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PRESENT:—DUCKWORTH, J.

Nga San Dike* v. Nga Ye Doke and five others.

Enhancement of sentence—Private party—No locus standi *to apply but may draw attention of Government—High Court may act* suo motu.

A private party has no *locus stande* to apply to the High Court for enhancing a sentence passed by a Subordinate Court. If he considers a sentence unduly lenient he may draw the attention of Government to the fact, or the High Court may of its own motion send for the record and take action.

Emperor v. *Shamji Ramchandra Gujar,* 16 Bom L R 202; *In re Nagji Dula* 26 Bom L R 182,—approved.

ORDER. 10*th November,* 1925.

This is an application by a private person for enhancement of sentences in a murder case. The applicant is father of the deceased. I shall not go into the merits, as, in my opinion, the application fails on other grounds. It was held in the case of *Emperor* v. *Shamji Ramchandra Gujar* (1) that a proposal to enhance a sentence must be supported by the Government Pleader, under instructions, which would enable him to put before the Court cogent reasons why there should be an enahncement of sentence.

In the case of *In re Nagji Dula* (2), it was held, further, that it is *not* open to a private party to apply to the High Court for enhancing a sentence passed by a Subordinate Court.

A District Magistrate, a Sessions Judge, or a Government Pleader, may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion, send for the record, and take action with a like object. If a private complainant considers

*Cr. Rev. No. 1014 B of 1925 being review of the Order of the Sessions Judge Meiktila in Sessions Trial No. 21 of 1925.

1. 16 Bom L R 202, 2. 26 Bom L R 182.

a sentence unduly lenient, he may draw the attention of Government to the fact.

With these decisions I am in agreement.

The applicant has no status, and his application is dismissed.

PRESENT:—CARR, J.

Abdul* *v.* Arlin.

Evidence Act (1 *of* 1872) *S.* 92—*Party executing agreement to work land on lease—Plea of benami—Whether evidence admissible to invalidate document.*

Where a party executed an agreement to work land on lease and in a subsequent suit for rent pleaded that the agreement had been executed in pursuance of a *benami* transfer to protect the land for creditors.

Held, that oral evidence was admissible to show that there was no grant or disposition at all in law.

Guddalur Ruthna v. *Kunnathur Arumuga,* 7 M H C R 189. *Pym* v. *Campbell,* 6 E and B 370—referred to.

Petherpermal Chetty v. *Muniandy Servai,* 4 L B R 266 (P C)—followed.

Laxmibai v. *Keshav,* 18 Bom L R 134 : 33 I C 396 not followed.

JUDGMENT. 22*nd December,* 1925.

This was a suit for rent of paddy land. In the plaint it was alleged that the defendant agreed to take land belonging to the plaintiff on lease and accordingly executed the agreement Ex. A. The defendant did not pay the rent. In his written statement the defendant denied the alleged agreement to take the land on lease, but admitted the execution of Ex. A. He alleged that to protect his property from creditors he had transferred his land *benami* to the name of the plaintiff and that the document Ex. A was made in furtherance of this *benami* transaction. In effect his case is that there was no agreement of lease at all and that Ex. A is merely a fiction.

The Township Court framed a preliminary issue to determine whether the defendant was estopped from pleading that the transaction was *benami.* It held that he was and gave the plaintiff a decree on admission. From his judgment the Judge appears to have held that the defendant had admitted his tenancy and could not, therefore, be permitted to deny his landlord's title.

---

*Civil 2nd Appeal No. 294 of 1924 against the decree of the District Court of Myaungmya in C A No. 45 of 1924.

The defendant appealed and his appeal was dismissed by the District Judge on much the same grounds, though in this case there is a reference also to S. 92 of the Evidence Act. The defendant again appeals to this Court.

I think that the Courts below have taken an erroneous view of the case. The defendant has not in fact admitted a tenancy at all. His case is essentially that there is no tenancy at all and that he himself is the owner of the land while admitting that he signed Ex. A, he says that this was merely a sham deed and did not represent any real agreement.

The essential quetsion now is whether under S. 92 of the Evidence Act he is debarred from producing oral evidence of this allegation—for of course the burden of proof is on him.

In my opinion he is not so debarred. He is not seeking to vary or contradict any of the terms of the document alleged to represent the agreement between himself and the plaintiff, but seeks to show that there never was any such agreement between them at all and that the document represents nothing.

It is perhaps arguable that the case comes under the part of Proviso 1 to S. 92 which allows a party to prove want or failure of consideration, but I do not propose to go into that question. In Amir Ali and Woodroffe's Law of Evidence, 8th Edition, at page 613, it is stated that "Evidence may be given—firstly to show that there was no disposition at all. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of parties to be embodied in the form of a document."

In support of this a Madras case *Guddalur Ruthna* v. *Kannathur Arumuga* (1) is cited, which was based on the English case of *Pym* v. *Campbell* (2) in which Erle, J., said "The distinction in point of Law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." Lord Campbell agreed, saying "No addition to, or variation from the terms of a written contract can be made by parol; but in this case the defence is that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming."

In the case of *Petherpermal Chetty* v. *Muniandy Servai* (3) oral evidence had been admitted to show that a

1. 7 M H C R 189. 2. 6 E and B 370. 3. 4 L B R 266 (P C).

deed of conveyance was *benami*. Their Lordships of the Privy Council accepted the findings of the Lower Courts that it was *benami*. The admissibility of the evidence does not appear to have been questioned and it seems to have been taken for granted that it was admissible. Indeed, I think it is settled law that evidence is in such cases admissible, and that the case of *Laxmibai* v. *Keshav* (4) which has been referred to is not sufficient authority to the contrary.

The District Judge remarked that the defendant had admittedly tried to defraud his creditors. On this point, which does not arise at this stage, the case of *Petherpermal* (3) quoted above, may be studied.

I allow the appeal, set aside the judgments and decrees of the Courts below and remand the suit to the Township Court of Myaungmya for disposal on its merits. The costs in this Court and in the appeal in the District Court will be costs in the suit and follow its result.

Bomanji for appellant.

Janab Ali for respondent.

PRESENT :—HEALD AND CHARI, JJ.

Mg San Shin and others* v. Mg Maung and others.

Limitation Act (IX of 1908), Art. 123—Arts. 142 and 144—Co-heir enjoying property by agreement of other co-heirs—Where no such agreement is proved—Starting point of limitation.

In those cases where co-heirs agree to enjoy the property left by a deceased jointly without effecting a partition Art. 142 or 144 of the Limitation Act will apply. But where there is no such agreement express of implied a suit against an administrator or a co-heir or a person merely in possession for a distributive share is governed by Art. 123 of the Limitation Act.

Mg. Po Kin v. *Mg. Shwe Bya*, 1 Rang 405; *Ma Nan Thu* v. *Ma Shwe Mi*, 4 B L J 76—referred to.

Where the right to bring a suit for land has become barred the mere fact of a trespasser taking possession does not revive the right.

Judgment. *22nd December*, 1925.

Per CHARI, J. :—The suit out of which this appeal arises was filed by the plaintiffs to recover a share in the estate of U Po Zin and Ma Min Hla.

---

*Civil First Appeal No. 23 of 1925 against the decree of the District Court of Magwe in C R No. 5 of 1924.

3. 4 L B R 266 (P C). 4. 18 B L R 134 : 33 I C 396.

The plaintiffs are the children and grandchildren of this couple. U Po Zin died before Ma Min Hla, and she died in 1884, *i. e.*, nearly forty years ago. According to Burmese Buddhist Law the estate became divisible among the children of this couple when Ma Min Hla died.

The plaintiffs' suit was dismissed by the District Judge as being barred by Art. 123 of the Limitation Act, and they now appeal.

It is clear from the evidence that the lands in question did form part of the estate of U Po Zin and Ma Min Hla. According to the evidence of Mg Tha Bu, who is the father of Mg Maung, the first defendant, and who has been cited as plaintiffs' witness most of the children of the old couple had left home before their death. After Ma Min Hla's death, Mg Po and Mg Pyoung, two of her sons, who were still living at home, took possession of the estate and worked the lands. Mg Po died some twenty-five years ago and, after his death, Mg Pyoung and the two sons of Mg Po, Mg Bya and Mg Sa, cultivated the lands jointly. Mg Bya died and Mg Sa married and separated. Thereafter Mg Pyoung seems to have worked the lands by himself till Mg Maung, the first defendant, grew up. He is a son of Mg Po, a nephew of Mg Pyoung. Mg Pyoung worked the lands with the help of Mg Maung, and, after Mg Pyoung's death in 1885, Mg Maung took possession of these lands and is working them.

The point for consideration is whether the District Judge was right in holding that the suit is barred under Art. 123 of the Limitation Act.

The defendants, other than the 1st and 2nd, are the descendants of the old couple. The 3rd defendant is Mg Sa, the son of Mg Po. The 4th defendant is Ma Gwe, a granddaughter of the old couple. The 5th defendant is a great grand-child.

It was alleged in the plaint that Mg Po and Mg Pyoung remained in possession of the ancestral lands with the consent of their brothers and sisters.

There is no evidence that they actively consented, and all that can be said is that they never objected to the possession of the lands by their two brothers. Nor is there any evidence of any agreement, express or implied, to hold these lands jointly and postpone partition.

The plaintiffs sought to prove an implied admission by Mg Pyoung that the lands are liable to partition. The

learned Judge held that this evidence was inadmissible, and it is argued before us that he was wrong. When some of the claimants demanded partition from Mg Pyoung he is alleged to have said that it could be done at his death. The 1st plaintiff, Mg San Shin, deposes to this effect, but, even if his evidence be true and if Mg Pyoung's statement is admissible, it does not help the plaintiffs. If anything, it tells against them, as it shows that the claimants were not in joint enjoyment of the lands.

It may be taken as settled law that, where a distributive share in the estate of a deceased is claimed, whether against an Administrator or a co-heir, or a person merely in possession, the Article applicable is Art. 123 of the first schedule of the Limitation Act, vide *Mg Po Kin* v. *Mg Shwe Bya* (1) and the cases therein cited, and *Ma Nan Thu* v. *Ma Shwe Mi* (2). There is an exception, apparent but not real to the applicability of this Article, and that is that, in those cases where co-heirs agree to enjoy the property left by the deceased jointly without effecting a partition, Article 142 or 144 of the Limitation Act will apply. We have already said there is no evidence of any such agreement in this case, and the only Article that can apply is Article 123 of the Limitation Act.

It has beeen argued before us that Mg Maung is not an heir of U Po Zin and Ma Min Hla, and that, therefore, he is a trespasser, who can resist the plaintiffs' suit only if he has completed his title by adverse possession for twelve years. This argument overlooks the fact that the plaintiffs' right to the property had already been long extinguished and could not possibly be revived by a trespasser's taking possession of the poperty.

We hold that the suit was rightly dismissed as being barred under S. 123 of the Limitation Act. The appeal is accordingly dismissed with costs.

PRESENT:—HEALD AND CHARI, JJ.

Ma Than Myint* v. Mg Ba Thein.

Letters Patent—Clause 13—Order allowing suit to be instituted in forma pauperis*—Whether appealable.*

*Civil Misc. Appeal No. 189 of 1925 against the order of the High Court, Original Side, in C M No. 135 of 1925.

1. 1 Rang 405. 2. 4 B L J 76.

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PRESENT:—DUCKWORTH, J.

Nga San Dike* *v.* Nga Ye Doke and five others.

Enhancement of sentence—Private party—No locus standi *to apply but may draw attention of Government—High Court may act* suo motu.

A private party has no *locus stande* to apply to the High Court for enhancing a sentence passed by a Subordinate Court. If he considers a sentence unduly lenient he may draw the attention of Government to the fact, or the High Court may of its own motion send for the record and take action.

Emperor v. *Shamji Ramchandra Gujar,* 16 Bom L R 202; *In re Nagji Dula* 26 Bom L R 182,—approved.

ORDER. 10*th November,* 1925.

This is an application by a private person for enhancement of sentences in a murder case. The applicant is father of the deceased. I shall not go into the merits, as, in my opinion, the application fails on other grounds. It was held in the case of *Emperor* v. *Shamji Ramchandra Gujar* (1) that a proposal to enhance a sentence must be supported by the Government Pleader, under instructions, which would enable him to put before the Court cogent reasons why there should be an enahncement of sentence.

In the case of *In re Nagji Dula* (2), it was held, further, that it is *not* open to a private party to apply to the High Court for enhancing a sentence passed by a Subordinate Court.

A District Magistrate, a Sessions Judge, or a Government Pleader, may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion, send for the record, and take action with a like object. If a private complainant considers

*Cr. Rev. No. 1014 B of 1925 being review of the Order of the Sessions Judge Meiktila in Sessions Trial No. 21 of 1925.

1. 16 Bom L R 202. 2. 26 Bom L R 182.

a sentence unduly lenient, he may dr aw the attention of Government to the fact.

With these decisions I am in agree nent.

The applicant has no status, anc his application is dismissed.

PRESENT:—CARR, J.

Abdul* v. Arlin.

Evidence Act (1 *of* 1872) *S.* 92—*Party execu ting agreement to work land on lease—Plea of benami—Whether evidence admissible to invalidate document.*

Where a party executed an agreement to work land on lease and in a subsequent suit for rent pleaded that the agreement had been executed in pursuance of a *benami* transfer to protect the land for creditors.

Held, that oral evidence was admissible to show that there was no grant or disposition at all in law.

Guddalur Ruthna v. *Kunnathur Arumaga,* 7 M H C R 189. *Pym* v. *Campbell,* 6 E and B 370—referred to.

Petherpermal Chetty v. *Muniandy Servai,* 4 I B R 266 (P C)—followed.

Laxmibai v. *Keshav,* 18 Bom L R 134 : 33 I C 396 not followed.

JUDGMENT. *22nd December,* 1925.

This was a suit for rent of paddy land. In the plaint it was alleged that the defendant agreed to take land belonging to the plaintiff on lease and accordingly executed the agreement Ex. A. The defendant did not pay the rent. In his written statement the defendant denied the alleged agreement to take the land on lease, but admitted the execution of Ex. A. He alleged that to protect his property from creditors he had transferred his land *benami* to the name of the plaintiff and that the document Ex. A was made in furtherance of this *benami* transaction. In effect his case is that there was no agreement of lease at all and that Ex. A is merely a fiction.

The Township Court framed a preliminary issue to determine whether the defendant was estopped from pleading that the transaction was *benami.* It held that he was and gave the plaintiff a decree on admission. From his judgment the Judge appears to have held that the defendant had admitted his tenancy and could not, therefore, be permitted to deny his landlord's title.

*Civil 2nd Appeal No. 294 of 1924 against the decree of the District Court of Myaungmya in C A No. 45 of 1924.

The defendant appealed and his appeal was dismissed by the District Judge on much the same grounds, though in this case there is a reference also to S. 92 of the Evidence Act. The defendant again appeals to this Court.

I think that the Courts below have taken an erroneous view of the case. The defendant has not in fact admitted a tenancy at all. His case is essentially that there is no tenancy at all and that he himself is the owner of the land while admitting that he signed Ex. A, he says that this was merely a sham deed and did not represent any real agreement.

The essential quetsion now is whether under S. 92 of the Evidence Act he is debarred from producing oral evidence of this allegation—for of course the burden of proof is on him.

In my opinion he is not so debarred. He is not seeking to vary or contradict any of the terms of the document alleged to represent the agreement between himself and the plaintiff, but seeks to show that there never was any such agreement between them at all and that the document represents nothing.

It is perhaps arguable that the case comes under the part of Proviso 1 to S. 92 which allows a party to prove want or failure of consideration, but I do not propose to go into that question. In Amir Ali and Woodroffe's Law of Evidence, 8th Edition, at page 613, it is stated that "Evidence may be given—firstly to show that there was no disposition at all. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of parties to be embodied in the form of a document."

In support of this a Madras case *Guddalur Ruthna* v. *Kannathur Arumuga* (1) is cited, which was based on the English case of *Pym* v. *Campbell* (2) in which Erle, J., said "The distinction in point of Law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." Lord Campbell agreed, saying "No addition to, or variation from the terms of a written contract can be made by parol; but in this case the defence is that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming."

In the case of *Petherpermal Chetty* v. *Muniandy Servai* (3) oral evidence had been admitted to show that a

1. 7 M H C R 189. 2. 6 E and B 370. 3. 4 L B R 266 (P C).

al of conveyance was *benami*. Thei r Lordships of the
vy Council accepted the findings of th ie Lower Courts that
was *benami*. The admissibility of th ie evidence does not
ear to have been questioned and it see ms to have been taken
granted that it was admissible. Indeed, I think it
settled law that evidence is in such cases
missible, and that the case of *Laxmib* *ai* v. *Keshav* (4)
ch has been referred to is not sufficie nt authority to the
trary.

The District Judge remarked that the defendant had
mittedly tried to defraud his creditors. On this point, which
s not arise at this stage, the case of *Petherpermal* (3)
ted above, may be studied.

I allow the appeal, set aside the j udgments and decrees
the Courts below and remand the su it to the Township
rt of Myaungmya for disposal on i ts merits. The costs
his Court and in the appeal in the D istrict Court will be
ts in the suit and follow its result.

Bomanji for appellant.

Janab Ali for respondent.

PRESENT :—HEALD AND CHARI, JJ.

Mg San Shin and others* v. Mg Maung and others.

Limitation Act (IX of 1908), Art. 123—Arts. 142 and 144—Co-heir enjoy-property by agreement of other co-heirs—No such agreement is proved—Starting point of limitation.

In those cases where co-heirs agree to enjoy the property left by a deceased ly without effecting a partition Art. 142 or 144 of the Limitation Act apply. But where there is no such agreement express of implied a suit nst an administrator or a co-heir or a person merely in possession for a dis- tive share is governed by Art. 123 of the Limitation Act.

Mg. Po Kin v. *Mg. Shwe Bya*, 1 Rang 205; *Ma Nan Thu* v. *Ma Shwe* 4 B L J 76—referred to.

Where the right to bring a suit for land has become barred the mere fact trespasser taking possession does not revive the right.

Judgment.

Per CHARI, J. :—The suit out o *22nd December*, 1925. es was filed by the plaintiffs to rec f which this appeal te of U Po Zin and Ma Min Hla over a share in the

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*Civil First Appeal No. 23 of 1925 against the decree of the District Court agwe in C R No. 5 of 1924.

3. 4 L B R 266 (P C). 4. 18 B L R 134 : 33 I C 396.

The plaintiffs are the children and grandchildren of this couple. U Po Zin died before Ma Min Hla, and she died in 1884, *i. e.*, nearly forty years ago. According to Burmese Buddhist Law the estate became divisible among the children of this couple when Ma Min Hla died.

The plaintiffs' suit was dismissed by the District Judge as being barred by Art. 123 of the Limitation Act, and they now appeal.

It is clear from the evidence that the lands in question did form part of the estate of U Po Zin and Ma Min Hla. According to the evidence of Mg Tha Bu, who is the father of Mg Maung, the first defendant, and who has been cited as plaintiffs' witness most of the children of the old couple had left home before their death. After Ma Min Hla's death, Mg Po and Mg Pyoung, two of her sons, who were still living at home, took possession of the estate and worked the lands. Mg Po died some twenty-five years ago and, after his death, Mg Pyoung and the two sons of Mg Po, Mg Bya and Mg Sa, cultivated the lands jointly. Mg Bya died and Mg Sa married and separated. Thereafter Mg Pyoung seems to have worked the lands by himself till Mg Maung, the first defendant, grew up. He is a son of Mg Po, a nephew of Mg Pyoung. Mg Pyoung worked the lands with the help of Mg Maung, and, after Mg Pyoung's death in 1885, Mg Maung took possession of these lands and is working them.

The point for consideration is whether the District Judge was right in holding that the suit is barred under Art. 123 of the Limitation Act.

The defendants, other than the 1st and 2nd, are the descendants of the old couple. The 3rd defendant is Mg Sa, the son of Mg Po. The 4th defendant is Ma Gwe, a granddaughter of the old couple. The 5th defendant is a great grand-child.

It was alleged in the plaint that Mg Po and Mg Pyoung remained in possession of the ancestral lands with the consent of their brothers and sisters.

There is no evidence that they actively consented, and all that can be said is that they never objected to the possession of the lands by their two brothers. Nor is there any evidence of any agreement, express or implied, to hold these lands jointly and postpone partition.

The plaintiffs sought to prove an implied admission by Mg Pyoung that the lands are liable to partition. The

learned Judge held that this evidence was inadmissible, and it is argued before us that he was wrong. When some of the claimants demanded partition from Mg Pyoung he is alleged to have said that it could be done at his death. The 1st plaintiff, Mg San Shin, deposes to this effect, but, even if his evidence be true and if Mg Pyoung's statement is admissible, it does not help the plaintiffs. If anything, it tells against them, as it shows that the claimants were not in joint enjoyment of the lands.

It may be taken as settled law that, where a distributive share in the estate of a deceased is claimed, whether against an Administrator or a co-heir, or a person merely in possession, the Article applicable is Art. 123 of the first schedule of the Limitation Act, vide *Mg Po Kin* v. *Mg Shwe Bya* (1) and the cases therein cited, and *Ma Nan Thu* v. *Ma Shwe Mi* (2). There is an exception, apparent but not real to the applicability of this Article, and that is that, in those cases where co-heirs agree to enjoy the property left by the deceased jointly without effecting a partition, Article 142 or 144 of the Limitation Act will apply. We have already said there is no evidence of any such agreement in this case, and the only Article that can apply is Article 123 of the Limitation Act.

It has beeen argued before us that Mg Maung is not an heir of U Po Zin and Ma Min Hla, and that, therefore, he is a trespasser, who can resist the plaintiffs' suit only if he has completed his title by adverse possession for twelve years. This argument overlooks the fact that the plaintiffs' right to the property had already been long extinguished and could not possibly be revived by a trespasser's taking possession of the poperty.

We hold that the suit was rightly dismissed as being barred under S. 123 of the Limitation Act. The appeal is accordingly dismissed with costs.

PRESENT:—HEALD AND CHARI, JJ.

Ma Than Myint* v. Mg Ba Thein.

Letters Patent—Clause 13—Order allowing suit to be instituted in forma pauperis—*Whether appealable.*

*Civil Misc. Appeal No. 189 of 1925 against the order of the High Court, Original Side, in C M No. 135 of 1925.

1. 1 Rang 405. 2. 4 B L J 76.

An order allowing a party to sue *in forma pauperis* is not a "judgment" within the meaning of cl. 13 of the Letters Patent of the Rangoon High Court and is not appealable.

Babu Sa v. *Purushotam Sa,* 47 M L J 932—dissented from.

Appasami Pillay v. *Somasundara Mudaliar,* 26 M 437; *Secretary of State* v. *Jillo,* 21 A 133—approved.

Muntazan v. *Rusular,* 23 A 364—referred to.

Judgment. 22*nd December,* 1925.

Per CHARI, J.—This is an appeal against an order of the Judge sitting on the Original Side allowing the plaintiff to file a suit *in forma pauperis.* The appellants were the respondents in the trial Court and they now appeal. The point for consideration is whether the order is a judgment within the meaning of cl. 13 of the Letters Patent. The meaning of the word "judgment" has been considered in more than one case recently and it has been held that an order will be a "judgment" within the meaning of cl. 13 of the Letters Patent if it decides some right in controversy between the parties. Almost every order does in a sense decide some right but the right referred to is the substantial right which is in issue in the suit or some part of that right. In the case of *Appasamy Pillai* v. *Somasundra Mudaliar* (1) the Madras High Court held that there was no appeal under the Letters Patent against an order by a single Judge refusing to give leave to appeal *in forma pauperis.* In a very recent case *Babu Sa* v. *Purushotam Sa* (2) a Bench of the same Court had distinguished that case and expressed an opinion that the law confers a substantial right in allowing a plaintiff, who holds a good case in law but no means to prosecute it, to sue *in forma pauperis* and that an adjudication on such a right is a "judgment" and therefore appealable. The right so conferred is however, not a right in which the defendant is interested except indirectly. In the case of the *Secretary of State* v. *Jillo* (3) which was an appeal from an order rejecting an application to sue *in forma pauperis* it was held that such an order was not a decree. That case was an appeal under the Civil Procedure Code, but there is a passage in the judgment which runs as follows. "The order before us was not an adjudication in any stage of a suit. It was passed upon an application which if granted would after the order granting it and only then have matured into a plaint in a suit. It was not therefore an adjudication deciding a right claimed

1. 26 Mad 437. 2. 47 M L J 932. 3. 21 All 133.

in a suit." In a later case *Mumtazan* v. *Rusular* (4) the same High Court held that an order granting leave to sue as a pauper in the Court of first instance cannot be challenged on appeal from a decree in favour of the plaintiff. The ground of that decision was that the order granting an application to sue *in forma pauperis* is not an order affecting the decision of the case. Such an oder relates to the institution of the suit and affects only the right of the Government to get Court-fees. No controversy between the plaintiff and the defendant in respect of any right claimed in the suit can possibly arise until the plaint is admitted.

With all respect for the opinion of the learned Judges of the Madras High Court we agree with the reasoning of the High Court of Allahabad, and we hold that the order in question is not a "judgment" within the meaning of cl. 13 of the Letters Patent and is therefore not appealable.

The appeal is accordingly dismissed.

Tun Byu for appellant.

PRESENT :—CARR, J.

Maung Saw and 8 others* v. Ma Bwin Byu.

Civil Procedure Code (Act V of 1908), O. 41, R. 19—Application to restore appeal—Discretion of individual Judge on question of fact to determine question of restoration.

On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion.

This case which was 17th on the list was called on unexpectedly at 12-30 P. M. in the absence of the Petitioner's Counsel and dismissed for default.

Held, that the case should be restored on payment of costs.

Pilasrai Laxminarayan v. *Gursondas Damodardas,* 44 B 82—approved.

Judgment. 21*st December,* 1925.

The petitioner's appeal was dismissed for default and this is an application to restore it. It is stated that the appeal was the 17th on the list for the day but that through some untoward concatenation of events it was called at 12.30 p. m., much earlier than petitioner's advocate had anticipated. These facts are not denied but it is contended that they do not furnish sufficient cause for restoration. I have been referred to a

*Civil Second Appeal No. 150 of 1925 against the decree of the District Court of Myingyan in C A No. 24 of 1924.

4. 23 All 364.

very recent case decided by a Bench. Civil Mis. Application No. 167 of 1925 but on referring to that case I find that the facts differ greatly.

The present case is very similar to that of *Pilasrai Laxminarayan* v. *Gursondas Damodardas* (1) in which a case 14th, on the list had been called on before 12.30 p. m. The learned Judges, following an earlier Allahabad case, were of opinion " that the case was one in which, whether there was sufficient cause or not, the Court should exercise its inherent jurisdiction to restore the case for the ends of justice, provided the defendant was amply protected in the matter of costs."

That is, in my view, a correct view of the matter and I shall follow that decision.

I should mention also the case of *Mg Than* v. *Zainat Bibi* (2) which was also cited before me. The facts there were different and the Judge expressly held that they were not such as to make out a case for the exercise of the inherent power of the Court. In this connection I would quote with approval the following words from the judgment of the learned Chief Justice in the Bombay case above cited. " But it is difficult to see how a decision of one Judge on the facts before him that sufficient cause has not been shown for the restoration of a suit can provide a precedent for other Judges on a similar application. On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion."

On my view of the circumstances this is an eminently proper case for restoration.

The appeal is restored to the file but the petitioner must pay to the respondent two gold mohurs as the costs of this application.

Jeejeebhoy for appellant.

Mr. Dutt for respondent.

PRESENT :—HEALD AND CHARI, JJ.

Maung Htin Gyaw and one* *v.* Maung Po Sein Gyi and one.

Probate and Administration Act (*V of* 1881), *Section* 41—*Administrator* pendente lite *must pay Court-fees on grant—Rightful party entitled to grant free of payment on termination of proceedings.*

*Civil Mis. Appeal No. 15 of 1925 against the order of the District Judge, Myaungmya, in Civil Mis. No. 13 of 1924.

1. 44 Bom 82. 2. 3 Rang 488.

Court-fees must be paid on the issue of a grant of administration *pendente lite* but the person in whose favour the full grant is subsequently ordered is, on termination of proceedings, entitled to such grant free of payment.

Order. *23rd November,* 1925.

Per HEALD, J.—In Civil Miscellaneous Case No. 13 of 1924 of the District Court of Myaung Mya the present respondents, Po Sein and Mg Chein, alleging themselves to be adoptive sons of one Po Thet who had died leaving a very large estate, applied for Letters of Administration in respect of that estate. In their application they mentioned the present appellants, Tin Gyaw and Sein Shwe, as being respectively a son-in-law who claimed to be also an adoptive son, and a minor grandson of Po Thet.

It appears that the respondent Po Sein has also filed a regular suit for the administration of the estate and in that suit has applied for the appointment of a Receiver for the whole estate, but apparently no such Receiver has yet been appointed. It appears further that appellants also have filed a suit in respect of moveable property, valued at over 12 lakhs of rupees, alleged to belong to the estate, and have got a Receiver appointed for that property.

In the miscellaneous case respondents applied for the appointment of an Administrator *pendente lite* or a Receiver for the whole estate, and a pleader, Mr. Banerjee, who had been appointed Receiver for the moveable property mentioned above, was ordered to be appointed to take charge of the immoveable properties also as Aministrator *pendente lite,* provided that he gave security in half a lakh and paid the necessary Court-fees. He gave the required security, and applied to the Court for permission to pay the Court-fees, which amounted to Rs. 18,804, out of monies belonging to the estate which were already in his hands, presumably as Receiver of the moveable property.

The Court refused to allow the Court-fees to be so paid and directed that respondents, at whose instance the appointment of an Administrator *pendente lite* was ordered, should pay the fees out of moneys belonging to the estate which were in their possession.

Shortly after that order was made the Judge who made it was transferred to another Court, and instead of appealing against the order respondents applied to his successor to vary the order as to payment of the Court-fees.

Appellants' learned Advocate asked to be heard against their application, but respondents contended that appellants were not entitled to be heard because the question of Court-fees was one merely between themselves and Government.

The new Judge, accepting this view, refused to hear appellants and passed an order stating that no Court-fees were payable by an Administrator *pendente lite*.

Appellants' appeal against that order on the grounds that the Judge had no power to review his predecessor's order, that he was wrong in refusing to hear them, and that he was mistaken in holding that Court-fees are not payable in respect of administration *pendente lite*.

We see no reason to doubt that the Judge was wrong in reviewing his predecessor's order and in refusing to hear appellants, and his order must be set aside.

It seems desirable, however, that we should express an opinion as to whether or not the original Judge was right in *ordering* Court-fees to be paid on an administration *pendente lite*. No authorities on the subject have been cited before us and there seem to be few if any relevant judicial decisions. Kinney in his annotated edition of the Probate and Administration Act (Second Edition, p. 71) says:— "under the Court-fees Act in India duty is payable on such a grant (that is, a grant of Letters to an Administrator *pendente lite*) and this duty is to be paid on the value of the assets before the grant issues" and in his work on "the law relating to Estate Duty in India" (1918, p. 70) he says "If an Administrator *pendente lite* is appointed in any testamentary proceedings the duty must be paid before the issue of such grant, and upon termination of such proceedings the person in whose favour the full grant is ordered to issue is entitled to such grant free of payment." It is true that he cites no judicial authority for these statements, but he was himself for many years Administrator General of Bengal, and there can be no doubt that in Bengal at any rate it has been the practice to charge court-fees on Letters granted to Administrators *pendente lite*. It is also the practice in this Court. We have considered whether or not the fact that S. 34 of the Probate and Administration Act speaks of the appointment of an Administrator and not of the grant of Letters would warrant an inference that an Administrator *pendente lite* can act as such without the grant of Letters to him, in which case no court-fees would be payable, since they

are payable only on Letters, but was have come to the conclusion that no such inference is warranted since S. 41 of the Act, which also speaks of the appointment of a person to administer the estate, clearly contemplates the grant of Letters to such person.

In these circumstance we are of opinion that the order directing that Court-fees must be paid before the appointment of the Administrator *pendente lite* was confirmed was correct. It seems probable that in this particular case the appointment of a Receiver would have been sufficient, since it appears that all that the Court intended the Administrator *pendente lite* to do was to receive the rents of the immoveable property, but this Court has already, in its order in Civil Miscellaneous Appeal No. 91 of 1924, refused to interfere with the Lower Court's direction that an Administrator *pendente lite* should be appointed, and therefore all that it is necessary for us to do in the present appeal is to set aside the illegal order which is under appeal and to leave the original order, which it purported to vary or set aside, in full force and effect.

We accordingly set aside the Lower Court's order of the 26th January, 1925, and direct respondents to pay the costs of this appeal, Advocate's fee to be five gold mohurs.

Ba Thein (1) for appellant.

Kyaw Din for respondent.

PRESENT:—DUCKWORTH AND J. A. MAUNG GYI, JJ.

Maung Twa* v. King-Emperor.

Penal Code (Act XLV of 1860), Ss. 302, 34—Applicability of S. 34 where two persons act jointly—One person subsequently ceases to act and stands by—Whether series of acts can be divided.

Where the appellant and his son attacked the deceased who succumbed to the injuries, and it was put forward in defence of the appellant that the sole common intention of the appellant and his son was to cause grievous hurt to the deceased by the use of a spear and long bamboo, and that thereafter when the appellant's actions had ceased, the son proceeded to stab deceased to death whilst appellant stood aside and took no further part in the matter; *Held,* confirming the conviction under S. 302 Indian Penal Code that the intentions and actions of appellant and his son could not be devided into two parts and the appellant was rightly convicted under S. 302 read with S. 34; that S. 34, Indian Penal Code deals with the doing of separate acts, similar or diverse, by several persons and if all are done in furtherance of a

*Cr Appeal No. 1438 of 1925 from the order of the Sessions Judge, Hanthawaddy, in Sessions Trial No. 19 of 1925.

common intention each person is liable for the result of them all as if he had done them himself.

Nga Po Sein and others v. *King-Emperor*, 1 L B R 233; *Mg. Gyi and two others* v. *King-Emperor*, 1 Ran 390 (overruling *Po Sein* v. *King-Emperor*) —referred to.

Barendra Kumar Ghose v. *Emperor*, 52 C 197 (P C) affirming principle in *Po Sein's case*—followed.

Judgment. 17*th November*, 1925.

Per DUCKWORTH, J.:—In this case the appellant, Mg Twa, who is a man of 58, was sentenced to death for the murder of a man, named, Po Han *alias* Han Gyi.

He has appealed to this Court.

After perusing the proceedings, the facts appear to us to be as follows:—

Between 3 and 4 p. m. on the 26th of April last, the deceased, armed with a stick and a dagger, went to Ma Pwa Gyi's house accompanied by one Po Chit. He informed Ma Pwa Gyi that he was going to the house of Tet Sein and his father, the present appellant. Mg Twa, in order to demand a debt, which Tet Sein owed him. Ma Pwa Gyi had received information that there had been a quarrel between the two men on the previous night; so she attempted to deter the deceased from going there, and even presented him with a rupee to spend, in order that he might not go to Tet Sein's house to create trouble. The deceased, however, proceeded to Mg Twa's house, using filthy abuse as he went.

The record does not show that he was in liquor, but his behaviour leads us to believe that he was. There is evidence that he was a bad character, and was feared as a bully.

On reaching the front of Mg. Tet Sein's house, the deceased addressed the appellant, Mg. Twa. He made a demand for the debt alleged to have been due by Tet Sein, and used threats and abuse. Tet Sein came out to the outer room, and asked the deceased whether he desired to assault him as on the previous night, and Tet Sein abused the deceased. A considerable amount of abuse and threats ensued. The noise attracted people to the scene. Among others that came were San Pe and Po Kyaw. San Pe and Po Kyaw tried to take Mg Po Han away, but he would not go and he stated that Tet Sein has exposed his person at him. He also stated that Mg. Twa was a dog, and that the big dog did not admonish the young dog. San Pe, Po Kyaw and Po Chit still attempted to persuade the deceased to go away, and actually pushed him away from the house about three or four fathoms. The deceased had still a dagger and a stick in his hand. He objected to his being moved away from the scene,

and brandished his dagger, so they had to release him. At that moment, the appellant, Mg. Twa and his son, Tet Sein, (who has absconded), came running down from their house. Mg Twa, the appellant, was armed with a spear, and his son, Tet Sein, was armed with a long bamboo stick. As they came up, the deceased turned round; whereupon the appellant thrust his spear into the face of the deceased, and Tet Sein struck the deceased with his bamboo. It appears that the first or the second blow delivered by Tet Sein fell on the hand of the deceased, which was holding the dagger, and the dagger dropped from his hand. Tet Sein bent down and tried to pick up the dagger.

The deceased caught Tet Sein by the hair, and as soon as he seized Tet Sein's hair, the appellant struck the deceased with his spear in the side or under the arm-pit. The evidence as to where the spear struck is discrepant. The deceased managed to strike and break the appellant's spear, and whilst the deceased was thus engaged with the appellant, Tet Sein, having secured the dagger from the ground, stabbed the deceased many times on the back of the chest, so that the latter fell to the ground, and died almost at once.

The witness, Po Chit, deposes that Tet Sein dealt the last blow with the dagger after Mg. Han Gyi had fallen down.

The appellant and his son then entered their house leaving the deceased lying on the ground.

There are slight discrepancies in the evidence as to the exact sequence of events; but from the evidence of Mg. San Pe, Po Kyaw and Po Chit, we think that the facts, as stated, are what actually occurred. The headman was informed. The deceased was removed and subsequently sent to hospital. The appellant Mg. Twa was arrested. By the time the latter was arrested, Mg. Tet Sein had absconded, and has up to date managed to evade justice.

The defence of Mg. Twa that the deceased came to the front of his house on that evening, using foul abuse and that, though he, the appellant, *Shikhoed* him, the deceased would not desist, even when Po Kyaw and others tried to pull him away. He says that his son, Tet Sein, came up and expostulated with the deceased, but that it was in vain, because the deceased abused him and said, "I will not only beat you, but also will come up on to the house and kill you". The appellant says further that Mg. San Pe came and pulled the deceased away; but that the deceased brandished his *dah* at San Pe, and said, "No one must pull me": The deceased freed himself, and came running to appellant's house. On

this, the latter's son Tet Sein went down from his house holding a bamboo, and he himself also went down taking the first weapon he happened to catch hold of. Tet Sein beat Mg. Han Gyi with the bamboo, but, in spite of that, the deceased came running towards him (the appellant). He went on to say that as he was afraid that the deceased would come near him, he held out the weapon which was in his hand directly towards him, and that it was only afterwards that he knew that the weapon which he held was a spear.

He said that the deceased was armed with a dagger and a stick, and that he was afraid that he would be stabbed with the dagger, and therefore acted in self-defence.

