnotes appended to those clauses at page 27 of the Upper Burma Land and Revenue Manual which is published under the authority of Government, it is pointed out that clause (ix) should apparently have been repealed by Burma Act II of 1905, and that clause (x) ceased to apply since the extension of the Burma Fisheries Act, 1905, to Upper Burma.

I think therefore there can be no doubt that clause (ii) to sub-section (2) of section 53 of the Upper Burma Land and Revenue Regulation neither bars nor purports to bar the jurisdiction of Civil Courts except in respect of such matters as the Local Government or a Revenue Officer is empowered by or under the regulation to dispose of, and inasmuch as the regulation does not empower Revenue Officers to dispose of claims to the ownership or possession of any State land more than one year after the date of the declaration by the Collector that the land is State, and does not give any authority to the Financial Commissioner to make rules for deciding such claims, I am of opinion that the jurisdiction of the Civil Courts is not barred and that they are entitled and bound to take cognizance of such claims.

I have already stated that the terms of Financial Commissioner's Notification No. 8 of 1889 do not appear to be intended to empower Revenue Officers to dispose of claims between private individuals and there does not seem to be any rule giving them such powers. If, however, there is any such rule or if it was the intention of the notification to confer the power upon Revenue Officers of deciding claims between private individuals to the occupation or possession of State land, I think it is clear that except in so far as such notification or rule is issued or framed under the authority of, and in conformity with, section 24, sub-section (3) or section 26 or otherwise to effect the purposes of the regulation, it cannot have the effect of barring the jurisdiction of a Civil Court since it is not made or issued by or under the regulation. I am unable to find that the regulation anywhere empowers Revenue Officers to decide claims to occupy or possess State land between private persons except within one year of a declaration that the land is State, or gives any power to make rules by which Revenue Officers may be so empowered.

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In this view of the case it is not necessary to consider whether section 53 of the regulation was validly enacted or not. But I do not think it is possible to pass over in silence two of the arguments used by the Additional Judge of this Court in arriving at the conclusion that the section was not validly enacted.

It is apparently urged that the word "allegiance" which occurs in section 22 of the Indian Councils Act of 1861 is used in the sense of devotion or loyalty, and it is apparently argued that as the allegiance, in the sense of devotion or loyalty, of the person may depend upon the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, any law which may be held to affect those unwritten laws or that constitution must be illegal since the allegiance, in the sense of devotion or loyalty, of any person to the Crown may depend upon such a law. I am of opinion that the word "allegiance" used in section 22, India Councils Act is used in the ordinary legal sense of a duty or obligation of loyalty owed by a subject to his Sovereign. This is the sense in which the word is used in Chapter X of the first Book of Blackstone's Commentaries, and I have no doubt that the object of the section was to lay down in the words of a learned writer that "the Council may not pass a law affecting the authority of Parliament or any part of the unwritten law or constitution of the United Kingdom dealing with allegiance or the sovereignty or the Dominion of the Crown over any part of British India" (Professor A. Berredale Keith, The Journal of the Society of Comparative Legislation, Volume XXXVI, page 211).

Nor can I agree with the argument that whereas the section might be validly enacted in respect of the natives of the country, it is invalid in respect of Englishmen and is therefore entirely invalid.

The suggestion that whereas the allegiance of an Englishman might depend upon his right to have recourse in all cases to the ordinary tribunals, whereas in the case of a Burman it would not so depend, appears to me to be merely an instance of the difficulties into which the Courts would be landed if they attempted to give the meaning to allegiance attributed to it by the Additional Judge and is entirely opposed to the general spirit of legislation in this country.

Since the jurisdiction of the Civil Courts is not barred, the appeal will now be heard upon the merits.

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

Criminal Miscellaneous No. 18 of 1916, 2nd November.

NGA TI *v.* MAUNG KYAW YAN AND TWO OTHERS.

Mr. D. Dutt—for Applicant.

Mr. H. M. Lütter—for the Crown.

Messrs. Tha Gywe and Maung Su—for Respondents.

Criminal Procedure—107, 144.

Persons who have the right to do an act which is not wrongful cannot be properly bound down to keep the peace because some one else proposes to interfere with the right. The proper course in such a case is to bind down the other party.

XVII C.W.N., 238.
XII C.W.N., 703.
I.L.R., XXXII All., 571.
I.L.R., VI Mad., 203.

Certain residents of Mandalay made a report to the District Superintendent of Police which was forwarded to the District Magistrate who recorded the information given by three of their number and thereupon issued warrants for the arrest of two persons under section 107 of the Code of Criminal Procedure and then transferred the proceedings to the Eastern Subdivisional Magistrate for disposal.

Against this order the two persons arrested have come to this Court in revision and the Government Prosecutor has been heard for the District Magistrate. The persons who gave the information to the District Magistrate were also cited, but they do not wish to be parties to the proceedings and they have not supported the order.

The information given in the first instance is in writing and it was accompanied by a printed notice and a copy of a newspaper. The notice is an invitation to a meeting "to clear up doubts"; it stated that the *Sayadaws* from the four quarters of Mandalay had been invited to give their decision on certain matters and all friends of the persons who issued the notice were invited to attend. The newspaper article stated that the *Sayadaws* from the four quarters were to be entertained, and after that the question whether beef should or should not be eaten would be considered, the injunction by the Ledi *Sayadaw* and various other *pôngyis* would be read, after which the opinion of the *Sayadaws* would be asked for, and they would give their decision. The written information stated that there would be a serious dispute resulting in a breach of public peace because when there is a difference among *pôngyis* there will be a difference among laymen. It stated that the notice and the newspaper article convening a meeting would encourage a great and serious dispute between half of the residents of Mandalay who revere the Ledi *Sayadaw* and the rest, and if the meeting is held the information states that there will, through ill-feeling on each side, be a serious

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quarrel. The information stated that a public meeting was to be held at which the two Applicants intend to attack the Ledi *Sayadaw's* propaganda for putting a stop to the eating of beef, that a very large number of priests and laymen had been called by the two persons mentioned to attend the meeting, and unless they are placed on security their action would result in a breach of public (apparently a misprint for " peace ").

It is contended that this information did not justify the arrest of the two Applicants and proceedings being taken against them under section 107 of the Code of Criminal Procedure. On the other hand, it is urged that the information did justify that action and that this Court should not interfere at this stage of the proceedings.

I think there is no doubt that if the information did not justify the issue of a warrant this Court is entitled to interfere. It has been held constantly that it is the duty of the High Court to prevent the abuse of the provisions of the law. A recent case is that of *Rajendra Narain Singh v. King-Emperor*.[1]

Section 107 of the Code of Criminal Procedure authorises a District Magistrate to take action upon information that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity.

It is clear that there are two distinct sets of circumstances in which a Magistrate may take action under this section, first where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, *e.g.*, by committing an assault, and secondly where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act, but in the latter case the Magistrate may only take action where the act anticipated is a wrongful act. It has been laid down in a number of rulings that this section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is wrongful, and that the mere fact that the doing of a lawful act may lead to a breach of the peace, while it may authorise the Magistrate to take action against the persons expected to commit that breach, does not authorise action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity. The distinction has been explained in *Ferose Ali Mullik v. King-Emperor*,[2] where certain persons proposed to take a procession along a public road and it was pointed out by Woodroffe, J., that if those persons "have the right claimed, it is obvious that they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party"

[1] XVII C.W.N., 238. [2] XII C.W.N., 703.

The law was similarly explained in *Emperor v. Mahammad Yacoob.* [1] The matter was discussed at great length in *Sandram Chetty. v. Queen-Empress.* [2]

There can be no question that the right of public discussion is a right which every subject possesses, and that in convening a meeting to discuss religious matters the Applicants in the present case were not doing a wrongful act. If owing to the prevalence of ill-feeling between certain persons likely to attend the meeting, or any other cause, a breach of the peace was expected, the Magistrate had ample power under section 144 of the Code of Criminal Procedure to secure that the peace was not broken. But I am clearly of opinion that in arresting the Applicants in the present case and in ordering an enquiry into their conduct, the District Magistrate was not, upon the information which was before him, justified by the provisions of the Code of Criminal Procedure. If information is or was available that the Applicants themselves intended to commit a breach of the peace or to disturb the public tranquillity, the fact should be or should have been recorded.

The proceedings of the District Magistrate must be quashed and the warrants for the arrest of the Applicants cancelled.

[1] I.L.R., XXXII All., 571. [2] I.L.R., VI Mad., 203.

G.B.C.P.O.—No. 20, J.C.U.B., 25-4-1917—1,003.

Circular Memorandum No. 1 of 1914.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 24th March 1914.

In continuation of this Court's Circular Memorandum No. 16 of 1913, the attention of all Judges is invited to the changes in the law regarding the registration of documents, *viz.* :—

Documents executed before the 1st January 1914, which had to be registered under the Upper Burma Registration Regulation, 1897, can still be and must be registered, and cannot be admitted in evidence unless they are so registered.

Documents executed after the 1st January 1914 must be registered or need not be registered, as the case may be, in accordance with the provisions of sections 17 and 18 of the Indian Registration Act, 1908. Hence documents affecting immovable property of value less than Rs. 100, if executed after the 1st January 1914, do not require to be registered.