The defence evidence, with the exception of that of one witness, is not worthy of consideration, as it does not fall within the admitted facts; but there is one witness for the defence, Mg. San Hnin, whose evidence, to a very large extent, supports the prosecution story. In fact, we are convinced that the deceased was wounded by the present appellant by two strokes of the spear, and by several stabs delivered by the absconder, Mg. Tet Sein.

It is quite clear, from the medical evidence, that a large majority of the wounds, 13 in all, were stab wounds delivered on the back of the deceased's chest, and that Tet Sein must have stabbed him from the back.

There were obvious stab wounds on the face, and there was another stab wound below the right arm-pit. We are asked to hold that the injuries caused by the appellant were a spear wound on the face and a wound below the right arm-pit, neither of which was very serious, although that on the face was undoubtedly grievous, inasmuch as it would certainly have permanently disfigured the deceased.

In our opinion it is not possible to decide which of the body injuries was caused by the appellant.

The learned Sessions Judge has convicted the appellant of murder by utilising the provisions of S. 34 of the Indian Penal Code. He relied upon the case of *Nga Po Sein and another* v. *King-Emperor* (1); but he overlooked the Bench decision of this Court in *Mg. Gyi and two others* v. *King-Emperor* (2) in which it was held that "it is not sufficient for joint responsibility for an offence under S. 34 of the Indian Penal Code, that the offence actually committed was likely to occur as a result of the several persons acting together; but that, the existence of a common intention being the sole

1. 1 L B R 233. 2. 1 Rang 390.

test of joint responsibility, it must be proved what the common intention was, and it must also be proved that the common act for which the accused were to be made responsible was commited in furtherance of that common intention." Incidentally the case of *Nga Po Sein* v *King-Emperor* (1) was overruled. Since the date of the Bench decision of this Court, there has been a pronouncement by their Lordships of the Privy Council in regard to S. 34 of the Indian Penal Code. This is in the case of *Barendra Kumar Ghose* v. *Emperor* (3). In that case, three men discharged pistols at a Postmaster while in his Post Office and the Postmaster was hit by two bullets and died. The learned Trial Judge in the High Court Sessions at Calcutta directed the jury, that, if they were satisfied that the Postmaster was killed in furtherance of the common intention of all three men, then the prisoner was guilty of murder, whether he actually fired the fatal shot or not. Their Lordships held that this interpretation of S. 34 of the Indian Penal Code was correct, and that "S. 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself" (page 211).

Applying these decisions to the present case, we cannot hold that the intentions and actions of appellant and his son can be divided into two parts; namely, that the sole common intention of the two men was to cause grievous hurt to the deceased by means of a spear and long bamboo, and that thereafter, when the appellant's actions has ceased, his son saw red, and proceeded to stab deceased to death, whilst appellant stood aside and took no further part in the matter.

For one thing, we cannot determine with any certainty which injury was inflicted by appellant. His spear may have caused one of the three serious penetrating wounds on the back of the side of the chest (for we cannot give the men's exact positions, when the blow was struck). Moreover, by S. 33, Indian Penal Code, a "criminal act" includes an omission to act, for example, " an omission to interfere, in order to prevent a murder being done before one's very eyes".

The Privy Council case would seem to us to re-affirm *Nga Po Sein's case* (1).

We are, therefore, constrained to hold that, under the law as laid down by their Lordships of the Privy Council, the

1. 1 L B R 233. 3. 52 Cal 197 (P C).

men's common intention was to cause injury to the deceased sufficient in the ordinary course of nature to cause death.

The appellant speared deceased on the second occasion, when the latter was defending himself against Tet Sein by holding his hair. In fact he clearly assisted Tet Sein.

It is clear that he suffered serious provocation, but inasmuch as the deceased had been removed some distance from appellant's house, at the time when the latter, and his son, ran out and assailed him, we do not think that the appellant can claim that he acted under grave and sudden provocation. We therefore think that he was rightly convicted of murder under S. 302, Indian Penal Code.

In view of the provocation, and the facts set forth, we do not think that in appellant's case the extreme penalty was called for, we maintain the conviction, but reduce the sentence to transportation for life.

PRESENT:—GODFREY AND DOYLE, JJ.

Kyon Hoe Tsee* *v.* Kyon Wong Si and one

Chinese Customary Law—Written contract whether necessary—May be presumed by long co-habitation and repute—Three essential steps only necessary for valid marriage—Usus—Evidence of.

Godfrey, J.:—By the Chinese Customary Law a China-man can have only one wife, though he may have concubines or secondary wives who also enjoy a recognised legal status, their sons inheriting the estate on failure of sons by the principal wife.

It is doubtful whether a written contract is really one of the essentials of a valid marriage in addition to the six preliminary steps. But in a case of repute and long cohabitation where the six preliminary steps are proved, the written contract may be presumed.

Abdul Razak v. *Aga Mahomed Jaffer Bindaneem*, 21 I A 56; *Tun Shin* v. *Ah Shein*, 8 L B R 222—referred to.

Surjya Moni Dasi v. *Kali Kanta Das*, 28 C 37; *Inderan Valunjupuly Taver* v. *Ramaswamy Pandia Taver*, 13 M I A 141; *Brindaban Chandra Kurmakar* v. *Chandra Kurmakar*, 12 C 140; *Administrator General of Madras* v. *Aranda Chari*, 9 M 466—discussed.

Doyle, J.:—The six preliminary steps are usually performed amongst the wealthier classes of Chinese though only two or at most three are stated to be really essential, *i. e.* betrothal as evidenced by the go-betweens or a written contract, the receipt by the bride's family of the presents which is the consideration, and the handing over of the woman as wife. *Parker's Comparative Chinese Family Law*, *p.* 18, *Jamieson's Chinese Family and Commercial Law*, *p.* 45.

Usus is the commonest form amongst many of the lower classes and receives the sanction of the law when the *usus* can be proved. The only question in any subsequent dispute would be the intention of the parties to constitute the relationship of husband and wife and whether the woman was given and accepted as wife. The ceremonial is merely evidence to prove such intention.

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*C M Appeal No. 57 of 1924.

Parker's Comparative Chinese Family Law, p. 10; *Von Mollondorff, p.* 19—referred to.

Judgment. 18*th September*, 1925.

GODFREY, J.:—This is an appeal against a judgment of the Original Side of this Court directing that letters of administration to the estate of one Kyon Ah Kyint, a chinese confucian, who died in Rangoon on the 20th March, 1923, be granted to the respondent Kyon Wong Si as being the deceased's chief wife at the time of his death.

Three applications of letters were filed, one by appellant, one by the respondent and one by the eldest son of the deceased. The last mentioned,however,abandoned his claim in favour of his mother, the respondent, so that the matter resolved itself into a contest between the appellant and the respondent, each claiming to have been the legally married wife of the deceased and each challenging the validity of the others alleged marriage.

By the Chinese Customary Law a China-man can have only one wife, though he may have concubines or secondary wives in addition, who also enjoy a recognised legal status, so that it would follow in the circumstances alleged that whoever of the two was not the chief wife would be in the position of secondary wife or concubine.

Apart from the question of the validity of the alleged marriages, the allegations made on either side are to a great extent not in dispute. From these it would appear that the deceased Ah Kyit left China and came to Rangoon some 40 years ago, having some five years previously, according to the respondent, made her his wife. Three years later he returned to China, staying only a short while, and again left for Rangoon. Five years later he again went to China, taking with him a Burmese lady apparently as his wife, and their children, it is not clear how many. These he left in China and returned again to Rangoon. The Burmese wife died in China and two years afterwards the respondent says she followed Ah Kyit to Rangoon and stayed with him two or three months and then went back to China. Three years or so later or about 23 years ago the deceased went again to China taking the appellant with him. The respondent says the appellant while in China lived with her parents and that the deceased told her he had brought her to look after the children. However, be that as it may, the deceased and the appellant appear to have returned to Rangoon together, and some time later the respondent again came to Rangoon and

admittedly so long as she stayed lived in the same house together with them, though on a different floor. The respondent has six children by Ah Kyit and the appellant has no issue.

As previously observed it is a recognised custom for a China-man to have secondary wives: and though these would not form members of his own family in the way that a principal wife would, still they have a recognised legal status, their sons inheriting the estate on failure of sons by the principal wife. Such evidence as has been adduced therefore and the facts as they appear must be considered in the light of the above and also of the custom prevaling for a China-man not to take his wife abraod with him, but instead to take a concubine or to acquire one in the country to which he goes (see Von Mollendorff's Family law of the Chinese, p. 21.).

The appellant's case is that she married Ah Kyit 23 years ago with all due ceremony in Rangoon and that she lived with him as his wife up to the day of his death. She admits going to China with him and admits the respondent's coming to Rangoon; but, though she admits that Ah Kyit had a previous legal wife in China, she asserts that this previous wife died and that the respondent was only a servant girl bought by Ah Kyit's parents and taken by Ah Kyit as a concubine.

The learned Judge of the Court of first instance has accepted the evidence adduced by the respondent, which he says impressed him very favourably, and finding that Ah Kyit and the respondents had performed all the necessary ceremonies to complete a valid marriage some 45 years ago held the respondent was necessarily the chief wife.

The present appeal against that finding is urged upon in effect two grounds:—firstly, that the evidence adduced by the respondent did not establish a valid marriage, inasmuch as one of the essentials, the written contract, was not even mentioned by her, but was presumed by the learned Judge and that no such presumption could arise, and secondly that there was a strong presumption in favour of a valid marriage with the appellant arising from long continued cohabitation with her and conduct inconsistent with the existence of the relationship of husband and wife as regards the respondent.

I do not think exception can be taken to this last contention as a general proposition, namely that long cohabitation and conduct inconsistent with any other relationship would give rise

to a strong presumption of the existence of a valid marriag and it is amply supported by the authorities quoted *Abdul Razack* v. *Aga Mahomed Jaffer Bindaneem* (1) and *Thein Shin* v. *Ah Shein* (2). In the absence of evidence sufficient to establish the anterior marriage alleged (the Respondent's) it is clear that the appellant would be bound to succeed.

The question therefore for determination here is whether the marriage alleged by the respondent has been established sufficiently to warrant the finding of the original Court. The ordinary requirements to constitute a valid marriage according to Chinese Law are enumerated in *Parker's Chinese Family Law, Jamieson's Family and Commercial Law, Von Mollendorff's Family Law of the Chinese and Alabaster's Commentaries on Chinese Law.* The two last authorities mention a written contract as being one of the essentials.

If it is so, it is rather curious that neither Parker nor Jamieson should mention it, and it would seem open to doubt whether especially in view of Parker's note to the effect that the six preliminary steps he mentions are, though usual, not indispensable the omission to have a written contract would invalidate a marriage. The learned Judge has proceeded upon the assumption that it would, and having found upon the evidence that all the other preliminary requisites were complied with has presumed that there was also a written contract. It is contended upon the authority of the case of *Surjya Moni Dasi* v. *Kail Kanta Das* (3) that no such presumption could properly arise. The facts of that case however were very different from those of the present one. There the husband was suing for the restitution of conjugal rights and his alleged wife, who was a minor, herself challenged the validity of the marriage. The Court of 1st instance, moreover, had come to no finding as to what rites and ceremonies were necessary to constitute a legal marriage or whether they had been performed. Here it is quite otherwise. There is no question as to what the rites and ceremonies in the main consist of and there is a finding by the original Court that they were performed, except as to the written contract the existence of which at the time has been presumed. And as to this presumption it is to be noted that there is nothing to show that there was not such a contract—the respondent simply made no mention of one, and it is significant that she was never asked anything about it in cross-examination.

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1. 21 I A 56. 2. 8 L B R 222. 3. 28 Cal 37.

In dealing with the cases, which support the proposition that no special finding is necessary and that once the fact of the celebration of the marriage is proved it should be presumed that the necessary rites were performed (*Inderan Valunjupuly Taver* v. *Ramaswamy Pandia Taver* (4), *Brindaban Chandra Kurmakar* v. *Chandra Kurmakar* (5) and *Administrator General of Madras* v. *Arandachari* (6) the learned Judges in the Calcutta case above referred to say: "However much such a presumption may be taken as rightly arising in cases involving questions of inheritance, so as to avoid illegitimacy, we cannot agree that in a case like the present it could have the effect to which the learned pleader for the respondent would wish us to give it. In this case the validity and legality of the marriage is one of the most essential points in issue, and we cannot hold that we are entitled to presume from the mere fiding that the marriage was celebrated that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed. On this point the Lower Courts should have come to a distinct finding....."

I entirely agree with those observations in relation to the case as presented to that Court. The differences in the case now under consideration appear to me obvious. All the proved circumstances relating to the respondent's position are entirely consistent with her case—her remaining in China to look after the family: the existence of that family: the periodical returns of the deceased: and the respondent's subsequent following him to Rangoon where her eldest son was working with the deceased, are all consistent with her being his legal wife. And the fact that he may latterly have preferred the more youthful attractions of the appellant is in no way inconsistent with the truth of the respondent's allegations. She is now an old woman of over 60 years of age, and in giving evidence she was speaking to events of 45 years ago. In the circumstances having regard to the fact that she was never asked about the existence of any written contract, and in view of the evidence of repute to the effect that the deceased had a chief wife living in China—which in fact is admitted by one of the appellant's own witnesses—it seems to me that the learned Judge was perfectly justified in presuming that there must have been a written contract if it is really an essential.

In my opinion therefore the appeal fails and should accordingly be dismissed with costs.

4. 13 Moo I A 141. 5. 12 Cal 140. 6. 9 Mad 466.

The proposition that the "six steps" or even any particular one of them are necessary to render valid a Chinese marriage appears to rest on scant authority. It is true that Mollendorff states that "the usual ceremonies and festivities are indispensable and needful for the completion of a proper marriage as well as the *consensus matrimonialis* (1) of those persons who signed the Betrothal." Mollendorff's pronouncements in other departments of marriage law *eg.* the question of *concubinatus* have however, been questioned by Parker (2). Parker himself states that six preliminary steps are necessary to a first class marriage, which in ordinary practice are amalgamated into two. He, however, goes on to say at p. 10 "usus is undoubtedly the commonest form amongst many of the lower classes and receives the sanction of the law when the usus can be proved by the litigants. The strictly ritualistic marriage is only performed in its complete integrity amongst the wealthier classes though fragments of it are frequently introduced into the lower marriage ceremonies (3)." Again Jamieson remarks "Though in all respectable families all these formalities are strictly observed it is submitted that only two or at most three are really essential, *viz.*, betrothal as evidenced by the go-betweens or by written contract, the receipt by the bride's family of the presents which is the consideration and the handing over of the woman as wife. The only question in any subsequent dispute would be was it the intention of the parties to constitute the relationship of husband and wife, and was the woman given and accepted as wife (4)." In other words the ceremonial is merely adduced as evidence of intention. Mollendorff appears to concede this view partially where he remarks "marriage is . . . concluded according to the will of the contracting parties and has in some way or other to be made public." (5).

Our attention has been drawn to the remarks at page 174 of Alabaster: "It is not held to be a complete marriage though the assent of the parents has been given and the wedding presents received if the marriage lines have not been given to the bridegroom (6)." It must be remembered that Alabaster is only quoting a particular decision of the Chinese Judiciary Board which may possibly have been merely deciding

1. Von Mollendorff's Family Law of Chinese, p. 18.
2. Parker's Comparative Chinese Family Law, p. 12.
3. Parker's Comparative Chinese Family Law, p. 18.
4. Jamieson's Chinese Family and Commercial Law, p. 45.
5. Von Mollendorff's Family Law of Chinese, p. 19.
6. Alabaster Chinese Criminal Law, p. 174.

as between the contracting parties to a marriage whether the completion of the marriage could be enforced, a totally different problem from the one now before the Bench. The six steps would appear to be formailities which if entered into would be binding on any party who wished subsequently to repudiate marriage but where consent and publicity were established their absence could not be pleaded by third parties as invalidating the marriage. This principle has been approved in *Thein Shwe* v. *Ah Shein* (7).

In the absence of the previous marriage there can be little doubt that the long co-habitation of the deceased with appellant would be strong presumption in her favour even if there had been no ceremonies.

Jamieson points out that it would seem China-men in Europe may, if not already married, contract a valid marriage according to the *lex loci* (8). This principle is, so far as my experience goes, recognised by China-men in some districts at any rate in Burma. On the other hand, the fact that certain ceremonies were gone through in Rangoon between the deceased and appellant is not conclusive proof that he recognised her at the time as anything more than a secondary wife since (in Canton at any rate) (*vide* Parker) "when a man wishes to take a particular concubine in addition to his wife, and the concubine is of a class which feels it a shame for a daughter to be anything but a legitimate wife, the bridegroom arranges to convey the concubine from her own house in a red chair accompanied by the usual musicians (9)" for the purpose of saving her face.

My view as to the facts is in agreement with that of my learned brother Godfrey, whose judgment I have had the advantage of perusing. The appeal must therefore fail.

Paget for petitioner.

N. M. Cawasjee for respondent.

RUTLEDGE, C. J. AND BROWN, J.

M. E. Moolla & Sons, Ltd.* *v.* Lean Shain Sway.

Civil Procedure Code (Act V of 1908), S. 110—Suit and appeal valued at Rs. 2,000—Whether subject-matter may be valued at Rs. 10,000—Obstruction of waterway—Value of relief as affects applicant to be ascertained.

A suit for damages and injunction for obstruction of a waterway was valued for Court-fees and jurisdiction at Rs. 2,000 and decreed on appeal. On

*Civil Mis. Application No. 68 of 1925.

7. 8 L B R 222. 8. Chinese Family and Commercial Law, p. 46.

9. Compartive Chinese Family Law, p. 13.

application for leave to appeal to His Majesty in Council it was contended that the value of the subject-matter in dispute is the amount of detriment which the applicant would suffer by the relief granted *plus* the benefit gained by the respondent.

Held, that the valuation not having been challenged on appeal the application would not lie under cl. (1) of S. 110, Civil Procedure Code, but that under S. 110, cl. (2), the value of the matter in dispute to the applicant is the difference between the exclusive use of the waterway and the sharing of that use with the respondent and as the value had not been ascertained the question should be remitted to the Original Side for report under O. 45, R. 5.

De Silva v. *De Silva*, 6 Bom L R 403 and *Gossain Bhaunath Gir* v. *Bihari Lal*, 4 Pat L J 415—approved.

Judgment. 29*th September*, 1925.

Per RUTLEDGE, C. J.:—This is an application for leave to appeal to His Majesty in Council.

As the decree of this Court on the Original Side was reversed on appeal, the only question for decision is whether the amount or value of the subject-matter of the suit in the Court of First Instance and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council are Rs. 10,000 or upwards.

The respondent sued the applicant for obstruction of a water-way over which he claimed right to float logs to his timber mill. He sued for an order to remove the obstruction, for an injunction, and for Rs. 1,000 by way of damages. He valued the suit as a declaration suit for Rs. 1,000, and paid Rs. 150 Court-fees.

The applicant-defendant objected to the valuation, and asserted in paragraph 11 of the written statement that the plaintiff should be made to pay Court-fees on three lakhs of rupees. By an order on this preliminary objection, dated the 23rd of May, 1924, Mr. Justice Beasley, following the decisions of the High Courts of Bombay, Madras and Allahabad, overruled the objection; but the applicant did not appeal from this order.

After a prolonged hearing the learned Judge on the Original Side dismissed the plaintiff's suit. The plaintiff respondent then appealed and valued his appeal at Rs. 2,000 for jurisdiction, Rs. 1,000 as damages, and Rs. 1,000 for an injunction, and paid Rs. 150 Court-fees. No cross-objection was launched by the applicant-defendant. The Appellate Court allowed the appeal and ordered the defendant to remove the piles, and granted the injunction prayed for, but did not give any damages.

Notwithstanding the fact that the subject-matter in dispute, as valued in both Courts, fell very far short of Rs. 10,000, the applicant claims that the valuation of the

subject-matter in dispute is, in fact, very much more than Rs. 10,000, and, in case we are not clearly satisfied that this is so, he asks that we may refer the question to the Court of First Instance for report under O. 45, R. 5. He relies on two Calcutta cases—31 Cal. 301 and 33 Cal. 1246. The judgment in the first of these cases, though a Full Bench, is a very short one. It was a case of a perpetual injunction to restrain an indigo manufacturer from erecting a manufactory. In the second case there was a claim for mesne profits, which, in the opinion of the Court, brought the subject-matter in dispute above the required limit. We may note, however, that this decision has been dissented from by a Bench of the Madras High Court in I. L. R. 39 Mad. 843 for reasons which we consider sound.

The learned advocate for the applicant contends that the subject-matter in dispute is the amount of detriment which the applicant will suffer by reason of the order for removal and perpetual injunction, *plus* the amount of benefit which the respondent gains thereby. We are unable to accept this argument. We consider that the law on this question has been accurately laid down by Sir Lawrence Jenkins, C. J. in the case of *De Silva* v. *De Silva* (1): "To entitle the plaintiff to appeal he must show that the conditions as to value prescribed by S. 596 of the Civil Procedure Code are satisfied, and for this purpose the decree is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal." The principle in that case has been followed by a Bench of the Patna High Court in 4 Pat. L. J., page 415.

In this case, though the applicant did question the correct valuation of the suit on the Original Side, when that decision was given against him, he must be taken to have acquiesced in it as neither by appeal nor cross-objections did he question the Trial Judge's decision before the Appellate Court. That being so, we consider that the valuation of the subject-matter in dispute in the Original Court must be held to be binding upon the parties and that, so far as the first clause of S. 110 of the Civil Procedure Code is concerned, it is not open to the applicant on an application for leave to appeal to the Privy Council to re-open that question. As though the question before the learned Judge on the Original Side was the adequacy of the valuation for the purpose of Court-fees,

1. 6 Bom L R 403 at 406.

by S. 8 of the Suits Valuation Act, 1887, the value for the purpose of Court-fees in this case and for the purpose of jurisdiction must be the same.

We have, however, to consider the effect of the second clause of S. 110 "or the decree or final order involves directly or indirectly some claim or question to or respecting property of a like amount or value". In the above cited case in 39 Mad. it was held that the clause could not be utilised to bring a suit within the section by adding mesne profits accruing since the date of the decree. It was, however, pointed out by Srinivasa Aiyangar, J. at page 849 that the second clause might apply if the matter in dispute were incapable of valuation as in the case of easements. In the case before us the value of the matter in dispute to the applicant is the difference between the exclusive use of the waterway and the sharing of that use with the respondent. This obviously was not valued except arbitrarily by the respondent in the Trial Court or in appeal. We think that it comes within the second clause of S. 110. And as it has not been valued, we must remit the question for report to the Original Side under O. 45, R. 5 as to what is the value to the applicant of the difference between the exclusive use of the waterway in suit and the sharing of that use with the respondent.

The costs of this application are to await the final result.

Ormiston for applicant.

Mr. Aiyangar for respondent.

PRESENT:—J. A. MAUNG GYI, J.

Miss. H. N. Burjorjee ... *Applicant**

v

Special Collector of Rangoon ... *Respondent.*

Land Acquisition Act (I of 1894), S. 18—Refusal of Collector to state case—Indian Limitation Amendment Act (X of 1922), S. 3—Application of Limitation Act to awards by Collector—Specific Relief Act (I of 1877)—Application under S. 45 to High Court to order Collector to refer case.

The High Court in its ordinary original jurisdiction has power under the Specific Relief Act, S. 45, to order a Land Acquisition Officer to refer the award to Court where such officer refuses to do so.

Under the provisions of the Indian Limitation Amendment Act (X of 1922) an applicant making an application to the Collector to refer the matter to Court is entitled to exclude the time requisite for obtaining a copy of the award.

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*Original Side Civil Mis. No. 281 of 1925.

Order. 18*th March* 1926.

This is an application made under S. 45 of the Specific Relief Act praying the Court to order the Special Land Acquisition Collector, Rangoon, to make a reference to the District Court of Insein under the provisions of S. 18 of the Land Acquisition Act, 1904.

A piece of garden land with fruit trees on it was acquired by the Land Acquisition Collector under S. 18 of the Land Acquisition Act, any person interested who has not accepted the award, may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court. The application must state the grounds of objection, and must be made within six weeks of the Collector's award if the person making the application was present or represented before the Collector at the time of the award. The award was made by the Collector on the 10th August, 1925 in the presence of the petitioner and her advocate. The petitioner filed her application for reference with the Collector on the 10th October, 1925, *i. e.,* two months after the date of the award. The application was rejected by the Collector as being time-barred. An application, supported by affidavits, was again made to the Collector claiming that under the provisions of Ss. 5 and 12 read with S. 29 of the Indian Limitation Act, 1908 (as amended by S. 3 of the Indian Limitation Act, 1922) that the application of the 10th October, 1925 was in time. On the 19th November, 1925, the Collector rejected the application *holding* that Ss. 5 and 12 of the Indian Limitation Act did not apply and refused to make a reference.

The petitioner now applies to this Court under S. 45 of the Specific Relief Act to compel the Special Collector to make the reference which was required of him, as there is no other specific and adequate legal remedy open to her except that given under this section and as the order applied for will be, in the circumstances, convenient, beneficial and appropriate.

Chapter VIII of the Specific Relief Act under which Ss. 45 to 51 come, treats of the enforcements of public duties. S. 45 treats of the power to order public servants and others to do certain specific acts, and the power given is that of the prerogative writ of Mandamus of the English Court. The principles which apply to mandamus apply to proceedings under Ch. VIII.

S. 45 declares that any of the High Courts of Judicature at Fort William, Madras and Bombay (and now Rangoon) may make an order requiring any specific act to be done or

forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by a corporation or interior Court of Judicature, provided.

(*a*) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

(*c*) that in the opinion of the High Court, such doing or forbearing is consonant to right and justice;

(*d*) that the applicant has no other specific and adequate legal remedy; and

(*e*) that the remedy given by the order applied for will be complete.

The exemptions from such power are stated in sub-clauses (*f*) (*g*) and (*h*), and they do not concern us except (*h*) which forbids the making of any order which is otherwise expressly excluded by any law for the time being in force.

Under S. 18 of the Land Acquisition Act the party interested who was present when the Collector made his award, if desirous of moving the Collector to refer the matter to the Court, must do so by a written application within six weeks of the award. If the application was made after this period it was time-barred and the applicant had no remedy.

On the 5th March, 1922 Act No. X of 1922 passed by the Indian Legislature (The Indian Limitation Amendment Act 1922) received the assent of the Governor-General under S. 3 A (2) of the amended Act "where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the 1st schedule, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—(*a*) the provisions contained in Ss. 4, 9 to 18, and S. 22 shall apply only in so far as, and not to the extent to which, they are not expressly excluded by such special or local law." Under Art. 14 of Sch. 1 of the Limitation Act, the period of Limitation for setting aside any act or order of an

officer of Government in his official capacity not otherwise expressly provided for in the Limitation Act, is one year. But this has been curtailed into 6 weeks by the Land Acquisition Act. As the amended Limitation Act came into force on the 5th March, 1922, Ss. 4, Ss. 9 to 18, and S. 22 apply to the Land Acquisition Act which is a Special Law. Part 3 of the Limitation Act (Ss. 12 to 25) deals with the computation of the period of limitation. S. 12 deals with the exclusion of time in legal proceedings. Sub-section 4 reads: "In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded."

It is intended that S. 12 (4) applies only to awards made under the Civil Procedure Code. But the preamble to the Limitation Act runs: "Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts:" it may be argued that an application to the Collector to refer the matter to the Court is not an application to Court.

The Land Acquisition Act does not lay down any direction by which the party interested in the land acquired can apply direct to the Court. And once the application is made to the Collector to refer the matter to Court, he has no discretion in the matter and must make the reference. To me, it appears that this is only a round about way of enabling the party interested to make application to the Court; and that the Collector for the purposes of the Act is only a conduit pipe. An application to the Collector to refer to Court must be taken as equivalent to an application to Court. I do not think it was the intention of the Legislature to deprive any owner of land or party interested in it, which has been acquired, of his right to apply to the Court against the award of an administrative officer, the Land Acquisition Collector. On the Collector refusing to make the reference, the petitioner has no right of action against the Special Collector and no other remedy (1 L. B R page 132), and the relief given by this Court will be adequate and complete. If my view is correct, then it follows that the time taken in applying for copies must be added to the 6 weeks statutory period. Before the 5th March, 1922, this would have been impossible. But as the amended Limitation Act applies since that date, and as it is not disputed that had the time for copying been allowed, the petitoner's application to refer to Court on the 10th October, 1925 would have been in time, I hold that the petitioner's application was

within time. I accordingly direct that the Special Land Acquisition Collector, Rangoon, do refer the petitioner's application to the District Court of Insein. Costs (Advocate's fees) five gold mohurs.

Burjorjee for applicant.

Government Advocate for respondent.

[FULL BENCH.]

PRESENT:—RUTLEDGE, C. J., HEALD, DUCKWORTH, CHARI, AND MAUNG BA, JJ.

King-Emperor

v.

Nga Tha Din.*

Criminal Procedure Code (Act V of 1898) (amended), S. 162—Statements made to Police whether oral or recorded in writing—Inadmissible except for the purpose of contradicting prosecution witnesses—Definition of "any person"—Not applicable to accused—Evidence Act (V of 1872), Ss. 27, 155, 157—S. 27 not over-ridden by Provisions of S. 162, Criminal Procedure Code.

Per *Curiam*:—The provisions of S. 162, Criminal Procedure Code, as now amended, absolutely bar the use of statements both oral and written when made to or recorded by a police officer in the course of an investigation under Cahp. XIV, Criminal Procedure Code, and render them inadmissible for any purpose under the Evidence Act in any enquiry or trial in respect of any offence under investigation at the time when such statements were made, except for the strictly limited purpose of contradicting prosecution witnesses under S. 145, Evidence Act.

Gandhe Venkatasubbiah's case, 48 M 640 dissented from.

Bank of England v. *Vagliano,* (1891) A C 107; *Emperor* v. *Vithu Balu Kharat,* 26 Bom L R 965; *Labh Singh* v. *The Crown.* 6 Lah 24; *Rakha* v. *The Crown,* 6 Lah 171 referred to.

A Police Officer has no power to require the attendance of, or to examine, under Ss. 160 and 161, Criminal Procedure Code, a person accused of the offence under investigation.

Weir's Criminal Rulings, Vol. II, 4th Edition, pp. 120, 121; *Emperor* v. *Ratan Satharam,* 4 Bom L R 644; *Queen-Empress* v. *Jadub Das,* 27 C 295 approved.

The provisions of Ss. 160, 161 and 162, Criminal Procedure Code, do not apply to an accused person, and do not over-ride or affect S. 27, Evidence Act, which applies only to information received from a person accused of any offence in the custody of a Police Officer.

Bawa Rowther's case, 3 B L J 245, commented on.

Jagwa Dhanuk v. *King-Emperor,* 5 Patna 63 at p. 78; *In re Semalai Goundan,* 86 I C 664 referred to.

Heald, J. (dissenting):—The provisions of amended S. 162, Criminal Procedure Code include not merely witnesses but an accused person and the effect of the amended section is to override S. 27 of the Evidence Act.

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*Cr. Ref. No. 145 of 1925.

Per Duckworth, J.—S. 157 of the Evidence Act is affected by S. 162 of the Criminal Procedure Code so far as statements to the Police taken under S. 161 whether oral or recorded are concerned, but S. 27 Evidence Act, which deals with information received from persons accused of an offence and in Police custody is not affected thereby.

Per Mg Ba, J.—Ss. 155 and 157 of the Evidence Act are affected by S. 162, Criminal Procedure Code, which applies to witnesses only. S. 27, Evidence Act. is not so affected.

Judgment. *16th February, 1926.*

This reference to a Full Bench has arisen out of Criminal Appeal No. 1590 of 1925 from a judgment of the Sessions Judge of Mandalay passed in Sessions Trial No. 14 of 1925, in which he convicted Nga Tha Din of the offence of murder under S. 302 of the Indian Penal Code and sentenced him to death.

The appeal was heard by a Bench of this Court consisting of my Brother Mg Ba and myself. In our judgment we stated as follows:

"We note that the learned Sessions Judge has excluded at the trial before him a piece of material evidence, namely, the discovery of a blood-staind shirt in consequence of information received from the accused while he was in the custody of the Police. Tun Bon and Mg Tok (P. W. 8 & 9) were present at the time of discovery. Tun Bon, his employer, was positive that it was the shirt bought by him for the accused. The Chemical Examiner reported that the stains on it were of human blood.

"He excluded all that evidence on the ground that the new S. 162 of the Code of Criminal Procedure must be held to over-ride S. 27 of the Indian Evidence Act. He had ruled so when he decided *Bawa Rowther's case* (1) as one of the Hon'ble Judges of this Court in September, 1924. Circular No. 7 of 1924 issued by this Court in July of that year appears to support his view. A Bench of the Madras High Court constituted of Wallace and Madhavan Nayar, JJ., in *Grandhe Venkatasubbiah's case* (2) decided in October, 1924 held a different view. It was there held that the provisions of S. 162 of the Code of Criminal Procedure as amended refer only to statements reduced into writing and are not an absolute bar to the use of oral statements for any purpose admissible under the Indian Evidence Act.

"We are of opinion that this legal question is of great importance in the administration of Criminal Justice and should be authoritatively settled by a Full Bench. We accordinly refer to such Bench the following question."

1. 3 Bur L. J. 245. 2. 48 Mad 640.

"Do the provisions of S. 162 of the Code of Criminal Procedure as now amended absolutely bar the use of statements, both oral and written, or do they still permit the use of oral statements for purpose admissible under the Indian Evidence Act."

The history of S. 162 of the Criminal Procedure Code and the related sections as well as the authorities both before and after the amendment of 1923 have been very carefully put before us by the Government Advocate and Mr. de Glanville and I wish gratefully to acknowledge the great assistance, which they have given to the Court, in interpreting this difficult section. Two main questions arise upon the reference before us.

(1) Does the amended S. 162 of the Criminal Procedure Code in effect repeal S. 27 of the Indian Evidence Act? and

(2) Do the words "any such statement" occurring in the third line of the amended S. 162 (1) (Unrepealed General Acts, Vol. IX, 4th Edition, page 506) apply to oral statements as well as written?

With regard to the first question it must be borne in mind that Ss. 160, 161 and 162 deal with an investigation under Chapter XIV of the Code and with the examination of persons who, from the information given or otherwise, appear to be acquainted with the circumstances of the case. It has, in my opinion, been rightly held that a Police Officer has no power to require the attendance of or to examine under Ss. 160 & 161 a person accused of the offence under investigation [*see* Weir's Criminal Rulings, Vol. II, 4th Edition, pages 120 and 121, *Emperor* v. *Ratan Satharam* (3); *Queen-Empress* v. *Jadub Das* (4)].

Since Ss. 160, 161 and 162 in my opinion do not apply to an accused person, and do not consider that they can have effect upon S. 27 of the Indian Evidence Act, which applies only to information received from a person accused of any offence in the custody of a Police Officer I am strengthened in this view by the Judgment of Acting Chief Justice Mullick in the case of *Jagwa Dhanuk* v. *King-Emperor* (5). The same view has been taken by Acting Chief Justice Spencer of the Madras High Court in *In re Semalai Goundan* (Referred Trial No. 51 of 1924) (6). But as he has based his opinion on wider grounds than I am prepared to accept, I prefer to base

3. 4 Bom L R 644.
4. 27 Cal 295.
5. 5 Pat 63 at 78.
6. 86 I C 664.

my decision that S. 27 of the Indian Evidence Act is neither repealed nor affected by the amended S. 162 of the Criminal Procedure Code on the ground that a person accused of any offence is not "any person being within the limits of his own or any adjoining station, who, from the information given or otherwise appears to be acquainted with the facts and circumstances of the case" and that consequently "information received from a person accused of any offence in the custody of a Police Officer" is not a statement within section 162 (1) of the Criminal Procedure Code.

The second question which we are called upon to decide is whether oral statement are excluded by the amended S. 162 (1). And in addressing myself to the task of interpreting the meaning of sub-section 1, I shall set out Lord Herschell's dictum in the *Bank of England* v. *Vagliano* (1891, A. C. 107) "I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Two different constructions are possible of sub-section 1. The first is that the words "nor shall any such statement" mean and refer to a statement (*a*) made by any person to a Police Officer and (*b*) in the course of an investigation under this Chapter. In this construction the words "if reduced into writing" only apply to the words "be signed by the person making it." The alternative construction is that the words "nor shall any such statement" mean a statement (*a*) made to a Police Officer, (*b*) in the course of an investigation and (*c*) reduced into writing. I do not think that it can be claimed that on the wording of the section the expressions used are so clearly in favour of the one construction as to negative the other. The words following however "nor shall any such statement or any record thereof, whether in a Police Diary or otherwise, or any part of such statement or record" seem to me to favour the former construction rather than the latter; because, if the words "any such statement" were to be confined to written statements there would seem to be no object in adding "or any record thereof".

A point is made by Mr. Justice Wallace who, in the case of *Venkatasubbiah* v. *King-Emperor* (I. L. R. 48 M 640 at 645) (where a Bench of the Madras High Court clearly

held that the second construction is the correct one) urges that the words "such statement" in the two provisos are clearly confined to a written statement and that he consequently cannot presume that "such statement" in the earlier part of the section can have a different meaning. I do not think that this argument is well founded, because in the provisos the context clearly shows that it is only statements reduced to writing that are referred to. If it were intended to exclude oral statements from the ban of S. 162, nothing would have been simpler than for the legislature to say "made by any person to a Police Officer in the course of an investigation under this Chapter and reduced to writing". Instead of this it used a hypothetical phrase, which, in its ordinary grammatical sense, might be taken only to apply and qualify the words "be signed by the person making it". A comparison of the amended sub-section with the sub-section of the Code of 1898, which it replaces, makes this point clearer. The earlier words of both sub-sections are nearly identical, but where the Code of 1898 was content with "nor shall such *writing* be used as evidence" the amended sub-section reads "nor shall any such statement or any record thereof, whether in a Police Diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any enquiry or trial in respect of any offence under investigation at the time when such statement was made". Why should the legislature drop the words "such writing" if only written statements were aimed at? It may also be observed that after all a statement reduced to writing might be presumed to be more accurate and reliable than one which remained oral. If the legislature intended, as it clearly did intend, to exclude written statements except for one narrow definite purpose, how can we presume that they intended to leave the less reliable oral statements admissible without any safeguard or limitation? In my opinion it was the intention of the legislature to adopt the former of the two possible constructions and consequently sub-section (1) exclude oral statements.