District Judges are requested to see that copies of the old Registration Manuals are not removed from the libraries of Subordinate Courts.

For years to come, they will be required for reference in Civil cases in which documents liable or not liable, as the case may be, to registration under the Regulation at the time they were executed, are put in evidence.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 9th April 1914.

In cases in which the Burma Railways are concerned, the Railway authorities issue a form to be presented by their employees called as witnesses to a Court (Criminal or Civil) in which is to be shown the "expenses" paid to such witnesses. The Judicial Commissioner directs that these forms when produced by a Railway employee should be filled in and signed by the officer paying out the witnesses' "expenses".

There is no objection to similar certificates of payment of witnesses' expenses being issued to other private employees if applied for.

The above instructions will be incorporated in the Courts Manual as paragraphs 517A and 601A.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 9th April 1914.

With reference to Judicial Department Notification No. 68, dated the 5th May 1913, publishing rules under section 91, sub-section (*1*), clause (*f*) of the Indian Lunacy Act, 1912, the Judicial Commissioner directs that the following shall be inserted in the Courts Manual as paragraph 795B :—

"Any expenditure incurred by Magistrates in carrying out the provisions of paragraph 795 by purchase of clothing or provision of travelling expenses (including those of a female attendant or relative sent as escort) shall be treated as judicial contingent expenditure.

Provided that—

(1) where the cost of maintenance of a lunatic is recoverable from Municipal or Town Funds, such cost should be paid from such fund in the first instance ;

(2) where an order has been passed by a Civil Court under Chapter V of the Act for the reception of a lunatic in an asylum, the guardian or relative obtaining such order is responsible for his transmission to the asylum."

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 4 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 19th May 1914.

It having been brought to notice that Magistrates are not sufficiently careful in seeing that the documents required by the Indian Lunacy Act, 1912, and Judicial Department Notification No. 68, dated the 5th May 1913, to accompany a civil lunatic sent by them to an asylum are complete, the Judicial Commissioner desires to impress on Magistrates the importance of making themselves familiar with the law and instructions referred to above and of seeing that they are correctly observed.

Magistrates are also directed to be careful in complying with the directions regarding classification of lunatics which are contained in paragraph 8 of Judicial Department Circular No. 18 of 1913.

By order,

ED. MILLAR,

Registrar.

[*Not translated into Burmese.*]

Circular Memorandum No. 5 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL DISTRICT JUDGES IN UPPER BURMA.

Dated Mandalay, the 2nd June 1914.

The attention of District Judges is drawn to the Notifications of the Government of India in the Home Department (Judicial) Nos. 1801C., 1802C, 1823C. and 1824C., dated the 13th March 1914, published on pages 365 *seqq.* of the *Gazette of India*, Part I, dated the 14th March 1914, whereby the Official Trustees Act, 1913, and the Administrator-General's Act, 1913, are brought into force on and with effect from the 1st April 1914; from that date Burma is constituted a separate province for the purposes of these Acts, the Chief Court, Lower Burma, exercises and discharges for the whole province (Upper and Lower Burma) the powers and duties assigned to the High Court, and Mr. P. C. Sen is appointed Administrator-General and Official Trustee.

Rules under the above-mentioned Acts will be framed in due course.

District Judges will observe that the Official Trustees Act now applies to Upper Burma for the first time, the old Act never having been extended to Upper Burma.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 6 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

ALL SESSIONS JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 20th June 1914.

The attention of all Sessions Judges and Magistrates is drawn to the amended form of Annual Criminal Judicial Statement No. 2 (Form No. U. B. $\frac{\text{Judicial}}{\text{Criminal 14}}$ in three sheets), which is circulated with Judicial Department (Forms) Memorandum No. 96, dated the 20th June 1914. The amended form should be brought into use with the Criminal Justice Report for the year 1914.

By order,

ED. MILLAR,

Registrar.

NOTE.—*Circular Memorandum No. 5 of 1914 is not translated into Burmese.*

Circular Memorandum No. 7 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

SESSIONS JUDGES AND MAGISTRATES IN

UPPER BURMA.

Dated Mandalay, the 30th June 1914.

The recent alteration in the law relating to criminal lunatics appears to have escaped the notice of some Sessions Judges and Magistrates. Under section 471 of the Code of Criminal Procedure, 1898, as amended by the Indian Lunacy Act, 1912, and the Repealing and Amending Act, 1914, Sessions Judges and Magistrates are now competent to order the detention of criminal lunatics in the Rangoon Lunatic Asylum, and it is unnecessary to report to the Local Government under this section.

The reference in Circular Memorandum No. 9 of 1913 to Magistrates or Courts applying for the orders of the Local Government under section 471, Criminal Procedure Code, is being cancelled.

Paragraphs 486, 487 and 489 of the Upper Burma Courts Manual will be duly amended.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 8 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 17th July 1914.

Courts should decline to issue a summons for the personal attendance of any officer of the Land Records Department unless they are satisfied, by enquiry from the party applying for the summons, that the officer's evidence is required for facts within his knowledge but not exhibited in his official registers or maps.

Entries in Settlement and Land Records registers and maps cannot legally be proved by the oral evidence of a Land Records officer.

They are public documents within section 74, Evidence Act. Certified copies of such documents can be obtained under section 76 and put in evidence under section 61 and section 77, and the Courts are obliged to accept them as correct unless or until they are disproved—Section 79. They are also the only secondary evidence of the contents of the original documents which can be given—Section 65 (*e*).

The practice of examining Land Records officers as witnesses as to the contents of Settlement and Land Records registers and maps is objectionable on two grounds—(1) such evidence is inadmissible, and (2) it wastes the time of the officers, and hampers them in their work.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 9 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 28th July 1914.

Judicial Department Notification No. 100, dated the 20th June 1914, extends sections 54, 59, 107, 117, 118 and 123 of the Transfer of Property Act to Upper Burma, except the areas excluded from the operation of the Indian Registration Act, 1908.

2. The effect of the extensions as a whole is to modify the instructions contained in the 3rd clause of Circular Memorandum No. 1 of 1914 of this Court with effect from the 1st September 1914.

3. One effect of the extension of section 59 is that mortgages "by delivery of title deeds" hitherto resorted to in Mandalay and perhaps other places will be no longer valid.

4. The meaning of section 117 is that section 107 does not apply to leases for agricultural purposes.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 10 of 1914.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES,

UPPER BURMA.

Dated Mandalay, the 14th September 1914.

The following amended clause (3) of paragraph 207 of the Upper Burma Courts Manual is circulated for information and guidance :—

The amendment will be included in the 7th List of Corrections to the Manual.

AMENDED CLAUSE.

(3) In cases where death has been caused whether the injuries were sufficient in the ordinary course of nature to cause the death of a person of normal health and strength or if not whether they were so imminently dangerous that they must in all probability cause the death of such a person or if not whether they were likely to cause the death of such a person ;

or if the injured person was weakly or suffering from any disease or injury whether in view of his particular bodily condition the injuries were likely to cause his death.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 11 of 1914.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES IN
UPPER BURMA.

Dated Mandalay, the 15th October 1914.

In supersession of this Court's Circular Memoranda No. 9 of 1910 and No. 1 of 1911, the attention of all Sessions Judges and Magistrates is invited to the annexed extract of Government of India Home Department Notification No. 938-C., dated the 10th February 1914.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 12 of 1914.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 15th October 1914.

The attention of all Judges is invited to Judicial Department Notification No. 139, dated the 1st September 1914, on page 605 of the *Burma Gazette*, Part I, whereby, with effect from the 1st September 1914, leases of immoveable property in Upper Burma, other than leases from year to year or for any term exceeding one year or reserving a yearly rent, may be made by unregistered instrument or by oral agreement without delivery of possession.

The substance of the above will be inserted in the Upper Burma Courts Manual as paragraph 834A.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 13 of 1914.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA

Dated Mandalay, the 10th December 1914.

The following amendment to paragraph 935 of the Upper Burma Courts Manual, which will be included in the 7th list of corrections to the Manual, is now circulated for information and guidance.

Amendment.

In paragraph 935 of the Upper Burma Courts Manual *delete* the figure and words "(2) dismissed complaints", and *re-number* the figures (3) (4) and (5) which follow as (2) (3) and (4) respectively.

By order,
ED. MILLAR,
Registrar.

Extract from the Government of India, Home Department, Notification No. 938-C (Judicial), dated Delhi, the 10th February 1914.

In exercise of the powers conferred by section 5, clause (*b*), of the Whipping Act, 1909 (IV of 1909), and in supersession of all previous notifications on the subject the Governor-General in Council is pleased to specify the offences under the laws mentioned in the schedule hereto annexed, being offences punishable under the said laws with imprisonment, as offences for the abetment or commission of or attempt to commit which juvenile offenders may be punished with whipping in accordance with the provisions of the said section.

Schedule.

General Acts.