It is urged that this construction may bear hardly upon an accused and may deprive him of the only method of showing the untrustworthiness of witnesses for the prosecution by eliciting in cross-examination that they had made statements to the police inconsistent with their evidence in Court. I admit that in many cases this may be so. Such hardship or such inconvenience is a question for the legislature and not for us. In the view which I have taken of the proper mean-

ing of this sub-section, I am fortified by a decision of the Bench of the High Court of Bombay in *Emperor* v. *Vithu Balu Kharat* (26 Bom. L. R. p. 965). At page 967 Mr. Justice Fawcett observes, "It is quite clear that under S. 162, Criminal Procedure Code, as substituted by the Code of Cr. Pro. Amendment Act of 1923, it is not now permissible for statements to the police, whether oral or written, to be put in evidence, in order to corroborate a prosecution witness or to contradict a defence witness. To this extent the decisions of this Court in *Imperatrix* v. *Jijibhai Govind* and *Emperor* v. *Hanmaraddi* which rule that evidence of that kind is permissible, are now superseded by the enactment of the legislature. It is quite clear from the very terms of the present S. 162, Criminal Procedure Code, that a police statement can only be used for one purpose, and that is by the accused to contradict a prosecution witness in the manner provided by S. 145 of the Indian Evidence Act." With this judgment the Acting Chief Justice (Shah) agreed. The same view seems to have been held by a Bench of the Punjab High Court in *Labh Singh* v. *The Crown* (I. L. R. 6 Lah. page 24), though the matter was not discussed. The question is, however, discussed at some length in *Rakha* v. *Crown* (I. L. R. 6 Lah. page 171). There the learned Chief Justice, after discussing the effect of the section says at p. 174, "The result is that not only is the record of the statement of a witness taken under S. 161 of the Criminal Procedure Code excluded from evidence, but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution."

In the case of *Guhi Main* v. *King-Emperor* (I. L. R. 4 Patna 204 at page 209) Mr. Justice Adami is of opinion "that the provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence from asking the Sub-Inspector whether in fact the witness had made that statement to him. In doing this there is no use of the statements recorded by the police during their investigation." I am unable to agree with this restriction put upon the meaning of the words "used for any purpose".

In the judgment of Mr. Justice Mullick already referred to 5 Patna 63 at page 77, he says: "I think it must be admitted that S. 162 of the Criminal Procedure Code of 1923 has altered the previous law so as to completely exclude state-

ments made by witnesses during the course of an investigation, except for certain limited purposes not here material." It is true that the learned Judge does not differentiate between written and oral statements; but his opinion seems to embrace both. The only decision to the contrary is the already mentioned in I. L. R. 48 Madras at page 640 with which, for the reasons already given, I am unable to agree.

The learned Government Advocate has asked us to deal with oral statements which may have been made by a witness to a police officer at an identification parade or to a person who happened to be a police officer when engaged in drawing a plan of the locality where a crime is alleged to have taken place. I do not propose to say anything further than this that the ban of S. 162 applies only to statements made to a police officer making an investigation under Chapter XIV. If the investigation contemplated by that Chapter is finished, then the section cannot be invoked to prohibit any statements made to a police office at some time subsequent to the investigation. If on the other hand statements made to police officers when preparing a map or holding an identification parade are statements made in the course of an investigation under Chapter XIV then they fall within the scope of the prohibition embodied in S. 162.

HEALD, J.:—I have had the advantage of reading the judgment of the learned Chief Justice and I see no reason to doubt that judgment in so far as it interprets the provisions of S. 162 of the Code of Criminal Procedure is in accordance with what was in fact the intention of the Legislature.

Nevertheless, with all respect, I find it impossible to read the words actually used in Ss. 161 and 162 of the Code of Criminal Procedure as expressing that intention. To read that intention into the sections it is necessary to construe them as if the words "other than an accused person" occurred in S. 161 at the end of sub-clause (1) and in S. 162 (1) after the words "any person". What S. 161 actually says is that the police may examine orally "any person supposed to be acquainted with the facts of the case" and it is clear that a suspected or accused person must be a person supposed to be "acquainted with the facts of the case". It is in many cases impossible for anyone to know until a late stage of the police investigation who will ultimately be accused and that is in my opinion why the legislature used in S. 161 so wide a phrase as "any person supposed to be acquainted with the facts and circumstance of the case," and may be

one of the reasons why they provided that persons examined by the police under that section shall not be bound to give incriminating answers. It is perhaps worth noting that the Local Government evidently reads S. 161 as including "suspected persons," since paras. 732 and 733 of the Police Manual, which contains the orders and rules made for the police with the sanction of Government, provide for the examination of suspected persons by the police, and so far as I am aware, there is no other provision in the Code, except S. 161, under which the police would have power to examine accused or suspected persons. It is clearly desirable that the police conducting an investigation should be in possession of any explanation which the person accused or suspected may be able to offer, since that explanation may put the police on the right track, and I see no reason to doubt that the words "any person supposed to be acquainted with the facts and circumstances of the case" include and were intended to include persons who are accused or are under suspicion. With due deference therefore I find myself unable to follow the rulings in the cases of *Queen-Empress* v. *Saminada Chetty* (1) and *Emperor* v. *Ratan Satharam* (2) in so far as those rulings suggest that those words do not include an accused person, and I am constrained to disagree with the ruling *Queen-Empress* v. *Jadub Das* (3) in so far as it suggests that S. 161 of the Code does not warrant the examination of an accused person by the police in the course of their investigation under that section.

S. 162 provides that "no statement made by any person to a Police Officer in the course of an investigation shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof be used for any purpose (save as provided in the section) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

It is clear that the actual wording of the section makes no exception in respect of statements made by accused persons. The words "no statement made by any person" must include statements made by accused persons, and there is, in my opinion, nothing in the section, as worded, to suggest that they ought to be read as if they were "any person other than an accused person". I am of opinion therefore that the section as enacted must be read as including statements made by an accused person.

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1. 7 Mad 274. 2. 4 Bom L R 644. 3. 27 Cal 295.

The difficulty then arises that S. 27 of the Evidence Act provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. In so far as this section provides for proof of statements made during the police investigation by accused persons who are in custody it conflicts with the provision of S. 162 of the Code which says that no statement made to a Police Officer in the course of his investigation shall be used for any purpose other than those mentioned in that section.

The conflict between the two sections has been the subject of various judicial decisions and the two cases cited by the learned Chief Justice, namely, the cases of *Jagwa Dhanuk* v. *King-Emperor* (4) and *In re Semalai Goundan* (5) seem to be the latest.

In *Jagwa Dhanuk's case* (4) the learned officiating Chief Justice said: "To what extent the provisions of a special enactment such as the Criminal Procedure Code override the provision of a general enactment such as the Indian Evidence Act must depend on the language of the special Act, but reading the present Ss. 161 and 162 of the Code, I think it clear that the main object of the legislature was to prohibit the use of statements of prosecution witnesses as corroboration under S. 157 of the Evidence Act. The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem in my opinion to be affected. If it were otherwise, Ss. 27 and 28 of the Evidence Act must be considered repealed. It surely cannot have been the intention of the legislature to effect such a repeal by implication. It is important for the Court to know what was the defence made by the accused at the earliest moment. If S. 162 is given the meaning which the learned Counsel now seeks to give to it, accused persons would be most seriously prejudiced and the only object of S. 163 of the Criminal Procedure Code would be to enable Police Officers to get clues for the purpose of investigating the charge. If that were the case, the Court would be deprived of much valuable material for testing the truth of the case for the defence. To shut out corroborative evidence comprising statements made by defence witnesses during the investigation

4. 5 Pat 63. 5. 86 I C 664.

is prejudicial enough but unless compelled to do so I do not think we ought to add to the prejudice by shutting out exculpatory statements by the accused and if the amendment of 1923 does not operate to exclude such statements then S. 27 of the Evidence Act remains unrepealed." With reference to this all that I need say is that although the main object of the legislature in the amendment of S. 162 of the Code may have been to prohibit the use of statements of prosecution witnesses as corroboration under S. 157 of the Evidence Act, it is admitted that the legislature, either by inadvertence or design, actually did more than that, since they prohibited the use of corroborative statements of defence witnesses, and the question is whether they did not also prohibit the use of statements, exculpatory as well as incriminating, made by the accused himself. I do not for a moment think that S. 162 of the Code was intended to affect S. 27 of the Evidence Act. On the contrary I have little doubt that the truth of the matter is that when S. 162 was drafted the fact that the word "any person" would include an accused person was overlooked But if the words used in an enactment are clear and unambiguous, as in my opinion the words "any person" certainly are in Ss. 161 and 162 of the Code, then I think we are not entitled to go beyond the clear meaning of the words used and we cannot consider the intention of the Legislature at all.

In *Semalai Goundan's case* (5) the learned Officiating Chief Justice said: "In my opinion, this section (S. 162), both before and after amendment, is directed against the admission at the instance of the prosecution of Police Diaries and other records prepared or copied from the diaries of investigating officers. The learned Sessions Judge expresses an opinion that S. 162 of the Criminal Procedure Code as revised makes every statement to a Police Officer irrelevant for any purpose unless it is proved at the instance of the defence, thus treating this section as virtually superseding S. 27 and other sections of the Evidence Act. I am clearly of opinion that the provisions of the Evidence Act are quite independent of the sections in the Criminal Procedure Code and cannot be treated as impliedly repealed in consequence of the amendment of the Criminal Procedure Code."

I entirely agree with the learned Judges that statutes are not to be held to be repealed by implication unless the repugnancy between the new provisions and the former statute is

5. 86 I C 664.

plain and unavoidable, but in this case the repugnance is clear and admitted, and I do not think that the learned Judges have given good or sufficient reasons for avoiding it. Practically all that they say is that they are unable to believe that the legislature could have intended that S. 162 should affect S. 27 of the Evidence Act and that the provisions of the Act are independent of those of the Code. If, as I believe we are not entitled to consider the intention as against the actual words of the Legislature, then the first of these reasons is no reason, and in view of the fact that the provisions of S. 162 of the Code unquestionably affect, to a greater or less extent those of Ss. 155 (3) and 157 of the Evidence Act, it is, difficult to see on what principle it must be held that they cannot affect S. 27.

With the greatest respect for the judgment of the learned Chief Justice I feel bound to hold that the conflict between the natural meaning of the words used in S. 162 of the Code and that of S. 27 of the Evidence Act, in so far as the latter would allow proof of statements made to the Police during a Police investigation under Chapter XIV of the Code by an accused person while in the custody of the Police, is such that the latter to the extent to which it allows proofs of such statements, must be regarded as having been repealed.

So far as the question actually referred is concerned I entirely agree with the learned Chief Justice that the provisions of section 162 as amended prohibit the use of statements which were not reduced into writing no less than statements which were reduced into writing.

DUCKWORTH, J.:—I have read the judgment of the learned Chief Justice, and I am in agreement with his views.

S. 162, Criminal Procedure Code, as it now stands amended, seems to me clearly to intend to prohibit the use of any statements by witnesses, whether oral or recorded, taken by the Police under S. 161, except as provided by the proviso to the section. The section is very different from the same section in the Code of 1898, but, *from the words used*. I am unable to see that any other interpretation is logical. It cannot be that there has been no change in the Law.

At the same time, in view of the grouping together, and the wording, of Ss. 160, 161 and 162, Cri. Procedure Code, I have no doubt that these three sections were only intended to refer, and do only refer, to witnesses, or in other words, "persons supposed to be acquainted with the facts and circumstance of the case." They could, I think only refer to an

accused person in the rare instance, in which the accused, when at first not suspected in a case, may have been examined by the Police as a witness. On the other hand, it is clear that the 2 following sections, Ss. 163 and 164 refer to the accused . . . . . the former for certain, and the latter certainly in part, though there are not lacking decisions, in which it has been held that it applies to the accused alone.

My view, therefore, is that S. 157 of the Indian Evidence Act is affected by S. 162 of the Code of Criminal Procedure, so far as statements to the Police, taken under S. 161, whether oral or recorded, are concerned, but that S. 27 of the Indian Evidence Act, which deals with information received from persons accused of an offence and in Police custody, *is not affected* by the aforesaid section of Code of Criminal Procedure.

I am of opinion that this sufficiently answers the reference now made.

Chari, J.:—I agree with the Chief Justice on both points and have nothing further to add.

Mg Ba, J.:—I also agree with the learned Chief Justice on both points. I may note that in the Code of 1882 the word "truly" occurred in S. 161. This clearly shows that this section was intended to apply only to witnesses. The effect of omitting that word in the Code of 1898 is that a witness is no longer liable to be prosecuted for perjury. So S. 27 of the Evidence Act remains unaffected by the latest amendment of S. 162. But Ss. 155 and 157 are affected except in the only instance mentioned in the proviso to S. 162, Criminal Procedure Code.

Eggar (*Government Advocate*) and *De Glanville amicicuria.*

PRESENT:—CHARI, J.

Mulla Ramzan . . . *Appellant**

v.

Mg Po Kaing . . . *Respondent.*

Civil Procedure Code (*Act V of* 1908). *S.* 47, *O.* 21, *R.* 2—*Agreement made before decree to execute for lesser sum—Not a question relating to execution—Objection to execution not maintainable.*

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*Civil 2nd Appeal No. 398 of 1925 from the order of the District Court of Prome in C M Appeal No. 68 of 1925.

Where a judgment-debtor sets up an agreement that prior to the decree there was an arrangement between the parties that though the decree is to be passed for a larger sum it should only be executed for a specified lesser sum and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties. Such enquiry does not fall within the provisions of S. 47 or O. 21, R. 2, Civil Procedure Code.

Judgment. 23*rd February*, 1926.

The facts of the case out of which this Appeal arises are that the respondent as assignee of the decree-holder of a decree sought to execute that decree.

The judgment-debtor, appellant objected to the execution on various grounds, one of which was that, prior to the passing of the decree, he had entered into an agreement with the original decree-holder, whereby in consideration of his confessing judgment for the full decretal amount of Rs. 2,000, the original decree-holder agreed to accept Rs. 1,000 only in full satisfaction. Both the Trial Court and the Lower Appellate Court held that this objection could not be enquired into in execution proceedings, though they came to that conclusion on different grounds. The judgment-debtor now appeals and the point for consideration is whether such an agreement as the one pleaded by the judgment-debtor in answer to the decree-holder's application for execution of the decree, which on the face of it is an unconditional one for Rs. 2,000, can be enquired into by the execution Court in execution proceedings.

The point has been the subject of consideration in many rulings. The agreement in this case is not one relating to the satisfaction of the decree as the Judge of the Trial Court seems to have thought but is in essence and agreement to treat the decree as in executable except to the extent of Rs. 1,000.

The wording of O. 21, R. 2 seems to show that the satisfaction and adjustment of the decree referred to in that rule are adjustments and satisfactions subsequent to the decree. In the case of *Chidambaram Chettiar* v. *Krishna Vathiyar* (1), which was a Full Bench case, the point for decision was whether an agreement entered into prior to the passing of a decree, whereby the decree-holder agreed that the defendant should make arrangements for the satisfaction of the decree within a certain time thereafter and that the plaintiff, the decree-holder, should not execute or transfer the decree before that

1. 40 Mad, 233.

time, was one which could be pleaded in the proceedings taken in execution of the decree. The Full Bench, Phillips, J., dissenting, held that such an agreement was not obnoxious to O. 21, R. 2, as that rule related to agreements after the passing of a decree, and that the question could be enquired into by the executing Court. This case was considered in a later case in the same High Court in *Arumugam Pillai* v. *Krishnasami Naidu* (2) Mr. Justice Seshagiri Aiyar, who was a party to the Full Bench ruling, explained that ruling and, so far as I can see from this judgment, he seems to have been of the opinion that Chidambaram Chettiar's case must be strictly confined to the facts of that case. In *Arumugam Pillai's case* the agreement set up was that the plaintiff decree-holder had prior to decree agreed with one of the defendants that defendant should pay only Rs. 300 towards any decree that might be passed in the suit and that the decree-holder should not execute the decree for anything more against the 3rd defendant but should try and get the decretal amount from the other defendents. Mr. Justice Oldfield drew a distinction between the arrangement which was then being considered and the agreement in the Full Bench ruling in the statement that, in the latter, the arrangement was only to postpone execution and not as in the case then before him for the decree being treated as in part inexecutable. The Full Bench case has been the subject of consideration by the same High Court in later rulings which are reported in unauthorised reports and doubts have been expressed about its soundness.

The High Court of Bombay in a Full Bench ruling, *Laldas Narandas* v. *Kishordas* (3), held that an agreement, entered into before the proceedings commenced, that plaintiffs should not recover the costs from one of the defendants could be enquired into in execution if the judgment-debtor set it up as an answer to the decree-holder's application.

The Calcutta High Court took a consistently different view. In *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (4) an agreement was set up in answer to the execution of an instalment decree that prior to the decree an arrangement was come to between the parties that a payment of certain instalments should not be enforced. The learned Judge held that such an agreement could not be pleaded. They based their decision on the broad ground that, if there had been such an agreement, it should have been incorporated in

2. 43 Mad. 725. 3. 22 Bom 463. 4. 29 Cal 810.

the decree and that after the passing of a decree, the decree itself must be taken to be conclusive between the parties. In the case of *Hasan Ali* v. *Gauzi Ali Mir* (5), the learned Chief Justice and Mr. Justice Geidt held that an agreement prior to decree in a suit for possession of a certain land, that after decree the judgment-debtor should not be ousted from the land but given permanent rights over the same could not be gone into in execution proceedings. In this state of authorities I am of opinion that the ruling of the Calcutta High Court takes the sounder view.

The conflict of views indicated above, seems to have resulted from the fact that in the arguments adduced in some of the cases, it is taken for granted that the wording of S. 47 of the Civil Procedure Code is wide enough to cover such enquiries, unless they are prohibited by the provisions of O. 21, R. 2. The applicability of S. 47 is thus relegated to the background.

Considering the matter on principle and without reference to the authorities I arrive at the same conclusion as that arrived at by the Calcutta High Court. S. 47 enacts that "All questions..... relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit." The wording of the section is, no doubt, very wide and I am bound to give the section a most liberal construction. Putting the most liberal construction on the words, I fail to see how a question like the one involved in the present case can be said to state "to the execution of a decree". The words "the decree" refer to the decree passed by the Court and of which the decree-holder is seeking execution. It is only questions relating to the execution or executability of this decree, which the Executing Court is directed to determine. When a judgment-debtor sets up an agreement of this kind, that, prior to the decree, there was an arrangement between the parties that though the decree is to be passed for Rs. 2,000 it should only be executed to the extent of Rs. 1,000 and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties. Without going to the extent of saying, as Mr. Justice Spencer of the Madras High Court does in one of the cases reported in the unauthorised

5. 31 Cal. 179.

reports, that parties who collusively allow a Court to pass a decree having privately agreed that the decree should not be enforced, are committing a fraud on the Court, I can at least say that parties who, having agreed that a decree should not be executable wholly or in part pray the Court to pass an unconditional decree, are thereby inviting the Court merely to take part in a solemn force.

I am not called upon in this appeal to decide, and I do not decide, whether the judgment-debtor has any kind of right at all, *e. g.*, whether he has or has not the right, by a regular suit, to obtain an injunction to restrain the decree-holder from enforcing the decree. I am, however, clearly of opinion that a decree, which, on the face of it, is enforceable to the fullest extent cannot, in execution proceedings, be challenged as being inexecutable, wholly or in part, on account of an agreement between the parties entered into prior to the decree.

For these reasons, I uphold the order of the Lower Courts and dismiss the appeal with costs. Advocate's fee, two gold mohurs.

Thein Maung (1) for appellant.

Bomanji for respondent.

PRESENT:—RUTLEDGE, C. J. AND CHARI, J.

Bon Kwi and others*

v.

S. K. R. S. K. R. Firm (Agent Latchmanan Chettyar and two).

Civil Procedure Code (Act V of 1908), S. 110—Appeal to Privy Council—Suit and appeal under Rs. 10,000—Matter directly or indirectly must be suit in existence.

In an application for leave to appeal to the Privy Council the appeal was valued at Rs. 5,400 and it was contended that there was another claim involving the same point for which leave to sue had been reserved but which had not yet been instituted and that if that claim had been tacked on the subject-matters in issue would involve a sum of Rs. 10,000 over. *Held,* that the words "directly or indirectly" cannot be stretched to cover a claim which is quite distinct in its character and to which there is an irrelevant reference in the plaint, but that the appeal must have reference to a suit in existence and not to suits *in gremio futuri.*

Order. *1st February,* 1926.

Per RUTLEDGE, C. J.:—This is an application for leave to appeal to His Majesty in Council from a decision of a

*C M Application No. 143 of 1925.

Bench of this Court confirming the judgment and decree of the District Court of Pyapan.

The suit was brought for the sale of mortgaged premises, in default of payment of Rs. 5,413-14-0.

The suit in appeal was valued at the same amount. But Mr. Clarke draws our attention to paragraph 8 of the plaint, where the plaintiff states that he made other loans to the defendant and that on the 26th of October 1921 the defendant executed a mortgage bond for Rs. 3,000 in respect of which he claims leave to file a suit later, and he contends that if he were to tack on this sum with interest due thereon to the amount in the present proceedings, it will come to over Rs. 10,000, that if ever a suit is filed in respect of this mortgage for Rs. 3,000, a similar question will have to be gone into as was done in the present suit and that consequently he comes under the words in S. 110 of the Code of Civil Procedure, that the decree involves directly or indirectly a claim or question to property worth over Rs. 10,000. We are clearly of opinion that whatever the precise words "directly or indirectly" may mean, they cannot possibly be stretched to cover a claim which is quite distinct in its character and to which there is an irrelevant reference in the plaint. An unnecessary application for leave to sue in respect of such amounts cannot on any grounds be tacked on to the amount of the subject-matter in suit. In the words of KNOX and Blair, JJ. in the case of *Hanuman Prasad and another* v. *Bhagwati Prasad* (1): "We are also of opinion that when it is laid down that the decree must involve, directly or indirectly, some claim or question to or respecting property of ten thousand rupees in value or upwards, the reference is to suit in existence and not to suits, if we may so term it, *in gremio futuri*."

Mr. Clarke has pressed us that the case is of such general importance and public interest that we should certify it, irrespective of the value of the subject-matter, under the provisions of S. 109 (*c*). We quite agree that the subject of the application of the Chinese customary law by the Courts of this country is a very important one and a decision by their Lordships of the Privy Council as to whether the Courts of this country have been right in their application of those principles might indeed be of general interest and importance. We do not consider that the present case raises a question of such importance. At best for the applicants the widow Ma Kyin

1. 24 All 236.

Yon was an administratrix *de son tort* and the case could very well be decided either in favour of the applicants or against them without the question of the applicability of the Chinese customary law being gone into.

For these reasons we are unable to grant a certificate and the application must be rejected with costs, three gold mohurs.

Clarke—for petitioner.

Cowasjee—for respondent.

PRESENT:—HEALD AND CHARI, JJ.

Ma Myaing and one ... *Appellants**

v.

Mg. B Chit and three others ... *Respondents.*

Civil Procedure Code (Act V of 1908) O. 2, R. 2—Suit for partition and possession—Subsequent suit for mesne profits not barred.

A prior suit for partition and possession does not bar a subsequent suit for mesne profits in respect of the same property.

Mawa Kuar v. *Banarsi Prasad*, 17 A 533; *Ma Myein* v. *Ma Ko*, 3 L B R 56—dissented from.

Ramachandra Adaram v. *Lodha Gowri*, 26 Bom. L R 288—approved and followed.

Judgment. *11th February*, 1926.

Per CHARI, J.:—The respondents claimed to recover from appellants a certain sum of money as mesne profits for three years in respect of a piece of paddy land in which they owned a half share. They had already filed a suit (Civil Suit No. 5 of 1924) in which they had claimed partition and possession of the same property but had not claimed the mesne which had accrued due prior to the filing of the suit. In the present suit they claimed those mesne profits, and the Sub-divisional Court gave them a decree for Rs. 2,490-11-0 with proportionate costs. Appellants appealed against that decree and the learned Judge of the Lower Appellate Court modified the decree by reducing the amount to Rs. 1,751-9-0. In the Lower Appellate Court appellants raised two grounds, (1) that their possession was not wrongful as they were joint owners of the property with respondents and that therefore the respondents were not entitled to mesne profits, and, (2) that the suit was barred under O. 2, R. 2 of the Civil Procedure Code by reason of the earlier suit. In this Court also they raise these two defences and they also allege that

*Special Civil 2nd Appeal No. 253 of 1925 against the Decree in C. A. No. 104 of 1924 of the District Court, Insein.

the decree as against the 2nd appellant Tun Win is wrong in law because Tun Win had disposed of his share to his mother Ma Myaing, the 1st appellant, who was in possession of the property, so that Tun Win, not being in possession, could not be made liable for mesne profits. We will first deal with the contention that the suit is barred by the provisions of O. 11, R. 2 of the Civil Procedure Code. The Allahabad High Court has held that a suit for possession bars a subsequent suit for mesne profits which could have been claimed in the earlier suit, vide *Mewa Kuar* v. *Banarsi Prasad* (1). The High Court of Calcutta in the case of *Lalessor Babu and others* v. *Janki Bibi* (2) and the Madras High Court in the Full Bench case of *Ponnammal* v. *Ramamirda Aiyar* (3) took a different view. The Chief Court of Lower Burma in the case of *Ma Nyein and one* v. *Ma Kon* (4) took the same view as the Allahabad High Court; but in *D. K. Dubash Kader and two* v. *T. K. Pakeer Meera* (5) Bell, J. was of opinion that the new Code of 1908 had altered the law and that therefore the ruling in *Ma Nyein's case* was no longer applicable.

We think that the Full Bench ruling of the Madras High Court which had been approved by a Bench of the Bombay High Court in a recent case *Ramachandra Adaram* v. *Lodha Gown* (6) lays down the sounder view and ought to be followed.

We therefore hold that the respondent's suit for mesne profits was not barred by their previous suit for partition and separate possession of their share of the property.

The second point argued is that Ma Myaing, being the purchaser of the share of a co-owner, could not be deemed to have been in wrongful possession of the property. We cannot accept this contention. Every co-owner of property is entitled to the enjoyment of the property so long as he does not interfere with the other co-owners like right of enjoyment, but in the case of agricultural lands where the mode of enjoyment is by a division of the produce or rent among the co-owners, when one co-owner receives and keeps all the produce or rent he necessarily deprives the other co-owners of their shares and he must therefore account to them for their shares. Moreover, as the District Judge has pointed out, the facts of this case are peculiar. The second appellant

* 1. 17 All 533. 2. 19 Cal 615. 3. 38 Mad 829. 4. 3 L B R 56.
5. 3 B L T 56. 6. 26 Bom L R 288.

transferred the whole property and not merely his own share to the first appellant, going to the length of getting some one to personate the wife of the 1st respondent, who was then the other co-sharer. He thus enabled the 1st appellant to take possession of the whole property and to hold it adversely to the other co-owners, who were thus effectively deprived of the enjoyment of the property to which they were entitled. There can be no question of the 2nd appellant's liability to make compensation to the plaintiff, if not in respect of mesne profits as such, at all events in respect of damages for his tortious act in transferring the respondent's share and depriving them of their enjoyment of the property. The damages for such deprivation would be their share of the mesne profits up to the time when they get possession of their share of the property. The amount of the damages awarded by the District Court is not challenged in appeal. We therefore dismiss the appeal with costs.

K. C. Bose for appeliants.

U Ba Thein (2) for respondents.

PRESENT:—OTTER, J.

Ma Tin*

v.

P. L V. R. Ramaswami Chetty, by his Agent Chellappa Chettiar

Burden of proof—Declaration of title—Conveyance—No proof of consideration—Presumption of fraud.

In a suit for declaration of title the vendor was alleged to have transferred the property in suit without joining the husband as a party and no witnesses as to consideration were produced and the attesting witnesses were alleged to be dead, *held,* distinguishing the case of *Maung Din and one* v. *Ma Hnin Me,* (3 Rang. 71) the Lower Courts were right in throwing the burden of proof on the appellant and in presuming fraud in absence of proof of consideration.

Maung Din and one v. *Me Hnin Me,* 3 Rang. 71—distinguished.

Judgment. *2nd February,* 1926.

The respondent in this case executed a decree against a person called Ma Kyon and attached the land which is the subject of these proceedings.

The appellant applied to remove the attachment, but was unsuccessful. She brings the present suit for a declaration

*Civil 2nd Appeal No. 422 of 1925 against the decree of the District Court of Yamethin in C A No. 128 of 1925.

of her title to the land and bases her claim upon a conveyance to her by Ma Kyon, who is her sister.

The only point of law argued before me was that the learned Township Judge was wrong in holding (as he appears to have done) that the burden of proving that the document relating to the sale (Ex. C) was a genuine one rested upon the appellant, and the case of *Maung Din and one* v. *Ma Hnin Me and four others* (1) was cited in support of the contention.

There are two answers to this argument. The first appears to me to be that this Court can review all the circumstances of the case as appearing upon the record and can dismiss this appeal if it is satisfied that a right conclusion upon all the facts was come to, notwithstanding that one of the Lower Court Judges misdirected himself upon a question of the burden of proof. In the present case it is sufficient for me to say that upon a review of all the circumstances, I should have come to the conclusion arrived at in both the Lower Courts.

With regard to the second answer, it may be (though I rather doubt it) that under the circumstances of the case referred to [*viz.* the case of *Maung Din and one* v. *Ma Hnin Me and four others* (1)] it was unnecessary for the plaintiff to prove consideration; but the present case is very different. It is a conveyance from one married woman to another and neither husband is joined; the persons who were said to be present when the consideration is said to have been paid are not called, though they are alive; the attesting witnesses and the person who drew up the document are said to be dead, and are not called. That being so, it is clear from a perusal of the case cited that it was open to the Lower Courts to hold that a presumption of fraud arose and that consideration should be proved by the plaintiff. The learned Township Judge was therefore right in his law.

For these reasons the appeal fails, and the respondent will receive his costs in the two Lower Courts.

Sein Tun Aung for appellant.

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1. 3 Rang 71.

[FULL BENCH.]

PRESENT:—RUTLEDGE, C. J., CARR AND MG. BA, JJ.

Ma Tin, Ma Khin Nyun and Mg. Pya*

v.

Ma Shwe Sint.

Burmese Buddhist Law—Succession—Competition between an aunt and nephews and nieces of deceased—Latter excludes the former.

When a Burman Buddhist has died leaving as his nearest relatives (1) nephews and nieces, the children of his brother, and (2) uncles and aunts, the brothers and sisters of his mother, the former class of relatives is entitled to inherit his estate to the exclusion of the latter.

Ma On Bwin v. *Ma Tu,* 8 B L T 141; *Ma Hnin Bwin* v. *U Shwe Gon,* 8 L B R 1: 7 B L T 105; *Mi A. Pruzan* v. *Mi Chumra,* S J 37; *Mg. Hmaw* v. *Ma On Bwin and three others.* 1 L B R 104 and *Mg. Kyaw* v. *Ma Tu,* 11 U B R (1892-1896), p. 189—considered.

May Oung's Buddhist Law, p. 270; *Lahiri's Treatise on Buddhist Law,* p. 174—dissented from.

Judgment. 22*nd January*, 1926.

MG. BA, J.:—This reference on a point of Burmese Buddhist Law arises out of Civil Miscellaneous Appeal No. 22 of 1925 in connection with the estate of one Mg. Tok Kywe, a Burman Buddhist. The appellants are the minor children of Mg. Tok Kywe's elder brother Mg. Tok Paw, while the respondent is a maternal aunt to Tok Kywe. Tok Kywe left no nearer relatives. Both parties applied for letters of administration. The learned Additional Judge of the District Court of Myingyan held that the rival claimants being equidistant in the degree of consanguinity, are entitled to share the estate equally. If this decision were correct, then his order granting Letters to the respondent Ma Shwe Sint, the maternal aunt of Tok Kywe, would be justified, because, under S. 246 of the Indian Succession Act (XXXIX of 1925), Letters could only be granted for the use and benefit of a minor, when that minor is the sole heir. Carr and Otter, JJ., who heard the appeal from that order doubted the correctness of that decision, and observing that there was no definite authority on this important point, referred to a Full Bench the following question:—

"When a Burman Buddhist has died leaving as his nearest relatives (1) nephews and nieces, the children of his brother, and, (2) uncles and aunts, the brothers and sisters of his

*Civil Reference No. 13 of 1925.

mother, is either of these classes of relatives entitled to inherit his estate to the exclusion of the other, and, if so, which class is so entitled, or are both classes entitled jointly to share in the inheritance?"

The Trial Judge based his decision entirely on the remarks of U May Oung in his work on Buddhist Law at page 273. Those remarks are: "If two persons at different levels, *e. g.*, an uncle and a nephew of the propositus are equidistant from him, the logical conclusion would be that they share equally." The learned author at page 279 of the same work again remarked: "Where there are nephews and nieces as well as uncles and aunts, there can be no exclusion on the ground of proximity, as both classes are three degrees removed; but, as they are on different levels, it might be equitable to award half to each class." He has quoted no authority; and it must be conceded that this question has never come up before the Courts, and that, strangely enough, it has not been considered in any of the 36 Dhammathats collected in ex-Kinwun Mingyi's Digest of the Burmese Buddhist Law.

Mr. Lahiri in his Treatise on Burmese Buddhist Law at page 174 adopted the same principle of division. He says: "If two collaterals are equidistant from the propositus, they share equally."

In support of that principle he quoted the case of *Ma On Bwin* v. *Ma Tu* (1). In my opinion that authority has no application because what was laid down in that case is that the paternal and maternal aunts succeed to their nephew's estate *per capita* and not *per stirpes*. That case dealt with collaterals standing on the same level. But, in the present case, we are concerned with collaterals standing on different levels.

To my mind, in solving the question referred to us, two fundamental principles of Burmese Buddhist Law, which have been recognised and which have become settled law, should be applied in the absence of a definite pronouncement on this point in the Dhammathats. The first principle is that inheritance shall not ascend where it can descend; the second is that the nearer excludes the more remote.

Section 1, Book X of the Manukye, which has been given a commanding position by the Privy Council in *Ma Hnin Bwin's case* (2) says that all kinds of inheritance shall only descend.

This principle was adopted by the other Dhammathats mentioned in S. 10 of the Digest. In the quaint words of

1. 8 B L T 141. 2. 8 L B R 1 : 7 B L T 105.

Manu Vannana, the water in a river never flows towards its source. This tendency to give full effect to that principle is noticeable in the fact that, even in the case of the first line of collaterals, *viz.*, brothers and sisters, younger brothers and sisters are preferred. Section 18, Book X of the Manukye lays down thus: "If, after the heirs have received their shares and established themselves separately, one shall die without leaving direct heirs, that is, wife or husband, son or daughter, let the property not ascend to the elder brothers or sisters, let the younger brothers or sisters only of the deceased share it. This is what is meant by not allowing the property to ascend." We find a similar law laid down in S. 211 of the *Attasankheppa Vannana.* There it is laid down that, after the division of inheritance, on the death of one of the co-heirs leaving neither wife nor child, inheritance should always descend, and the younger brothers and sisters of the deceased should inherit his property, and that, failing juniors, inheritance may ascend, and the elder relatives of the deceased, like elder brothers or sisters, or even parents or grandparents, may succeed to his estate. This Dhammathat was prepared by the ex-Kinwun Mingyi after consideration and comparison of all available texts, and it contains the views of the learned compiler on the law as it actually stood at the time of compilation in 1882, and has always been regarded as a work of weighty authority.

This preference of younger brothers and sisters was recognised as early as 1874 in the case of *Mi A. Pruzan* v. *Mi Chumra* (3) by Sandford, J. C., and later by a Bench of the late Chief Court in *Maung Hmaw* v. *Ma On Bwin and three others' case* (4). Had Tok Paw survived his younger brother Tok Kywe, he would undoubtedly have been the sole heir, and, as far as I can ascertain, Buddhist Law does not appear to recognise any right to inherit by representation in the case of out-of-time nephews and nieces as in the case of out-of-time grandchildren. It is well known that, in the case of the division of grandparents' estate, out-of-time grandchildren are admitted as heirs, presumably by right of representation.

It may be pointed out that S. 11 of the Digest, as translated, mentions the children of brothers and sisters among the five kinds of co-heirs. On referring to the original in the vernacular which is very ambiguous, I find the word *"mee-ba"* (parents) used. That word has been ignored by the translator. It is possible that the writer of the *Dhamma-*

3. S J 37. 4. 1 L B R 104.

sara Dhammathat meant that the co-heirs of a couple are their brothers and sisters, and that, including the couple, five kinds of co-heirs are obtained. But, if the translator is right, then this section will permit us to include the children of brothers and sisters among the co-heirs. However, I do not consider it safe to place any reliance on this solitary text which is ambiguous.

The learned Judges who have heard this appeal mentioned S. 106 of the Digest, and remarked that there is general agreement that, in the absence of descendants, the surviving co-heirs inherit. It may be pointed out that the translator has made a serious omission in translating the heading of that section. The heading given in the original reads: "After the death of parents *before the division of inheritance* if a co-heir dies leaving neither wife nor children, the law of partition among his co-heirs of the share in the inheritance to which he is entitled." So this section will not help us in any way in deciding the question referred to this Bench.

The heading of S. 173 is also incorrect and misleading. The Dhammathats enumerated in that section are practically reiterating the principle that, on the death of either husband or wife, the survivor inherits, and that on the death of parents, their children inherit.

One of those Dhammathats, *viz., Vannana,* has a proviso that between nephew and uncle, one may acquire the status of an heir of the other on the demise of one of them by discharging the liabilities of the deceased. This proviso seems to have reference to a case where there are direct heirs, and is intended to confer some benefit upon a relative who takes upon himself the burden of the deceased's liabilities. So this proviso also will not give us any help.

It may be of some use to mention the views expressed by the late Kinwun Mingyi and *Watmasut Wundauk,* two eminent authorities on Burmese Buddhist Law, when they were consulted in 1895 by Copleston, J. C. in the case of *Maung Kyaw and three others* v. *Ma Tu and another* (5). In that case the children of a predeceased brother and sister claimed inheritance in the estate of their aunt who died without leaving direct heirs. Those two gentlemen evidently held that, failing brothers and sisters, their children might inherit. But it is not clear whether the deceased left any uncle or aunt to compete with the deceased's nephews and nieces. I have

5. II U B R (1892-96), 189.

searched in U Tha Gywe's Buddhist Law, but have not been able to get any assistance on this point. At page 152 this passage occurs: "The idea appears to be that the succession should go to the nearest classes of heirs on the same level, *i. e.*, standing in the same degree of propinquity with the deceased owner of property, subject to partition to the total or partial exclusion of classes more remote." The learned author has not touched upon the claims of relations standing in the same degree but on different levels.

In Spark's Code, prepared in 1860, there is a chapter on inheritance as part of Burmese Buddhist Law. It begins with a statement of the fundamental principle that, whenever possible to avoid it, an estate shall never ascend. It then gives three orders of succession, (*i*) the descendant line, children and their descendants, (*ii*) the collateral line, brothers and sisters and their descendants, and (*iii*) the ascendant line, parents and their representatives in order. It then lays down a rule that, if there are any heirs in the first or descendant line, they exclude the second, the collateral line, and that, if there are no heirs in the first line, but heirs in the second line, the latter excludes the third or ascendant line. If we can apply this principle, then the appellants would exclude the respondent, but no authority has been quoted in support of that rule. It may be pointed out that Spark's Code was sanctioned by the then President in Council for the Province of Pegu.

From the above observations it will be seen that neither in the Dhammathats nor in the case-law can we find direct authority on this important question. The most equitable course left is, to my mind, to determine that question by applying the fundamental principles which were stated earlier in this judgment.

The claimants being equidistant from the propositus, the second principle, *viz.*, the nearer exclude the more remote, can have no application. This principle is, in my opinion, subject to the first and dominant principle, *viz.*, inheritance shall not ascend where it can descend. The natural corollary to this dominant principle is that there should be no ascent more than necessary.

In the present case, to get to the appellants, we ascend once and descend twice; but to get to the respondent we have to ascend twice and descend once. It is obvious that the respondent is on a higher level than the appellants. Remembering that in the first line of collaterals—brothers and sisters,

younger brothers and sisters exclude the elder on the same level, it is not only logical, but, in my opinion, also equitable to prefer the appellants to the respondent as being on a lower level, though equidistant. So, with due respect to the learned author U May Oung, I disagree with him, and hold that the appellants should exclude the respondent. I may note that the respondent herself did not claim that, as an aunt, she was even a co-heir with the appellants. To support her claim for Letters, she alleged that she was the adoptive mother of Tok Kywe, and further, that the appellants had forfeited their right of inheritance by reason of neglect and desertion. It may also be pointed out that Ma Shwe Sint's brothers and sisters also disclaimed any right of inheritance.

For the above reasons, my answer to the question referred to us will be that, "When a Burman Buddhist has died leaving as his nearest relatives (1) nephews and nieces, the children of his brother, and (2) uncles and aunts, the brothers and sisters of his mother, the former class of relatives is entitled to inherit his estate to the exclusion of latter."

RUTLEDGE, C. J. :—I concur.

CARR, J. :—I concur.

U Tun Aung for appellant.

PRESENT:—HEALD AND CHARI, JJ.

Ma Ma Gyi ... *Appellant**

v.

U Chit Pe ... *Respondent.*

Burmese Buddhist Law—Succession—Right of succession by survivorship created by agreement invalid—Valid as agreement for joint ownership—No estoppel where parties act in ignorance of law.

Where a father entered into an agreement with his son by the first wife that they would enjoy a house and land equally and that the survivor was to succeed to the whole to the exclusion of the lawful heirs. *Held*, that the agreement was invalid as defeating the Buddhist Law of Inheritance but was valid as a disposition *inter vivos* and that upon the death of the son his widow became entitled to the half-share of the son.

Held, also, that the son's wife was not estopped from denying the validity of the agreement because she had made no claim during the life-time of the father and had acquiesced in the father's claim as no estoppel can arise from ignorance of the law.

Judgment. *5th February*, 1926.

Per HEALD, J. :—Appellant is widow of On Gaing, who was a son of one Maung Thein by his first wife Ma Ma. While

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*Civil 1st Appeal No. 96 of 1925 from the decree in C. R. No. 46 of 1924 of the District Court of Amherst.

Ma Ma was married to Maung Thein she inherited from her father the piece of land which is now in dispute. Ma Ma is said to have died about 1899, and, soon afterwards apparently, Mg. Thein married Ma Me. On his father's re-marriage On Gaing became entitled to a share in the land, but he never claimed his share. He nevertheless, presumably with his father's consent, built a house on the land.

In 1912 he and his father entered into an agreement (Ex. B) which recorded that with the knowledge and consent of their respective wives, such knowledge and consent being evidenced by their attestation of the document, they agreed that for the lifetime of both the land and the house should belong to them jointly and that on the death of either the land and house should belong to the survivor and his heirs, the heirs of the deceased to have no interest in the property. The document stated that the consideration for the agreement was on the one side the father's making the son an equal joint owner of the land and on the other the son's making the father an equal joint owner of the building.

It is clear that the object of this agreement was to secure that on the father's death the son should succeed to the land to the exclusion of the step-mother because the land had been inherited by the first wife, who was the son's mother, so that the second wife might reasonably be regarded as having no interest in it. At that time the father, who was an elderly man, might naturally be expected to die before the son, who was comparatively young, but as a matter of fact the son predeceased the father.

After the son's death the father wrote a letter (Ex. 4) to appellant, in which he said that the property was his and asked her to send him the title deeds. She sent a reply (Ex. 5) in which she said that she would have sent the title deeds if they had been in her possession but she had not got them. She said nothing about his claim to be owner of the property.

A few weeks later the father died also, and the step-mother sold her rights in the property to respondent, a lawyer who had married her daughter.

Appellant sued respondent and the step-mother to recover a share of the property, but the step-mother died and respondent alone contested the claim.

Appellant's case was that the agreement which was made between the father and son was invalid as offending against the Burmese Buddhist law of inheritance, that in spite of that

agreement her husband was owner of the one-fourth share of the land, to which he became entitled on his father's re-marriage, that he was also entitled to the house which he had himself built, and that she was entitled to recover her husband's interest in the property or its value, which she assessed at Rs. 5,500.

Respondent replied that the agreement was valid that if it was invalid appellant having attested the document and acquiesced in the arrangement could not question its validity, being estopped by her acts and omissions, that his purchase of the land from his mother-in-law was *bona fide,* in full value of the property, which he alleged to be Rs. 3,000, having been paid, and that the suit, as a suit to set aside the agreement was time-barred.

The Trial Court framed issues as to whether or not the agreement was void, whether appellant was estopped from claiming a share of the property, what share if any, appellant's husband had in the property, what was the value of the property and whether the suit was barred by limitation as alleged.

Only respondent gave evidence. He said that he drafted the letter (Ex. 4) which his father-in-law, Mg. Thein, sent to appellant after On Gaing's death, and that when he bought the property from Mg. Thein's widow, Ma Me, he relied on the agreement (Ex. B) which he regarded as a valid agreement, and on appellant's letter (Ex. 5). It is, however, to be noted that he had not in his written statement alleged that any estoppel arose against appellant by reason of that letter.

The trial Court came to the conclusion that so far as the agreement purported to create a right of succession by survivorship it was opposed to the Buddhist law of inheritance and could not be sustained, but the learned Judge held that appellant was estopped from claiming the property by reason of her having agreed to the arrangement made in 1912 and having failed in her letter (Ex. 5) to deny the claim to ownership which Mg. Thein made in his letter (Ex. 4).

On these grounds appellant's suit was dismissed with costs.

She appeals on the grounds that the agreement (Ex. B) was not proved, and that an invalid document cannot be validated by estoppel.

We are clearly of opinion that so far as the agreement purported to create a right of succession by survivorship it offended against the Burmese Buddhist law of inheritance and cannot be enforced. It is now settled law that a Burman

Buddhist cannot make a transfer of his property which is intended to be operative only after his death [*see* the case of *Ma Thin Myaing* v. *Mg. Gyit and five* (1)]. The intention of the provision for succession by survivorship in the agreement (Ex. B) was undoubtedly to defeat the ordinary rules of inheritance so far as the step-mother Ma Me was concerned and we agree with the learned Judge in the Lower Court that under Burmese Buddhist Law that could not be allowed.

But it does not necessarily follow that the whole of the disposition of the property made in that document was invalid. The provision for succession by survivorship was in our opinion separable, and although we are unable to recognise that provision we may nevertheless recognise the disposition apart from that provision. Mg. Thein had an undoubted right to make his son joint and equal owner with him in the land during his life-time and similarly On Gaing was entitled to make his father joint and equal owner with him in the house and in his interest, if any, in the land. It follows that at the time of his death On Gaing was owner of a half-share of the land and a half-share of the house, and that appellant as his widow would be entitled to recover those shares. It follows further that the details of appellant's claim as made in her plaint were mistaken. She claimed a quarter-share in the land, presumably on the supposition that her husband, by reason of his father's re-marriage had become entitled to that share. But On Gaing had never claimed the share of the land to which he became entitled on his father's re-marriage, and the claim when made by appellant would be time-barred. She also claimed the whole of the house, whereas if the disposition recorded in the agreement be confirmed, except in respect of the supposed right of survivorship, her husband's share would be only one half. We are of opinion nevertheless that in spite of this mistake in her statement of her claim we have power to give her the share to which we find her actually entitled

We hold therefore that, unless she is estopped from claiming it, appellant is entitled to half the land and half the house.

As for the alleged estoppel it seems to us that no estoppel can possibly be based on her letter (Ex. 5). The letter could not affect Mg. Thein's position adversely, and therefore it could not affect respondent in so far as he stands in Mg. Thein's shoes. There is no question of the application of S. 41 of the Transfer of Property Act in respondent's favour, since

1. 1 Rangoon 351.

he took the transfer of the property with full knowledge of the facts, having himself drafted the letter (Ex. 4) to which appellant's letter (Ex. 5) was a reply. We hold, therefore, that there is no estoppel against appellant by reason of her letter (Ex. 5).

As for the estoppel suggested in respect of the agreement, even if we suppose that appellant acquiesced in the making of the agreement, we do not see how that fact could estop her from denying its validity, since no estoppel can arise from ignorance of the law which both parties are supposed to know [*see* the case of *Gurulingaswami* v. *Ramalakshmamma and another* (2).].

We are therefore of opinion that no estoppel arises against appellant by reason either of her letter (Ex. 5) or of her attestation and alleged acquiescence in the agreement of 1912, and we hold that she is entitled to a decree for possession and partition of half the land and half the house. As however she herself valued the land at Rs. 2,000 and the house at Rs. 5,000, and expressed her willingness to take the value of her share in money, respondent will have the option of paying into Court Rs. 3,500 as the value of her share. If he shall be unwilling to exercise that option, then the property as a whole, that is, the house and the site on which it stands, will be sold and the proceeds of the sale will be divided between appellant and respondent, both being of course entitled to bid at the auction.

The judgment and decree of the Lower Court are accordingly set aside and appellant will be given a decree to the effect mentioned above.

Respondent will pay appellant's costs throughout.

Aye Maung (1) for appellant.

Thein Maung (1) for respondent.

PRESENT :—CHARI, J.

Mg. Saw and eight others ... *Appellants**

v.

Ma Bwin Byu ... *Respondent.*

Civil Procedure Code (Act V of 1908), O. 41, R. 11—Appellate Court dismissing appeal—Necessity for writing judgment according to O. 41, R. 31.

*Civil 2nd Appeal No. 150 of 1925 from the decree in Civil Appeal No. 24 of 1924 of the District Court of Myingyan.

2. 18 Mad. 53.

An Appellate Court dismissing an appeal under O. 41, R. 11 is bound to write a judgment in compliance with the provisions of O. 41, R. 31, showing the points raised, the decision upon the points and the reasons for that decision.

Bipin Behari v. *Jogendranath*, 65 I C 479 approved and followed.

Samin Hassan v. *Piran*. 30 A 390, *Tanoji* v. *Shankar*, 36 B 116 discussed and dissented from.

Hanmal v. *Annaji*, 37 B. 610 distinguished.

Judgment. *25th January*, 1926.

This is a second appeal against the judgment and decree of the District Court of Myingyan. The plaintiff-respondent filed a suit in the Sub-divisional Court of Myingyan claiming possession of certain property from the defendants on the allegation that the property belonged to her adoptive parents now dead. She obtained a decree in the Trial Court and the defendants appealed to the District Court. The District Judge in a very short judgment dismissed the appeal under O. 41, R. 11 of the Civil Procedure Code without issuing notice to the respondent. The defendants now appeal and the only point of law argued on their behalf is that the judgment of the District Court is not in accordance with the mandatory provisions of O. 41, R. 31 of the Code. Mr. Justice Carr in admitting the appeal made a note that the judgment fails utterly to comply with those provisions. I am in entire agreement with him and only doubt was whether the provisions of O. 41, R. 31, apply to those cases in which the Appellate Court dismisses an appeal summarily under the provisions of O. 41, R. 11.

The rulings are not uniform on this point. In the case of *Rami Deka* v. *Brojo Nath Saikia and others* (1) the Calcutta High Court was of opinion that a summary dismissal of an appeal under S. 551 of the old Code (corresponding to O. 41, R. 11 of the new) did not relieve the Court from the necessity of writing a judgment which according to the provisions of S. 574 of the old Code (corresponding to O. 41, R. 31 of the new), should show the points raised, the decision upon the points and the reasons for that decision. This case was cited with approval by another Bench of the same High Court in *Rakhal Chundra Tewari* v. *Satindra Debrai and others* (2), but in another case of the same Court *Pach Desi* v. *Bala Dass* (3), the two learned Judges who composed the Bench differed in their opinion, Cox, J. being of opinion that S. 551 of the then Code was not controlled by S. 574 while Richardson, J. was of a contrary opinion. It is true that all

1. I L R 25 Cal 97. 2. 5 Cal L J 348. 3. 13 C W N 1031.

the above cases were cited under the old Civil Procedure Code but in a very recent case decided by a Bench of the same High Court consisting of Sir N. R. Chatterjee and Mr. Justice Panton, *Bipin Behari* v. *Jogendranath* (4), after a review and consideration of the authorities of their own Court and of the other High Courts adhered to the view expressed in *Rami Deka's case*. The Madras High Court in the case of *Royal Reddi* v. *Linga Reddi* (5) took the same view as the Calcutta High Court in respect of the corresponding section of the Civil Procedure Code then in force. The Allahabad High Court, however, seems to be of a different opinion. In the case of *Samin Hasan* v. *Pirai* (6), the learned Judges dealing with an appeal which was summarily dismissed under S. 551 of the then Code were of opinion that the provisions of S. 574 were not applicable in their entirety to the case of an appeal dismissed under S. 551 of the Code. They also say : "We think this is evident from the immediately preceding sections and in particular S. 571." "It is difficult to see how it is so evident unless it be that S. 571, which lays down that the Appellate Court shall pronounce judgment in open Court enacts that the judgments shall be so pronounced after hearing the parties or their pleaders implying that the judgment, which the Appellate Court was directed to pronounce, was to be pronounced after both the appellants and respondents or their pleaders have been heard in support of their respective cases. If this is the effect of Ss. 571 and 574 of the old Code (corresponding to Rr. 30 and 31 of O. 41 of the new), then an Appellate Court disposing of an appeal under O. 41, R. 11, need not write a judgment at all in such cases. There is no indication in the Allahabad judgment to what extent, if not in its entirety, S. 574 of the Code does apply to cases disposed of under S. 551 but the concluding passage of that judgment that there was nothing in the case before them to show that the District Judge did not apply his mind to the facts of the case and the grounds taken before him, would seem to indicate that there must be a judgment in such cases and that the judgment must at all events show that the District Judge applied his mind to the facts of the case and the grounds argued. The Bombay High Court took a view similar to the Allahabad view in the case of *Tanji Dagde* v. *Shankar Sakharam* (7). This decision was overruled by a Full Bench of the same High Court, not on the ground that the decision itself was unsound, but on the ground that there was a circular

4. 65 I C 479. 5. 3 Mad 1. 6. 30 A 390. 7. 36 B 116.

of the Bombay High Court, having the force of law, which cast on the subordinates judiciary the duty of writing a judgment even in cases falling under O. 41, R. 11 [*Hanmant Valad Rakhmaji* v. *Annaji Hanmanta* (8)]. Sir Basil Scott in the Full Bench case admitted that there was much to be said for the reasoning in *Tanoji's case* on the materials which were then before the Court, and Beaman, J., who was a member of the Bench which decided *Tanoji's case,* was of opinion that if the question depended only on a true construction of O. 41, he, in spite of the conflicting judgments which had been cited before the Court, would have adhered to the view expressed by Hayward, J. in the earlier case. With the greatest respect, I am unable to accept the reasoning of that learned Judge (Hayward, J.) which is based on the arrangement of the rules in O. 41 of the Code. A re-arrangement of a section in a new Code does not necessarily imply a change in the law. Where the words of a section are clear and unambiguous, as those of O. 41, R. 31 are, it is hardly permissible to curtail their plain operation on a consideration of the arrangements of the section. Nor, in my opinion, does the arrangement of rules in O. 41 lead to the conclusion that R. 31 does not apply to judgment pronounced under O. 41, R. 11. Rule 31 appears under a separate and general heading "Judgment in Appeal" which must necessarily govern all cases in which an Appellate Court writes a judgment. The arguments of Mr. Justice Hayward would be reasonable and intelligible if the Code authorised the Appeliate Court to reject an appeal without admitting it. But O. 41, R. 11 only enables the Court to dismiss the appeal. Such a dismissal must be followed by a decree and a decree can only be based on a judgment (O. 41, R. 35). It seems to me that the duty of writing a judgment in all case is cast upon an Appellate Court, no matter in what manner the appeal is disposed of and that the provision of R. 31 of O. 41 must necessarily apply to such judgments. The words of R. 30 " after hearing the parties or their pleaders and referring to any part of the proceeding" mean no more than that the judge shall give an opportunity to the party or parties before him of arguing their case and the words "after referring to any part of the proceeding" merely contemplate cases where such reference is unnecessary, as for example, where the Trial Court has disposed of the case on a point of law which is clearly set out in its judgment. These words do not imply that the

8. 37 B 610.

section applied only in those cases where there are two parties to be heard and where the records are before the Court to be referred to.

Considering the matter on principle I am inclined to hold that the view of the Calcutta High Court is the sounder one. The object of O. 41, R. 31 is to have on record the decision of the Appellate Court with the reasons therefor so that the Court of second appeal which is bound by the findings, may have before it materials from which it can ascertain the views of the Court of first appeal. This necessity exists in cases summarily dismissed under O. 41, R. 11 just as much as it exists in cases dismissed after notice to the respondent and full hearing. There are no decisions on this point in this High Court. There is, however, a letter, General Letter No. 13 of 1925, addressed to all the District Judges wherein their attention is drawn to the necessity of a judgment complying with the provisions of O. 41, R. 31 of the Code. This letter contains the following passage:—"This applies as much to a judgment dismissing the appeal under O. 41, R. 11 as to one given after a hearing of both parties." This, though not a judicial pronouncement expressed in a ruling was the considered opinion of the Hon'ble Judges of this High Court. I therefore prefer to follow the Calcutta ruling.

I hold that the judgment of the lower appellate Court does not conform to the provisions of O. 41, R. 31. It is set aside and the case is remanded to the District Court for pronouncement of a judgment in accordance with law. If the learned Judge presiding in the District Court is a different Judge or if he be the same Judge but has forgotten the arguments placed before him, it will be open to him to ask the appellant to re-argue the appeal. The costs of this appeal will abide the result. There will be a refund of the Court fees in respect of the appeal to the appellant under S. 13 of the Court Fees Act.

Mr. Surty for appellants.

Mr. Dutt for respondent.

PRESENT:—DAS, J.

Maung Thein Daw *v.* Ma Shwe Ein*

Civil Procedure Code (Act V of 1908), O. 2, R. 2—Suit for bare declaration —Subsequent suit for possession not barred.

*Special Civil 2nd Appeal No. 229 of 1924 from the decree of the District Court of Magwe in C. A. No. 16 of 1924.

Where a party filed a suit for a mere declaration under S. 42. Specific Relief Act, which was dismissed on appeal on the ground that the suit was not maintainable and subsequently filed a suit for possession, *Held,* that the second suit was not barred under O. 2, R. 2.

Judgment. *2nd June* 1925.

In Civil Regular No. 60 of 1922 of the Township Court of Magwe the plaintiff-appellant filed a suit for a declaration that the house in dispute belonged to him.

The defendant-respondent contended in that suit that the plaintiff was not entitled to sue for a mere declaration as the defendant was in possession of the house.

The plaintiff obtained a decree in the Court of First Instance, but, on appeal, his suit was dismissed on the ground that he was not entitled to maintain a suit for a mere declaration under S. 42, Specific Relief Act.

The plaintiff then filed the present suit for possession of the house.

The defendant contended, amongst other things, that the plaintiff's suit was barred under O. 2, R. 2, Civil Procedure Code, the plaintiff having failed to seek for consequential relief in his previous suit.

The plaintiff obtained a decree in the Court of First Instance, but the lower appellate Court dismissed his suit on the ground that his suit was barred under O. 2, R. 2.

The plaintiff now appeals.

I am of opinion that the plaintiff's suit is not barred under O. 2, R. 2, Civil Procedure Code. The plaintiff was not bound to seek for consequential relief in the previous suit, the only consequence of his not doing so being that under S.42, Specific Relief Act, his suit would be dismissed.

It has been so held in *Darbo* v. *Kesho Rai* (1), *Mohan Lal and another* v. *Bilaso* (2) and *Jagarnath Ojha* v. *Ram Phal* (3).

I therefore set aside the judgment and decree of the Lower Appellate Court, and remand the case to that Court for decision on other grounds of appeal taken by the respondent in her appeal.

The plaintiff will have costs in this Court.

Hamlyn for appellant.

B. K. Naidu for respondent.

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1. 2 A 356 (F B). 2. 14 A 512. 3. 34 A 150.

PRESENT:—CARR, J.

Ma Thu Za* v. Mg. Po Shein

Civil Procedure Code (Act V of 1908), S. 144—Property already sold in execution—Decree modified on appeal—Sale to stand good—Surplus sale proceeds to successful party.

Where a sale of immoveable property takes place in execution of a decree and that decree has been subsequently modified on appeal the sale will not be set aside but the judgment-debtor will be entitled to restitution in respect of the surplus sale proceeds.

Judgment. *20th May*, 1925.

This judgment will deal also with Civil Second Appeal No. 492 of 1924, in which the question for decision is the same as in this appeal, though the appellants are different.

In Suit No. 93 of 1924 of the Sub-divisional Court of Pyapon Mg Po Shein obtained a decree against Ma Thu Za for Rs. 1,800 with costs Rs. 259-12-0.

In Execution No. 132 of 1921 of the same Court he took out execution of this decree and attached a portion of a holding of the paddy land belonging to Ma Thu Za. This was sold on the 21st March, 1922, and was bought by Po Shein himself for Rs. 2,100. He paid in Rs. 105 as the Bailiff's commission and set off the rest against his decree, which was not fully satisfied.

Meanwhile Ma Thu Za had appealed to the Divisional Court. Her appeal was dismissed on the 8th April, 1922, and a further sum of Rs. 90-8-0 was awarded against her as costs. She filed a Second Appeal No. 203 of 1922 of the Chief Court and was partially successful in this. The substantive amount awarded to Mg. Po Shein was reduced to Rs. 1,150 and the costs granted to him to Rs. 66-4-0. The wording of the order in this appeal was "The decrees of the Courts below are set aside and respondent will be given a decree for Rs. 1,150 with costs."

Thereupon Ma Thu Za filed an application in which she said that Po Shein's decree had been set aside and prayed that the execution sale of the land be set aside. This application was under S. 144, Civil Procedure Code. The statement of fact was at least disingenuous.

The Sub-divisional Judge, however, accepted her claim and on the wording of the order of this Court held that the

*Special Civil 2nd Appeal No. 529 of 1924 against the decree of the District Court, Pyapon, in C. M. Appeal No. 73 of 1924.

decree had been set aside, I cannot accept this reasoning. The order must be read as a whole. Its effect is to set aside the decree only in part and it leaves a substantial part of the decree still standing.

This was the view taken by the District Judge in first appeal. He set aside the order setting aside the sale. Ma Thu Za now appeals.

In my view the decision of the District Court was correct. A substantial part of the original decree remained in force and had the original decree been only for the amount granted by the final decree it would still have been open to the respondent to attach the land and bring it to sale. He might, perhaps, in those circumstances have attached a somewhat smaller part of the holding, but it is obviously impossible to determine whether he would have done so, or what part of the land sold should have been left unattached. In my view she was not entitled to have the sale set aside at all, but certainly she was not entitled to have it set aside unconditionally, as she asked. At the least it was incumbent on her to pay up the amount of the final decree and the costs of execution.

She is, of course, entitled to restitution and may claim the balance of the sale proceeds after deducting the amount of the final decree and the total costs of execution. But she was not as yet claimed this and may be left to do so.

This appeal is dismissed with costs.

Second Appeal No. 492 arises out of a suit by Po Shein, the respondent, for mesne profits of the same land. The defendent-appellants kept him out of possession of it after his purchase at the execution sale. Their defence is that as his decree has been set aside he has no title.

Their case is even weaker than Ma Thu Za's. Even had the latter been entitled to have the sale set aside that sale would still hold good until set aside by the Court. The appellants were mere trespassers and are liable to Po Shein for the mesne profits.

Their appeal also will be dismissed.

Rahman for appellant.

Villa for respondent.

PRESENT:—DOYLE, J.

V. R. M. R. M. Firm by their agent Chidambaram Chettiar ... *Appellant**

v.

K. Muhammed Kassim and one ... *Respondent.*

Sale—Subject to mortgage—Suit by mortgagee—Defence by purchaser that bond was bogus one—Bond invalid—Purchaser liable on personal covenant in equity—Admission of mortgage by party—Party not bound unless bond valid.

The appellant purchased certain property at a Court auction sale subject to a mortgage. In a suit on the mortgage the appellant was not allowed to plead that the mortgage was a bogus one and that he was not bound by it, but as the mortgage was found to be invalid owing to having been attested by one witness he was bound in equity to personally pay under the personal covenant in the mortgage deed.

Even if a party admits the execution of a mortgage bond a suit does not lie unless the mortgage bond sued upon is valid in form.

Sarkar Bannard and Company v. *Alak Manjary Kuari,* 26 Bom L R 737 (P C)—referred to.

If a person describes himself as a scribe in a mortgage it must *prima facie* be assumed that he is not an attesting witness, but if his evidence can be believed that although signing as a scribe he was in addition an attesting witness the mortgage deed will be *prima facie* valid in form.

Jagannath Khan v. *Bajrang Agarwala,* 28 C 61.

Judgment. *25th June,* 1925.

K. Muhammed Kassim sued Veerappa Kavander and V. R. M. R. M. Chidambaram Pillay in the Township Court of Pegu on a registered mortgage deed for Rs. 550, bearing interest at the rate of Rs. 2 per cent. per mensem, on the ground that Veerappa Kavander executed the deed and that Chidambaram Pillay had purchased the mortgaged property subject to mortgage at a Court auction sale.

Chidambaram Pillai put up the defence that the mortgage sued on was a sham mortgage, without consideration, made with intent to defeat the unsecured creditors. He urged that the mortgage deed on which the suit was based was invalid, having been attested by only one witness.

It was held by the learned Judge of the Township Court of Pegu that the mortgaged properties had not been purchased subject to mortgage, but purchased with notice of the mortgage. He held further that Chidambaram Pillai was not estopped from challenging the validity of the mortgage; and that, as it had not been established that the mortgage had been properly attested, Muhammed Kassim was entitled only to a

*Special Civil Second Appeal No. 506 of 1924 from the decree of the District Court of Pegu in C A No. 154 of 1924.

The learned Judge of the District Court of Pegu, in appeal held that Chidambaram Pillay was estopped from denying the validity of the mortgage, as he had purchased the property subject to the mortgage and gave a mortgage-decree against the 2nd deft. Chidambaram Pillay.

Before this Court it is admitted that the land was sold subject to the mortgage, but it is urged that, even if it be admitted, that Chidambaram Pillay is estopped from denying the validity of the mortgage held by Mohamed Kassim, it is still incumbent upon Mohamed Kassim, to prove that the mortgage was *prima facie* executed.

As the deed stands, without evidence being taken, it is invalid, since it purports to be attested by only one witness. Thus, whether Chidambaram Pillay is allowed to open his mouth or not, no cause of action lies upon the mortgage deed, unless it can be proved that the attestation was valid.

It has been held in *Sarkar Barnard* and *Company* vs. *Alak Manjary Kuari* (1) (a Privy Council case), that, even if the respondents in a suit admit the execution of a mortgage bond, a suit does not he unless the mortgage bond sued upon is valid in form. The same principle must apply in the present case.

It is sought to prove that the scribe who wrote the document was an attesting witness. As he describes himself in the document as a scribe, it must *prima facie* be assumed that he is not an attesting witness. If, however, his evidence that, although signing as a scribe he was, in addition, an attesting witness, can be believed, there is authority —vide *Juganath Khan* vs. *Bajrang Das Agarwala* (2)—for holding that the mortgage deed would *prima facie* be valid in form.

The scribe who wrote the document has been produced to testify to the fact that he signed as a witness. The deed was written on the 2nd of March 1922—two and a half years before the scribe was summoned to give evidence. He admits that he writes from four to five hundred documents a year, including many mortgages, that he cannot remember whether the attesting witness signed in his presence or not, (correcting himself later and alleging that the other witness did sign in his presence) and that he cannot remember whether

(1) 26 Bom. L. R. 737. (2) 48. C. 61.

money was paid in his presence or not. He vouchsafes the dictum that he is able to deliver documents after they are written, although the executants do not sign in his presence.

In the face of these vague statements I am in complete agreement with the Court of first instance in holding that it is not satisfactorily proved that Abdul Hakim signed as an attesting witness. The mortgage is, therefore invalid; but, as Chidambaram Pillay bought the property subject to the mortgage, which contains a personal promise to pay, he is, in equity, liable personally.*

I set aside the judgment and decree of the District Court of Pegu. As Veerappa Kavander has not appealed, the personal decree against him must stand. The decree of the Township Court of Pegu is modified to one of a personal decree for Rs. 812-1-0 against both Chidambaram Pillay and Veerappa Kavander, with costs in the Township Court.

Each party to the two appeals will bear his own costs in these appeals.

J. C. Ray for Petitioner.

Cowasjee, Sen & Banerjee for respondent.

* On review in C.M.P. No. 105 of 1925 the learned Judge over-ruled that part of his judgment in which he held that the appellants were bound in equity to pay personally. Judgment was accordingly entered for appellants and the decree modified—Ed.)

PRESENT:—RUTLEDGE C. J. AND MAUNG BA, J.

Ma Thein .... *Appellant**

vs.

Ma Mya and Mg. Ba Tun ... ... *Respondents.*

Burmese Buddhist Law—Inheritance—whether Kittima adopted daughter can claim status of orasa for the purpose of the one-fourth.

Where there are only *Kittima* adopted children the first of such adopted children is entitled to the status and rights of the *orasa* as regards partition of the *orasa's* one-fourth share in the joint estate of the adoptive parents.

* Civil 1st Appeal No. 171 of 1925 from the Judge on the Original Side in Civil Regular No. 408 of 1923.

Digest Section 189—approved; *Kirkwood. Vrs. Maung Sin* 2. Rangoon 693 — 3 B. L. J. 304—referred to.

***Mi The O & Mi Swe* 2. U. B. R. 1914-16. 46--28. I. C. 821—explained.**

Judgment. *31st March 1926.*

Per MAUNG BA J.—This is an appeal from a Judgment and Decree of this Court on the Original side dismissing the appellant—plaintiff's suit where she claimed a share valued at nearly Rs. 20,000/- in the estate of one Mg. Maung, a Burman Buddhist who died in March 1914.

Mg. Maung was married twice. His first wife Ma Pwa died about 20 years ago and he married her sister Ma Mya (1st Respondent—Defendant). The case set up by the plaintiff was shortly this:—Mg. Maung and his first wife adopted her, and when Ma Mya became his wife they again adopted her. She always lived with her adoptive parents and continued to live with Ma Mya after the death of Mg. Maung till June 1918, when Ma Mya re-married and they got separated. Beside her, Mg. Maung and Ma Mya also adopted Ba Tun (2nd respondent) as a son.

Ba Tun never appeared to contest the suit, Ma Mya alone contested it. She denied that either the plaintiff who is her niece, or Ba Tun was adopted. She also denied that she had re-married.

The learned trial Judge rightly took up the legal issue first and decided it. That issue in the words of that Judge was, "whether under the Burmese Buddhist Law the status of a daughter, in this case an adopted daughter, which comes to the same thing, was affected as far as her father or adopted father's property was concerned by the re-marriage of his widow". He accepted a decision of the late Mr. Justice MacColl when he was sitting as Judicial Commissioner, Upper Burma, in the case of *Mi The O* (1) and dismissed the suit. That case was decided in 1914.

In that case *Mi The O* sought to redeem some land alleged to have been mortgaged by her grand-mother Ma Shwe Mi. She was the only daughter of Ma Shwe Mi's deceased son Lu Pe. Her suit was dismissed on the ground that as her mother was still alive she had no interest in the land. On appeal two points were urged; (*a*)

(1) 2 U. B. R. 1914—16 p. 46--28 I. C. 821.

as Lu Pe's eldest daughter she had a vested interest in his estate and (*b*) as her mother re-married she had a right to an immediate partition with her mother. The learned Judicial Commissioner held that an eldest daughter can only claim a fourth share if her mother died first and she is capable of replacing her mother in the household. He further held that she cannot claim this share *even if her mother re-marries.*

The above decision is in direct conflict with that of a Full Bench of the late Chief Court decided in 1904 *Ma Thin's* case (3) where it was held that a daughter, being an only child, is entitled to claim one-fourth share of her parents' joint estate from her mother *when the latter re-marries* after the father's death. In that case also, the suit was by an adopted daughter against her adoptive mother.

In both cases the learned Judges were considering the rights of an eldest daughter. They did not expressly discuss her status as an "*Orasa*," but they nevertheless fixed her share at one-fourth. It may be pointed out that such share is only claimable by an "*Orasa*" on the death of one of the parents. It may also be pointed out that an "*Orasa's*" interest in that share becomes vested the moment one of the parents dies and his or her right to claim it does not depend upon the re-marriage of the surviving parent at all.

The reason why those Judges did not discuss the status of an "*Orasa*" in the two cases is obvious. In those days it was thought that the status of an "*Orasa*" was determined by the sex of the parent who died first and that the child, if a son, must survive the father, and if a daughter must survive the mother. So a son could not be "*Orasa*" if the deceased parent be a father and a daughter could not be "*Orasa*" if that parent be a mother.

The real conflict between the Upper Burma and the Lower Burma cases was as regards the effect of the re-marriage of the surviving parent on the right of the eldest child, who, by reason of the sex disqualification could not claim the status of an "*Orasa.*" The Upper Burma Court held that re-marriage would not confer on that child the right to claim immediate partition in respect of the fourth share. On the other hand, the Lower Burma Chief Court held that it would.

(3) 2, L. B. R. 255.

This controversy has now been set at rest by the decision of the Privy Council in the case of *Kirkwood* vs. *Mg. Sin* (3). Their Lordships! ruled that an "*orasa*" child is the eldest born child capable of undertaking the responsibilities of a deceased parent and that the status of such child does not depend upon the child, if a son, surviving the father or if a daughter surviving the mother. Had this principle been known at the time the learned Judges decided the two cases noticed above, they would certainly have confined their consideration to the question of status as "*Orasa*" (and ignored the other question about re-marriage).

In the present case the plaint does not show who has drawn it and it is not well drawn up. But read as a whole there are indications that the plaintiff is claiming as an "*orasa*." She not only claims a fourth-share but also alleges that she was adopted before Ba Tun. There are no natural children. If we treat her claim as one by an "*orasa*" it is necessary to decide whether an adopted child can claim that status. Now the first meaning attached to the word "*Orasa*" was natural child as distinguished from a "*kittima*" child. Gradually the word came to be applied to the eldest-born child. In his work on Buddhist Law the learned author U May Oung observed at page 142. "It may be questioned whether a mere adopted son can acquire such rights (preferential rights of an Orasa) where there is natural issue. In the absence of other children, no doubt, the *kittima* may claim to be *orasa*. But no case has arisen in which a *kittima* son or daughter has preferred a claim of this nature as against a natural born child."

The learned author has apparently not considered what *Manukye* says in section 189 of the Kinwun Mingyi's Digest. The *Manukye* says "The statement that on the death of the adoptive parents, the *kittima* or adopted son who lived with them, shall receive the eldest son's share if he is the eldest, the intermediate son's share if he is the intermediate, or the youngest son's share if he is the youngest, shall be understood to mean that he shall receive a share equal to that of the eldest, according as he falls into one of the three classes of sons. Because the adopted children forfeit the right to inherit the estate of their own parents." The other Dhammathat known as *Dhamma*

(3) 2 Rangoon 693-3 B. L. J. 304.

expresses the same view in a more precise manner. It says "On the death of the adoptive parents, the *kittima* or adopted child who lived with them shall be treated as their own child and he shall receive his share as such according to the place he occupies in the family with reference to age."

However, for the purposes of the present suit we need not pursue that question any further, because there is no natural child. If the plaintiff is the first *kittima* child, as alleged by her she certainly has a right to claim immediate partition with her adoptive mother in respect of a fourth share in the joint estate of her adotpive parents. This right does not depend upon the re-marriage of the adoptive mother and so the question of re-marriage need not be threshed out. The only question to be tried is whether the plaintiff is the first *kittima* adopted daughter of Mg Maung and Ma Mya. (We note that in Civil Misc. No. 2 of 1916 Ma Mya described Ma Thein as her daughter and Ba Tun as her son).

For the above reasons, we accept the appeal, set aside the judgment and decree of the trial Court and under Order XLI Rule 23 Civil Procedure Code remand the suit to be disposed of on the issue mentioned above. Costs of this appeal to abide the final result.

* * * *

Under Sections 152 and 153 of the Code of Civil Procedure we modify the part of the above judgment which says that the right to claim immediate partition with the adoptive mother does not depend upon her re-marriage and so the question of re-marriage need not be gone into. We direct that an issue on this questiou be framed and a finding arrived at.

Bose for appellant

Hay for 1st respondent.

PRESENT:—HEALD AND CHARI, J. J.

M. H. Ariff. ... ... *Appellants**

vs.

Perumal and 2 others. ... ... *Respondent.*

Limitation Act (Act IX of 1908) Article 151. Letters Patent Appeal under Clause 13, from Original Side whether Article 151, Limitation Act applies.

The period of Limitation for an appeal under Clause 13 Letters Patent from a Judgment on the Original Side is 20 days from the date of Judgment such appeals falling under Article 151 Limitation Act.

The words "decree or order" are wide enough to cover a "judgment" in the sense in which that word is used in Clause 13.

Rule 5, Appellate Side Rules of Practice—dispensation from filing judgment—application for leave necessary—extension of time.

Rule 5, Appellate Side Rules of practice, applies to appeals filed under Clause 13 Letters Patent from judgments and orders on the Original Side and a certified copy of the judgment under appeal must accompany the memorandum of appeal, unless the Court dispenses therewith.

An application for such dispensation should be made.

Judgment. *21st April 1926*

Per HEALD, J:—This is an appeal nnder Clanse 13 of the Letters Patent of this Court from a Judgment of this Court on the Origiual Side.