1. The Police Act, 1861 (V of 1861), section 34.

* * * * *

3. The Cattle Trespass Act, 1871 (I of 1871), section 24.

* * * * *

5. The Opium Act, 1878 (I of 1878), section 9.

* * * * *

7. The Indian Arms Act, 1878 (XI of 1878), sections 19, 20, 22 and 23.

8. The Indian Salt Act, 1882 (XII of 1882), sections 9 and 10.

9. The Indian Telegraph Act, 1885 (XIII of 8885), sections 24 and 25.

10. The Indian Railways Act, 1890 (IX of 1890), sections 126, 127, 128 and 129.

11. The Prevention of Cruelty to Animals Act, 1890 (XI of 1890), sections 3, 4 and 5.

12. The Prisons Act, 1894 (IX of 1894), section 42.

13. The Excise Act, 1896 (XII of 1896), sections 45, 46, 48, 49 and 51.

* * * * *

15. The Reformatory Schools Act, 1897 (VIII of 1897), sections 27 and 28.

16. The Indian Post Office Act, 1898 (VI of 1898), sections 61, 62 and 68.

17. The Ancient Monuments Preservation Act, 1904 (VII of 1904), section 16.

18. The Indian Electricity Act, 1910 (IX of 1910), section 40.

19. The Criminal Tribes Act, 1911 (III of 1911), section 22 (1)

20. The Cantonment Code, 1912, section 67 (1).

Local Acts.

* * * * *

BURMA.

1. The Burma Gambling Act, 1899 (I of 1899), sections 10, 11 12 and 13.

* * * * *

3. The Burma Forest Act, 1902 (IV of 1902), section 55, clause (*b*).

H. WHEELER,

Secretary to the Government of India.

Circular Memorandum No. 1 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 22nd June 1915.

At the instance of the Government of Burma the Judicial Commissioner issues the following instructions for careful observance in Upper Burma :—

A contingent register, where it is not already maintained, should be opened at each Judicial headquarters in Upper Burma. It is not, however, necessary that more than one such register should be maintained at each headquarters. The register should be kept in the Court of the senior judicial officer in the station, *viz.*, the District Judge, Subdivisional Judge or Township Judge as the case may be. All contingent bills of other judicial officers at the same headquarters should be drawn by the officer in charge of the register on their behalf and entered in detail in the register as if they had been charges incurred by himself; and no officer who is thus absolved from the necessity of maintaining a contingent register should in future be allowed to draw contingent bills on his own account.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum, No. 2 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 12th August 1915.

The Judicial Commissioner has been pleased to decide that powers of attorney are not required in future in the case of Advocates appearing on behalf of accused persons or appellants in criminal cases in all Subordinate Courts and in the Court of the Judicial Commissioner, Upper Burma.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 23rd August 1915.

1. With reference to Police Department letter No. 686—1M.-44, dated the 21st July 1915, from the Chief Secretary to the Government of Burma, the Judicial Commissioner directs that all original references forwarding documents for examination by the Government Expert in Handwriting should, in future, be addressed to the Director, Criminal Intelligence, instead of direct to the Expert as heretofore. To this extent rule 13 of the instructions published in Circular Memorandum No. 5 of 1909, dated the 4th June 1909, is hereby amended.

2. The Government Expert's report will, in all cases, be submitted to the Director, Criminal Intelligence, by whom it will be forwarded to the officer who originated the reference. Intermediate references and all requisitions and summonses for Court attendances under rules 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Instructions referred to above should be disposed of, as hitherto, by direct communication with the Government Expert.

3. To avoid delays and difficulties that are likely to arise in securing the attendance of the Expert in Criminal cases, it is directed that the authority of Courts to issue summons for his appearance be exercised with due discrimination. The Expert should not be called upon to appear in cases which are of a comparatively unimportant nature, or in which it is probable his evidence would be of doubtful utility. It is accordingly directed that no summons to give evidence should be issued to the Expert by any Subordinate Magisterial Court without the concurrence of the District Magistrate previously obtained in each case.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 6th September 1915.

The Judicial Commissioner has noticed on inspecting Courts that office copies of the weekly returns of criminal cases are made and kept in all Courts submitting this return. As all the information required is available in the registers of the Court, it is not necessary for office copies to be made and this practice should therefore cease.

By order,

ED. MILLAR,
Registrar.

G. B. C. P. O.—No. 33, J. C., U. B., 7-1-1916—1,000—R. A. P.

Circular Memorandum No. 5 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL COURTS IN UPPER BURMA.

Dated Mandalay, the 5th November 1915.

Attention is invited to this Court's Notification No. 10, dated the 24th October 1912, regarding the procedure to be observed in the transmission of processes issued to Courts in certain States in Rajputana.

It has been brought to notice that several Courts still continue to send processes for service to the Agent to the Governor-General, Rajputana, instead of direct to the Courts concerned through the channels specified in the list published with the notification referred to.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 6 of 1915.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Dated Mandalay, the 19th November 1915.

In continuation of this Court's Circular Memorandum No. 3 of 1915, dated the 23rd August 1915, Magistrates are warned that as Mr. Hardless, Government Expert in Handwriting, has been granted furlough preparatory to retirement with effect from the 1st August 1915, no further work should be sent to him. Information as to his successor is still awaited.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1915.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 23rd December 1915.

The attention of all Judges is drawn to Judicial Department Notification No. 170, dated the 19th November 1915, under which rules under section 10 of the Indian Soldiers (Litigation) Act, 1915, are published by the Local Government.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 1 of 1916.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 10th January 1916.

The attention of all Magistrates is drawn to the orders in paragraph 623 of the Burma Police Manual prescribing the procedure to be adopted with regard to the reporting of the seizure or possession of property by the Police under sections 51, 53, 523 and 550, Code of Criminal Procedure, to a Magistrate. It has been observed that the police are apt to detain property seized under these sections for indefinite periods, owing to the loose manner in which many magistrates pass orders. If the Magistrate does not pass an order for the immediate return of the property to its owner, the police must send in a list in Form $\frac{\text{Police}}{59}$, and the Magistrate must open out a Miscellaneous case and enter it in Register II, Criminal. If when the Police report in Form $\frac{\text{Police}}{59}$ is submitted to him, the Magistrate passes orders for the property to be returned to its owner or detained during further inquiry by the police, he need not, unless the special circumstances of the case require it, open a miscellaneous proceeding in his Court, but in the event of his passing an order of detention must fix a definite date, not generally more than seven days ahead, by which the Police must submit a further report of the action taken. If he passes orders for the disposal of the property in any other way, *e.g.*, by proclamation or sale, he must straightway open a miscellaneous case and enter it in his Criminal Register No. II.

The above will be inserted in the Upper Burma Courts Manual as paragraph 811A and will be included in the 9th list of corrections to that Manual in due course.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 2 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 21st January 1916.

As the embargo on the export of feathers was imposed on humanitarian principals, the Government of India are of opinion that it would be inconsistent for Government to profit by their confiscation. It is therefore directed that feathers ordered to be confiscated under the Wild Birds and Animals Protection Act, 1912, or under any other Act, shall be destroyed.

In view of the value of feathers, special precautions should be taken by Magistrates to see that the orders are carried out.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

To

ALL SESSIONS JUDGES AND MAGISTRATES IN
UPPER BURMA.

Dated Mandalay, the 21st January 1916.

It has been brought to notice that the Inspector of Factories, Burma, was, on more than one occasion, sommoned to Court for the purpose of prosecuting managers and occupiers of factories for offences against the Indian Factories Act, 1911, or the rules or orders thereunder, only to find on reaching the Court that the Magistrate would not sit at the hour mentioned in the summons, or that the summons had not been served. It is suggested that, to save time and money, the Inspector should be informed when summonses have not been served or when, for any reason, cases cannot be heard on the day originally fixed.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 4 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES AND JUDGES IN UPPER BURMA.

Dated Mandalay, the 5th February 1916.

Processes issued to other Courts and to the police and other officers for service should be shown in the Register of letters issued ($\frac{\text{Miscellaneous}}{\text{General 136}}$) and not in Bailiff's Register No. III.

The fifth paragraph of the instructions to that Register will be amended accordingly in due course.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1916.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 23rd February 1916.

The attention of the Judicial Commissioner has been drawn to the fact that the Judges of certain Township Courts which have under section 11 of the Upper Burma Civil Courts Regulation, 1896, been invested with Small Cause Court jurisdiction, use the style "Judge of the Small Cause Court" and that the records are headed "In the Small Cause Court of ." This nomenclature is incorrect. All proceedings in Township Courts should be headed "In the Township Court of ." If a case is dealt with in its Small Cause Court jurisdiction, "Small Cause Court jurisdiction" should be added under the title on the flyleaf of the record. The Judge should sign as Judge or Additional Judge without any addition.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 6 of 1916.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 23rd February 1916.

Attention is invited to this Court's Notification No. 3, dated the 23rd July 1915 (page 934 of the *Burma Gazette*, Part IV, dated the 31st July 1915), whereby in clause (2) of Rule 11 of Order XX, Civil Procedure Code, the words "and after notice to the decree-holder" have been substituted for the words "and with the consent of the decree-holder." Courts now have the power to order payment of a decretal amount by instalment at any time, and the Judicial Commissioner trusts that they will avail themselves of it.

The power given by the amended rule is discretionary, *i.e.*, it should not be exercised without sufficient reason—and there is nothing to prevent the Court when granting an order for payment of the decree by instalments, from attaching to the order a condition that upon default of any one instalment the whole balance shall become payable.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 7 of 1916.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 21st March 1916.

The following alterations are made in the Instructions to annual Civil Judicial Statement No. 5 (Form No. U.B. $\frac{\text{Judicial}}{\text{Civil 12}}$):—

Substitute the words "under Chapter V of the Indian Lunacy Act, IV of 1912" *for* the words "under Act XXXV of 1858 as amended by Act XIV of 1870" and the words "or under section 75 of the Indian Lunacy Act, IV of 1912" *for* the words "or under section 14 of Act XXXV of 1858."

Presiding officers of Courts are requested to use up the existing stock of these forms, making the necessary alterations by hand.

By order,

ED. [illegible],

Registrar.

Circular Memorandum No. 8 of 1916.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 6th June 1916.

It has been brought to the Judicial Commissioner's knowledge that orders are from time to time passed for the detention of persons in accordance with the provisions of section 471, Code of Criminal Procedure, without any attempt having been made to obtain medical advice or to ascertain the opinion of a medical officer as to the mental state of the accused. It is in the Judicial Commissioner's opinion very necessary both in the interests of justice and in the interests of accused persons who are belived to be insane, that the opinion of a medical officer who has had an opportunity of observing the accused should in every case be obtained by the Magistrate before orders for detention in an asylum are passed. When therefore there is reason to believe that it may be necessary to deal with the case of an accused person under section 471, Code of Criminal Procedure, before passing orders under that section the Magistrate dealing with the case should remand the accused for observation by a competent medical officer and should before passing orders examine and record the examination of the medical officer. It will probably be found advisable as a general rule to remand such cases to the custody of a jail and it may be advisable to transfer the proceedings of Magistrates at out-stations to the Court of a Magistrate at the station where the jail is situated. In districts where there is no jail the District Magistrate should make the necessary arrangements to carry these instructions into effect.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 9 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

Dated Mandalay, the 10th July 1916.

The following orders of Government prescribing the procedure to be followed when issuing notices of orders attaching the salary or allowances of persons employed in the various departments of Government or Railway Companies, are reproduced for the information and guidance of Courts in Upper Burma.

By order,

ED. MILLAR,
Registrar.

(1) Army Department Judicial Notification No. 84, dated Fort William, the 28th January 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of Military officers in Military employ serving in any Division of the Army, as noted on the margin, shall be sent to the Deputy Controller of Military Accounts of such Division.

Peshawar Division.
Rawalpindi Division.
Lahore Division.
Quetta Division.
Mhow Division.
Poona Division.
Meerut Division.
Lucknow Division.
Secunderabad Division.
Burma Division.

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(2) Judicial Department Notification No. 352, dated the 25th April 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that the following addition shall be made to Army Department Notification No. 84, dated the 28th January 1910:—

"*Explanation.*—For the purposes of this notification the Kohat and Bannu Brigades shall be deemed to be included in the Rawalpindi Division, the Derajat Brigade in the Lahore Division and the Aden Brigade in the Poona Division."

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(3) Commerce and Trade Notification No. 3002—38, dated the 22nd April 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Civil Procedure Code, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of employees of the Commercial Intelligence Department, shall be sent to the Comptroller, India Treasuries.

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(4) Home Department Judicial Notification No. 1862, dated the 9th November 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices or orders attaching the salary or allowances of persons employed in the High Court, Calcutta, in the Home Department of the Government of India, and in offices subordinate to the Home Department, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

THE SCHEDULE.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
High Court, Calcutta	Accountant-General, Bengal.
Home Department : Offices of Administrator-General, Bengal, Criminal Intelligence Department, Director-General, Indian Medical Service, Office of the Private Secretary to His Excellency the Viceroy.	Controller, India Treasuries, Calcutta.
X-Ray Institute	Treasury Officer, Dehra Dun.
Offices in Port Blair	Treasury Officer, Port Blair.

PART II.—NON-GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
High Court, Calcutta	Registrar, High Court, Appellate or Original Side, according as the judgment-debtor is employed on the Appellate or Original Side.
Home Department	Registrar, Home Department, Calcutta. / Simla
Office of Administrator-General, Bengal	Administrator-General, Bengal.
Criminal Intelligence Department ...	Director, Criminal Intelligence, Simla.
Office of Director-General, Indian Medical Service.	Secretary to the Director-General, Indian Medical Services, Simla.
X-Ray Institute	Superintendent, X-Ray Institute, Dehra Dun.
Offices in Port Blair	Superintendent, Port Blair.
Office of Private Secretary to His Excellency the Viceroy.	Registrar, Office of the Private Secretary to His Excellency the Viceroy, Calcutta. / Simla

(5) Legislative Department Notification No. 63, dated the 9th December 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed in the Legislative Department shall be sent to the officers specified in column 2 of the schedule hereto annexed.

THE SCHEDULE—contd.

Class of employee. (1)	Officer to whom notice should be sent. (2)
Gazetted officers	Comptroller, India Treasuries, Calcutta
Non-gazetted officers	Registrar, Legislative Department, Calcutta / Simla

(6) Public Works Department Notification No. 101, dated the 9th December 1910.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed in the Public Works Department of the Government of India, and in the offices subordinate to the Public Works Department, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Public Works Department and officers of the Consulting Architect to the Government of India and Electrical Advisor to the Government of India.	Comptroller, India Treasuries.

PART II.—NON-GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Public Works Department	Registrar, Public Works Department, Calcutta / Simla
Office of the Consulting Architect to the Government of India.	Consulting Architect to the Government of India, Calcutta / Simla
Office of the Electrical Advisor to the Government of India.	Electrical Advisor to the Government of India, Calcutta.

THE SCHEDULE—contd.

(7) Educational Department General Notification No. 28, dated the 13th January 1911.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed in the Department of Education of the Government of India, and in offices subordinate to that Department, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of the Presidency Senior Chaplain, Church of Scotland, Bengal.	Accountant-General, Bengal.
Department of Education, Offices of Census Commissioner for India, Director-General of Archæology, Lord Bishop's Chaplain, Calcutta, Archdeacon of Calcutta, Registrar of the Diocese, Calcutta, Sanitary Commissioner with the Government of India, Imperial Library, Imperial Record Department, Board of Examiners, and Indian Museum.	Comptroller, India Treasuries, Calcutta.
Central Research Institute ...	Treasury Officer, Kasauli.

PART II.—NON-GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Department of Education	Registrar, Department of Education, Calcutta. / Simla.
Office of Census Commissioner for India	Census Commissioner for India, Simla.
Office of Director-General of Archæology	Director-General of Archæology, Simla.
Office of Lord Bishop's Chaplain, Calcutta.	Bishop's Chaplain, Calcutta.
Office of Presidency Senior Chaplain, Church of Scotland, Bengal.	Presidency Senior Chaplain, Church of Scotland, Bengal, Calcutta.
Office of Archdeacon of Calcutta ...	Archdeacon of Calcutta, Calcutta.
Office of Registrar of the Diocese of Calcutta.	Registrar of the Diocese of Calcutta, Calcutta.

THE SCHEDULE—contd.

PART II—NON-GAZETTED OFFICERS—concld.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of Sanitary Commissioner with the Government of India.	Sanitary Commissioner with the Government of India, Simla.
Central Research Institute	Director, Central Research Institute, Kasauli.
Imperial Library	Librarian, Imperial Library, Calcutta.
Imperial Record Department ...	Officer in charge of the Records of the Government of India, Calcutta.
Office of Board of Examiners ...	Secretary to the Board of Examiners, Calcutta.
Indian Museum	Secretary to the Trustee, Indian Museum, Calcutta.

(8) Railway Department Notification No. 16, dated the 20th January 1911.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed under the Railway Board, and in Railway offices subject to the administrative control of the Railway Board, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Railway Department (Railway Board)—Gazetted officers	Comptroller, India Treasuries, Calcutta.
Non-gazetted officers	Registrar, Railway Department (Railway Board), Calcutta / Simla.
State Railways worked by or being constructed by the State.	Examiner of Accounts of the Railway concerned, except when the Examiner of Accounts is personally concerned, in which case the Accountant-General, Railways, is the appointed officer.
Office of State Railway Coal Superintendent.	Examiner of Accounts, Eastern Bengal State Railway.
Office of Superintendent, Local Manufactures, Calcutta.	
Office of Superintendent, Local Manufactures, Bombay.	Government Examiner of Railway Accounts Bombay.