Article 151 of the first schedule to the Limitation Act which provides a period of Limitation for appeals from a "decree or order" of a High Court in the exercise of its original jurisdiction and allows 20 days from the date of the decree or order, has hitherto been held to apply to such appeals in this Court.

The Judgment which is under appeal was passed on the 10th of July 1925.

The memorandum of appeal was presented on the Appellate Side of this Court on the 30th of July 1925, and so would have been in time if properly presented. But it was not accompanied by a certified copy of the Judgment.

Rule 5 of the Appellate Side Rules says that memoranda of appeal shall be accompanied by certified copies of the decree or order against

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Civil Mis. Appeal No. 165 of 1925 against the order of the High Court on the Original Side in Civil Execution No. 161 of 1921.

which the appeal is made and the Judgment on which such decree or order is founded but that the Court may dispense with the copy of Judgment.

Appellant did not apply for such dispensation. On the contrary his learned advocate contended that under the rules no copy of the Judgment was necessary because the appeal was against a "*Judgment*" and not against a "decree or order" so that Rule 5, which refers only to appeals against a "decree or order," did not apply.

The Judge before whom the memorandum of appeal was laid for orders directed that it should not be accepted without a certified copy of the Judgment.

That order was made on the 12th of August and the memorandum of appeal was returned to the Advocate, who acknowledged receipt on the 13th of August.

On the 31st of July. that is after the period of 20 days had elapsed appellant had applied for a copy of the Judgment. The estimate of copying fees was communicated to him on the same day but he did not complete the application for the copy until the 14th August. The copy was ready on the 20th of August and appellant took delivery of it on the 21st of August and on that date presented the memorandum of appeal again, duly accompanied by a certified copy of the judgment.

The matter now comes before us on the preliminary question of Limitation.

Appellant's learned advocate still contends that no copy of the judgment was necessary because Rule 5 does not apply, and he now goes further and says that Article 151 does not apply because that article also mentions appeals from a "decree or order" only, and appeals under clause 13 of the Letters Patent are appeals from a Judgment, and not from a decree or order, so that there is no period of Limitation prescribed for them.

No authority on this last point has been cited and we are of opinion that the words "decree or order" as used in Article 151 are

wide enough to cover a "Judgment" in the sense in which that word is used in Clause 13.

We therefore hold that the period of limitation for an appeal under Clause 13 of the Letters Patent from a judgment of this Court on its Original Side is 20 days from the date of the judgment, such appeals falling under Article 151 of the first Schedule of the Limitation Act.

The question whether or not a certified copy of the judgment appealed against was necessary remains for consideration.

We see no reason to doubt that Rule 5 was intended to apply and does apply to appeals against judgments of the Original Side under Clause 13 of the Letters Patent, no authority to the contrary having been cited.

We hold therefore that in the case of such appeals the memorandum of appeal must be accompanied by a certified copy of the Judgment which is under appeal, unless the Court dispenses therewith.

As we have said no application for such dispensation was made, and the Judge ordered the copy to be filed, so that the Court did not grant the dispensation *ex mero motu*.

No application for an extension of time under Section 5 of the Limitation Act has been made and no grounds for such extension have been suggested. It seems probable that the matter was one of mere neglect and that the presentation of the memorandum of appeal without the copy of judgment was a mere device to secure an extension of time for which no grounds under Section 5 existed.

However that may be it seems clear that the appeal was not properly presented within the period of Limitation.

No question of any allowance for the time requisite for obtaining the copy of the judgment arises, since the application for the copy was not made until after the period of limitation had expired and was not completed until long after the expiry of that period.

We are bound in these circumstances to hold that the appeal was time-barred and to dismiss it on that ground.

Appellant will pay respondents' costs, advocate's fee to be two gold mohurs.

PRESENT:—CARR AND DUCKWORTH, J. J.

King-Emperor ... ... *Petitioner**

vs.

Nga Kyaw Hla ... ... *Respondent**

Cr. Pro Code (Act V. of 1898) Section 110 Opium Law Amendment Act (Burma Act VII of 1909) Section 3—Burma Habitual Offenders Restriction Act (Burma Act II of 1919) Section 7—Whether restriction order can be passed on the ground that person earns livelihood by unlawful sale of Opium.

A restriction order under Section 7 Burma Habitual Offenders Restriction Act 1919 cannot be passed against a person on the ground that he earns his living in whole or in part by unlawful sale of Opium, though the Court may proceed under Section 110. Criminal Procedure Code and put the offender on security on such ground.

King-Emperor. vs, Nga Kyaung 2. Rangoon 5=13 B. L. J. 17—over ruled—

Judgment. *26th February 1926.*

Per Carr J:—Under section 7 of the Burma Habitual Offenders Restriction Act, 1919, an order of restriction for two years has been passed against Nga Kyaw Hla. What was found proved against him was that he earns his living in whole or in part by unlawful sale of Opium. This finding was amply justified by the evidence, and is sufficient to justify his being placed on security under Section 3 of the Burma Opium Law Amendment Act 1909.

The question that now arises is whether on such grounds an order of restriction can be passed under section 7 of the Burma Habitual Offenders Restriction Act. This question was answered in the affirmative by a single judge of this Court in *King Emperor vs. Nga Kyaung* (1). The learned judge held that the effect of section 3 Burma Opium Law Amendment Act was to add another ground to

* Criminal Revision No. 1213. A, of 1926 being review of the order of the Subdivisional Magistrate of Minbya in Criminal Miscellaneous Trial No. 52 of 1926.

(1) 2 Rang, 61 = 3 B. L. J. 17.

the six set out in section 110 of the Criminal Procedure Code as grounds on which a person may be required to furnish security for his good behaviour. He held, therefore, that under section 3 of the Habitual Offenders Restriction Act the Magistrate could proceed under that Act.

With all respect I am unable to agree.

Section 3 of the Burma Opium Law Amendment Act lays down that a person against whom there is information that he earns a livelihood either wholly or in part by the illicit sale of Opium may be dealt with " as nearly as may be as if the information r eceived about him were of the description mentioned in Section 110 of the Code of Criminal Procedure, 1898." It does not say that he may be proceeded against under section 110.

Section 3 (1) of the Burma Habitual Offenders, Restriction Act says:—"In any case in which a Magistrate may under the provisions of Section 110 of the Code of Criminal Procedure 1898, require a person to show cause why he should not be ordered to execute a bond for his good behaviour, the Magistrate may, in lieu of or in addition to so doing, require such person to show cause why an order of restriction should not be made against him.....".

The section as worded clearly applies to cases in which the person could be called upon under Section 110 of the Criminal Procedure Code, and in my opinion it does not apply to cases which come under section 3 of the Burma Opium Law Amendment Act and for that reason may be dealt with as if they came under Section 110 of the Code To hold that it does apply to such cases would be to attribute to the legislature an intention which it certainly has not expressed.

I would therefore set aside the order of the restriction passed against Nga Kyaw Hla. As he has been restricted to a place other than his own village for a considerable time I would not pass any order requiring him to execute a bond under the Criminal Procedure Code. Should he persist in his evil ways it will be open to the executive authorities to proceed against him again.

Duckworth J;—I concur.

PRESENT :—CARR AND DUCKWORTH, J. J.

King-Emperor. ... ... *Appellant* *

vs.

1. Kan Thein and (2) Kyaw Wa ... ... *Respondent.*

Criminal Procedure Code (Act V. of 1898) Section 439 (4)—Conviction under Section 326. Indian Penal Code.—Appeals to High Court summarily dismissed—notice to show cause why sentence should not be enhanced for major offence under Section 302. Indian Penal Code—Whether High Court can convict for major offence in revision.

Where the Respondents were convicted of offences under Section 326 Indian Penal Code and their appeals were summarily dismissed by the High Court and the High Court called upon the Respondents to show cause why their sentences under section 326 I. P. C. should not be enhanced or why they should not be convicted of murder under Section 302 I.P.C. read with Section 34 I.P.C. and sentenced to death—*Held*:—

Per Duckworth J:—If the High Court were dealing with the case both as an appellate and Revision Court it could convict and sentence the respondents for the major offence but as the appeals had been dismissed and the High Court was acting in its revisional capacity under Section 439 (4) Criminal Procedure Code in which, though the Court has undoubtedly the power to enhance the sentences for the offence under Section 326 it has no power to convert the aquittal of the respondents of murder into convictions thereof. The term "acquittal" covers not only express acquittals but implied acquittals such as where the conviction has been of the minor offence only.

Per Carr, J:—(concurring,) that as the case was before the Court solely on revision it had no power to convict the respondents of any offence of which they had been acquitted whether expressly or by implication. but his Lordship did not commit himself to acceptance of the decision in the case of *On Shwe* vs. *King-Emperor* as to which he expressed no opinion.

(In the result the sentences of respondents were enhanced to transporatinon for life for offences under Section 326, I.P.C.

Queen Empress. vs. Balwant, 9. A. 134 (F.B.); *Emperor vs. Sheodarshan Singh*, 44 A 332. *Bhola. vs. King Emperor*, 1904 Punjab Record Cr. No. 12. *re K. Bali Reddi & others* 37 M. 119. *Emperor vs. Shivputraya*. 48 A. 510, *Empress of India. vs. Judoonath Gangooly*. 2. C, 273. *On Shwe. vs. King Emperor*. 1. Rang 436–referred to and discussed.

Criminal Revision No, 52A. & 53A of 1926 being review of the order of the Sessions Judge of Myingyan in Sessions Trial No. 8 of 1925.

Judgment. *31st March 1926.*

Duckworth J: —In this case the respondents were concerned with another man in doing to death a village elder at night in their village. They were going round the village apparently under the influence of liquor, and making a great noise, using foul and abusive epithets. The deceased, who appears to have been an emenently respectable man, went out and expostulated with them, whereupon they turned on him and gave him a great many serious injuries with *das*, from which he died almost at once.

In the first place, one of the men who had been sentenced to death, appealed to this Court, and, after a very full consideration of the facts, my learned brother Carr. J., in a judgment in which I have fully concurred, maintained the conviction and sentence.

Subsequcntly the present respondents appealed. They had been convicted by the learned sessions Judge under Section 326, Indian Penal Code, and sentenced to four years' rigorous imprisonment each. Their appeals were summarily dismissed. At the same time my learned brother Carr. J. thought it necessary to call upon these respondents to show cause why their sentence under Section 326 should not be enhanced, or whether they should not be convicted of murder under the provisions of Section 302, Indian Penal Code, read with Section 34, and sentenced to death.

A question has now arisen as to whether under Section 439, Criminal Procedure Code, the High Court has power to alter the convictions under Section 326, Indian Penal Code, to convictions under Section 302.

The respondents were charged with, murder in the Sessions Court, but the Sessions Court convicted them of a complete minor offence thereby implicitly acquitting them of the major offence of murder.

Section 439, Clause 4, lays down that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

Section 417, Criminal Procedure Code, authorizes the Local Government to appeal against an order of acquittal.

On the one side, it is argued that the only way by which an order of acquittal can be altered into a conviction is by means of a Government appeal. On the other hand, it is contended that the acquittal intended by Section 439 (4) is a complete acquittal on all the facts, as well as in regard to any particular section, and that, where, for instance, a Magistrate or Judge in the case of, say, a charge under Section 326, Indian Penal Code, implicitly acquits a man under that section, but, on the facts of the case, convicts him under Section 324 a High Court can in revision interfere with and set aside the acquittal so far as Section 326 is concerned,. and convict the accused person under that latter section. The other view, of course means that the word "acquittal" as used in Section 439 means every kind of acquittal, whether entire, such as ends in an acquittal and release, or (to use the term for the purpose of argument) partial, such as where a man on the facts is convicted of a complete minor offence. In either case there is really an acquittal, or whether it is expressed in so many terms, or whether it is implied. Of this I think there can be no doubt.

In the case of *Queen-Empress* v. *Balwant* (1) it was held that the High Court could interfere with an order of acquittal on revision, but that the proper course in that case was to order a retrial.

In the case of *Emperor*. v. *Sheodarshan Singh* (2) it was held that, where a man was charged with both murder and culpable homicide not amounting to murder, and was acquitted of the former charge, but convicted of the latter, the High Court had no power, except through the medium of an appeal by the Local Government, to convert the acquittal into a conviction. In this case the difficulties in question were not discussed, as there had been a previous Allahabad Full Bench case.

A different view was taken in the case of *Bhola*. v. *King-Emperor* (3) In that case there was a criminal appeal before the Chief Court (High Court), and, during the pendency of that appeal, the Chief Court, acting in its revisonal capacity, called on

(1) 9. A 134 (F B) (2) 44. A 332. (3) (1904) Punjab Record, Criminal No. 12.

the prisoner to show cause why he should not be convicted of murder, and sentenced therefor. He had been charged with murder, but had been convicted of an offence under Section 326, Indian Penal Code. It was held that, inasmuch as the case was before the court, both as an appeal and as a revision, the Court could alter the finding under Section 423, (*b*) (2) Criminal Procedure Code, and having done so, enhance the sentence under Section 439, Clause 1. It was also held that the word "acquittal" used in Section 439 (4), Criminal Procedure Code, meant a complete acquittal on all the allegations and facts charged, and not an acquittal on one charge, and a conviction upon another on the same facts.

The same view was taken in the case of *Bali Reddi* (4). But the Bombay High Court in the case of *Emperor* v. *Shivputraya* (5) took the other view, holding at once that, where a man was convicted under Section 323, Indian Penal Code, on a charge under Section 326, the High Court, acting in its revisional capacity could not, in view of the wording of Section 439 (4), Criminal Procedure Code, convert the conviction into one under Section 326, because the order of the Sessions Court amounted to an order of acquittal under that latter section.

In the case of *The Empress of India, v Judoonath Gangooly* (6) it was held that, where a man had been charged with murder but had been acquitted thereof, and, instead, had been convicted of the minor offence of culpable homicide not amounting to murder, the Local Government could appeal against the acquittal under Section 417, Criminal Procedure Code. This serves to show that the word, 'acquittal" as used in Section 417 was held to include every kind of acquittal.

In the case of *On Shwe* v. *King Emperor* (7), sitting as a Bench with my learned brother, May Oung J., I followed the Punjab and Madras cases (not having then seen the recent Bombay case) and decided that in such a case as the present, where a man charged with murder had been convicted of a minor offence, the High

(4) 37 M 119
(5) 48 B 510
(6) 2 C 273
(7) 1 Rang. 436

Court could, if it acted both as a Court of Appeal and a Court of Revision, convict the man of murder and sentence him to death. In that case it was held that the case of *Sheodorshan Singh* (referred to above) was clearly distinguishable, because there the High Court had no appeal before it, but was simply acting in its capacity as a Court of Revision. Incidentally this was also the case in the recent Bombay case referred to above. The solution of the question seems to me to lie in whether the High Court in any given case is dealing with it both as an Appellate and a Revisional Court, or whether it is acting merely in its revisional capacity. If it was acting both as an Appellate and a Revisional Court, I would take the view already expressed by me in *On Shwe's* case. If it was acting solely as a Court of Revision, I would certainly, in view of the very clear wording of Section 439 (4), Criminal Procedure Code, take the view of the Allahabad and Bombay High Courts.

In the present instance, as has already been pointed out, we have summarily dismissed the appeals of the present respondents, and we are now therefore acting solely in our revisional capacity, in which, though we undoubtedly have the power to enhance the sentences already passed under Section 326, Indian Penal Code, I must hold that we have not the power to convert the acquittal of the respondents of murder into convictions thereof.

It remains to state that I have not the least doubt that, in the circumstances of the present case, the sentences passed upon the respondents should be enhanced.

The facts of the case, in regard to which our views have been clearly expressed in our judgment in the case of the prisoner who appealed in the first instance, show clearly that the respondents and the other prisoner made a dastardly, brutal and combined attack upon the village elder, and jointly did him to death. The most serious grievous injuries were caused in addition to the terrible and fatal wound.

In my opinion the respondents have been unable to show any good cause against enhancement. I would therefore enhance the sentence passed upon all the respondents under Section 326, Indian Penal Code, to transportation for life.

CARR J—I agree that, since the appeals of the respondents have been dismissed and the case is now before us solely on revision, we have no power now to convict the respondents of any offence of which they have been acquitted, whether expressly or by implication.

I wish, however, to say expressly that I do not commit myself to acceptance of the decision in *Qn Shwe's case* (7), quoted above by my learned brother. The question decided in that case does not arise now in this case, though it might have arisen had the appeals of the respondents not already been dismissed, and I prefer to express no opinion whatever on that question.

I agree with my learned brother in enhancing the sentences passed on the respondents Kan Thein and Kyaw Wa to sentences of transportation for life, under Section 326 of the Penal Code.

Government Advocate for Petitioner.

De Glanville for Respondents.

PRESENT:—CUNLIFFE, J.

A. P. Joseph. ... ... *Plaintiff.*

vs.

E. H. Joseph. ... ... *Defendant.*

Transfer of Property Act (IV of 1882.) Section 6. (d)—Mortgage of life interest in share of rents from immoveable property—whether mortgage enforceable.

The defendant was a beneficiary under a deed of gift executed by his father in which he was entitled to a life-interest in a portion of rents from immovable property—the life-interest in the other portions going to his brothers on like terms. The limitation was construted by the Court to be a personal provision by the father for the sons. The Defendant mortgaged his life-interest to one of his brothers, who sued on the mortgage. *Held*; that the mortgage of the life interest was not enforceable as being contrary to Section 6, (d) Transfer of Property Act. *Held also*—, that the doctrine of estoppel did not apply by reason of the mortgagor's acquiescence in the mortgage.

Contract Act (IX of 1872) Section 24—. mortgage unenforceable on ground of being illegal or prohibited by law—whether simple money decree may be passed on the personal covenaut.

Held—that the mortgage being unenforceable on the ground of being illegal or prohibited by law the personal covenant which was incorporated for the same consideration in the contract was unenforceable and no money decree could be passed thereon.

Murlidhar and others..vs...*Pem Raj and others*, 22. A. 205.
Har Prasad Tiwari..vs...*Sheo Gobind Tiwari*, 44 A.—486-referred to.

Judgment. *23rd February 1926*

This is an action in which the brothers Joseph are once more in litigation before this Court, and in this case the plaintiff Joseph sues the defendant Joseph for Rs. 11,237/- odd on what purports to be a mortgage. I was asked by Mr. Shaffee to decide a preliminary point of law, and that is what I propose to do now leaving the rest of the case for further argument and, if necessary, evidence being called.

The point put forward by Mr. Shaffee is shortly this: that the mortgage before the court is an illegal mortgage by virtue of section

Civil Regular No. 356 of 1925 of the Original Side

6 (d) of the Transfer of Property Act. That sub-section reads as follows:—

(d) "An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him."

The defendant Joseph was a beneficiary under a deed of gift on the part of his father in which he was entitled to a life-interest—and to a life interest alone—in certain rents. Mr. Shaffee argued that the deed of gift, construed as a whole, showed that it was the intention of the donor to provide for his sons and that they were not to alienate their life interest to anyone else. I have come to the conclusion that that is the right way to look upon this deed as a whole and, that being so, I am of the opinion that sub-section (d) protects the interest under the deed from any purported mortgage.

Mr. Bose, however, for the plaintiff argued that the defendant was estopped from setting up a defence of this nature, the reason being that it was his own acquiescence in the mortgage which led the plaintiffs' brother to lend the money. I do not think that the doctrine of estoppel can ever really be applied to non-enforcement of an illegal contract. The proper way, I, think, to look on a matter of this kind is not to suppose that the defendant is estopped but that the plaintiff is prevented from obtaining the assistance of the Court to enforce a contract or that part of a contract which is wanting in legal consideration. The provisions of Sub-section (d) of Section 6 of the Transfer of Property Act are, no doubt, based upon public policy and if a contract is unenforceable because it is illegal as being contrary to public policy the Court will not assist a person coming and claiming to act under such an alleged right by virtue of such a contract. I therefore decide the preliminary point in the defendant's favour that, as far as his life-interest is concerned, it cannot be the subject of attachment under this so-called mortgage; but I do not decide, as I wish to hear further argument and, if necessary, evidence as to what is the right of the plaintiff against the defendant personally. It may well be that there are two ways of looking on the contract, that it has an illegal as well as a legal side, and that the legal right under the contract is severable from the illegal. In these circumstances, I shall place this case in the Short Cause List.

20th April 1926

This case first appeared in my list under the name of "Short Cause."

A preliminary point was decided by me as to whether by virtue of section 6 (*d*) of the Transfer of Property Act, the mortgage in suit was an illegal one and unable to be enforced in a court of law. I decided this preliminary point in the affirmative, and, as the suit had already taken more than the average time for a short cause, I postponed the case for a second hearing. At the second hearing as argued on behalf of the defendant and having regard to section 24, Indian Contract Act, provided, as had already been decided, the mortgage of the life-interest was illegal then the whole of the agreement must be void and the plaintiff must in law be disentitled to recover even personally against the defendant.

Section 24, Indian Contract Act runs as follows "If any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful the agreement is void."

The single consideration as far as the plaintiff is concerned in this case was the hypothecation of the life interest. It appears to me under this section whatever decision I might come to were I to decide this matter according to the principles of the English Law, the law in India is quite clear and I am unable to give effect to the contract in any way at all. This point which is a very short one seems to have been considered on the same principle in other Provinces in India (See the case of *Murlidhar & others vs. Pem Raj & others* (1) also what appears to me to be a direct parallel, the decision of *Har Prasad Tiwari* vs. *Sheo Gobind Tiwari* (2) There was a mortgage of an occupancy holding. Such a mortgage is forbidden by the provisions of the agreed tenancy. On an attempt by the mortgagee to obtain a money decree against the mortgagor defendant it was held that such a money decree could only be obtained on a personal covenant of the defendant to pay and such a personal covenant incorporated in an illegal contract was not to be enforced as the consideration presumably was exactly the same as the consideration attaching or purporting to attach to the occupancy holding. It appears to me

(1) 22. A, 205. (2) 44. A, 486.

that the principle of Indian Law in relation to such contracts is that once you find two parties *in pari delicto* in a civil sense no effect will be given to the claims of either party because the court will refuse to recognise the transaction between them *in toto*.

A further point was raised by the defendant against the personal enforcement of this contract by a reference to Order 2 Rule 2 of the Code of Civil Procedure. Whilst looking favourably upon this argument and agreeing with the cases which were cited to support it, having regard to my conclusion on the first point, I do not think it falls to be decided. The plaintiff then is not entitled to succeed. There is no necessity now to call evidence.

There will be judgment for the defendant, but having regard to the whole of the conditions in this case I do not propose to give the defendant his costs. The order therefore will be judgment for the defendant without costs.

Bose for Plaintiff.

Mr. Shaffee for Defendant.

RUTLEDGE C. J. CARR AND CHARI. J. J.

King-Emperor. ... ... *Appellant**

vs.

Tha Shwe and two others. ... ... *Respondents.*

Criminal Procedure Code (Act V of 1898) Sect. 252 and 257--Burma Process Fees Act (Burma Act I of 1910)– whether process-fees are leviable in non-cognisable warrant cases.

In a non-cognisable warrant case the Court is not bound to summon witnesses for the prosecution or the defence under the provisions of Sections 252 and 257 of the Criminal Procedure Code if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rules 17 and 18 of the Process Fees Rules made under the Burma Process Fees Act 1910.

Obiter—A Magistrate in cases other than those falling under chapters XIX, XX and XXI of the Indian Penal Code may remit the process fees when satisfied that the party liable to pay them has not the means of payment (*Vide Rule 20 Burma Process Fees Rules*) No process fees are to be levied by a Criminal Court in any cognisable case (*Vide Rule 18 clause b (2)* same Rules) *King Emperor and Mg San Nyein*, 4. B. L. J. 187—Over-ruled *Palanagiri Pitchivadus*; II *Weir 323. In re Ponnammal* 16 M. 234—dist.

Reference.

The following reference was made by Carr J. in Cr. Appeals Nos. 188, 189 and 190 of 1926 from the order of the Special Power Magistrate of Mergui in Cr. Reg. Trial No. 146 of 1925.

18th March 1926.

Per CARR J.—The appellants in these three cases have been convicted of forgery, punishable under section 467, I. P. C., and have each been sentenced to five years Rigorous Imprisonment.

On the facts I see no reason for interference with the convictions. The appellant Tha Shwe, who is a boy of 19, approached the complainant Hone Gwan for a loan on a mortgage of certain land, which stood in the names of his parents Mg. Sin and Ma Le, and for which he produced the revenue receipt. He was told that his parents must execute the deed. He came again bringing appellants Nga Gya and Ma Bwin, who represented that they were Mg. Sin and Ma Le, and executed a mortgage deed on which the complainant lent Rs. 500. Later complainant discovered that these two appellants were

* Cr. Reference No. 40 of 1926.

not Mg. Sin and Ma Le.

It is shown that Tha Shwe was one of the attesting witnesses to the deed. Tha Shwe in the trial Court denied all the allegations against him, but they were amply proved and in his petition of appeal he does not persist in his denial.

The other two appellants admitted taking part in the execution of the document but alleged that they were induced to place their thumb prints on it as witnesses. I have no doubt that this defence is not true.

The offence is one that calls for a substantial punishment, but I think that the sentences passed in this case were unduly severe and I propose to reduce them.

But before I pass my final order I think that another question that arises should be authoritatively settled.

The case is a non-cognisable warrant case. Under the Process Fees Rules, 1923,which were made by the Local Government of Burma under section 3 of the Burma Process Fees Act 1910, and which are reproduced in paragraph 976 of the Burma Courts Manual, fees must be paid by the parties in all non-cognisable cases for processes issued. The relevant provisions are contained in Rules 17 (1) and 18 (b). Until recently the validity of these rules has not to my knowledge been questioned. But in this case it was questioned and the defence pleaders refused to pay process fees for the summons to their witnesses, and the Magistrate says that the Court bore the expenses of the witnesses.

The complainant, however, had paid the process fees for his own witnesses, and the Magistrate directed under section 31 of the Court Fees Act that the three appellants. in addition to other sentences of imprisonment, should pay these costs of the complainant, amounting to Rs. 15.

On the wording of section 31 of the Court Fees Act the Magistrate was right in passing this order. But if the process fees in question were not lawfully levied from the complainant then I think that the spirit of the law requires that they should be refunded to him by the Court, and that the burden of repaying them should not be imposed upon the appellant.

The authority on which the defence pleaders relied when refusing to pay process fees,and which the Magistrate followed, was the case of *King Emperor v. Mg. San Nyein* (1). This is an unauthorised publication and was not therefore binding on the Magistrate. But I have verified it from the original record ot this Court. The decision was given by one judge of this Court in a case called for in revision on the Court's own motion. No advocate was heard on either side. The learned Judge, after a discussion of certain provisions of the Criminal Procedure Code. held that in non-cognisable warrant cases the parties could not be required to pay process fees for the issue of summons to-witnesses.

I have some doubt of the correctness of this decision but think that, although it is reported only in an unauthorised publication, it would not be proper for me either to over-rule or to ignore it. The question raised is one of very great importance, involving, as it does, a question of the validity of the Process Fees Rules and I consider it necessary that it should be authoritatively decided.

I therefore postpone final orders in this case and refer the following question for decision by a Bench or a Full Bench, as the Honourable the Chief Justice may direct.

"In a non-cognisable warrant case is the Court bound to summon witnesses for the prosecution or the defence under the provisions of sections 252 and 257 of the Criminal Procedure Code if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rules 17 and 18 of the Process Fees Rules made under the Burma Court Fees Act, 1910?"

OPINION *28th April 1926.*

Per RUTLEDGE C. J.—The question referred is:—

"In a non-cognisable warrant case is the Court bound to summon witnesses for the prosecution or the defence under the provisions of sections 252 and 257 of the Criminal Procedure Code if the party at whose instance or in whose interest the process is issued does not pay process fees as required by Rule 17 and 18 of the Process Fees Rules made under the Burma Court Fees Act. 1910?"

The reference in the last line is a clerical error and should read "Burma Process Fees Act."

(1) 4 B. L. J. 187.

The question has arisen in consequence of the magistrate who tried the case under appeal having followed a decision of this Court published in the *Burma Law Journal*, which is a private publication not authorised by any Local Government. The case in question is *King Emperor vs. San Nyein* (1). The magistrate seems to have treated the decision as absolutely binding on him. It was not in fact binding on him. This is a very prevalent misapprehension and it is therefore desirable to draw attention to the Indian Law Reports Act. XVIII of 1875. Section 3 of that Act reads as follows;—No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts ..... other than a report publisheed under the authority of any Local Government."*

To understand the question raised it is necessary to consider certain sections of the Criminal Procedure Code.

Section 204 deals with the issue of process to compel the attendance of an accused person when a magistrate taking cognizance of an offence is of opinion that there is sufficient ground for proceedings. It provides that if the case is one in which a summons should issue in the first instance the magistrate *shall* issue a summons and if the case is one is which a warrant should issue he *may* issue either a warrant or a summons. Sub-section (3) of the section, however, provides that "when by any law for the time being in force any process fee or other fees are payable no process shall be issued until the fees are paid and if such fees are not paid within a reasonable time the magistrate may dismiss the complaint."

In Chapter XX. of the Code, which deals with the trial of summons cases, Section 244 (2) provides that the magistrate "*may* if he thinks fit, issue a summons to any witness directing him to attend..... ....." Section 244 (3) provides that the magistrate may before issuing a summons require that the reasonable expenses of the witness be deposited in Court.

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(1) 4 B. L. J. 187.

(* We understand from the District Bar concerned that there was no misapprehension as to the scope of the Indian Law Reports Act and that the learned Magistrate accepted the ruling in the absence of any reported decision-*See Supplement-Ed.*)

But in Chapter XXI. dealing with the trial of warrant cases, Section 252 in Sub-section (1) provides that when the accused appears before the Court the magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. Sub-section (2) then goes on to provide that.—"The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and *shall* summon to give evidence before himself such of them as he thinks necessary."

Section 256 was not referred to in *San Nyein's Case*, (1) but it is desirable to mention it here. t provides that after the framing of the charge, if the accused wishes to cross-examine any of the prosecution witnesses whose evidence has been taken such witnesses *shall* be recalled." Here the issue of process to the witnesses may or may not be necessary.

Section 257 provides for the summoning of witnesses at the instance of the accused. It lays down that the magistrate "*shall*" issue process to such witnesses "unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice." Sub-section (2) further provides that the Magistrate may require the reasonable expenses of a witness to be deposited in Court before summoning him.

On a consideration of these provisions the learned Judge in *San Nyein's Case* (1) held that under sections 252 & 257 of the Criminal Procedure Code the Court could not refuse to issue process to witnesses either for the prosecution or the defence on the failure of the complainant or the accused to pay process fees. (If this view is correct it will apply equally to section 256).

It is argued that the presence in Section 204 of a provision for dismissal of the complaint for non-payment of process-fees leads, on the accepted rules for the interpretation of statutes, to the presumption that the omission of any similar provision from sections 252, 256 and 257 was intentional and that payment of process fees cannot be enforced by refusal to issue process; and that additional provision in Section 257

providing for refusal to issue process for certain specific reasons also leads, under the same rules, to the presumption that there can be no refusal on other grounds.

This argument is based on the assumption that Section 204 (3) is limited merely to the issue of process on the accused. Sub-section (3), however, is so worded "any process fees or other fees" as to indicate a much wider application.

The only limitation indicated is that, on non-payment the Magistrate may dismiss the complaint, a remedy obviously inapplicable where the default had been made by the accused in respect of his witnesses under Section 257.

If it were the intention of the Legislature to indicate that it was not intended to interfere with the provisions of the Court Fees Act 1870 and the Rules framed thereunder, we would naturally look for such an indication in this section which deals with "the commencement of proceedings before Magistrates." That this was the intention of the Legislature seems to be indicated by Section 546. A. (1) (one of the amendments of 1923) which runs:—"Whenever any complaint of a non-cognisable offence is made to a Court, the Court if it convicts the accused may, in addition to the penalty imposed upon him, order him, to pay to the complainant (a) the fee (if any) paid on the petition of complaint or for the examination of the complainant and (b) any fees paid by the complainant for serving processes on his witnesses or on the accused." This section which applies to non-cognisable cases is quite inconsistent with the view that the mandatory nature of section 252 (1) relieves the complainant of any liability to pay the process fees for his witnesses.

In Section 1 (2) of the Code, it is provided that "in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by any other law for the time being in force."

In respect of process fees, the Indian Court Fees Act 1870 Section 20 was clearly a special law which gave the High Court power to make rules in respect of "the fees chargeable for serving and executing processes issued by the Criminal

Courts established within such limits in case of offences other than offences for which police officers may arrest without a warrant."

Rules were made under this section by the Chief Court of Lower Burma in their Notification No: 11 dated 30th May 1900 and are still set out at page 45 of the Stamp Manual as if still in force.

In 1910 the Burma Process Fees Act (Burma Act 1 of 1910) was passed. It declared that Sections 20 to 23 of the Court Fees Act, 1870, should not apply to Burma. It transferred the power of making rules for the levy of process fees to the Local Government, and it gave the Local Government, in respect of Criminal Courts, considerably greater powers than had been given by Section 20 of the Court Fees Act, since it imposes no limitation to the processes issued by Criminal Courts in respect of which the rules may be made.

Rules were made by the Local Government under this authority and those now in force were published in Judicial Department Notification No. 57, dated the 8th May 1923, and are reproduced in paragraph 976 of the Burma Courts Manual. Rule 17 of those rules provides that "subject to the exemption set out in Rule 18 process fees on the following scale shall be levied in respect of each process from the person at whose instance or in whose instance or in whose interest the process is issued." The scale prescribes fees for all classes of processes. The only exemption in Rule 18 which affects the present argument is contained in clause (b) (2), and provides that no process-fee shall be levied by a Criminal Court in any cognizable case.

Rule 20 provides that a Magistrate in cases other than those falling under Chapters XIX, XX and XXI of the Indian Penal Code "may remit the process-fees when satisfied that the party liable to pay them has not the means of payment."

All cases falling under Chapter XIX of the Penal Code are summons cases, but all cases falling under Chapters XX and XXI are warrant cases.

Thus it is clearly indicated that it was the intention of the Local Government when making these Rules, that

process-fees should be leviable in all non-cognizable warrant cases as well as in summons cases. And since these rules were made by a statutory authority they have themselves the force of law.

Rule 22 (2) further provides that "unless a Court by order in writing permits their levy subsequent to the issue of process, process-fees shall be recovered before the process is drawn up for service or execution....." This is a mandatory provision preventing the court from issuing process until the fees have been paid. The power to postpone levy of the fees obviously would not justify the court in issuing a process before they had been paid if it was aware that the party concerned had no intention of paying them.

The Burma Court Fees Act 1910, does not, like the Indian Court Fees Act 1870, come under the words "any special Act now in force" as the Code was enacted in 1898, but we see no reason to doubt that it comes under the words" "any special.... ..power conferred.....by any other law for the time being in force" in Section 1 (2) of the Code.

Though the Process Fees Rules have been in force for many years, so far as we know their validity in this respect has not been questioned in any authorised reported decisions. The learned Judge in *San Nyein's* case (1) relies on an unauthorised report of *Palanagari Pitchivadu's case* (2). Whoever was the Judge who decided that case referred only to the Criminal Procedure Code and did not mention Section 20 of the Court Fees Act or the rules made under it by the Madras High Court. Section 361 of the Code of 1872, to which considerable importance was attached is a section dealing only with summons cases. Section 362 which dealt with warrant cases was in effect the same as the present Section 252 (2).

The decision seems to be based on a supposed change in the Code which had not in fact been made and is of no value. We have been referred to *In re Ponammal* (3). That however was a maintenance case and it was held not to come under the word "offences" in Section 20 (2) of the Court Fees Act.

In the view we take of Section 204 (B) Section 546-A and Section 1 (2) of the Code, Sections 252, 256 and 257 must be read as subject to the Rules made under the Burma Process Fees Act 1910. The decision in *K. Emperor v. San Nyein* (1) is erroneous and must be overruled and the reference is answered in the negative.

Eggar (Govt. Advocate) for the Crown.

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(2) 2. Weir 323. (3) 16. M. 234.

SIR GUY RUTLEDGE C. J. AND MR. JUSTICE MAUNG BA.

*MA PHAW AND OTHERS *vs.* MAUNG BA THAW.

Provincial Insolvency Act (V of 1920) Section 28 (4)—Date of vesting of after-acquired property of Insolvent.

The Insolvent was adjudicated in 1917. In 1925 he became entitled to a one-fourth share in the estate of his father. He released his one-fourth share worth Rs. 8,000 to the other heirs for Rs. 2,000 in consideration of his father having had to support him since the date of the Insolvency. The receiver applied to the Court to declare that the partition was void.

Held **that the Court had ample power under Section 4 of the Provincial Insolvency Act to entertain the application, and that under Section 28 (4) the after-acquired property of the Insolvent vested forthwith in the Receiver and was not postponed until the intervention of the Receiver.**

Section 7 Insolvency Debtors Act 1848 and rulings thereon *considered* and *distinguished. Cohen v. Mitchell* 25. Q. B. D. 262 *not applied.*

Alimahmad Abdul Hussein Vohora and others v. Vadilal, 43. B 890; *Chhote Lal. v. Kedar Nath and others* 46-A. 565—Dist.

Judgment. *8th March 1926.*

Per Rutledge C. J.;—The 4th Appellant Mg Po Saung was adjudicated an Insolvent on his own petition on the 30th March 1917, and he is still undischarged. The Insolvent's father U Byu died in July 1925, leaving property which the appellants admit amounted roughly to Rs. 56,000. They also admit that the property in law was divisible equally amongst them, the 1st and 6th appellants being the children and the 7th Appellant the grandchild of the deceased, and stated that they entered into an agreement whereby Po Saung the 4th appellant got only Rs. 2,000 instead of Rs. 8,000 the pretext being that their father had to support him and his family since he become Insolvent.

The respondent as receiver of the estate moved the Court to declare that the Insolvent's share in the estate still remained unaffected and that the partition between U Pyu's heirs was void so far as the Insolvent was concerned.