THE SCHEDULE—contd.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be se (2)
North Western Railway Collieries ...	Examiner of Accounts, North-West Railway.
State lines worked by Companies and Companies' lines.	Chief Auditor of the Railway c cerned.
Office of Senior Government Inspector, Circle No. I, Calcutta.	Government Examiner of Rail Accounts, Calcutta.
Office of Junior Government Inspector, Rangoon.	Government Examiner of Accou Burma Railways, Rangoon.
Office of Senior Government Inspector, Circle No. II, Calcutta.	Government Examiner of Rail Accounts, Calcutta.
Office of Junior Government Inspector, Circle No. II, Calcutta.	
Office of Senior Government Inspector, Circle No. III, Lucknow.	Examiner of Accounts, Oudh a Rohilkhand Railway, Lucknow.
Office of Junior Government Inspector, Circle No. III, Gorakhpur.	Government Examiner of Accou Bengal and North-Western R way, Gorakhpur.
Office of Senior Government Inspector, Circle No. IV, Lahore.	Examiner of Accounts, North-West Railway, Lahore.
Office of Senior Government Inspector, Circle No. V, Bombay.	Government Examiner of Railv Accounts, Bombay.
Office of Junior Government Inspector, Circle No. V, Bombay.	
Office of Senior Government Inspector, Circle No. VI, Bombay.	
Office of Junior Government Inspector, Circle No. VI, Bombay.	
Office of Senior Government Inspector, Circle No. VII, Madras.	Government Examiner of Railw Accounts, Madras.
Office of Junior Government Inspector, Circle No. VII, Madras.	
Office of Government Examiners of Railway Accounts.	The Government Examiner concern except when he is himself persona concerned in which case the Acco tant-General, Railways, is the appo ted officer.

(9) Finance Department (Accounts and Finance) Notification No. 1153-A dated the 24th February 1911, as amended by Finance Department (Accounts a Finance) Notification No. 657-A., dated the 15th October 1912.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules the First Schedule to the Code of Civil Procedure, 1908, the Governo General in Council is pleased to direct that notices of orders attachin the salary or allowances of persons employed in the Finance Depar ment of the Government of India, and in offices subordinate to it, sha be sent to the officers specified in each case in column 2 of the schedu hereto annexed.

THE SCHEDULE—contd.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Finance Department: Offices of the Comptroller and Auditor-General, the Head Commissioner of Paper Currency and the Mint and Assay Master, Calcutta	Comptroller, India Treasuries, Calcutta.
Office of the Mint and Assay Masters, Bombay.	Accountant-General, Bombay.
Office of the Accountant-General and Commissioner of Paper Currency, Madras.	* Accountant-General and Commissioner of Paper Currency, Madras.
Office of the Accountant-General and Commissioner of Paper Currency, Bombay.	* Accountant-General and Commissioner of Paper Currency, Bombay.
Office of the Accountant-General, Bengal	* Accountant-General, Bengal.
Office of the Accountant-General, United Provinces.	* Accountant-General, United Provinces, Allahabad.
Office of the Accountant-General and Commissioner of Paper Currency, Punjab.	* Accountant-General and Commissioner of Paper Currency, Punjab, Lahore.
Office of the Accountant-General and Commissioner of Paper Currency, Burma.	*Accountant-General and Commissioner of Paper Currency, Burma, Rangoon.
Office of the Accountant-General, Eastern Bengal and Assam.	* Accountant-General, Eastern Bengal and Assam, Shillong.
Office of the Accountant-General, Post Office and Telegraphs.	* Accountant-General, Post Office and Telegraphs, Calcutta.
Office of the Comptroller, India Treasuries.	* Comptroller, India Treasuries, Calcutta.
Office of the Comptroller, Central Provinces.	* Comptroller, Central Provinces, Nagpur.
Office of the Examiner of Accounts, Military Works Services.	* Examiner of Accounts, Military Works Services, Simla.
Office of the Accountant-General, Railways.	Comptroller, India Treasuries.
Office of the Examiner of Accounts, North-Western Railway.	† Examiner of Accounts, North-Western Railway.
Office of the Examiner of Accounts, Eastern Bengal Railway.	† Examiner of Accounts, Eastern Bengal Railway.
Office of the Examiner of Accounts, Oudh and Rohilkhand Railway.	† Examiner of Accounts, Oudh and Rohilkhand Railway.
Office of the Examiner of Accounts, Lower Ganges Bridge Project.	† Examiner of Accounts, Lower Ganges Bridge Project.
Office of the Government Examiner of Railway Accounts, Madras.	Examiner of Accounts, Oudh and Rohilkhand Railways.
Office of the Government Examiner of Railway Accounts, Bombay.	

* Except where the head of the office is himself concerned, in which case the Comptroller-General is the appointed officer.

† Except where the head of the office is himself concerned, in which case the Accountant-General, Railways, is the appointed officer.

THE SCHEDULE—contd.

PART I.—GAZETTED OFFICERS—concld.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of the Government Examiner of Railway Accounts, Calcutta. Office of the Government Examiner of Railway Accounts, Rohilkhand and Kumaon Railway Company. Office of the Government Examiner of Railway Accounts, Bengal and North-Western Railway. Office of the Government Examiner of Railway Accounts, Assam-Bengal Railway. Office of the Government Examiner of Railway Accounts, Burma Railways.	Examiner of Accounts, Oudh and Rohilkhand Railways.

PART II.—NON-GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Finance Department	Registrar, Finance Department, Calcutta, Simla.
Office of the Comptroller and Auditor-General.	Comptroller and Auditor-General, Calcutta.
Office of the Head Commissioner of Paper Currency.	Assistant Comptroller-General in charge, Paper Currency, Calcutta.
Office of the Mint Master, Calcutta ...	Mint Master, Calcutta.
Office of the Assay Master, Calcutta ...	Assay Master, Calcutta.
Office of the Mint Master, Bombay ...	Mint Master, Bombay.
Office of the Assay Master, Bombay ...	Assay Master, Bombay.
Office of the Accountant-General and Commissioner of Paper Currency, Madras.	Accountant-General and Commissioner of Paper Currency, Madras.
Office of the Accountant-General and Commissioner of Paper Currency, Bombay.	Accountant-General and Commissioner of Paper Currency, Bombay.
Office of the Accountant-General and Commissioner of Paper Currency, Bengal.	Accountant-General, Bengal, Calcutta.
Office of the Accountant-General and Commissioner of Paper Currency, United Provinces.	Accountant-General, United Provinces, Allahabad.
Office of the Accountant-General and Commissioner of Paper Currency, Punjab.	Accountant-General and Commissioner of Paper Currency, Punjab, Lahore.
Office of the Accountant-General and Commissioner of Paper Currency, Burma.	Accountant-General and Commissioner of Paper Currency, Burma, Rangoon.

THE SCHEDULE—contd.

PART II.—NON-GAZETTED OFFICERS—concld.

Department or office in which judgment-debtor is employed.	Officer to whom notice should be sent.
(1)	(2)
Office of the Accountant-General, Eastern Bengal and Assam.	Accountant-General, Eastern Bengal and Assam, Shillong.
Office of the Accountant-General, Post Office and Telegraphs.	Accountant-General, Post Office and Telegraphs, Calcutta.
Office of the Comptroller, India Treasuries.	Comptroller, India Treasuries, Calcutta.
Office of the Comptroller, Central Provinces.	Comptroller, Central Provinces, Nagpur.
Office of the Examiner of Accounts, Military Works Services.	Examiner of Accounts, Military Works Services, Simla.
Currency Office, Karachi	Deputy Commissioner of Paper Currency, Karachi.
Currency Office, Cawnpore ...	Assistant Accountant-General in charge, Paper Currency, Cawnpore.
Office of the Accountant-General, Railways.	Accountant-General, Railways.
Office of the Examiner of Accounts, North-Western Railway.	Examiner of Accounts, North-Western Railway.
Office of the Examiner of Accounts, Eastern Bengal Railways.	Examiner of Accounts, Eastern Bengal Railway.
Office of the Examiner of Accounts, Oudh and Rohilkhand Railway.	Examiner of Accounts, Oudh and Rohilkhand Railway.
Office of the Examiner of Accounts, Lower Ganges Bridge Project.	Examiner of Accounts, Lower Ganges Bridge Project.
Office of the Government Examiner of Railway Accounts, Madras.	Examiner of Accounts, Oudh and Rohilkhand Railway.
Office of the Government Examiner of Railway Accounts, Bombay.	
Office of the Government Examiner of Railway Accounts, Calcutta.	
Office of the Government Examiner of Railway Accounts, Rohilkhand and Kumaon Railway Company.	
Office of the Government Examiner of Railway Accounts, Bengal and North-Western Railway.	
Office of the Government Examiner of Railway Accounts, Assam-Bengal Railway.	
Office of the Government Examiner of Railway Accounts, Burma Railways.	

(10) Department of Revenue and Agriculture General Notification No. 756, dated the 21st March 1911.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed in the Department of Revenue and Agriculture of the Government of India, and in the Departments under the administrative control of the Department of Revenue and Agriculture, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

THE SCHEDULE—contd.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed.	Officer to whom notice should be sent.
(1)	(2)
1. Department of Revenue and Agriculture, Government of India, including the office of the Inspector-General of Forests to the Government of India. 2. Forest Research Institute and College, Dehra Dun. 3. Survey of India Department ... 4. Imperial Meteorological Department, Simla. 5. Offices of the Director, Colaba and Alibag Observatories, Bombay and of the Director, Kodaikanal and Madras Observatories. 6. Imperial Agricultural Department including the Offices of the Inspector-General of Agriculture in India, Pusa and the Imperial Cotton Specialist, Poona. 7. Agricultural Research Institute and College, Pusa. 8. Office of the Inspector-General, Civil Veterinary Department, Simla. 9. Imperial Bacteriological Laboratory, Mukhtesar. 10. Government Cattle Farm, Hissar ... 11. Civil Veterinary Department, Sind, Baluchistan and Rajputana. 12. Office of the Veterinary Officer Investigating Camel Diseases, Lahores. 13. Botanical Survey of India including Reporter on Economic Products and the Indian Museum' Industrial Section.	Comptroller, India Treasuries, Calcutta.