In our opinion the Court has ample power to entertain such an application under Section 4 of the Provincial Insolvency Act 1920. The words of Section 28, sub-section (4) of that Act are very clear in their terms and set out "all property which is acquired by or devolves on the Insolvent after the date of an

*Civil Misc Appeal No. 32 of 1926 against the order of the District Court, Henzanda, in Civil Misc No. 17 of 1917.

order of adjudication and before his discharge shall forthwith vest in the Court or the Receiver" and the learned advocate for the appellant admits that, if these words are given their natural meaning, he cannot contend that the learned District Judge was wrong. He urges however that though there were some similar words in the English Bankruptcy Acts, a long chain of legal decisions culminating in the case of *Cohen v. Mitchell* (1) has laid down that, where a bankrupt, who has not obtained his discharge, enters into transactions in respect of property acquired after the bankruptcy then, until the trustee intervenes, all such transactions with any person dealing with the bankrupt *bona fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee, and that this rule has been followed in several High Courts of India; and reliance in particular has been placed on a decision of the Bombay High Court (*I.L.R.* 43. *Bombay* 890) and of the Allahabad High Court (*I.L.R.* 46 *Allahabad* 565). We may, remark that both these decisions were under the Insolvent Debtors Act 1848, Section 7, and there is a material difference between the wording of Section 7 and Section 28 (4) of the Provincial Insolvency Act. In the two cases abovementioned the Courts, following a long series of English cases, modified the words of the statute on apparent grounds of convenience by postponing the vesting in the receiver until he had intervened. It seems to us that the insertion of the word "forthwith" by the legislature in Section 28 (4) was to sweep away the Court's attempt to postpone the vesting. In view of the specific and clear words of the sub-section we are unable to apply the principle of *Cohen.* V. *Mitchell* (1) to the present case, as, to do so, in our opinion, would be to nullify the express direction of the legislature. Hard cases may no doubt arise where the Court or receiver has taken no action and property has exchanged hands and been acquired by *bona fide* transferees without notice of the Insolvency. But the remedy does not lie with Courts but rather with the legislature and if it thinks well it can imitate the English statute of 1914, Section 47, In the present case we agree with the District Judge that even if we apply the principle of *Cohen. V. Mitchell* (1) it would not avail him, as the transaction, on the face of it seems to be neither *bona fide* nor for value. Po Saung admittedly gave up three-fourths of his share in his father's estate for no legal consideration. The obvious inference is that he wished unduly to prefer his relatives to his creditors

In these circumstances we think that the order appealed from was perfectly just and the appeal must be summarily dismissed under Order 41, Rule 11.

McDonnell for Appellant.

(1) L. R. 25. Q.B.D. 262.

MR. JUSTICE CARR.

TAN KYI LIN *vs.* KING-EMPEROR.

Cr. Pro. Code (Act V of 1898) Section 537-539. B. Omission to file Chemical Examiner's Report by Sessions Court-Magistrate inspecting scene of occurrence—not recording memo of facts—irregularities cured under Section 537. Cr. Pro. Code.

(10) Where a Sessions Cour on appeal sent certain exhibit bottles to the Chemical Examiner to satisfy itself whether the contents were opium and filed the report in the process file and ignored the contents of the report:—

Held, **that having sent the exhibits to the Chemical Examiner the Sessions Court should have had the report formally put in evidence and should also have taken the evidence necessary to prove that what was sent to the Chemical Examiner was what had been seized from the possession of accused but that it appearing from the record that there was adequate evidence that the bottles contained opium and the appellant was not prejudiced, the irregularity was cured by Section 537 Cr. P. Code.**

(2) The trial Magistrate having inspected the scene of the search recorded the fact as follows.—"Inspected the site with defence pleader U Po Maung, accused present on the site." .. He did not prepare a memorandum of the facts observed and place it on the record as required by Section 539. B. Cr. P. Code but came to the conclusion that from his observation of the spot the exhibit bottles could not have been planted.

Held, **that the failure of the Magistrate to record a memorandum had not been prejudicial to the accused and had not occasioned a failure of justice; and that the Magistrate's error was a mere error of detail which was cured by Section 537. Cr. P. Code.**

Order. *22nd January* 1926.

The petitioner was found guilty under Section 9. (C) of the Opium Act for illegal possession of a substantial quantity of *Beinsi* or prepared opium, and was sentenced to imprisonment and fine. His appeal to the Sessions Court was dismissed, and he comes to this Court in revision. The first ground taken relates to the procedure in the appeal. The Sessions Judge first heard the advocate for the appellant under the proviso to Section 421 of the Criminal Procedure Code. He then called for the exhibit bottle alleged to contain opium and on their receipt sent them to

***Cr. Revision No. 1298B. of 1925 being review of the Order of the Subdivisional Magistrate of Kyaikto in Cr. Reg. No. 103 of 1925.**

the Chemical Examiner for report. On the request of the appellant's advocate he arranged to hear him again. A report was received and the advocate was heard and the appeal was then summarily dismissed, in an adequate judgment.

The report of the Chemical Examiner was not put in evidence but is filed on the process file of the appeal record. The Sessions Judge makes no mention whatever of it in his judgment.

It is contended now that the Sessions Judge acted wrongly. I agree that he did. He should not have sent the opium to the Chemical Examiner at all unless he found that it was necessary to have further evidence on the question whether the bottles contained opium or not. Having sent it he should have had the report formally put in evidence and should have taken also the evidence necessary to prove that what was sent to the Chemical Examiner was what had been seized from the possession of the appellant. He seems indeed, merely to have sent the exhibit to the Chemical Examiner in order to satisfy his own mind on the subject. The only way in which he could legitimately so satisfy himself was by taking evidence in a regular manner.

But I do not think that this irregularity constitutes a sufficient ground for interference. We must necessarily exclude the report from consideration and deal with the original record. On that record, there is, in my opinion, adequate evidence that the contents of the bottles were opium. Several witnesses said that they contained opium. Their evidence was not challenged in any way, nor were they cross-examined on this point. The accused himself in his examination referred to "the opium before the Court". I see no reason why that evidence should not be accepted. There are many people in this country sufficiently acquainted with opium to be able to indentify it by sight and smell. In this respect opium differs from cocaine, which is not so easily identifiable. Similarly this case differs from that of *Ah Lok and others v. King-Emperor* (1) in which it had been assumed from the labels on the packets that the contents were cocaine.

The next three grounds relate to the magistrate's visit to the scene of the search and his failure to comply with the provisions of Section 539B. of the Criminal Procedure Code.

Here the facts are as follows. The trial of the case was concluded at Kyaikto on the 10th October 1925. The Magistrate recorded in his diary "Inspection of the site will be made on 11th October 1925 at 9 a.m." He also reserved judgment until the 13th October. On the 11th October the entry is "Inspected the site with defence pleader U Po Maung. Accused present on the site." Judgment was subsequently postponed to the 16th October owing to the late receipt of a ruling which Mr. Sutherland, accused's

(1) 3. L.B.R. 216.

Advocate, had promised to send. It was delivered on that date. The Magistrate did not prepare a memorandum of the facts observed and place it on the record, as required by Section 539B. of the Criminal Procedure Code. In his judgment he says very little on the subject. After referring to the evidence of certain witnesses as to the place where the bottles were found he says. "This consideraion combined with my own personal observation of the spot has led me to the conclusion that the exhibit bottles could not have been "planted" in the place where they were found without the knowledge and assent of the persons selling in the shop."

In these circumstances I am unable to hold that the Magistrate's failure to record a memorandum has been prejudicial to the accused and has occasioned a failure of justice. On the facts it seems sufficiently obvious that no one concerned contemplated that the memorandum should be considered by the accused or that anything further should be done. The probability is that all concerned overlooked the existence of Section 539B. which is a recent addition to the Code. This view gains support from the fact that this point was not taken up by Mr. Sutherland in the original petition of appeal filed in the Sessions Court. He raised it only in an additional ground filed nearly three weeks later. In these circumstances I am unable to attach any weight to Mr. Sutherland's arguments as to the manner in which his client has been prejudiced. He has referred me to many rulings on cases of a similar nature, in which the proceedings were held void. These all date from before the enactment of Section 539B. and therefore proceed on the ground of prejudice.

They are of no assistance in the present case when I have found that there has not in fact been any prejudice.

In the fourth ground it is contended that the failure to observe Section 539B. is an illegality which vitiates the trial apart from any question of prejudice, and is not a mere curable irregularity. This proposition has been adopted by a bench of the Calcutta High Court in *Hriday Govinda Sur vs. Emperor* (2). The learned judges did not discuss the question at length. All they said was "This provision in the section is in our opinion mandatory, and the failure to comply with this express direction of law was an illegality, and not an irregularity which could be cured if we held that there was no prejudice to the accused." That the provision is mandatory must be conceded, but with all respect, I am unable to follow the learned Judges any further. I agree with the view taken by my brother Brown in *Nga Hla U* vs. *King-Emperor* (3) that it is not every failure to comply with a mandatory provision of the law which renders the proceedings void. The test

(2) 52. Cal. 148. (3) 3. Ran. 139.

quoted by him from a judgment of the High Court of Allahabad, on page 145 of the report seems to me to be the correct test. Applying that test I consider that the Magistrate's error in this case is a mere error of detail which is cured by Section 537 of the Code and not an error that goes to the root of the trial.

I hold therefore that the Magistrate's error of procedure is not one that vitiates the trial and is not therefore a ground for interference in revision.

On the rest of the grounds I see no ground for interference. The search seems to have been regular, but even if there were some slight irregularity, that would not be a sufficient cause for doubting the evidence. There is in fact no doubt that the opium was found as alleged and I see no sufficient ground for believing that it had been planted. Mr. Sutherland has quoted numerous rulings as to facts which are of no use except in so far as they lay down the principle that the possession of the opium by the accused must be proved and that possession involves knowledge. The Courts below have been satisfied on those points and I see no sufficient ground for interference in revision.

The application is dismissed.

The appellant, who has been released on bail must be re-arrested and committed to prison to serve the remainder of his sentence.

Sutherland for petitioner.

Asst. Govt. Advocate for the Crown.

———:o:———

MR. JUSTICE DUCKWORTH.

(1) NGA PU, (2) NGA MAUNG *vs.* KING-EMPEROR.

Penal Code (Act XLV of 1860) Sections 397, 398—applies to those actually armed—not applicable to unarmed companions—appropriate Section.

Pointed out—**Sections 397 and 398, I. P. C. are individualistic Sections.**

Section 397, I. P. C. can only be used in connection with the appropriate robbery or dacoity Section.

Section 398, I. P. C. does not by itself create an offence but merely lays down a minimum punishment.

Both Sections 397 and 398, I. P. C. only apply to the person actually armed and cannot be utilised as against companions who themselves were not armed with deadly weapons when the substantive offence was committed.

A person cannot be convicted of abetting an offence under Sec-

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Criminal Appeal No. 151 of 1926 from the Order of the Sessions Judge Arakan in Sessions Trial No. 15 of 1925.

tion 398, I. P. C. The appropriate Section for abetment should be 393|114.

Where a person was convicted under Section 398 for abetment under that Section and the charge was not amended by the Sessions Court, the charge was altered on appeal into one under Section 393|114, I. P. C.

S. P. Ghose v. K. E. 8. L. B. R. 274—*applied.*

Judgment. *8th March 1926.*

In this case the 1st appellant Nga Pu was convicted of attempting to commit robbery, when armed with a deadly weapon, under Section 398. I. P. Code, whilst the 2nd appellant Nga Maung was convicted of abetting the offence under Section 398 by Nga Pu under Sections 398|109. I. P. C. They were each sentenced to undergo seven years R. I.

I had to admit the appeal of the 2nd appellant, because Section 398. I. P. Code does not by itself create an offence. What it does is to lay down a minimum punishment for attempted robbery or for dacoity of a certain kind. In this instance of attempted robbery, it should have been used only in connection with Section 393. I. P. Code. An analogy is Section 397. I. P. Code, which can only be used in connection with the appropriate robbery or dacoity section. Further both these sections 397 and 398 of the Code are what may be styled individualistic. They only apply to the person actually armed, and cannot be utilized as against companions, who themselves were not armed with deadly weapons, at the time when the substantive offence in question was committed.

Further still, I am of the opinion that a man cannot be convicted of abetting an offence under Section 398. I. P. Code. For one thing he cannot be made liable for the fact that the other person is armed, and for another the Section does not represent a substantive offence.

In this case, if the evidence is sufficient, the convictions should have been under Section 393|398, and Sections 393|114, I. P. Code.

That there was an attempted robbery by four men at the house of Ma Ngwe U and her husband Tha Maung on the night of the 2nd of July 1925 is clearly proved, Ma Ngwe U was actually cut by one of the robbers and she managed with much gallantry, to wound the man who attacked her when she went out from the house to her husband's assistance. The robbers then decamped. It appears that only two of the four men actually came to the house, the other two remaining under a banian tree 99 feet away from it. During the determined attack of Ma Ngwe U, these two men were joined by one of the two who went to the house, and the fourth man, when wounded. and chased by Mg. Ngwe U. ran to these men. I think that there were not more than four men, and that the crime was not a dacoity.

Nga Maung admitted his guilt in his statement before the

committing Court, but he resiled from that in the Court of Sessions, and stated that he was tutored. He had also made an admission of his complicity in this affair to Nga Aung and others, shortly after the crime was committed, and there is ample evidence of that admission, Nga Aung being a relation of his. There is also ample evidence that he was called away to commit dacoity, and that eventually he went with Nga Pu.

In the admission which he made, it appears that he was one of the men who stayed under the banian tree 99 feet away from the house in question. The learned Sessions Judge found that his presence there assisted in the commission of the crime, and I have no doubt that this finding was correct, or that he was guilty of abetment. The only trouble is that he was never charged with abetment, the sole charge framed against him being one under Section 398 I. P. Code. This was apparently overlooked by the learned Sessions Judge, when he tried the case, since he could easily have amended the charge during the trial. Howver, on full consideration, I am not prepared to hold that the appellant Nga Maung could not be convicted for abetment, even though he was not charged therewith. In the case of *S. P. Ghose* vs. *King-Emperor* (1), it was held that the fact that an accused person has been charged with dacoity does not necessarily invalidate a verdict of guilty of abetment of robbery. That was of course, a case which was tried by a Jury, but it seems clear that the principle involved is the same.

The appellant Nga Maung called no defence witnesses, and I consider that he is proved by sufficient evidence to have abetted the commission of this attempted robbery. I shall, therefore, alter his conviction to one under Section 393-114 of the Indian Penal Code, and maintain the sentence imposed upon him by the Sessions Court. It is the maximum sentence, but when crimes of this sort are as prevalent as they are, at present, all over the Province, very deterrent sentences must be imposed.

Next I shall deal with the case of the appellant Nga Pu. As against him, there is evidence which I see no adequate reasons for doubting, that he *did* come and call Nga Maung away to commit dacoity, and that he came, with this end in view, more than once. Then there is clear evidence that he was wounded in the hand, and that he was seen with this wound shortly after the commission of this crime. Ma Ngwe U was sure that one of her *dah* cuts went home, though the others fell on the gun carried by the robber, with whom she was figthing, or else upon his *dah* for she states that he carried both weapons. It is very odd that appellant Nga Pu should have received such a wound just about that time. He has not accounted for it in a convincing and satisfactory manner. Further there is the retracted confession or admission of the co-accused Nga Maung to be considered against

(1) 8. L. B. R. 274.

this appellant Nga Pu. This, of course is of little value, taken by itself but, taken with the other facts already stated, I am not prepared to hold that the evidence was insufficient to warrant the conviction of Nga Pu for this crime. Ma Ngwe U said the blow of hers, which went home, must have wounded the robber on the *hand* and we find Nga Pu with just such a wound. I am of the opinion that there was enough evidence for his conviction. He also, called no defence evidence whatever.

One of the four assessors thought that both the appellants were guilty, and another found that Nga Pu was " a little" guilty.

The other two assessors thought that the evidence against the two appellants was insufficient for a conviction.

In regard to the appellant Nga Pu, I alter his conviction to one under Section 393|398 Indian Penal Code, and uphold the sentence. I have stated my finding in regard to Nga Maung earlier in this judgment.

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MR. JUSTICE CHARI.

MAUNG PO SIN AND ONE *vs.* MG PO SIN.

Suit on oral mortgage—Procedure—mortgagor to file suit for possession based on title.

This case draws attention to the procedure which should be observed where a mortgagor sues on an alleged oral mortgage for redemption. As the suit on the mortgage, if over Rs. 100 is not maintainable without a registered deed the proper suit is one for recovery of possession based upon title. If the mortgagee alleges an advance on the security of the land the money will be ordered to be repaid before the mortgagor is allowed to take possession.)

Maung San Min and one v. Mg Po Hlaing 4 B. L. J. 118.

Ma Twe v. Mg Lun 8 L. B. R. 334—referred to.

Judgment. *11th March 1926.*

The plaintiff filed the suit out of which this appeal arises for redemption of a piece of land alleged to have been mortgaged to the defendant without document. The date of the mortgage is 22nd of April 1922. It is alleged that the plaintiff also delivered possession of the land besides handing over the title deeds. The prayer is for redemption only. As the suit is one for redemption of a mortgage the plaintiff will have to prove that mortgage. A mortgage can only be created by a registered deed, the provisions of the Transfer of Property Act having been made applicable to Burma. Since there is no registered mortgage deed, and as the mortgage is alleged to have been for Rs. 350 there is no mortgage which the plaintiff could

Special Civil 2nd Appeal No. 284 of 1925, from the decree of the District Court of Yamethin, in Civil Appeal No. 27 of 1925.

redeem. The reference of the learned Judge to Section 91 of the Evidence Act is unnecessary. There is no question of giving oral evidence of the contents of a document which has been reduced to writing. As no mortgage has been created in accordance with law there is no existing and operative mortgage to be redeemed. The lower appellate Court therefore was right in dismissing the suit.

The proper procedure to be followed in such cases has been recently laid down in the Full Bench case of *Mg San Min vs. Mg Po Hlaing and others* (1) in whicr the case cited by the learned Judge in *Ma Htwe vs. Mg Lun* (2) has been considered and the principles applicable have been laid down. It has been pointed out by Sir. Sydney Robinson that where a suit is one for redemption only, and no mortgage has been created in accordance with law, then the suit for redemption must be dismissed. It is of course open to the mortgagor to file a suit for recovery of possession of the property based on his title in which case it may be open to the defendant to plead that he had advanced monies, which, though advancd on an invalid mortgag,e must, in equity, be repaid to him before the plaintifl takes possession of his land.

I therefore dismiss the appeal with costs.

Mr. Dutt for appellants

Leong for respondent.

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(FULL BENCH.)

SIR GUY RUTLEDGE C.J. SIR BENJAMIN HEALD J. MR. JUSTICE CARR & MR. JUSTICE CHARI.

MA SU TWIN *vs.* FATIMA BIBI AND ONE.

Court Fees Act (VII of 1870) Schedule II Art. 17 (iii)—Suit for declaration to be entitled to an Ayo-Correct Court fee payable on plaint.

A Court fee of Rs. 10 is payable on a plaint to be declared the holder of or entitled to an *Ayo*.

The plaint being one for declaration of status without consequential relief the provisions of Article 17 (iii) of Schedule II of the Court Fees Act 1870 were held to apply.

Civil Reference No. 3 of 1926 arising out of Civil 1st Appeal No. 18 of 1925, from the Decree of the District Court of Magwe in C. R. No. 15 of 1924.

(1) 4. B. L. J. 118. (2) 8. L. B. R. 334.

Referencc.

The following Reference was made by Heald & Chari J. J. in Civil 1st Appeal No. 18 of 1925 on the 20th April 1926.

Per Heald J. Appellant sued respondents to recover what is known as an *Ayo,* that is an hereditary right to apply to Government for grant of Oil-well sites in certain areas known as "reserves" and to receive such sites from Government. Her case was that the *Ayo* in question was what is known as a "female" *Ayo,* that is, one which could be held only by women, that one Ma Hla Ya was formerly holder of the *Ayo,* that the she was succeeded as holder of the *Ayo* by her granddaughter, Ma E Kyi, who was her sons' daughter, that Ma E Kyi transferred her life interest in the *Ayo* to the 1st respondent, Fathima Bibi, such transfer orf personal interest being recognised by custom, that Ma E Kyi died on the 2nd of November 1918, so that her life-interest in the *Ayo* then came to an end, that appellant being a great granddaughter of Ma Hla Ya, through Ma Hla Ya's son and grandson, and being a niece of Ma E Kyi, was by custom entitled to succeed to the *Ayo* on Ma E Kyi's death, that Ma Hnin Yan, the 2nd respondent a cousin of Ma Hla Ya also claimd the *Ayo* from the 1st respondent on the ground that she was a granddaughter of another Ma E Kyi, grand-mother of Ma Hla Ya, and great-grand-mother of appellant's aunt Ma E Kyi through whom appellant claimed, that because the 2nd respondent's suit against the 1st respondent was still pending the 2nd respondent was joined as a defendant and that appellant was entitled to a declaration that she had succeeded to the *Ayo* and that neither the 1st nor the 2nd respondent was entitled to it.

In the 2nd respondent's suit against the 1st respondent a question of the valuation of the claim for purposes of Court-fees was raised and the District Court held that Court-fees were payable *ad valorem* on the value of the *Ayo,* but dismissed the suit on the ground that the claim was barred by limitation. The 2nd respondent filed an appeal on a ten-rupees Court-fee stamp and a Bench of this Court held that Court-fees were payable in respect of the appeal *ad valorem* according to the value of the *Ayo.* The 2nd respondent failed to pay the Court-fees claimed, and as she also failed in her application to be allowed to appeal as a pauper, her appeal was dismissed.

When appellant filed her present suit a similar question of valuation for the purposes of Court-fees was raised and the District Court, considering itself bound by the decision of the Bench of this Court in the 2nd respondent's appeal, directed that Court-fees must be paid *ad valorem* on the value of the *Ayo.* Appellant's learned advocate still contended that Court-fees were not payable *ad valorem* and declined to pay such fees, with the result that appellant's suit was dismissed on the ground that her plaint was insufficiently stamped.

Appellant now alleges in appeal that the order of the Lower Court that Court-fees must be paid *ad valorem* on the value of the **Ayo** was mistaken and that such suit falls within the purview of clauses (iii) and (vi) of Article 17 of Schedule II of the Court fees Act, so that the plaint was properly stamped with a court-fee of Rupees ten.

Suits of this nature have from time to time been instituted in the Upper Burma Courts and we have sent for the records of some of those suits in order to ascertain on what basis Court-fees have been paid in the past.

We find that in C. R. Suit No. 12 of 1896 of the Township Court of Yenangyaung, which was a suit to recover a similar "female" *Ayo* the plaint was stamped with a Court-fee of Rs. 10 and that in the connected appeals in the District Court (No. 27 of 1896) and the Judicial Commissioners' Court (No. 123 of 1896) the memoranda of appeal were similarly stamped.

Again in Civil Regular suit No. 50 of 1904 of the Subdivisional Court of Yenangyaung, which also was for the recovery of a "female" *Ayo* the plaint was stamped with a ten-rupee Court-fee stamp and the memorandam of appeal in the District Court (No. 84 of 1904) was similarly stamped. In the Judicial Commissioner's Court the memorandum of appeal was originally stamped with a ten-rupee stamp but the Judicial Commissioner before whom the appeal first came, directed that it be stamped *ad valorem*. He seems, however, to have been doubtful about the correctness of his order, since he directed that the stamp should not be punched pending further orders. The deficient Court-fees stamp was furnished. The learned Judicial Commissioner before whom the appeal ultimately came for disposal, recorded the following order—"With regard to the question of valuation I am of opinion that the note of my predecessor directing the memo, of appeal to be stamped *ad valorem* according to the value of the *Ayo* and finding that value to be Rs. 40,000 on a telegram from the District Judge was incorrect. There is obviously no means of determining the value of an *Ayo*. At most a suit to recover an *Ayo* can only be a suit "for a right to some benefit (not herein otherwise provided for) to issue in or out of land" (Section 7. IV. Court-fees Act), in which case it is to be stamped according to the value at which the relief sought is valued in the plaint. For these reasons I am of opinion that the plaint and memorandum of appeal must be held to have been sufficiently stamped with a Rs. 10 stamp in each case. If the stamp has been cancelled a certificate will be granted to the plaintiff under Direction 8A. page 147 Stamp Manual to enable her to recover the value of the additional stamp duty. If it has not been cancelled it will be returned to her."

We have not been referred to any cases in which Court-fees have actually been paid *ad valorem* on the value of the *Ayo* and we have not been able to trace any such cases.

The question of the basis on which Court-fees are payable on such claims is clearly open to doubt and we are doubtful whether

the decision of the Bench of this Court in Civil 1st Appeal case No. 581 of 1922,* of the Court of the Judicial Commissioner Upper Burma was correct.

That decision was a decision of a Bench of two judges and we are not in a position to reconsider it.

In these circumstances it is clearly desirable that the question should be decided by a Bench of more than two Judges.

We, therefore, refer the following question for the determination of ssuch Bench as the learned Chief Justice may direct " On what basis are Court-fees payable in respect of a claim to be declared holder of or entitled to an *Ayo*."

Opinion. *17th May* 1926.

Per Rutledge C. J.—The question referred for our decision is "On what basis are Court-fees payable in respect of a claim to be declared holder of, or entitled to an *Ayo*."

An *Ayo* has been in our opinion correctly described in the Order of Reference as a hereditary right to apply to Government for grants of Oil-well sites in certain areas known as "Reserves" and to receive such sites from Government. It is admitted that Government is not under any obligation to grant Oil-well sites at any particular period or in any year. If, however, a grant is made it must be to a member of a particular class who have the right to apply for Oil-well sites. In these circumstances the question whether a person has succeeded to an *Ayo* seems to be one of status. This status may no doubt be a valuable one and qualify the person establishing such status to acquire specific property but does not in the first instance vest any specific property in the person.

A reference to the Plaint, which is a very inartistically drafted document, shows that all that the plaintiff is claiming is a declaration (a) that plaintiff has succeeded to Ma E Kyi's *Ayo* and that Ma E Kyi could not alienate the enjoyment of her *Ayo* beyond the term of her own life. The suit, as framed, comes under the terms of Section 42 of the Specific Relief Act. Nowhere in the plaint is there anything suggested which would lead us to think that the plaintiff has to seek for further relief and has omitted to do so. It has been suggested during the argument that the respondent has been allotted 2 Oil-well sites since Ma E Kyi's death. If this is so, and plaintiff claims them, no doubt she will have to stamp her plaint *ad valorem* in this respect. But this is not before us. We are only concerned with the case as set up in the present plaint. It is a suit to obtain a declaratory decree where no consequential relief is prayed.

It is accordingly covered by Article 17 (iii) of the 2nd Schedule of the Court-fees Act 1870, and should pay a Court-Fee of Rs. 10. I answer the Reference accordingly.

Kyaw Din for petitioner.

A. B. Banerjee for respondent.

* **Mandalay Bench.**

SIR GUY RUTLEDGE C. J. & MR. JUSTICE CARR.

ABDUL GAFFUR *vs.* MA PWA SHIN

Succession Certificate deceased following Mahomedan and Buddhist forms of worship—certificate granted to Buddhist relative.

The question which arose in this case was whether the deceased was a Mahomedan or Buddhist. The evidence on one side was that deceased had attended the mosque prayers regularly and was married and buried according to Mahomedan rites. On the other side, that the deceased was *shinpyued,* that he contributed towards the expenses of a "Katein" ceremony, and bought and presented a rahan (a relative of his mother) with yellow robes, that he used to worship at the pagoda festivals when invited, contributed to the costs of the festivals and used to offer lights to and worship at the pagoda.

In this state of the evidence it was held that the deceased had participated in acts of worship o such a Buddhist religious nature as would amount to apostacy, and that until some process of reconversion was undergone, he could not be considered a Mussalman but a Buddhist.

Judgment. *11th May* 1926.

Per Rutledge C. J.—This is an appeal from the judgment of the Additional District Judge of Myingyan dismissing the appellant's application for succession certificate to the estate of his son one Maung Ba Nyein.

The question in appeal is solely one of fact: for if, as the District Court has held, the deceased Ba Nyein was a Burman Buddhist at the time of his death or indeed was an apostate from the faith of Islam, the appellant, his father, who was admittedly a Mussalman, cannot obtain a succession certificate as he has no interest whatever in his estate.

For the appellant he himself and one of his sons, two Pathans, a Chittagonian trader and the cemetery-keeper, (a Moplah) gave evidence in which they stated that the deceased attended the mosque prayers regularly, was married and was buried according to Mahomedan rites.

For the respondent, besides herself, an elderly Buddhist Monk called U Kusala, who was the first cousin of the deceased's mother, deposes that the deceased was *shinpyued.* He first says more than 30 years ago, but withdraws this period in his cross-examination. He states that the deceased contributed towards the expenses of the "Kahtein" ceremony, and bought and presented him with yellow robes. He also says that the deceased worshipped at the

Civil Misc Appeal No. 79 of 1925 from the Order of the District Court of Myingyan in Civil Mis. No. 33 of 1924.

pagoda and used to come to his (witness's) kyaung often and worship him. This witness is corroborated by Mg. Hpi, 5th witness for the respondent, as to Ba Nyein coming to the kyaung and worshipping U Kusala, and also worshipping at the pagoda and presenting U Kusala with yellow robes.

U Maung, 6th witness for the respondent speaks to there being an image of Buddha at the deceased's house and on being asked about it the deceased replied that he was a Buddhist. He also says that the deceased was novitiated when he was 10 or 11 years of age.

The Thugyi, Mg. Aung Min, states that the deceased used to attend pagoda festivals when invited, that he contributed towards the cost of the festivals and that he used to offer lights to, and worship at, the pagoda. Several other witnesses give corroborative evidence as to Ba Nyein's religious observance.

The learned trial Judge had of course an advantage which we have not, on appeal of hearing the witnesses and coming to the conclusion whether they gave their evidence in a satisfactory manner or not.

In the state of the evidence before us we are unable to come to a different conclusion from that arrived at by him. The deceased was living in Burmese style among people, a large majority of whom were Burmese Buddhists. His mother was clearly of Burmese Buddhist birth and we have no doubt whatever that his wife was always a Burmese Buddhist. He has a near connection who is not merely a Burmese Buddhist but also a senior rahan.

We are satisfied that it has been established that the deceased participated in acts of worship of such a Buddhist religious nature as would amount to apostacy and that, until some process of reconversion was undergone he could not be considered a Mussalman.

For these reasons we consider that the appeal fails and must be dismissed with costs, three gold mohurs.

Ganguli for petitioner.

Maung Ni for respondent.

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MR. JUSTICE MAUNG BA.

MAUNG BA TIN *vs.* KING-EMPEROR

Penal Code (Act XLV of 1860) Section 376—rape—evidence substantial corroboration necessary for conviction.

It is notoriously very unsafe to convict in a case of rape on

Criminal Appeal No. 197 of 1926 from the order of the Special Power Magistrate of Bassein, in Criminal Regular Trial 216 of 1925.

the uncorroborated evidence of the woman. In the present case, the fact that the woman had recently had intercourse with some person but showed no signs of force having been used, and had reported to several persons, was held not to be substantial corroboration of her evidence.

Judgment. *22nd February* 1926.

This conviction of rape rests on the evidence of the woman alone, without any substantial corroboration. It is true that she reported to a number of people, but that she would naturally do whether the charge were true or false. The evidence of the Sub-Assistant Surgeon combined with the report of the Chemical Examiner, shows that she had sexual intercourse recently with some one, but shows no more than that. There were no signs of rape.

No motive for a false charge is disclosed, but it is notoriously very unsafe in such cases to rely on the uncorroborated evidence of the woman alone, and to make it an exception to the general rule. I consider he conviction unsafe.

I set aside the conviction and sentence passed on Nga Ba Tin and direct that he be acquitted and released.

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MR. JUSTICE DUCKWORTH.

MAUNG MYO
MAUNG PO THIN
MAUNG SHWE AUNG
vs.
MAUNG PAW SHUN
MA E MAI
MA MYA THIN

Civil Procedure Code (Act V. of 1908) *Order II, Rule 2. Previous suit for execution of conveyance—subsequent suit for possession—whether latter suit barred—cause of action.*

Where a previous suit was filed for specific performance by execution of conveyance without including a prayer for possession:—

Held that a subsequent suit for possession was not barred by Order 2, Rule 2, as the right to possession was acquired only on the execution of the conveyance.

Krishnammal vs. *Sundaraja Aiyar,* 38. M. 698—*followed.*

Judgment *27th April* 1926.

The sole point argued in this appeal was that since, in the

Civil 2nd appeal No. 401 of 1925, from the decree of the District Court Minbu in Civil Appeal No. 3 of 1925.

former suit, there was no prayer for possession, the present suit was barred under Order 2, Rule 2, Civil Procedure Code.

The facts are as follows:—

1st defendant agreed to sell 2 pieces of land to the plaintiffs, thereafter, the latter sued him to compel him to execute a registered conveyance. It was then proved that, after the agreement had been made with plaintiffs, the first defendant had sold one plot of land to the second defendant. The 3rd defendant had held a mortgage on the other plot, but it had been sold to plaintiffs with his consent, and his mortgage debt had been paid. In the first suit the plaintiffs obtained a decree, and the 1st defendant had to execute a conveyance. Nevertheless he did not give the plaintiffs possession of the land, but remained obdurate. The plaintiffs then filed the present suit for possession and have won their case in both the lower Courts.

Mr. Kale contends that this second suit was barred. He quotes *Narayana Kavirayan* vs. *Kadasawmi Goundan* (1) and *Rangayya Goundan* vs. *Nanjappa Rao* (2) in support of his claim. The first named case certainly does support him, but it was disapproved, and the second case was distinguished and explained, in the case of *Krishnammal* vs. *Sundaraja Aiyer* (3) which appears to be the leading case on the subject. There it was held that, in such circumstances, the suit for possession was not barred by Order 2, Rule 2, Civil Procedure Code, because,at the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the conveyance. The learned Judges, who decided that case, gave cogent reasons for their decision, in which I entirely concur. They clearly distinguished the case of *Rangayya Goundan* vs. *Nanjappa Rao*, (2), which was decided by their Lordships of the Privy Council, and pointed out that, in that case the facts and circumstances were quite different, as indeed was actually the case.

I therefore see no reasons for holding that this suit was barred under Order 2, Rule 2, Civil Procedure Code.

I dismiss the appeal with costs.

Kale for appellants.

Kyaw Htoon for Respondents.

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SIR GUY RUTLEDGE C.J. & MR. JUSTICE CARR.

U CHIT SU *vs.* MA HPU.

Civil Procedure Code (Act v of 1908) Section 11—Res Judicata—widow of deceased mortgagor made party to mortgage suit as

(1) 22. M. 24 (2) 24. M. 491 (P. C.) (3) 38. M. 698.

Civil Misc. Appeal 97 of 1925, from the remand judgment of the District Court of Myingyan in Civil Appeal No. 26 of 1925.

legal representative—issue raised as to title of mortgagor—subsequent suit by widow for half share maintainable.

A widow was made a party defendant to a mortgage suit as legal representative of her deceased husband. The widow pleaded that the plaintiff was not entitled to a decree for the whole of the land and the Court framed an issue whether the plaintiff was entitled to such decree. In a subsequent suit by the widow for half of the property. Held, that the second suit was not res judicata as the widow had not been impleaded in her personal capacity, and as it was not open to the Court to go into questions of title or claims of parties which are adverse to the title of the mortgagor in a mortgage suit.

Judgment. 10*th May* 1926.

Per Rutledge. C. J.—This is an appeal from a judgment of the District Court of Myingyan reversing the judgment and decree of the Township Court of Taungtha. The Township Court held that the present respondent's suit for declaration that she was half owner of certain mortgaged land was *res-judicata* because in suit No. 7 of 1924, in the same Township Court the present appellant sued Ma Hpu as legal representative of her deceased husband, Ba Khin, for a mortgage decree, and that Ma Hpu in her written statement claimed that the plaintiff was not entitled to a mortgage decree for the whole land, and on the pleadings the Court framed as the third issue. "Is the plaintiff entitled to have a decree on the mortgaged properties in Exhibit A."

It must be noted that Ma Hpu was not sued in her personal capacity and could not be sued in this capacity unless she had joined in the mortgage or consented to it, and as it is not open to the Court in mortgage suits to go into questions of title or claims of parties which are adverse to the title of the mortgagor, it was not necessary that Ma Hpu should be a party in her personal capacity to the mortgage suit. She did not in her written statement clearly raise the claim that in her personal capacity she was the owner of one-half of the property alleged to be mortgaged, and we consder that the judge, in so far as he purported to go into the question of title to the property mentioned in the mortgage, was going beyond what he was legally entitled to do.

In these circumstances we must agree with the finding of the District Court that the respondent-plaintiff's suit was not barred by *res-judicata*. The appeal must accordingly be dismissed with two gold mohurs costs.

Kale for the appellant.

Maung Ni for the respondent.

MR. JUSTICE DUCKWORTH.

KO MAUNG AND ONE. *vs.* MAUNG BA HTWE.

Evidence—Amissibility of unsigned Pyatpaing—evidence of Revenue Surveyor who recorded Pyatpaing.

A Pyatpaing (Foil of Register No. VII) is admissible in evidence notwithstanding that it has not been signed by the transferors and transferees. In the present case the Pyatpaing was proved by the Revenue Surveyor who recorded it and was held to be admissible in evidence for what it was worth.

Maung Cheik v. *Maung Tha Hmat.* 1. L.B.R. 160—explained *Pointed out*—**The mere fact that a witness is related to a party is not a true criterion for holding that he has given untrue or perjured evidence.**

Judgment. *27th May 1926.*

There are no merits in this appeal, which can only lie under Section 100. C. P. Code, and it is not easy to comprehend why it was admitted at all.

The question of jurisdiction was waived at the hearing by Mr. Leong and his sole grounds of appeal, at the actual argument, were that the "Pyatpaing" in question (Foil of Register VII) was not admissible in evidence, since it had not been signed by the Transferors and Transferees, and that the respondent-plaintiff's evidence consisted in statements of his relatives, whilst the evidence as to mutation of names was discrepant.

As to the actual evidence, there are concurrent findings by both the Lower Courts. These findings were not perverse, and were based on regular evidence. The mere fact that a witness is related to a party is not a true oriterion for holding that he has given untrue or perjured evidence. I refuse to interfere in regard to these findings of fact.

In regard to the admissibility in evidence of the Pyatpaing, Mr. Leong quoted the case of *Maung Cheik v. Maung Tha Hmat* (1) but that decision has been much misunderstood, and does not go as far on general principles as the head note would indicate. The Pyatpaing in the present case was proved by the Surveyor, who recorded it, and *was* admissible in evidence for what it was worth. This

Civil 2nd Appeal No. 287 of 1925, from the Decree of the District Court of Myaungmya in Civil Appeal No. 26 of 1925.

(1) I. L. B. R. 260.

is clear from a perusal of the cases of *Maung Hlaing v. Maung Chit Su* and others (2) *Ko Po Maung v. Ma Mein Gale* (3). Moreover, there was much other evidence to corroborate the facts entered in the Pyatpaing. In my view the decisions of the two Lower Courts were correct.

The Appeal is dismissed with costs.

Leong for appellant.

Mr. Ganguli for respondent.

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(FULL BENCH-.

SIR GUY RUTLEDGE, C.J. SIR BENJAMIN HEALD J. AND MR. JUSTICE CHARI.

* H. A. AZIZ *vs.* KILYOBOY.

Rangoon Rent Act (Burma Act II of 1920) Section 18—Order of Chief Judge, Rangoon Small Cause Court under Section 18—High Court no jurisdiction to reverse.