PART II.—NON-GAZETTED OFFICERS.

Department of office in which judgment-debtor is employed.	Officer to whom notice should be sent.
(1)	(2)
1. Department of Revenue and Agriculture, Government of India, including the office of the Inspector-General of Forests.	Registrar, Department of Revenue and Agriculture, Government of India, Calcutta / Simla
2. Office of the President, Forest Research Institute and College.	President, Forest Research Institute and College, Dehra Dun.
3. Office of the Imperial Sylviculturist	Imperial Sylviculturist, Dehra Dun.

THE SCHEDULE—contd.

PART II.—NON-GAZETTED OFFICERS—contd.

Department or office in which judgment-debtor is employed.	Officer to whom notice should be sent.
(1)	(2)
4. Office of the Imperial Forest Botanist	Imperial Forest Botanist, Dehra Dun.
5. Office of the Imperial Forest Economist.	Imperial Forest Economist, Dehra Dun.
6. Office of the Forest Zoologist ...	Forest Zoologist, Dehra Dua.
7. Office of the Forest Chemist ..	Forest Chemist, Dehra Dun.
8. * Survey of India Department (Trigonometrical Surveys).	Superintendent, Trigonometrical Surveys, Dehra Dun.
9. Survey of India Department (Northern Circle).	Superintendent, Northern Circle, Survey of India Department, Mussoorie.
10. Survey of India Department (Southern Circle.)	Superintendent, Southern Circle, Survey of India Department, Bangalore.
11. Survey of India Department (Eastern Circle).	Superintendent, Eastern Circle, Survey of India Department, Shillong.
12. Survey of India Department (Office of Superintendent, Map Publication).	Superintendent, Map Publication, Survey of India Department, Calcutta.
13. Survey of India Department (Photo-Litho Office).	
14. Survey of India Department (Engraving and Drawing Offices.	
15. Survey of India Department (Map Record and Issue Office).	
16. Survey of India Department (Mathematical Instrument Office).	Officer in charge, Mathematical Instrument Office, Survey of India Department, Calcutta.
17. Survey of India Department (Simla Drawing Office).	Officer in charge, Simla Drawing Office, Simla.
18. * Survey of India Department (Surveyor-General's Office).	Registrar, Surveyor-General's Office, Calcutta.
19. Meteorological Office, Simla ...	Director-General of Observatories, Simla.
20. Meteorological Office, Madras ...	Meteorologist, Madras.
21. Meteorological Office, Bombay ...	Meteorologist, Bombay.
22. Meteorological Office, Calcutta ...	Meteorologist, Calcutta.
23. Meteorological Office, Allahabad ...	Meteorologist, Allahabad.
24. Office of the Director, Colaba and Alibag Observatories.	Director, Colaba and Alibag Observatories, Bombay (Colaba).
25. Office of the Director, Kodaikanal and Madras Observatories.	Director, Kodaikanal and Madras Observatories, Kodaikanal.
26. Meteorological Department (whole-time observers other than those employed in Nos. 19 to 25 above).	Director-General of Observatories, Simla.
27. Office of the Inspector-General of Agriculture in India.	Inspector-General of Agriculture in India, Pusa, Bengal.
28. Office of the Imperial Cotton Specialist, Poona.	Imperial Cotton Specialist, Poona.
29. Agricultural Research Institute and College, Pusa.	Director, Agricultural Research Institute and College, Pusa, Bengal.

* NOTE.—Entries Nos. 8 to 18 in Part II of the Schedule include the following classes of establishments:—

Sub-Assistant Superintendents, old Provincial Service; Sub-Assistant Superintendents, Upper Subordinate Service; Ministerial Establishment (clerks, printers, engravers, photographers, artificers, etc.); and Lower Subordinate Service (surveyors, writers, computors, draftsmen, etc).

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THE SCHEDULE—contd.

PART II.—NON-GAZETTED OFFICERS—concld.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
30. Office of the Inspector-General, Civil Veterinary Department.	Personal Assistant to the Inspector-General, Civil Veterinary Department, Simla.
31. Imperial Bacteriological Laboratory, Mukhtesar.	Imperial Bacteriologist, Mukhtesar, District Naini Tal, United Provinces.
32. Government Cattle Farm, Hissar ...	Superintendent, Government Cattle Farm, Hissar.
33. Civil Veterinary Department, Sind, Baluchistan and Rajputana.	Superintendent, Civil Veterinary Department, Sind, Baluchistan and Rajputana, Karachi, Sind.
34. Office of the Veterinary Officer Investigating Camel Diseases.	Veterinary Officer Investigating Camel Diseases, Lahore.
35. Botanical Survey of India, including assistant for systematic work, the Reporter on Economic Products, and the Indian Museum, Industrial Section.	Director, Botanical Survey of India, Sibpur, Howrah.
36. Office of the Board of Scientific Advice.	Secretary, Board of Scientific Advice, Royal Botanic Gardens, Sibpur, Howrah.

(11) Judicial Department Notification No. 792, dated the 25th May 1911.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of gazetted and non-gazetted officers employed under the orders of the Military Secretary to His Excellency the Viceroy shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed

PART I.—GAZETTED OFFICERS.

Designation of officer. (1)	Officer to whom notice should be sent. (2)
Military Secretary and Aides-de-Camp to the Viceroy.	Deputy Controller, Military Accounts 8th (Lucknow) Division.
Surgeon to the Viceroy. Comptroller, Viceroy's Household. Personal Assistant to the Military Secretary to the Viceroy.	Comptroller, India Treasuries.
Assistant Surgeon to the Viceroy Superintendent, Viceregal Estates, Simla Subdivision.	Accountant-General, Public Works, Bengal.
Commandant and Adjutant, Viceroy's Body Guard.	Deputy Controller, 7th (Meerut) Division

THE SCHEDULE—contd.

PART II.—NON-GAZETTED OFFICERS.

Designation of officer. (1)	Officer to whom notice should be sent. (2)
Superintendent, Viceregal Estates, Calcutta Subdivision.	Deputy Accountant-General, Public Works, Bengal.
Superintendent, Viceregal Gardens, Simla.	Military Secretary to the Viceroy.
Foreman Engineer, Viceregal Estates, Simla.	Superintendent, Viceregal Estates, Simla.
Office of the Military Secretary to the Viceroy.	Personal Assistant to the Military Secretary to the Viceroy.
Offices of the—	
Superintendent, Viceregal Estates, Simla.	Superintendent, Viceregal Estates, Simla.
Superintendent, Viceregal Estates, Calcutta.	Superintendent, Viceregal Estates, Calcutta
Director of Music and establishment of His Excellency the Viceroy's Band.	Military Secretary to the Viceroy.

(12) Finance Department (Military Finance) Leave and Appointments Notification No. 751-G., dated the 16th June 1911.

In pursuance of Order XX, Rule 48, sub rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Governor-General in Council is pleased to direct that notices of orders attaching the salary or allowances of persons employed in the Finance Department (Military Finance), and in the offices subordinate to the Government of India in that Department shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed.

PART I.—GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Finance Department (Military Finance).	Comptroller, India Treasuries, Calcutta.
Office of the Military Accountant-General.	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Controller of Military Accounts, Northern Circle.	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Deputy Controller of Military Accounts, 1st (Peshawar) Division. Office of the Divisional Disbursing Officer, 1st (Peshawar) Division.	Deputy Controller of Military Accounts, 1st (Peshawar) Division, Peshawar.

THE SCHEDULE—contd.

PART I.—GAZETTED OFFICERS—contd.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of the Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division.	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Divisional Disbursing Officer, 2nd (Rawalpindi) Division.	
Office of the Deputy Controller of Military Accounts, 3rd (Lahore) Division.	Deputy Controller of Military Accounts, 3rd (Lahore) Division, Lahore.
Office of the Divisional Disbursing Officer, 3rd (Lahore) Division.	
Office of the Controller of Military Accounts, Western Circle.	Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Deputy Controller of Military Accounts, 4th (Quetta) Division.	Deputy Controller of Military Accounts, 4th (Quetta) Division, Quetta.
Office of the Divisional Disbursing Officer, 4th (Quetta) Division.	
Office of the Deputy Controller of Military Accounts, 5th (Mhow) Division.	Deputy Controller of Military Accounts, 5th (Mhow) Division, Mhow.
Office of the Divisional Disbursing Officer, 5th (Mhow) Division.	
Office of the Deputy Controller of Milinary Accounts, 6th (Poona) Division.	Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Divisional Disbursing Officer, 6th (Poona Division.	
Office of the Controller of Military Accounts, Eastern Circle.	Deputy Controller of Military Accounts, 8th (Lucknow) Division.
Office of the Deputy Cotroller of Military Accounts, 7th (Meerut) Division.	Deputy Controller of Military Accounts, 7th (Meerut) Division, Meerut.
Office of the Divisional Disbursing Officer, 7th (Meerut) Division.	
Office of the Deputy Controller of Military Accounts, 8th (Lucknow) Division.	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Divisional Disbursing Officer, 8th (Lucknow) Division.	
Office of the Deputy Collector of Military Accounts in Independent charge, 9th (Secunderabad) Division.	Examiner of Military Accounts, 9th (Secunderabad) Division, Bolarum.
Office of the Divisional Disbursing Officer, 9th (Secunderabad) Division.	
Office of the Deputy Controller of Military Accounts in Independent charge, Burma Division.	Examiner of Military Accounts, Burma Division, Maymyo.
Office of the Divisional Disbursing Officer, Burma Division.	
Office of the Controller of Military Supply Accounts.	Controller of Military Supply Accounts, Calcutta

THE SCHEDULE—contd.

PART I.—GAZETTED OFFICERS—concld.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of the Chief Accountant, Bombay Dockyard. Office of the Accountant, Kidderpore Dockyard.	Controller of Marine Accounts, Calcutta.

PART II.—NON-GAZETTED OFFICERS.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Finance Department (Military Finance)	Registrar, Finance Department (Military Finance), Simla.
Office of the Military Accountant-General.	Military Accountant-General, Simla.
Office of the Controller of Military Accounts, Northern Circle.	Controller of Military Accounts, Northern Circle, Rawalpindi.
Office of the Deputy Controller of Military Accounts, 1st Peshawar Division.	Deputy Controller of Military Accounts, 1st (Peshawar) Division, Peshawar.
Office of the Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division.	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Deputy Controller of Military Accounts, 3rd (Lahore) Division.	Deputy Controller of Military Accounts, 3rd (Lahore) Division, Lahore.
Office of the Divisional Disbursing Officer, 1st (Peshawar) Division.	Divisional Disbursing Officer, 1st (Peshawar) Division, Peshawar.
Office of the Divisional Disbursing Officer, 2nd (Rawalpindi) Division.	Divisional Disbursing Officer, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Divisional Disbursing Officer, 3rd (Lahore) Division.	Divisional Disbursing Officer, 3rd (Lahore) Division, Lahore.
Office of the Controller of Military Accounts, Western Circle.	Controller of Military Accounts, Western Circle, Poona.
Office of the Deputy Controller of Military Accounts, 4th (Quetta) Division.	Deputy Controller of Military Accounts, 4th (Quetta) Division.
Office of the Deputy Controller of Military Accounts, 5th (Mhow) Division.	Deputy Controller of Military Accounts, 5th (Mhow) Division, Mhow.
Office of the Deputy Controller of Military Accounts, 6th (Poona) Division.	Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Divisional Disbursing Officer, 4th (Quetta) Division.	Divisional Disbursing Officer, 4th, (Quetta) Division, Quetta.

THE SCHEDULE—concld.

PART II.—NON-GAZETTED OFFICERS—contd.

Department or office in which judgment-debtor is employed. (1)	Officer to whom notice should be sent. (2)
Office of the Divisional Disbursing Officer, 5th (Mhow) Division.	Divisional Disbursing Officer, 5th (Mhow) Division, Mhow.
Office of the Divisional Disbursing Officer, 6th (Poona) Division, Poona.	Divisional Disbursing Officer, 6th (Poona) Division, Poona.
Office of the Controller of Military Accounts, Eastern Circle.	Controller of Military Accounts, Eastern Circle, Lucknow.
Office of the Deputy Controller of Military Accounts, 7th (Meerut) Division.	Deputy Controller of Military Accounts, 7th (Meerut) Division, Meerut.
Office of the Deputy Controller of Military Accounts, 8th (Lucknow) Division	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Deputy Controller of Military Accounts in Independent charge, 9th (Secunderabad) Division.	Deputy Controller of Military Accounts in Independent charge, 9th (Secunderabad) Division, Bolarum.
Office of the Divisional Disbursing Officer, 9th (Secunderabad) Division.	
Office of the Deputy Controller of Military Accounts in Independent charge, Burma Division.	Deputy Controller of Military Accounts in Independent charge, Burma Division, Maymyo.
Office of the Divisional Disbursing Officer, Burma Division.	Divisional Disbursing Officer, Burma Division, Maymyo.
Office of the Controller of Military Supply Accounts.	Controller of Military Supply Accounts, Calcutta.
Office of the Chief Accountant, Bombay Dockyard.	Chief Accountant, Bombay Dockyard, Bombay
Office of the Accountant, Kidderpore Dockyard.	Accountant, Kidderpore Dockyard, Calcutta.

(13) Judicial Department Notification No. 77, dated the 10th June 1911.

In pursuance of Order XXI, Rule 48, sub-rule (1) of the rules in the First Schedule to the Code of Civil Procedure, 1908, the Lieutenant-Governor is pleased to direct that notices of orders attaching the salary or allowance of officers shown in column 1 of the schedule hereto annexed, shall be sent to the officers specified in each case in column 2 of the schedule hereto annexed :—

Officers whose salary is to be attached. (1)	Officer to whom notice should be sent. (2)
1. Gazetted officers stationed in Rangoon belonging to the following Departments :— (a) Land Revenue (including Settlement and Land Records) and General Administration.	The Accountant-General, Burma.

THE SCHEDULE—contd.

Officers whose salary is to be attached. (1)	Officer to whom notice should be sent. (2)
1. Gazetted officers stationed in Rangoon belonging to the following Departments:—*concld.*	
(*b*) Excise	The Accountant-General, Burma.
(*c*) Income-tax	
(*d*) Political	
(*e*) Samps	
(*f*) Accounts	
(*g*) Judicial	
(*h*) Prison	
(*i*) Registration	
(*j*) Police	
(*k*) Marine	
(*l*) Education	
(*m*) Ecclesiastical	
(*n*) Medical	
(*o*) Sanitary	
(*p*) Veterinary	
(*q*) Agricultural	
(*r*) Printing	
2. The following gazetted officers or classes of gazetted officers stationed outside Rangoon:—	
(*a*) All officers of the Burma Commission.	The Accountant-General, Burma.
(*b*) Judges of the rank of District Judge or higher rank.	
(*c*) Superintendents of Jails.	
(*d*) Officers of the Civil Police of the rank of Assistant Superintendent or higher rank.	
(*e*) Officers of the Military Police of the rank of Assistant Commandant or Assistant Adjutant or higher rank,	
(*f*) Port Officers, the Marine Transport Officer, Mandalay, and the Superintendent of Government Vessels and Launches, Upper Burma.	
(*g*) Inspectors of Schools, the Inspectress of Schools, the Head Master and Technical Instructor, Government Engineering School, Insein, and the Superintendent of the Insein Reformatory School.	
(*h*) Government Chaplains and Chaplains of the Additional Clergy Society.	
(*i*) Civil Surgeons	
(*j*) Gazetted officers of the Agricultural Department.	

THE SCHEDULE—contd.

Officers whose salary is to be attached. (1)	Officer to whom notice should be sent. (2)
2. The following gazetted officers or classes of gazetted officers stationed outside Rangoon—*concld.* (*b*) The Superintendent, Archæological Survey.	
3. Officers (excluding clerks and menials) belonging to any of the departments specified in item 1 above, and not mentioned in any other item in this list—	The Accountant-General, Burma.
If stationed in Rangoon	
If stationed outside Rangoon ...	The Treasury Officer of the district in which stationed.
4. Officers of the Kheddah Department	The Treasury Officer of the headquarters of the district in which stationed.
5. Officers and establishment of the Customs Department stationed in Rangoon.	The Chief Collector of Customs.
6. Officers (excluding clerks and menials) of the Customs Department stationed outside Rangoon.	The Treasury Officer of the district in which stationed.
7. Gazetted officers of the Public Works Department of the rank of Sub-Engineer and higher rank, and all Accountants belonging to the same department.	The Deputy Accountant-General, Public Works Branch.
8. Establishment of the Deputy Accountant-General, Public Works Branch.	
9. Subordinate establishments, office or other, of Superintending Engineers, Public Works Department, and of the Sanitary Engineer, Burma.	Superintending Engineer concerned or Sanitary Engineer, as the case may be.
10. Supervisors and Subordinate Public Works officers and office establishment of Executive Engineers including subdivisional clerks.	Executive Engineer.
11. Supervisors and Subordinate Public Works Officers and office establishment of the following independent subdivisions:—	
Central Stores, Rangoon ...	Officer-in-charge.
Chin Hills, Falam	
Mandalay Subdivision, Mandalay	
Independent Lighthouse Subdivision, Rangoon.	
12. The Chief Conservator of Forests, Burma.	The Chief Conservator of Forests, Burma.
13. The Conservator of Forests, Northern Circle.	The Conservator of Forests, Northern Circle.
18. The Conservator of Forests, Southern Circle.	The Conservator of Forests, Southern Circle.
15. The Conservator of Forests, Pegu Circle.	The Divisional Forest Officer, Depôt and Agency Division, Rangoon.

THE SCHEDULE—contd.