The Chief Judge of the Rangoon Small Cause acts as *persona designata* and not as a Court when exercising the powers conferred on him by Section 18, Rangoon Rent Act 1920 (Section 20 of the Act of 1925).

The High Court has no jurisdiction to revise decisions of the first (now the Chief) Judge of the Court of Small Causes in Rangoon in respect of references under Section 18, of the Rangoon Rent Act 1920 (now Section 20 of the Act of 1925).

M. E. Moola v. S. R. Jandass 11, L. B. R. 387—1. B. L. J. 138 (F. B.)—disapproved.

K. A. M. Moideen v. Bukshi Ram 3, Rangoon 410—followed.

The Municipal Corporation of Rangoon v. M. A. Shakur 3. Rangoon, 560—4. B. L. J. 202—applied.

Vijiaraghavulu Pillay v. Theagoraya Chetty, 38. Mad. 581—approved.

Balakrishna Pramanik v. A. K. Roy, 26, C. W. N. 30.

Kali Dasi v. Kanai Lal De, 26. C. W. N. 53.

Chatterjee v. Tribedi, 20. C. W. N. 78.

India Engineering and Motor Company v. Gladstone Wyllie and Co., 26. C. W. N. 102; *Allan Bros v. Bando*, 49. C. 931—distinguished.

Reference.

The following Reference was made by Heald. J. in Civil Revision No. 135 of 1925 on the 1st March 1926:—

Civil Reference No. 1 of 1926.

(2) 1. Rang. 135. **(3) 1. Rang. 562.**

Heald J.—Applicant who is Managing Trustee of the Bengali Mosque in Rangoon, applied to the Rent Controller for a certificate that the standard rent of two stalls, which were in the occupation of respondent, was Rs. 4-8-0 a day.

The Controller granted a certificate but certified the rent as Rs. 2-8-0 and not Rs. 4-8-0 a day.

Applicant qustioned the decision of the Controller and referred the matter to the 1st Judge of the Court of Small Causes under Section 18 of the Rangoon Rent Act.

The Judge said that he saw no reason to differ from the Comtroller's finding and dismissed the application.

Applicant now asks me to revise the order of the Small Cause Court Judge, and the question arises whether or not this Court has power to revise such an order.

That question was raised in the case of *M. E. Moola* vs. *S. R. Jandass* (1) and a Full Bench of the Chief Court decided it in the affirmative. Doubts have, however, been cast on the correctness of the judgment in that case by the decision of a Full Bench of this Court in Civil Reference No. 6 of 1925, and the concluding passages in the judgment of the Full Bench in Civil Reference No. 12 of 1925, suggest that the question whether the 1st Judge of the Court of Small Causes Rangoon in deciding references under Section 18 of the Rangoon Rent Act 1920, (which corresponds to Section 20 of the Rangoon Rent Act 1925) acts as a Court or as a *persona designata* should be reconsidered.

I therefore refer for the decision of a Bench of two Judges or of a Full Bench, as the Chief Justice may direct, the following question:—"Has this Court jurisdiction to revise decisions of the 1st Judge of the Court of Small Causes, Rangoon, in respect of references under Section 18 of the Rangoon Rent Act 1920".

Opinion. *27th May* 1926.

Per Rutledge C. J.—The question referred for the decision of this Bench is:—

"Has this Court jurisdiction to revise decisions of the 1st Judge of the Court of Small Causes, Rangoon, in respect of references under Section 18 of the Rangoon Rent Act 1920?"

A Full Bench of the Chief Court of Lower Burma held that the orders of the Chief Judge of the Court of Small Causes, Rangoon, in references under Section 18 of the Rangoon Rent Act 1920, were subject to revision by the Chief Court. *M. E. Moola* vs. *S. R. Jandass* (1). It is clear from the judgment of the learned Chief Justice in that case that the basis of the decision was that the Rent Controller when exercising the powers conferred on him by the Rangoon Rent Act, acts as a Court subordinate to the Chief Court and that *a fortiori* the Chief Judge of the Rangoon Small Cause Court in dealing with references from the decisions of the Rent

(1) 11. L. B. R. 387:—1. B. L. J. 138 (F.B.)

Controller acts as a Civil Court, and, as such, must be subordinate to the Chief Court. The revisionary powers of the Chief Court in respect of the decisions of the Rent Controller under the Rangoon Rent Act were not, in the case last cited, directly in question, a Full Bench of this Court held that the Rent Controller was not a Civil Court and that this Court had no jurisdiction to interfere with the decision of the Rent Controller in revision, either under Section 115 of the Civil Procedure Code or under Section 107 of the Government of India Act, (*K. A. M. Mohideen* vs. *Bukshi Ram* (2). In a later case another Full Bench of the High Court held that the Chief Judge of the Court of Small Causes Rangoon, in exercising the powers conferred on him by Section 14 of the Rangoon Municipal Act (Burma Act VI of 1922) acts as a *persona designata* and not as a Court (*The Municipal Corporation of Rangoon* vs. *M. A. Shakur* (3).

The wording of the relevant sections in both the Acts (The Rangoon Rent Act and the Rangoon Municipal Act) is similar and it is therefore, in our opinion, necessary to reconsider the Full Bench decision of the late Chief Court in the light of those later decisions.

The relevant sections relating to the functions and powers of the first Judge (now the Chief Judge) of the Rangoon Small Cause Court are Sections 18, 22, and 23 of the Rangoon Rent Act (Burma Act II of 1920). This Act has been repealed and replaced by Burma Act IX of 1925, but Sections 18, 22 and 23 have been re-enacted as Sections 20, 24 and 25 in the new Act.

Sections 18, 22 and 23 run as follows:—

"Section 18.—If the decision of the Controller fixing the standard rent for any premises is questioned, a reference shall lie to the 1st Judge of the Court of Small Causes, Rangoon, or the Judge of such other Court as the Local Government may by rule direct. A copy of the order of the Controller shall be filed with the petition of reference. The petition of reference shall bear a Court-fee stamp of 8 annas. Any such reference shall be filed within thirty days from the date of the order passed by the Controller. The time taken in obtaining a copy of the order of the Controller shall be excluded in computing the period in which the reference must be filed. The decision of the 1st Judge of the Court of Small Causes Rangoon or the Judge of such other Court as aforesaid, shall be final.

Section 22 (1).—The Local Government may make such rules as it thinks fit, for the purpose of giving effect to the provisions of this Act.

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(2) 3. Ran 410:—

(3) 3. Ran 560:—4. B. L. J. 202 (F.B.)

(2) Without prejudice to the generality of the foregoing provisions, such rules may—

(a) regulate the procedure to be followed in enquiries by the Controller under this Act;
(b) direct that such enquiries shall be conducted as far as desirable in private;
(c) direct that references from decisions of the Controller shall be to the Judge of any Court other than the Court of Small Causes, Rangoon.
(d) prescribe a scale of costs and fees and provide for the charging or remitting of costs and fees.

Section 23.—In disposing of references from the decision of the Controller the Judge shall follow, as nearly as may be, the procedure laid down in the Civil Procedure Code, for the regular trial of suits."

With reference to the functions and powers of the Rent Controller and the first (now Chief) Judge of the Rangoon Small Cause Court, the learned Chief Judge of the late Chief Court in the Full Bench judgment above referred to said, "The Controller's duty is to fix the standard rent which is declared ordinarily to be the rent at which the premises were let on the 1st April 1918; he is given further powers in certain cases of fixing the standard rent at such amount as, having regard to the provisions of the Act and the circumstances of the case, he may deem just.He may for instance, fix the rent higher than that which was payable on the 1st April 1918, when, in his opinion, that rent was unduly low. He is given authority by written order to require any person to furnish him with particulars as to the rent that had been previously payable. He may require him to produce his accounts and rent receipts etc., for inspection. He is given power to summon and enforce the attendance of witnesses and compel the production of documents by the same means and so far as may be in the same manner as is provided in the case of a Court by the Code of Civil Procedure 1908. He has to decide on a Civil dispute as to proprietary rights between the landlord and the tenant and it is to my mind clear that in so doing he is given, although not in express language as the President is given in Calcutta by Rule 24, of the rules made under that Act, all the powers that a Civil Court could possess. In my opinion, therefore, so far as the Controller is concerned it must be held that he is acting judicially in the exercise of a Civil jurisdiction and that he must therefore he held to be a Civil Court, and in the absence of anything in the Act to the contrary he must therefore be held to be a Court subordinate to this Court. As regards the first Judge of the Court of Small Causes, he also acts as a judicial tribunal to revise the order of the Controller. In disposing of references he is directed by Section 23 to follow as nearly as may be the procedure laid down in the Civil Procedure Code for the

regular trial of suits. It is open to him to take further evidence and to call for further documents to enable him to deal fully with the matter. It is true that the power is conferred on the first Judge of the Court of Small Causes and not upon any Judge of that Court, and that the power is not conferred, as it is in the Calcutta Act, in the case of premises situate outside Calcutta, on the principal Civil Court of original jurisdiction in the District. But that alone is not sufficient to show that he is merely a *persona designata* appointed for a special purpose, or to show that he is acting merely in a ministerial or administrative capacity. He will decide questions of Civil rights in the same manner as a Court exercising civil jurisdiction would do, and in my opinion he must be regarded as a Civil Court and as a Court subordinate to this Court. Section 18, no doubt provides, that his decision shall be final, but there is nothing to show that this expression is used in any other meaning than in its ordinary legal meaning, viz, that his order shall not be appealable."

With great respect we cannot agree with the learned Chief Judge as to the inference to be drawn from a consideration of the provisions of the Act. It may be that the Act intended that the Rent Controller and the first Judge of the Rangoon Small Cause Court should exercise judicial or quasi-judicial powers and should discharge their functions in the same manner as a judicial tribunal but, in our opinion, this does not necessarily mean that these authorities are "Courts". (See *Vijiaraghavulu Pillay* vs. *Theagoraya Chetty* (4).

A legislative direction that the newly created authority or the authority invested with newly created powers should act in the same manner as judicial tribunals, and should as far as possible conform to recognised judicial procedure, might be taken as suggesting an inference exactly contrary to that drawn by the learned Chief Judge. In the concluding portion of our judgment in the *Municipal Corporation of Rangoon* vs. *M. A. Shakur* (3), we said. "When by an Act of the Legislature a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act and a Judge or Presiding Officer of a Court, as distinct from the Court itself is directed to perform the functions of the newly created authority then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature was that the Judge or Presiding Officer should perform those functions as a *persona designata* and not as a Court. Such a presumption is stronger in the case of a Court like the Rangoon Small Cause Court which consists of a plurality of judges, when only one particular Judge is invested with the new powers.

We are still of that opinion and we think that the first (now Chief) Judge of the Rangoon Small Cause Court, when exercising the powers vested in him by Section 18 of the Rangoon Rent Act 1920 (Section 20 of the present Act) exercises those powers not as a Court but as a *persona designata*.

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(4) 38. Mad. 581.

Our attention has been drawn to certain cases decided by the Calcutta High Court *Balakrishna Pramamok* v. *A. K. Roy (5) Kali Dasi* v. *Kanai Lal De* (6) *Chatterji* v. *Tribedi* (7) *Indian Engineering and Motor Co.*, v. *Gladstone Wyllie and Co.*, (8) *Allan Bros.* v. *Bando (9)*. It is assumed in these cases that the Rent Controller and the President of the Calcutta Improvement Trust when exercising powers vested in them by the Calcutta Rent Act are "Courts." In the case of *K. A. M. Moideen* v. *Bukshi Ram (2)* the difference in the wording of the clauses of the Letters Patent creating the Calcutta High Court and the Rangoon High Court was pointed out, but in the view we have taken that the first (now Chief) Judge of the Rangoon Small Cause Court acts as a *persona designata* and not as a "Court" when exercising the powers conferred on him by Section 18 of the Rangoon Rent Act of 1920, it is not necessary to lay any stress on this distinction or to consider the extent of the powers of the Rangoon High Court as compared with those of the Calcutta High Court. We therefore answer the question referred to us as follows:—

"The Court has no jurisdiction to revise the decisions of the first (now Chief) Judge of the Court of Small Causes Rangoon in respect of references under Section 18 of the Rangoon Rent Act 1920."

Auzam, for appellant.

Bose for respondent.

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FULL BENCH.

SIR GUY RUTLEDGE C. J. SIR BENJAMIN HEALD, J.
MR. JUSTICE CARR, MR. JUSTICE CHARI AND
MR. JUSTICE J. A. MAUNG GYI.

MAUNG PO AN *vs.* MA DWE.

Burmese Buddhist Law—Keiktima adopted son—whether entitled to partition of orosa's one-fourth on death of adoptive father.

A *keiktima* adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father the orosa son's quarter share of the estate of the adoptive parents.

Ma Gun v. *Ma Gun*, S. J. 33:—*Sa So* v. *Mi Han, II. U. B. R.* (1892-96) 171:—*Ma Gyan* v. *Mg Kywin, II U. B. R.* (1892-96) 176:—*Ma Thin* v. *Ma Wa Yon*, 2. L. B R. 255 (F.B.): —*Tet Tun* v. *Ma Chein*, 5. L. B. R. 216:—*Ma Thein* v. *Ma Mya*, 5. B. L. J. 70:—*Kirkwood* v. *Maung Sin*, 3. B. L. J. 304 (P.C.)—*Considered.*

Civil Reference No. 6 of 1926.

(5) 26. C.W.N. 30. (6) C.W.N. 53.
(7) .26. C.W.N. 78. (8) 26 C.W.N. 102.

(The Bench ruling in Ma Thein vs. Ma Mya & one (5. B. L. J. 70) which was in the press at the date of this judgment, must be taken to be over-ruled so far as the claim to the orosa's one-fourth is concerned—Ed.)

Reference.

The following reference was made by Heald and Chari J. J. in Civil 1st Appeal No. 27 of 1925, on the 27th April 1626.

Per Heald J. This is a typical Burmese Buddhist inheritance case and shows clearly the desirability of some form of registration of adoptions.

One San Dun, a comparatively wealthy Burman Buddhist died in June 1924, leaving a widow, the respondent Ma Dwe, with whom he had lived for many years as man and wife in possession of practically the whole of his estate.

After his death one Ma On Hmyin, whom he had kept in a separate house, made common cause with the present appellant Po An, and claimed that appellant had been adopted by San Dun and his wife Ma Dwe as their only son, that being an only son he was *auratha*, that as *auratha*, he was entitled to a quarter of the joint estate of his parents by reason of his father's death, that Ma On Hmyin was a wife of equal *status* with Ma Dwe, and that therefore she was entitled to recover from Ma Dwe half of the three-quarters of the estate which would be left after appellant had taken his quarter share. As usual in such cases the suit was brought *in forma pauperis*.

Respondent, Ma Dwe, said that Ma On Hmyin was not a wife of San Dun, that if she could be regarded as a wife she was merely an inferior wife who would be entitled only to such property as the husband had given to her before he died, that even if she had been a wife, she had forfeited that *status* by reason of her adultery and neglect of her husband, that even if she was a wife with full rights of inheritance she would be entitled to inherit only in respect of such of the property comprised in San Dun's estate as had been acquired by her and San Dun jointly, that Po An was not adopted by San Dun and Ma Dwe at any time, that she and San Dun had adopted one Po Zon as their son, that Po Zon was older than appellant Po An, so that even if Po An had been adopted he would not be entitled to claim the *auratha* son's quarter share, that an adopted son could never be *auratha*, that if Po An were held to have been adopted in the *apatitha* form he could not claim any share of the estate while she was alive and that if he had been adopted in any form, he had forfeited his *status* by prolonged separate living and by neglect of his filial duties. She also denied that various properties, which Ma On Hmyin and Po An alleged to belong to the estate, did belong to it.

So far we have in the case an admitted widow and a claimant whose *status* as widow was disputed, a claimant as adopted son, and another alleged adopted son who was defending the case on the admitted widow's behalf. But that was not all. Six other claimants appeared and alleged that they were children of another adopted son, Tha Myat, and claimed to be added as parties to the suit, presumably as plaintiffs suing *in forma pauperis*.

The Lower Court refused to add these alleged adopted *grand* children, relegating them to a separate suit, and, holding that the claims of Ma On Hmyin and Po An could more conveniently be tried separately, directed that they should be tried in separate suits.

Ma On Hmyin's suit has since been dismissed, it being held that she was a mere mistress and not a wife entitled to inherit.

It does not appear whether or not the children of Tha Myat have yet filed a suit.

In the appellant Po An's suit, the Court framed a preliminary issue of law as to whether or not under Burmese Buddhist law an adopted child can ever be *auratha*, and, finding on that issue in the negative, dismissed the suit.

Po An appeals against that finding.

The question is one on which there seems to be no authoritative decision, though there are cases in which such a claim has been admitted without question.

In the case of *Sa So* v. *Mi Han* (1) it is said to have been admitted that a son adopted in the *keiktima* form is practically in the position of a natural son. In that case the adopted son, who was the only child seems to have made no claim against his adoptive mother after his adoptive father's death, but after the adoptive mother's death, he impugned a gift of the property comprised in the estate, made by her, on the ground that the gift was invalid as having been procured by undue influence. The Court held that the allegation of undue influence was not established, but gave the plaintiff a decree for a quarter share of the property on the strength of a passage in *Attasankhepa* and on the assumption that a *keiktima* child is on the same footing as a natural-born child, and that therefore a *keiktima* child can be *auratha*. All that it is necessary to say about this, is that the metrical authority cited by the Kinwun Mingyi in *Attasankhepa* refers to "own children" and that the Kinwun Mingyi's commentary refers to the son who takes a quarter share as "*auratha*" which as has been pointed out in the case of *Ma Thein* v. *Maung Sin* (2) literally means "child of the body" and is used in Burmese Buddhist Law as meaning also "eldest born child" but never, so far as I know, applied to an adopted child.

(1) 11. U.B.R. (1892-96) 17.
(2) 2. Ran. 693—3 B.L.J. 304, (P.C.)

In the case of *Ma Gyan* v. *Mg Kywin* (3) where there was an adopted daughter and a younger natural daughter, it was said that "the completely adopted child comes into the adoptive family with the just and reasonable expectation of being placed on the same footing as a natural child," and that "the ordinary rules of inheritance prevail as in the case of natural-born children." If this statement of the law is correct, it would seem to follow that a *keiktima* child can be *auratha*, which to a Burman Buddhist jurist would, I think, have been a contradiction in terms.

In the case of *Ma Thein* v. *Ma Wa Yon* (4) it was held that an adoptive daughter, who is the only child, is, on the re-marriage of the mother after the death of the father, entitled to claim from the mother, one-fourth of the estate and it was said:—"It does not affect the question that the plaintiff is an adopted daughter, for the *keiktima* adopted child takes the same place as the natural child." There was no discussion of the authorities on this point, but the decision clearly recognised the right of the *keiktima* child to be *auratha*.

It would thus appear that so far as the case-law is concerned it has been assumed that the *keiktima* child has exactly the same rights as the natural-born child, and that therefore the *keiktima* can be *auratha*, but no direct authority from the *Dhamathats* has been cited for the latter assumption and the grounds on which the former assumption was based seem to need reconsideration.

The *Manugye* deals with adoption regarded as a gift of the child by its parents in the 3rd Chapter of the 8th Book, and also deals with it again in the 4th Chapter of the same book. These authorities show that adoption was not necessarily permanent, and that in certain circumstances the parents could take the child back, while in other circumstances the adoptive parents could return the child whom they had taken in adoption, and in still other circumstances compensation was payable by the parents to the adoptive parents, or *vice-versa*, for the return or retention of the child. There is a quotation from *Manugye* cited in Section 201 of the *Kinwun Mingyi's* Digest (Vol 1) which reproduces also a rule of *Dhamma* to the effect that if parents with or without children of their own adopt another person's child as their child, and if while they are bringing up the child, own children, or, in a case where they have no children of their own, their relatives, say they ought not to adopt the child and turn the child out, they shall pay to the child sixty pieces of silver. Chapters 26 and 27 of the 10th book of *Manugye* deal with the rights of *keiktima* children in respect of inheritance, and lay down the law as follows:—

"Where there are natural-born children as well as an adoptive child, if the adoptive child on coming of age leaves the adoptive family and returns to its own parents, it is not entitled to share in the property of the adoptive parents though it may keep property which has

(3) 2 U.B.R. (1892-96) 176.
(4) 2. L.B.R. 255 (F.B.)

already been given to it. If the *keiktima* child lives with the adoptive parents and the adoptive parents die, then it is said that that *keiktima* publicly and notoriously adopted son inherits as eldest if with the parents he was eldest, as 2nd if he was 2nd and as last or youngest if he was last or youngest. This means that he shall share with the eldest own son or daughter as among the eldest, with the second own son and own daughter (as amongst second sons and daughters) and with the last and youngest own son and daughter equally, because the child thus publicly and notoriously adopted does not return and enjoy the inheritance of its own parents. As for the inheritance of *keiktima* children, where are no own children, the law is laid down as follows:—"If there are no children or descendants of either of the adoptive parents, then, on the death of the adoptive parents the adoptive child inherits all their property, except that, in the adoptive parent's share of property inherited by them from their parents which has not yet come into the possession of the adoptive parents, the adoptive child shall have only half and the relations, that is the brothers and sisters of the parents who inherited the property, shall have the other half." The meaning of the rule cited in *Manugye* to the effect that the *keiktima* child "shall inherit as eldest if he was eldest with the parents" and so on, is obscure, and the author attempted to explain it.. It might be read as meaning that if the adopted son was eldest in his own family he was entitled to be regarded as eldest in the adoptive family, and it has been argued that that is what it does mean. Dr. Richardson translated the explanation "If it (the adopted chlid) be of the same age as the eldest child of the adopting parents, or as the second, or younger, it shall share equally with them". I think it probable that what *Manugye* intended was merely that the adoptive child should take its place and its share in the adoptive family according to its age that is, that it should take the share given to a *keiktima* child according to its place in the family. It is true that *Manugye* does not give the rules which state the share of the *keiktima* according to its position in the family, but many other *Dhammathats* do, and it must be remembered that *Manugye* is not a complete Code, but merely a collection of rules (possible) for doubtful cases, the ordinary rules of inheritance being so well known that it was not considered necessary to reduce them to writing, see the case of *Ma Tin* v. *Ma Shwe Sin* (5). It is clear in any case that the wording of the passage in *Manugye* is elliptical and obscure.

In these circumstances it is permissible to refer to the other *Dhammathats*, extracts from which are to be found in Section 181-196 of the Digest (Vol. I.) In these sections it is to be noted that the word *auratha* is constantly opposed to *keiktima* meaning "own child" as opposed to "adopted child."

The passage which has already been cited from *Manugye* is reproduced in Section 189 of the Digest, and as usual appears also in *Amyeb'on* which ordinarily reproduces *Manugye* sometimes with verbal alterations. A metrical version of what was obviously the same authority also appears in *Cittara*. The *Dhamma* which is said to be a *Dham-*

(5) 4. Ran. 27 (at page 34)—5. B L.J. 51. (F.B.)

mathat of the same period as *Manugye*, that is of the letter half of the 18th century, gives a similar rule since it says "If the *keiktima* child lives with them, when the adoptive parents die, let it share equally in the property of the deceased according to age with the own sons and daughters of the deceased."

The *Dayajja* which is said to be an early 19th century *Dham mathat* and is in verse, says, that if the *keiktima* lives with the adoptive parents and the parents die, the eldest own child is to have five-sixths of the estate and the *keiktima* one-sixth, that if the *keiktima* is the eldest and the own child comes second, the *keiktima* is to have one-fifth and the own child four-fifths, that if the own child is younger but not the youngest child, he is to have three-fourths and the *keiktima* one-fourth, and that if the own child is last or youngest, he and the keiktima are to share equally. The method of partition intended by this authority, where there are several children, may not be very clear, but at any rate the passage shows clearly that the *keiktima* was not by any means regarded as being on equal terms in the family with the adoptive parents own children, A similar result appears from the passage in *Dayajja* cited in Section 190 of the Digest, where it is said that if there are *auratha*, *keiktima* and *apatitha* children living with the parents, the *keiktima* is to get one-sixth the *apatitha* one-sixth of the remainding five-sixths, and the *auratha* the remainder. The *Mano* or *Dhammathatkyaw*, *cited* in Section 191 of the Digest, also gives the *keiktima* one-sixth, and the *auratha* five-sixths, and so do all the others cited in that section except *Dhammasara*, a 19th Century *Dhammathat*, which makes the share one-fifth and four-fifths. The *Dhammathats* cited in Section 192 of the Digest, deal with the case where the *keiktima* is living with the parents and the *auratha* is not, and practically all of them, give the *keiktima* one-fifth and the *auratha* four-fifths the only exception being the *Vinicchaya* which gives the keiktima two-sixths and the *auratha* four-fifths and the *Dhammasara*, which gives the *keiktima* one-fourth and the *auratha* three-fourths The *Dhmmathats* cited in Section 193 lay down, the rule, that if there are no children or descendants of children, the *keiktima* child, who was living with the adoptive parents up to the time of their death, inherits the whole estate to the exclusion of the brothers and sisters of the deceased. That is the rule which has already been cited from the 27th Chapter of the 10th book of *Manugye*, and the second part of the rule as herein laid down appears in the *Dhammathats* cited in Section 194. The *Manu* cited in Section 194, and the *Rajabala*, cited in Section 196 say, that if there is an owu son as well as a *keiktima* son, then the two divide between them the undivided share of the parents in property inherited from their parents, the parents' coheirs taking no share, and the *Manu* says that the own son and the *keiktima* son divide the share between them according as they are younger or elder, according to the rules already laid down while the *Rajabala* seems to say that the own son and the *keiktima* son are to divide the parents' share equally between them. The authorities cited in Section 195 lay down that a *keiktima* child who does not live with the adoptive parents does not inherit if there are own children of the adoptive parents, and the *Waru* adds that even if there are no own children, the *keiktima* child who lives separately does

ot take the estate but gets only half of it, the other half going to the eceasod parents' relative, while the *Cittara* says that where there are o own children the *keiktima* who lives separately from the adoptive arents inherits only as if he were *apatitha* which seems to be the ame rule differently expressed, vide Section 198 of the Digest.

We now come to the *Attasanhepa*, which was the latest compilaion of the Buddhist Law in the time of the Burmese Kings. In Section 76 of that work, the learned author apparently quotes from some ietrical *Dhammathat* the rule for partition where the *auratha* and *eiktima* both live with the parents, and paraphrases that rule as folows:;" Let the inheritance be divided into six shares and let the *uratha* child who lives with the parents take five shares. One share et the *keiktima son* who lives with the parents take. Of the four elationships in which the said *keiktima* who lives with the parents nd the said *auratha* who lives with the parents may stand to each ther, namely eldest, second, little. or least child (or as the translator n the official edition puts it "eldest, elder, younger or oungest child of the family"). If (the *auratha*) is ldest, let onesixth be given to the *keiktima* child iving with the parents. If the auratha is the second let the nheritance be divided into five shares and let one share be given to he *keiktima* living with the parents, if (the *auratha*) is the "little" hild, let the inheritance be divided into four shares and let the *eiktima* living with the parents have one share; if (the *auratha*) be he least child let him divide the inheritance equally with the *keiktima* iving with the parents." This is the sane rule as that given in *Dayajja* s cited in Section 189 of the Digest. In Section 177 of *Attasan-kepa* the author quotes from the metrical *Dhammathat* the rule for partition when the *auratha* son lives apart and the *keiktima* lives with he parents, and paraphrases that rule as follows:—"Let the inheritance e divided into five shares, and let the *keiktima* who lives together ave one share and the *auratha* child have four shares." This is he rule given by all the *Dhammathats* except *Vinicchaya* and *Dhamanasara* in Section 192 of the Digest (see above). Similarly in Section 178 the author of *Attasankhepa* cites the metrical *Dhamamathat* on the question whether or not the *keiktima* who lives in a separate house from the adoptive parents is entitled to inherit and ranslates that rule into prose as follows. If the *keiktima* child lives n a separate house, let him have only what has come into his hands. Let him net take any share of the inheritance" That is the rule given in Section 195 of the Digest. In Section 179 of the *Attasankhepa* the rules laid down in Sections 193 and 194 of the Digest are stated, and it is said that in the absence of children or other descendants, the *keiktima* inherits all the property of the adoptive parents except the adoptive parents' share of property inherited from heir parents, where that share has not yet come into the adoptive parents possession. In such a share the *keiktima* and the relations. (brothers and sisters) of the adoptive parents, are to share equally.

From all these authorities it seems clear that in the Burmese Buddhist Law books the *keiktima* child was not by any means regarded as being on an equal footing with the "own" child.

It must be remembered that in Burmese Buddhist Law the own children did not share equally among themselves but took decreasing shares from the eldest downwards, *vide* the elaborate rules contained in Section 161-167 of *Attasankhepa* and in the *Dhammathats* including *Manugye* cited in Sections 137-161 of the Digest. Those complicated rules are now regarded as being obsolete, and the present rule is, that except for the special share awarded in certain circumstances to the eldest-born child who grows and is not subject to certain physical disabilities, and the special share awarded to the eldest born child on the remarriage of a surviving parent, the children share equally in the parents estate. But even if the obscure passage cited above from the 26th Chapter of the 10th book of *Manugye* be read as meaning that the *keiktima* child takes its place according to its age among the own children of his adoptive parents, then, although under the modern rule it would share equally with the other children it does not seem to me to follow that if it was the eldest child of the family it would necessarily acquire the rights of *auratha* or eldest born, either on the death of one parent, or on the remarriage of the survivor. On the contrary I am strongly of opinion, as I have suggested above, that any Burman jurist who was familiar with the *Dhammathats* and with the constant opposition in meaning between *auratha* and *keiktima* would have regarded the proposition that the *keiktima* could ever be *auratha* as a contradiction in terms. One has only to refer to the lists of children who are entitled to inherit, as given at the end of the 10th book of *Manugye,* or in Section 150 of *Attasankhepa,* or Section 16 of the Digest, and to remember the constant opposition of *auratha* to *keiktima* in the Dhammathats which give the rules relating to the inheritance of *keiktima* children to realise how difficult it would be for a Burman Buddhist Law writer ever to regard the *keiktima* as *auratha,* and since there is certainly no passage anywhere in the *Dhamathats* which says that if the *keiktima* is the eldest child in the adoptive family he is to be regarded as *auratha* or to have the *auratha* son's special and exceptional right to claim from the mother on the death of the father one-fourth of the joint estate, I am strongly of opinion that the learned Judge in the Lower Court was right in holding that an adopted child can never be *auratha* and that appellant's suit was bound to fail.

I find however that a contrary opinion has very recently been expressed by a Bench of this Court in the case of *Ma Thein* v. *Ma Mya* (6) where the learned judges expressly held on the strength of the passage in the 26th Chapter of the 10th book of *Manugye* and the corresponding passage in *Dhamma* to which I have referred, that an adopted child can be *auratha.* I would with all respect suggest that the rule given in those authorities that the adopted child takes its share in the adoptive family according to age cannot be interpreted as meaning, that if the adopted child is eldest it takes the eldest child's share, or as meaning more than that if the adopted child is eldest, it takes the special share given to the adopted child who is eldest child of the family.

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(6) Civil 1st Appeal No. 171 of 1925, (5, B. L. J. 70).

But even if it could be taken as meaning that the adopted child if eldest in the family, takes the special share given to the eldest child by the old rules of Buddhist Law, which are now regarded as being obsolete, I still think that it would not follow that the *keiktima* child can be regarded as *auratha* and that there is no authority in the *Dhammathats* for the proposition that a *keiktima* child can ever be *auratha*.

In this connection I feel bound to note that in the judgment in *Ma Thein's case* (6) the learned Judges seem to have propounded another proposition of Burmese Buddhist Law which is contrary to the opinions of Judges who decided the case of *Ma Thein* v. *Mg. Sin* (2) and is, in my opinion, contrary also to the rule to be found in most of the *Dhammathats*, namely, that on the death of the father the *auratha* daughter can recover from the mother, a quarter of the joint property, even if the mother does not marry again.*

The question whether or not that part of the decision is correct does not arise in the present case, but in view of the decision of the learned Judges, that a *keiktima* child can be *auratha* with which decicion I respectfully disagree for reasons which I have given above, I think that all we can now do in this case is to refer for the decision of a Full Bench the following question.

"Is a *keiktima* adopted son entitled to claim from the adoptive mother on the death of the adoptive father, the *auratha* son's quarter share of the joint estate of the adoptive parents?".

Opinion. 31*st May* 1926.

Per Heald J. The question referred to us for decision is whether or not a *keiktima* adopted son is entitled to claim from the adoptive mother on the death of the adoptive father the *auratha* son's quarter share of the joint estate of the adoptive parents.

The commentary to Sparks Code, which was published in 1859 and was largely based on Richardson's translation of *Manugye*, said that "if the (*keiktima*) adopted child shall remain with the parents who adopted him, or live with or among their family, he shall possess the same rights of inheritance in their estate in every respect as though he were the real actual child of his adoptive parents". In support of that proposition the learned author cited Chapter 26 of the 10th book of *Manugye* but a reference to that authority shows that the meaning of the passage is obscure and that the rule laid down therein so far as it can be ascertained, is not by any means so generally expressed.

We have been referred to the case of *Ma Gun* v. *Ma Gun* (1) as a judicial decision that the publicly adopted child stands in the same position as the real child, but in that case, the learned Judicial Commissioner merely assumed that the adopted child stands in the same posi-

* The judgment was modified later and an issue directed to be framed and tried on this question—Ed.

(1) .S. J. 33 . .

tion as the real child, and on the strength of that assumption applied to an adopted daughter the rule of *Manugye* for partition between a daughter of a first marriage and her step-mother after the death of both the daughter's parents. No question of the *auratha* child's special share arose in that case, since partition was claimed after the death of both parents.

In the case of *Sa So* v. *Mi Han* (2) it was admitted at the Bar that the adopted son is practically in the position of a natural son in respect of inheritance. The dispute was between an adoptive only son, both of whose adoptive parents were dead, and a niece of the adoptive mother, who claimed to hold certain property under a deed of gift said to have been made by the adoptive mother after the adoptive father's death. The Court, on the assumption that an adopted child is in the same position as an own child, and on the strength of a passage in *Attasankhepa* which contains an express reference to "own children," seems to have been of opinion that the adoptive son would have been entitled as against his adoptive mother, while she was alive, to a quarter share of the jointly acquired property of the adoptive parents, but as the gift under which the niece claimed, was ultimately held not to have been established, the decision of the question of Burmese Buddhist Law was really unnecessary.

In the case of *Ma Gyan* v. *Mg. Kywin* (3) the special share allotted to the *auratha* child was not claimed, but the learned Judicial Commissioner said "It has been the practice of the Courts both here and in Lower Burma to treat the *keiktima* adopted child generally as filling the same position as the natural-born child."

Similarly in the case of *Ma Thin* v. *Ma Wa Yon* (4) the right claimed was not the special right of the *auratha* to receive a share on the death of one parent, but the right of the eldest child, who was also the only child, to receive a share on the re-marriage of the surviving parent, and the decision is cited only because one of the learned judges said, without any discussion of authorities, that "It does not affect the question that the plaintiff is an adopted daughter, for the *keiktima* child takes the same place as the natural child."

The only other case to which we have been referred as showing that a *keiktima* child has all the rights of an own child is *Tet Tun* v. *Ma Chein* (5). One of the learned judges there remarked "the *keiktima* son has the full rights of inheritance of a natural son", but in that case also there was no consideration of the authorities on that subject and no question of the special right of the *auratha* to take a share on the death of one parent arose, since the *keiktima* son in question was an only son, whose adoptive parents had both died, and he was claiming their estate from the widow and child of the adoptive

(2) II. U. B. R. (1892-96) 171.
(3). II. U. B. R. (1892-96) 176.
(4). 2. L. B. R. 255...
(5). 5, L. B. R. 216.

father's brother who had taken possession of the estate after the adoptive parents' death.

Many passages from the *Dhammathats* have been cited in the order of reference as showing that the position of the *keiktima* as laid down in the Burmese Buddhist Law books was distinctly inferior in respect of inheritance to that of the own children, and respondent's learned advocate has added to those authorities, the extracts from *Mano, Pyu* and *Warulinga* cited in Section 310 of the Digest. He has also pointed out that there is no mention of the *keiktima* child in Chapter VI of the Digest which deals with partition between parents and children, and limits the application of the rule therein contained to "partition between own parents and own children," that there are in the Digest no rules for partition between parents and adoptive children, and that the rules relating to the rights of adoptive children are relegated to near the end of Chapter VIII, which deals with partitions among children after the death of both parents.

We are satisfied that according to the *Dhammathats* the position of the keiktima child in respect of inheritance was inferior to that of own children, but in view of the judicial decisions which for many years have recognised the right of the *keiktima* child to share equally with the own children we are of opinion that right should not now be questioned. But apart from the recent case of *Ma Thein* v. *Ma Mya* (6) mentioned in the order of reference, there seems to be no case in which it has been expressly decided that an only or eldest *keiktima* child can be *auratha,* or that if it fulfils the conditions which would entitle an own child to be *auratha,* it can on the death of one parent claim from the surviving parent the *auratha* child's special share of the jointly-acquired property of the parents. The existence of that right had been doubted in the case of *Mahomed Ahmin* v. *Ma Kya* (7), and the only earlier case which could be regarded as recognising it is the case of *Sa So* v. *Mi Han* (2), where as we have said, the decision was based partly on an admission, and partly on what seems to have been a mistaken application of a passage in *Attasankhepa.* The special right of the *auratha* is an exception to the general rule of equal partition among children, which is now settled law, and in the absence of any authority in the *Dhammathats,* or of any long course of judicial decisions extending that right to the *keiktima* child,, we are of opinion that it should not be so extended.

We therefore answer the reference as follows:—

"A *keiktima* adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father the *auratha* son's quarter share of the estate of the adoptive parents".

Maung Ni, for Appellant.
Sein Tun Aung, for Respondent.

(6) 5. B. L. J. 70.
(7). Civil 1st Appeal No. 116 of 1922.

CIVIL REFERENCE.

SIR BENJAMIN HEALD J. AND CHARI J.

MAUNG NI,
MA MI GYI, *vs.* MAUNG AUNG BA

Provincial Small Cause Courts Act (IX *of* 1887)—*Schedule II, Art* 15, 24—*money payable under an award—whether can be sued for in Provincial Small Cause Court—whether it is enforcement of award or suit to contest award.*

When a reference has been made to arbitrators without the intervention of a Court and the arbitrators have passed thereon an award merely directing a party or parties to that award to pay a sum of money to the other party or parties, a suit to recover that money can be filed in a Court of Small Causes under the Provincial Small Cause Courts Act, if the pecuniary conditions of Section 15 of the Act are satisfied.