Officer whose salary is to be attached. (1)	Officer to whom notice should be sent. (2)
16. The Conservator of Forests, Tenasserim Circle.	The Conservator of Forests, Tenasserim Circle.
17. All other Forest Officers ...	The Divisional Forest Officer.
18. Establishments in the Civil Secretariat.	The Under Secretary concerned or the Assistant Secretary, as the case may be.
19. Establishments in the Public Works Secretariat.	The Assistant Secretary, Public Works Department.
20. Establishment in the Chief Court, Lower Burma (including Interpreters, Licensed Translators and Licensed Copyists and establishment of the Rule Committee).	The Registrar, Chief Court, Lower Burma.
21. Establishment of the Judicial Commissioner, Upper Burma.	The Registrar of the Judicial Commissioner's Court.
22. Establishment of the Financial Commissioner, Burma.	The Assistant Secretary to the Financial Commissioner.
23. Establishments of all Magistrates in Rangoon.	The District Magistrate, Rangoon.
24. Establishment of the Central and Local Stamp Depôts, Rangoon.	The Superintendent of Stamps, Rangoon.
25. Establishment of the Superintendent, Civil Veterinary Department in Rangoon (including office establishment and Veterinary Assistants).	The Superintendent, Civil Veterinary Department, Rangoon.
26. Establishment of the Government College, Rangoon.	The Principal of the College.
27. Establishment of the Male and Female Dispensary at Pazundaung of the Kemmendine Dispensary and of the office of the Senior Civil Surgeon, Rangoon.	The Senior Civil Surgeon, Rangoon.
28. Establishment of the General Hospital, Rangoon.	The Superintendent, General Hospital, Rangoon.
29. Establishment of the Government Medical School, Rangoon.	The Superintendent, Government Medical School, Rangoon.
30. Establishment of the Government Plague Hospital, Rangoon.	The Medical Officer in charge.
31. Establishment of Commissioners of Divisions.	Commissioners of Divisions.
32. Establishment of Deputy Commissioners (including Revenue, Treasury, Judicial, Criminal, Stamp, Registration and Income-tax Departments, Veterinary Inspectors, Veterinary Assistants, Bailiffs, Process-servers, Trade Registration, District Fund and District Cess Fund establishments).	Deputy Commissioners.
33. Establishment of Superintendents of Excise (including office establishment, Resident Excise Officers and Excise Inspectors and Sub-Inspectors).	Superintendents of Excise.

THE SCHEDULE—concld.

Officer whose salary is to be attached. (1)	Officer to whom notice should be sent. (2)
34. Establishment of Superintendents of Jails (including office establishment, jailors and jail warders).	Superintendents of Jails.
35. Establishment of District Superintendents of Police (including office establishment and police force).	District Superintendents of Police
36. Establishment of Adjutants and Commandants of Military Police (including office establishment and Military Police-force).	The Adjutant or Commandant.
37. Establishment of Civil Surgeons (including Civil Dispensary and Vaccination establishments).	Civil Surgeons.
38. Establishment of Land Records Department (including office establishment, Inspectors, Surveyors, etc.).	Superintendent of Land Records.
39. Establishment of Settlement Department (including Inspectors, Surveyors, etc.)	Settlement Officers.
40. Establishment of Deputy Inspectors of Schools (including office establishment and Schoolmasters of Vernacular schools within their circles).	Deputy Inspectors of Schools.
41. Schoolmasters of Government European and Anglo-Vernacular Schools.	The Inspector of Schools of the Circle in which they lie.
42. Schoolmasters of Government Normal Schools.	The Inspector of Normal Schools and European Education, Rangoon.
43. Establishment of all Departments mentioned in item I, not specifically mentionod above, of the Forest Department, Customs Department outside Rangoon, and the Headquarters of the Inland Trade Registration Department.	The Head of the Office.
44. Municipal employees	President of the Municipality.
45. Employees of the Rangoon Port Commissioners.	The Chairman of the Port Commissioners.
46. Employees of Port Funds outside Rangoon.	The Port Officer.
47. Boiler Inspectors and office establishment of the Burma Boiler Commission.	The Chairman, Burma Boiler Commission.

Circular Memorandum No. 10 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

TO

ALL JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 28th July 1916.

It has been brought to the notice of the Judicial Commissioner that in a certain civil case two Sub-Inspectors with little knowledge of finger print work represented themselves to be experts and gave evidence on certain finger print exhibits before the Court and that as a result of the "expert" evidence of one of these Sub-Inspectors of Police, the plaintiff became an accused and was sent up for trial; that in the Criminal case that ensued the District Magistrate ordered evidence of a Finger Print Expert to be taken on Commission, and the evidence of this expert was directly contrary to the evidence of the Sub-Inspector who posed as an expert.

As it is possible that similar cases have occurred elsewhere and have escaped notice, the Judicial Commissioner desires to invite the attention of Judges and Magistrates to the orders contained in paragraph 643, clauses (*f*) and (*g*), of the Burma Police Manual which define a "Proficient" and an "Expert" in connection with finger impressions.

When the services of an expert are required application should be made to the Deputy Inspector-General of Police for Railways and Criminal Investigation, Burma.

By order,
ED. MILLAR,
Registrar.

Circular Memorandum No. 11 of 1916.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 21st August 1916.

The following orders of Government prescribing amended Rules for the payment of the expenses of complainants and witnesses attending Criminal Courts in Burma are reproduced below for information and guidance of Courts in Upper Burma.

Amendments to the Upper Burma Courts Manual and the Guard Book of Forms will be issued in due course.

By order,
ED. MILLAR,
Registrar.

Judicial Department Notification No. 91, dated Rangoon, the 29th June 1916.

Under the provisions of section 544 of the Code of Criminal Procedure, 1898, and in supersession of the notifications cited in the margin, the Lieutenant-Governor, with the previous sanction of the Governor-General in Council, is pleased to make the following rules for the payment of the expenses of complainants and witnesses attending any Criminal Court in Burma for the purpose of any enquiry, trial, or other proceeding before such Court under the said Code.

Judicial Department Notification No. 182, dated the 12th May 1892.
Judicial Department Notification No. 131, dated the 10th April 1894.

Rules for the payment of the expenses of complainants and witnesses attending any Criminal Court in Burma for the purpose of any enquiry, trial, or other proceeding before such Court under the said Code.

I.—The Criminal Courts may at their discretion pay, according to the scale set forth in Rule III, the expenses of complainants and witnesses either for the prosecution or for the defence—

(1) in all cases which are cognizable by the police;

(2) in all cases entered in column 5 of the Schedule II as not bailable;

(3) in all cases in which witnesses are compelled to attend the Court under sections 94, 103, 208, 217, 257, and 540 of the Code of Criminal Procedure; and

(4) in all cases where the prosecution is instituted or carried on by, or under the orders or with the sanction of, Government or any Judge, Magistrate, or public officer, or in which the presiding officer thinks the prosecution to be directly in furtherance of the interests of public justice.

II.—Expenses of complainants and witnesses shall be payable, according to the scale set forth in Rule III, on account of their journeys to and from the Court and for the days during which they have been absent from their homes for the purposes of the trial, proceedings, etc.

Provided that—

(1) a Government officer giving evidence in his official capacity—

(*a*) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance;

(*b*) when giving evidence at a place not more than five miles from his headquarters, shall receive under these rules actual travelling expenses, but shall not receive subsistence, special nor expert allowances.

(2) A Government officer giving evidence in his private capacity shall receive actual travelling expenses under these rules, but shall not receive subsistence, special or expert allowances.

(3) In cases in which the Magistrate acquits the accused under section 245 or section 247 of the Code of Criminal Procedure,

and is of opinion that the complaint was frivolous or vexatious, the expenses of the complainant shall not be paid.

III.—The scale of expenses payable shall be as follows :—

(1) *Ordinary labouring class of natives.*—The actual railway or steam-boat fare to and from the Court by the lowest class ; or, where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2 a day by boat and of four annas a mile by road ; and an allowance for each day's absence from home of six annas to those who are residents of places other than the place where the Court is held, and of four annas to those who are residents of the place where the Court is held.

(2) *Petty village officers.*—Double the above rates of daily allowance ; same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road.

(3) *Persons of higher ranks of life, such as clerks, tradespeople, village headmen and headmen of circles.*—Second class railway or steam-boat fare to and from the Court; or, where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 4 a day by boat and of six annas a mile by road ; and an allowance not to exceed, except in special cases, Rs. 3 for each day's absence from home to Europeans or Anglo-Indians, and Re. 1 to Burmans and Indians.

(4) *Persons of superior rank.*—The actual sum spent in travelling to and from the Court, with an allowance according to circumstances, not to exceed, except in very special cases, Rs. 5 for each day's absence from home to Europeans or Anglo-Indians, and Rs. 2 to Burmese and Indian gentlemen.

(5) *Witnesses following any profession, such as medicine or law.*—A special allowance according to circumstances. In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

[NOTE.—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat-allowance in respect of the latter part of the journey.]

IV.—Allowances shall be paid under the orders of the Court, and in the presence of the presiding officer, and ordinarily at the conclusion of the trial, enquiry, or other proceeding. The presiding officer of the Court shall check the statement of charges and will be responsible that unauthorized charges are not allowed.

V.—In cases committed to the Court of Session, or to the High Court, the Magistrate who commits the case shall note in the list of witnesses the class to which, in his opinion, each belongs.

G.B.C.P.O.—No. 6, J. C. U.B., 16-1-1917—1,003.

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