Ma Hla Gyi vs. *Mg Seik Pyo;* I *Rang.* 700—*overruled*
Thirumurthy Chetty vs. *Karuppan Chetty* 76 *I.C.* 843—*followed.*
Kunja Behary Bardhan vs. *Gosto Behary Burdhan*—22 C.W.N. 66—27 C.L.J. 486—dissented from

Reference.

The following reference was made by Brown. J. in Civil Revivision No. 119 of 1925, on the 22nd April 1926.

The parties to this case had a dispute as to certain money claimed by the respondent to be due, and the matter was referred to arbitration. An award was passed, and the respondent filed a suit in the Small Cause Court of Yedashe for the recovery of Rs. 40|- which he claimed to be due to him under the award. The Trial Court found the award directing the petitioners to pay the respondent Rs. 40|- to be a valid award, and passed a decree in favour of the respondent. The petitioners have now come to this Court in revision. A number of points have been raised in the petition which have not been pressed before me seriously. The second ground is to the effect that the award was unenforceable when a suit on the the same cause of action was pending. It does not, however, appear to be the case that such a suit was pending at the time of the award, and the cause of action in that suit was certainly not the same as in the present suit.

The next ground is that there was no valid reference, at least, as regards the second petitioner. It appears that two deeds of reference were executed. According to the evidence of two of the arbitrators Ma Mi Gyi was present and agreed to the execution in her name of the second deed, Maung Ni says that she was present when the first deed was executed. She has not offered herself as

a witness. I can see no good ground for interfering in revision with the finding of the trial Court that the reference was binding on both the petitioners. The next ground taken is that the award is not binding because it is not the award of all the arbitrators. But the award is signed by four out of the five arbitrators, and the reference provides for a decision by a majority in the event of disagreement.

On none of these grounds am I prepared to hold that there is any good reason for interference. The remaining ground, however, raises a point which it is not so easy to decide. The contention strongly urged on behalf of the petitioners is that a suit to enforce an award must be regarded as a suit for specific performance of a contract, and that the present suit was not therefore within the cognizance of a Court of Small Causes. If this contention is sound then the trial Court in the present case was acting without jurisdiction and a good ground for interference in revision has been made out.

It was held by the late Judicial Commissioner of Upper Burma (2. *U. B. R.* 1917-20, *page* 109) that a suit for the specific performance of an award was not a suit for the specific performance of a contract, and that when the award was for the payment simply of a sum of money less than Rs. 500|- a suit for recovery of that money was within the cognizance of a Court of Small Causes.

This finding has however been dissented from in the case of *Ma Hla Gyi* v. *Maung Seik Pyo,* (I. L. R, 1. Rangoon 700). In that case a suit had been filed for compensation based upon an award of arbitrators. It was held that this was a suit for the specific performance of a contract and that it did not therefore lie within the cognizance of a Small Cause Court. That is an authority for the contention that the present suit was not within the cognizance of the Trial Court. The question was not discussed at length, and the reasons for the view taken were not given in *Ma Hla Gyi's* case. The decision was apparently, based chiefly on the Calcutta case of *Kunja Behary Bardhan* v. *Gosto Behary Bardhan,* (22, C. W. N. 66). In that case it was pointed out that when matters are referred to arbitration by agreement between the parties, and that as soon as an award is given there is an agreement between the parties that their rights and liabilities would be regulated by the terms previously ascertained by the arbitrators. I do not wish to suggest that that is not correct, but it appears to me that there is a further point which requires consideration before it can be decided that the present suit is for specific performance of a contract. The suit may be a suit based on, and to enforce a contract, but it does not seem to me necessarily to follow that it is therefore a suit for the specific performance of a contract. A suit for money due on a promissory note is a suit based on and to enforce a contract, but I do not think that it would be contended that it was a suit for specific performance of a contract, and therefore within the class of cases excluded from the jurisdiction of a Court of Small Causes by Article 15 of the Schedule to the Provincial Small Cause Courts Act. As pointed out in the case of *Nga Hla Gyi* v. *Nga Aung Ya,* (2. U. B. R. 1907-09, Provincial Small Cause Courts Act page 3.) the essence of the recovery of a debt is in the recovery of the amount due and not in the specific restitution of certain coins, and the money recovered is really in the nature of pecuniary damages

upon a contract for the payment of money. That this is the correct view appears to be borne out by the wording of certain pertinent sections of the Specific Relief Act. Section 5 of that Act defines the different methods in which specific relief can be given. An order for the payment of a sum of money cannot come within the terms of this definition unless it be held that it is an order to the party to do that which he is under an obligation to do. But if it be held to be such an order, it is difficult to see what order for the payment of money due under a contract would not be classed as specific relief. Chapter II of the Act which deals with specific perfrmance of contracts does not apparently contemplate any such result. Section 12 prescribes the cases in which specific performance is enforceable. Except in cases of trust, cases where pecuniary compensation for non-performance of the act agreed on can be ascertained and made, are clearly excluded from cases where specific performance can be decreed. And Section 21 (A) of the Act clearly lays down that a contract for non-performance of which compensation in money is an adequate relief cannot be enforced specifically. It appears to me to be assumed in these sections, that, an order for the payment of money is not an order for specific performance at all. Whether a suit to obtain money declared to be due under an award is a suit to enforce a contract or not, it is not to my mind a suit for the specific performance of a contract within the meaning of Article 15 of the Schedule to the Small Cause Courts Act.

Nor does it appear to me that the express exclusion of Article 24 of a suit to contest an award from the jurisdiction of a Court of Small Causes in any way supports the contention that a suit to enforce such an award must also be so excluded. Article 15 excludes suits for the specific performance or for the rescission of a contract. But it does not exclude a suit for the enforcement of a contract when specific performance is not desired.

Had the Legislature intended to exclude all suits to enforce awards from the jurisdiction of Courts of Small Causes it would have been a simple matter to say so as they have done in the case of suits to set aside awards.

And in fact Schedule II of the Code of Civil Procedure would appear specifically to confer jurisdiction on such Courts to entertain suits for the filing of an award when the necessary pecuniary conditions are satisfied. Paragraph 20, of that Schedule says that application for the filing of an award may be made to any Court having jurisdiction over the subject matter of the award.

I find myself unable therefore to hold that the present suit is excluded from the cognizance of a Court of Small Causes. But this finding appears to be contrary to the view taken in *Ma Hla Gyi's* case.

I therefore refer for the decision of a Bench of two Judges or of a Full Bench as the Chief Justice may direct the following question:—

When a reference has been made to arbitrators without the inter-

vention of a Court and the arbitrators have passed thereon an award merely directing a party or parties to that award to pay a sum of money to the other party or parties, can a suit to recover that money be filed in a Court of Small Causes under the Provincial Small Cause Courts Act. if the pecuniary conditions of Section 15 of the Act are satisfied?

Opinion *27th May* 1926.

Per Chari J.—This case was heard in the ordinary course by a single Judge of this Court, who being doubtful as to the correctness of the previous decision of a single Judge of this Court, in the case of *Ma Hla Gyi* v. *Seik Pyo* (1) referred the following question for the decision of a Bench.

"When a reference has been made to arbitrators without the intervention of a Court and the arbitrators have passed thereon, an award merely directing a party or parties to that award to pay a sum of money to the other party or parties, can a suit to recover that money be filed in a Court of Small Causes under the Provincial Small Cause Courts Act, if the pecuniary conditions of Section 15 of the Act are satisfied?"

We have accordingly as a Bench heard Counsel on legal question raised in the reference.

The facts of the case are that the parties referred a dispute between them about a sum of Rs. 50|- to arbitrators who made an award directing the defendants to pay Rs. 40|- to the plaintiff. The defendants failed to pay and the plaintiff sued to recover the amount in the Township Court on its Small Cause Court side. The defendants objected to the jurisdiction of the Court, as a Small Cause Court, on the ground, that suits to enforce awards are not congnisable by Courts of Small Causes. They cited the case of *Kunj. Behari Burdhan* v. *Gosto Behari Burdhan* (2) a case of the Calcutta High Court, which seems not to have been officially reported, as authority for their contention that a suit to enforce an award is not cognisable in a Court of Small Causes, but the learned Judge distinguished that case from the present case and following the ruling of the Madras High Court in the case of *Simson* v. *McMaster* (3) held that the Court of Small Causes had jurisdiction, and gave plaintiff a decree for the amount claimed.

No appeal lay against that decree but the defendants come to this Court in revision on the ground that the Court had exercised a jurisdiction not vested in it by law, and they relied on the decision of a single Judge of this Court in the case of *Ma Hla Gyi* v. *Seik Pyo* (1) already cited.

That decision merely followed *Kunja Behari Burdhan's case* (2) and dissented from the decision of the learned Judicial Commissioner of Upper Burma in the case of *Po Tok* v. *Ma Shwe Mi* (4).

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(1) 1. Rang. 700.
(2) 27. C. L. J. 486—22. C. W. N. 66.
(3) 13. Mad. 344.
(4) 3. U. B. R. 109.

The learned Judge who made this references was of opion that the decision of this Court in *Ma Hla Gyi's* case (1) was mistaken, in so far as it laid down in general terms that a suit for compensation based on an award made without the intervention of a Court, is, in essence, a suit for specific performance of a contract, and is therefore excluded from the cognizance of a Court of Small Causes. He has given reasons for holding that a suit to enforce payment of money, which is the only relief given by an award, cannot be held to be a suit for specific performance, and he has cited the relevant provisions in the Specific Relief Act.

We entirely agree with his reasoning and his conclusions, but in view of the conflict of authority on the subject we think that it is desirable that we should examine the authorities.

The earliest case in which the question was raised was that of *Ganesha* v. *Dyala* (5) and in that case, the learned Judges were clearly of opinion that a suit for money due under an award was not, as such, excluded from the cognizance of a Court of Small Causes.

In the next case, *Simson* v. *McMaster* (3), which has already been cited, the provisions of both Article 15 and Article 24 of Schedule II of the Provincial Small Cause Courts Act were considered, and it was held that neither of these articles excluded a suit for money payable under an award from the cognizance of Small Cause Courts, and that the suit was cognisable by such a Court.

In the case of *Sukar Hajam* v. *Oli Mohammed Mea* (6) a Bench of the High Court of Calcutta took the same view and referred to the case of *Simon* v. *McMaster* (3) and also to an earlier case in the Calcutta Court, namely, *Bhajahari Saha .Banikya* v. *Behary Lall Basak* (7).

The next case in order of date is the Calcutta case of *Kunja Behari Burdhan* v. *Gosto Behari Burdhan* (2) already cited. In that case the award disposed of certain immoveable properties and also gave directions for payment of the sums of money by one of the parties, to the other. One of the parties sued for money due to him under the award and objection was taken that the award could not be enforced piecemeal. Objection was also taken that the Small Cause Court had no jurisdiction. The case of *Simon* v. *McMaster* (3), *Sukar Hajam* v. *Oli Mohamed Mea* (6) and *Bhajahari Saha Banikya* v. *Behary Lall Basak* (7) were considered, but the Bench came to the conclusion that a suit to enforce an award is in essence a suit for specific performance of a contract and is therefore barred by Article 15 from the cognizance of a Court of Small Causes. The answer to this view has been suggested in the order of reference. The payment of money is not regarded as specific relief under the Specific Relief Act, *vide* the provisions of Sections 21 (A) and Section 12 of that Act, the relief provided in that Act being relief *in specie*, that is, the performance of a specific act or the delivery of particular articles, and not the payment of money, unless of course the contract is for the delivery of particular coins.

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(5) 1877. Punjab Record, Case 57.
(6) 25. I. C. 826.
(7) 33. Cal. 881.

The next case was the Upper Burma case of *Po Tok* v. *Ma Shwe Mi* (4) already mentioned, where the learned Judicial Commissioner considered the provisions or Articles 15 and 24 and accepted the ruling in *Simon* v. *McMaster* (3) as good law. It does not appear that the decision in *Kunja Behari's* case (2) was brought to the learned Judicial Commissioner's notice.

In the case of *Mizaji Lal* v. *Partab Kunwar* (8), which was exectly similar to the present case, the same question was raised in the Allahabad High Court, and it was argued that the suit was barred by the provisions of Article 24 under which a suit to contest an award is not triable by a Court of Small Causes. The learned Judge said. "The answer to this argument is that the present suit was not a suit to contest an award. On the contrary, it was a suit to enforce an award by asking for the delivery of the money which was payable under the award," and on this ground he held that the suit was cognisable by the Small Cause Court.

The ruling in *Kunja Behari's* case (2) was recently considered by a Bench of the High Court of Madras in the case of *Thirumurthy Chetty .v. Ponnan Chetty* alias *Karuppan Chetty* (9) and the learned Judges dissented from the statement that a suit for the enforcement of an award is in essence a suit for specific performance of a contract. They said,—"A suit for the recovery of money can in no sense be treated as suit to enforce a contract" and with that statement we agree. It is true that Section 30 of the Specific Relief Act says that the provisions of Chapter II of the Act, which deals with the specific performance of contracts shall, *mutatis mutandis* apply to awards, but since, under the Act, payment of money due under a contract, is not regarded as specific relief, the payment of money due under an award is similarly not to be regarded as specific relief.

It may be anomolous, or even illogical, that a Small Cause Court should be debarred from entertaining a suit to contest an award but should not be debarred from entertaining a suit to enforce an award in which the award may be contested, but Small Cause Courts seem also to have power under paragraphs 20 and 21 of the second Schedule to deal with awards which may be contested, and the anomaly, if any, is the concern of the Legislature and not of the Courts.

We are of opinion that such a suit as the prsent, that is a suit to recover money due under an award, where the only relief given by the award is the payment of money is not barred from the cognizance of a Court of Small Causes by the provisions of either Article 15 or of 24 of the Second Schedule to the Provincial Small Cause Courts Act, and therefore we answer the reference as follows:—

"When a reference has been made to arbitrators without the intervention of a Court and the arbitrators have passed thereon an award merely directing a party or parties to that award to pay a sum of money to the other party or parties a suit to recover that money can be filed in a Court of Small Causes under the Provincial Small Cause

(8) 42. All. 169.
(9) 76. I. C. 843.

Courts Act, if the pecuniary conditions of Section 15 of the Act are satisfied."

P. B. Sen, for appellants.
Ganguli, for respondent.

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SIR BENJAMIN HEALD J. AND CHARI J.

ABDUL KARIM ABDUL LATIFF — APPELLANTS.

vs.

AI-HNOOR AND OTHERS — RESPONDENTS.

Civil Procedure Code (Act V of 1908). Order IX, Rule 8 application to restore suit—inherent jurisdiction of Court to restore.

The Court has inherent power to restore a case dismissed for default if it is satisfied that the case is one in which it should exercise that power.

Bilasrai v. *Cursondas,* 44. B. 82; *Lalta Prasad* v. *Ram Karan* 34. All. 426—followed.

The plaintiff engaged a Rangoon Advocate to attend his suit at Myaungmya. The boat was delayed owing to fog and the Advocate arrived in Court a few minutes after the case had been called and dismissed... The 1st plaintiff accompanied the Advocate from Rangoon, the 2nd plaintiff failed to attend owing to illness of his daughter. A bald petition of 2 short paragraphs to restore the case was filed the same day without any affidavit explaining the circumstances.

Held, **that notwithstanding the negligence of the Pleader in having failed to file an affidavit in support, yet having regard to the importance of the case and the value of the property involved the Lower Court ought in the exercise of its inherent jurisdiction to have restored the case.**

Judgment — *1st June* 1926.

Per Chari J.— This is an appeal against the order of the District Judge of Myaungmya refusing to set aside a dismissal order passed under Order 9, Rule 8, of the Civil Procedure Code, dismissing the plaintiff's suit for default. On the 7th of February 1925, the case was fixed before the learned District Judge. All the defendants, of whom there were many, had been served except three. There were two plaintiffs in the suit, who were brothers, and neither of them appeared when the case was called on that day. The learned Judge dismissed the suit presumably under Order 9, Rule 8, though in the Diary he says it was dismissed for want of prosecution. Later on the same day an application was filed for setting aside the order of dismissal. That application was a curious application consisting of two short paragraphs without any affidavit in support of it. In answer thereto a written objection was filed on behalf of defendants 14 to 18, supported by an

Civil Misc Appeal No. 98 of 1925.

affidavit by a man calld Abdulla. In spite of this the plaintiff's advocate does not seem to have realised the necessity for filing an affidavit to explain the absence of the first plaintiff himself, and even if the cause assigned in the petition for his absence is correct, the reasons for the absence of the 2nd plaintiff were unexplained. The learned Judge of the Trial Court dismissed the plaintiff's application and they now come up in appeal. They have filed in this Court a certificate that the 2nd plaintiff's daughter died on the 9th of February at Myaungmya and it is stated on their behalf that she was very ill on the 7th of February, and that therefore the 2nd plaintiff who believed that the 1st plaintiff would be in Myaungmya in time did not attend the Court. In the petition filed by the 1st plaintiff it was alleged that on account of the fog his boat was late and that he came to Court with his Rangoon Advocate just a few minutes after the case had been called and dismissed. It is argued on behalf of the respondents that there is no affidavit in the record to show that the 2nd plaintiff's statement is correct and that he should have known that at that time of the year the boats would be subject to delay on account of fogs and should have taken precautions to reach Myaungmya earlier and further that he could have engaged a Local Advocate instead of relying on an Advocate from Rangoon. There is force in the arguments put forward by the respondents' Advocate but at the same time considering the importance of the case and the value of the property involved, we are not disposed to visit the sins of the Advocate on the plaintiffs and make them suffer for the incompetence and negligence of their Advocate in filing their application without an affidavit. Counsel for the appellants has asked us either to let him file an affidavit in this Court to show why the plaintiffs were absent when the case was called, or to remand the case in order to enable them to produce such evidence in the trial Court.

We do not think that in the present case it is necessary to remand the case for that purpose. The Court has inherent power to restore a case dismissed for default if it is satisfied that the case is one in which it should exercise that power. Our attention has been drawn to the Full Bench Rulings of the Madras High Court in which it has been held that the Court has no such power but we find that the Bombay and Allahabad High Courts have taken a different view (see the cases of *Bilasrai* v. *Cursondas* (1) and *Lalta Prasad* v. *Ram Karan* (2) and we are of opinion that the Court has such power and that the learned Judge of the trial Court should in the exercise of his inherent power have restored the case. We accordingly set aside the order of the trial Court and direct that the order dismissing the suit be set aside and the same be proceeded with from the stage where it was left off.

Appellants will pay the respondents' costs in this Court, Advocate's fee fr each Advocate to be two gold mohurs.

*Keith, f*or appellants.
Anklesaria for Respondents 1-13.
Ganguli, for Respondents 14-18.

(1) 44. B. 82 (2) 34. All. 426. . .

MR. JUSTICE DUCKWORTH.

MAUNG TIN vs. MA LUN AND 4 OTHERS.

Minor—attestation of sale deed—incapacity to contract—whether estoppel arises.

Where a minor attested a sale deed of certain property and claimed the same property in a subsequent suit on attaining majority *Held* the minor was not estopped from making his claim.

The law relating to estoppel must be read together with, and subject to, other laws in force, such as those relating to contract and transfer of property.

Where such laws declare an infant to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.

Brohmo Dutt v. *Dharmo Das Ghose* 26. C. 381—applied.

Judgment *Dated the 14th June* 1926.

The lower appellate Court decided the 1st appeal merely on the question of estoppel. I think that Court was in error in holding that appellant was estopped.

He was a minor, when the sale deed was executed, and when he attested it, being then only about 14 years of age. It is not proved that he made any fraudulent misrepresentation when he attested the sale deed

In any case, I am of the opinion that as he could not then contract, he could not be estopped. The law in such cases was stated in the case of *Brohmo Dutt* vs. *Dharmo Das Ghose* (1) but was perhaps too broadly stated for general application. It may be laid down as follows:—

The law relating to estoppel must be read together with, and subject to, other laws in force, such as those relating to contract and transfer of property, and that where such laws declare an infant to be

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Civil 2nd Appeal No. 535 of 1925, from the decree in C. A. No. 165 of 1924 of the A. D. J. Pyapon.

(1) 26. Cal. 381.

free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.

I do not think, therefore, that in the present case the appellant was estopped from claiming his share in the land sold, if any.

The decree of the lower appellate Court is set aside, and the case is remanded to that Court, to decide the appeal on the merits according to law.

The appellant will get the costs of this appeal from the respondents and a certificate under Section 13 of the Court Fees Act for return of the Court fees paid on the memorandum of appeal in this Court.

Hay, for Appellant.
U Ze Ya, for rspondent.

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MR. JUSTICE CARR.

MAUNG BA AND ONE vs. DAW THIT.

Execution—agreement before decree restricting right of execution against a party—not embodied in decree.

An agreement entered into before the passing of the decree not to execute the same against a party does not restrict the right of the decree-holder to execute the decree against that party.

Mulla Ramzan v. *Maung Po Kaing* 5. B.L.J. 41—approved.

The only proper course is to have the terms embodied in a decree passed by consent.

Judgment 15*th June* 1926.

The appellants are the holders of a decree against the respondent and other persons. It is alleged by the respondent that she allowed the decree to be passed against her on an agreement with the appellants whereby the right of the latter to execute the decree against her was restricted. On that ground she opposed the execution of the decree and her objection has been upheld in both the Courts below.

The question whether an agreement such as this can be pleaded as a bar to execution has very recently been considered by my brother Chari in the case of *Mulla Ramzan* v. *Mg Po Kaing* (1) which is reported in 5. Burma Law Journal at page 41. I am in entire agreement with the views of my learned brother as set out in his judgment in that

Civil 2nd Appeal No. 471 of 1925, from the decree in C. A. No. 20 of 1925 of the A. D. J. Pyapon.

(1) 5. B. L. J. 41.

case and I consider it unnecessary to discuss the question any further. I hold with him that an objection based on an agreement prior to the passing of the decree, such as is set up in this case, is not maintainable. If parties wish to enter into such arrangements the only proper course is to have the terms enbodied in a decree passed by consent.

I allow the appeal, set aside the judgments of the Courts below and direct that the Subdivisional Court do proceed to execute the decree in question.

The respondent will pay the costs of the appellants in this appeal advocate's fee three gold mohurs—and in the District Court as allowed in the decree of that Court. No formal decree was drawn up in the Subdivisional Court. I allow the appellants their costs in that Court also—advocate's fee one gold mohur.

Villa, for appellant.

Mr. Shaffee, for respondent.

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MR. JUSTICE CARR.

SAYA HATTAI AND ONE vs. MA PWA SA

Civil Procedure Code (Act V of 1908), Order 20, Rule 11, (2)—Order for payment by inslatments after decree—appeal or revision.

An order for payment by instalments may be passed under Order 20, Rule 11 (2) as amended by notification merely after notice to the decree-holder and without his consent.

Mahomed Ebrahim v. *A. Subbiah Pandaram,* 7. L. B. R. 71—distinguished.

Such an order relates to the execution, discharge, or satisfaction of the decree, and is a "decree" within the meaning of Section 47, Civil Procedure Code, and an appeal therefore lies.

Obiter. **It is doubtful whether a second appeal would lie if the suit is not a land suit. The fact that a party proposes to sell immoveable property in execution would not make it a land suit.**

Civil Revision No. 310 of 1925, from the decree of the District Court of Toungoo, in Civil Appeal. No. 69 of 1925.

Judgment 18*th June* 1926.

I think the District Judge has gone wrong in this case. The order in the case on which he relies *Mahomed Ebrahim* v. *A. Subbiah Pandaram*, 7. L. B. R. 71 was passed at the time of passing the decree, and was under Order XX, Rule 11 (1). The order in the present case is one under Order, XX, Rule 11 (2). Under that sub-rule, as it originally stood, order for payment by instalments could be made after the passing of the decree only with the consent of the decree-holder. There could, of course, be no appeal from an order passed by consent. Nor could the judgment-debtor appeal if the decree-holder refused to consent to an order. But the sub-rule has been altered by our Schedule Notifications and in Burma such an order can now be passed in execution merely after notice to the decree-holder and without his consent. When, therefore, a question arises whether such an order should be passed or not the question seems to me to be clearly one between the parties to the suit and one relating to the execution, discharge, or satisfaction of the decree. It therefore comes under Section 47 of the Code and is itself a decree. An appeal to the District Court therefore lies.

I do not think that a second appeal would lie, because the suit does not appear to be a land suit, and the fact that the respondent proposes to sell immoveable property in execution, would not make it a land suit. However, it is not necessary definitely to decide this question. If this application would not lie as a revision, it might reasonably be treated as an appeal.

I allow the application, set aside the judgment and decree of the District Court, and remand the appeal to the District Court for decision on its merits.

Costs in this appeal and the District Court will follow the result. Advocate's fees in this Court, one gold mohur.

Mr. Dutt, for appellant.

N. C. Sen, for respondent.

(The Notification referred to is Chief Court Notification No. 1 (General) dated 18th February 1915 which contains the following amendment to the C. P. Code:—"In Order XX Rule 11 Sub-rule (2) for the words "and with the consent of the decree-holder" the words "and after notice to the decree holder" shall be substituted. The notification was superseded by High Court Notification No. 20 (General) dated 11th September 1924, which restores the original words in the Code (Rule 233, O. S. Rules) so far as the Original Side of the High Court is concerned, and it has since been so held on the Original Side of the High Court—Ed).

CIVIL REFERENCE.

SIR GUY RUTLEDGE, C. J.; SIR BENJAMIN HEALD J; MR. JUSTICE CARR; MR. JUSTICE DUCKWORTH.

Ma Ah Kyi & 4 others ..... *Appellants**

v.

Ma Pu & 2 others ..... *Respondents.*

Transfer of Property Act (IV of 1882) Section 58—simple mortgage—subsequent sale of morgaged property to mortgagee without registered deed—delivery of possession—redemption suit—whether defence of sale and transfer of possession valid.

Where a simple mortgage has been effected by a registered deed and subsequently possession is delivered by the mortgagor to the mortgagee without a registered document in pursuance of an agreement for sale, the mortgagee will be entitled to plead and prove the agreement for sale in a suit for redemption by the mortgagor and if he prove such an agreement it will be a complete answer to the suit for redemption.

Maung Mya Tun Aung. v. *Maung Lu Pu,* 3. Ran. 243. *Overruled.*

Ma Pyone and 2 others. v. *Ma U and 2 others,* 2, B. L. J. 233 *confirmed.* *Ma Shwe Kin.* v. *Ko Hoe and one,* 3, B. L. J. 211. *Ma Ma E. and others.* v. *Maung Tun,* 3, B L. J. 214;—*Cited*

Myat Tha Zan. v. *Ma Dun 2. Ran. 283—3. B. L. J. 78—applied.*

Maung Shwe Hmon. v. *Mg Thu Byaw,* 11. L. B. R. 462; *Po Cho.* v. *Paw Saing* (unreported)—*relied on.*

RUTLEDGE, C. J:—This rule is confined to non-possessory mortgages—different considerations may apply in the case of usufructuary mortgages. A subsequent agreement of sale does not, and does not purport to rescind or modify the mortgage but merely purports to satisfy it.

It is open to the mortgagor to enter into a contract subsequent to the mortgage for the sale of the mortgaged premises to the mortgagee. But the agreement must be a separate transaction from the mortgage.

Kanhayalal v. *Narhar,* 27, Bom. p. 297; *Lisle.* v. *Reeves,* L. R. 1902 1 Ch. 35 and 1902, A. C, 461—referred to.

Reference.

The following reference was made on 2nd June 1926, by Mr. Justice Duckworth in Civil 2nd Appeal No. 161 of 1926 :—

For the purpose of this Reference, it suffices to state that the proceedings commenced by a registered simple mortgage made by the plaintiffs-appellants to the respondents for Rs. 540 in April 1910.

Subsequently, and about one year later, the property was delivered to the respondents' entire possession.

* Civil Reference No. 9 of 1926.

The appellants contend that the respondents were merely given the usufruct, because they themselves could not pay up the interest due on the mortgage.

The respondents set up the plea that the land was sold outright to them, the reason being that interest for one year could not be paid, and because the appellants had defaulted in one year's rent due to them.

Whatever the second transaction was, it was evidenced by document, and, of course there was no registration. This is common ground.

The original registered simple mortgage was not disputed. Both the Lower Courts agreed in dismissing the plaintiff-appellants' suit, but they proceeded on the ground that the usufructuary mortgage set up by the appellants could not be proved, inasmuch as it was not in writing, and registered. This was of course, wrong.

The land has stood, since the transfer of possession, in the defendants-respondents' name.

There are two divergent rulings of this Court as to whether in the circumstances, stated, the respondents-defendants could equitably set up the invalid sale as an agreement to sell, by way of a shield, so as to deprive the appellants of the right of redemption of the registered simple mortgage.

The present case is however, slightly different, inasmuch as there was no subsequent cash payment when the invalid sale transfer took place, but there was apparently fresh consideration because interest due and possibly rent for the land due by the appellants to the respondents was struck off. There is thus no great dissimilarity in the cases.

In the case of *Ma Pyone and 2 others* v. *Ma U and 2 others* (1) I held that the invalid transfer by way of sale could, in such circumstances, be equitably pleaded and proved and was a good defence as against redemption. On the other hand, in the case of *Maung Myat Tun Aung* v. *Maung Lu Pu* (2) Lentaigne. J. held the contrary, and decided that, in such circumstances, the redemption of the mortgage should proceed. This, I may say, is the only decision printed in the authorised Law Reports.

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(1) 2. B. L. J. 233. (2) 5. Ran 243.

The matter is of such great importance to the community at large, and is so often coming before this Court, that my opinion is that it should be referred to a Full Bench.

On the merits, the evidence as to the alleged invalid sale was, I think, good enough to have warranted the Lower Courts in holding that it was established. Neither Court, unfortunately, dealt with this point, and therefore a finding upon it may be necessary later on.

Incidentally, I would refer to the cases of *Ma Shwe Kin* v. *Ko Hoe and one* (3), and *Ma Ma E. and others* v. *Maung Tun* (4), where in a slightly different case, but one involving similar principles Carr. J and I have come to diametrically opposite conclusions.

I would therefore refer to a Full Bench, if the Hon'ble Chief Justice agrees with me, the following question :—

"When there is a registered simple mortgage of land, and a subsequent transfer of possession of the land to the mortgagees without document by the mortgagors, and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, can the mortgagees, in a suit by the mortgagors for redemption of the mortgage plead and prove this invalid sale, in equity, and as a shield, or must the mortgage prevail and redemption be allowed?"

NOTE :—

The suit mortgage deed is to be found in the Process File of the Trial Courts Record.

Opinion, *2nd August* 1926.

RUTLEDGE C. J.—Mr. Justice Duckworth has made the following reference: "Where there is a registered simple mortgage of land, and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid sale to them, can the mortgagee in a suit by the mortgagors for redemption of the mortgage plead and

(3) 3. B. L. J. 211. (4) 3. B. L. J. 214.

prove this invalid sale in equity and as a shield, or must the mortgage prevail and redemption be allowed."

The learned Judge states that the matter is of great importance and is often coming before the Court. In this I agree with him. The well known unbusiness-like methods of the bulk of the agricultural population in neglecting to comply with the provisions of the Transfer of Property Act and the Indian Registration Act coupled with the great rise in the value of land during the past quarter of a century, has given rise to a great volume of litigation and has provided a field for the activities of the speculator in litigation. Consequently any question like the present is of great practical importance.

A simple mortgage is defined in Section 58 (6) of the Transfer of Property Act: "Where, without delivering possession of the mortgage property, the mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage."

It will be seen from this that the outstanding characteristic of a simple mortgage is that possession remains with the mortgagor. And if possession subsequently passes to the mortgagee that possession is not explained or accounted for by the simple mortgage instrument. If the transaction in the course of which possession was given is not evidenced by a registered instrument, the onus of proving what the transaction was, lies on the person who is not in possession. To change a simple mortgage into a usufructuary mortgage is such a varying and adding to its terms that it would require, within the meaning of Section 92 of the Evidence Act, a new registered instrument, as it would to change a simple mortgage into a sale out and out.

We have been referred to in the reference, and learned counsel for the appellant has relied strongly upon, a decision of Lentatgne J., in *Myat Tun Aung.* v. *Lu Pu* (1.) The mortgage in that case appears to have contained

(1) 3. Ran. 243.

a clause empowering the mortgagees to take possession of the land and to sell the same in the event of the mortgagor making any default in payment. As I construe this case, the possession can only be taken for the purpose of exercising a power of sale and not for the purpose of enjoying the rents and profits thereof and applying them to the payment of interest and capital. With regard to the law of part performance and the equities that arise thereon where the Specific Relief Act gives no assistance I prefer the language approved by their Lordships of the Privy Council that the acts relied on as part performance must be "unequivocally referrable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable." I am unable to agree with Lentaigne J., where he goes on to say in the abovementioned case :—

"In all such cases the possession of the mortgagee would ordinarily be referrable to his mortgage or in the case of a simple mortgage to his influence over the mortgagor by reason of such mortgage, and consequently to the mortgage. That would be the position, I think, in the case of an oridinary simple mortgage, but it is still more so in a case like the one before me, where the mortgage deed confers an express power to enter into possession even for the limited purpose of effecting a sale to third parties." As I have already stated the power to enter into possession was merely for the purpose of sale and not to enjoy the rents and profits in lieu of interest and cannot be referrable to any such agreement. If we are to construe possession subsequently taken in the case of a simple mortgage to some supposed influence of a mortgagee over his mortgagor, and by an artificial construction of the provisions of the Evidence Act, shut out all evidence of an agreement for sale, in view of the social and economic conditions of this Province referred to earlier in this judgment, I feel convinced that a great and lamentable impetus will be given to fraudulent suits at the instance of speculators.

A subsequent agreement of sale does not, and does not purport to, rescind or modify the mortgage, but merely purports to satisfy it. In the case of an agreement for sale a Full Bench of the late Chief Court in *Karamath*

Khan. v. *Latchmi Aehi* (2) held that a defendant may plead by way of defence to a suit for eviction by an owner that he is in possession under a contract to sell and that if he can prove the contract and it still subsists, it will be a valid defence, however valuable the property may be, and whether he has a registered deed of transfer or not.

In *Venkatesh Damadar Mobashi's* case (3) a Bench (judgment being delivered by the late Chief Justice Macleod) held, that where a defendant in possession had paid the full purchase price but had omitted to get a registered sale deed and his right to specific performance had become barred, he was entitled to remain in possession as against the plaintiff.

Karamath Khan's case (2) was reviewed and confirmed by a Full Bench of this Court in *Myat Tha Zan.* v., *Ma Dun* (4). Prefacing his review of the authorities, the late Chief Justice observes at page 302 —"The decisions are based, some, on principles of equity (the equity of part performance), some, on the ground that the Court would not lend itself to aid the plaintiffs in effecting a fraud, and some, on the ground of fiduciary relation which was created between the parties by the facts. In my opinion the case might be adequately disposed of on any one of these grounds." And later, on page 303 —"Returning to the ground of fraud, I think there can be no doubt that an attempt by the plaintiffs in this case to go back upon the contract itself after having received the purchase price, and after possession had been given, clearly amounts to an attempt at fraud which the Courts in this country cannot and should not aid." These observations are very pertinent to cases like the present and may well be borne in mind, where a subsequent agreement to sell followed by possession is set up in cases of redemption of simple mortgages. It is clear that it is open to the mortgagor to enter into a contract subsequent to the mortgage for the sale of the mortgaged premises to the mortgagee (*Kanhayalal.* v. *Narhar*, 27, Bom. p. 297 and *Lisle* v. *Reeve*, L. R. 1902, 1 Ch. 53 and 1902, A. C. 461.) But the agreement must be a separate transaction from the mortgage.

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(2) 10. L. B. R. 241. (3) 46, Bom. 722 (4) 2 Ran, 285-3 B. L.J. 78.

In *Maung Shwe Hmon.* v. *Maung Tha Byaw* (5) Mr. Justice Pratt had before him a case not unlike the present. At page 465 the learned Judge states: "In the present case the position is that after the mortgagees had assigned the mortgage to Maung Po Hlaing, the mortgagors made over the land in suit to him under an agreement to sell for a fixed sum due under the mortgage. Their intention clearly was by the transfer to extinguish that portion of the mortgage debt. They cannot be allowed to take advantage of the fact that they neglected to give a conveyance in due form and redeem the land. To give plaintiffs a decree would be in effect to assist the vendors in perpetrating a fraud on the vendee."

In the unreported case of *Po Cho.* v. *Paw Saing* (6) a Bench of this Court consisting of my brother Heald and myself held that an agreement to sell the mortgaged property outright to the mortgagees is a good defence to a suit for redemption. At page 4 of the judgment the reasons are given as follows :—

"If the original transaction be regarded as a non-possessory mortgage, then although the consideration might be regarded as being nothing more than the amount due on the mortgage, the so-called rent being regarded as interest, there would be transfer of possession. There would also in either case be the equitable right of the transferee to obtain a legal conveyance. As for the ground of fraud, it would be clearly fraudulent for the transferors who had discharged their debt by the agreement to sell and by delivery of possession, to repudiate the agreement and to claim redemption at a time when the debt, or at any rate, the debt for rent would be irrecoverable. Similarly, since transferors who have entered into an agreement to sell and have received consideration may be regarded as holding the legal title in trust for the transferees, it would amount to allowing a violation of a fiduciary obligation to allow them to repudiate the agreement for sale. Personally I would base the decision on the ground of fraud and would hold that it is clearly fraudulent that mortgagors who have agreed to sell the equity of redemption to the mortgagees, so as to put an end to the mortgage and to make the original mortgagees

(5) 11, L. B. R. 462. (6) Civil 2nd Appeal No. 299 of 1924.

owners of the property, and as consideration for that agreement have accepted from the transferees a release of debts due by them, should repudiate their agreement and should claim to redeem the property as if the agreement had never been made."

These are the words of my colleague with which I fully concurred at the time (i. e., 10th June 1925) and I see no reason to doubt their soundness at the present time after further consideration.

My answer to the reference is that the defendant is entitled to plead and prove an agreement to sell in pursuance of which possession was given and if he proves the same it is a complete answer to the plaintiff's suit for redemption.

I wish to make it clear that my opinion is confined to non-possessory mortgages. For obvious reasons different considerations may apply in the case of usufructuary mortgages.

HEALD J.—I have had the advantage of reading the learned Chief Justice's judgment, and as he has pointed out I have already in the case of *Po Cho* v. *Paw Saing* (6) expressed my opinion on the subject matter of the reference. I do not agree with the view, taken by Lentaigne J. in the case of *Myat Tun Aung.* v. *Lu Pu*, (2) that a contract of simple mortgage explains the mortgagee's possession of the mortgaged property. On the contrary I agree with the learned Chief Justice that such possession cannot be referred to such a contract. Under a simple mortgage the mortgagor must be in possession, of the mortgaged property and if he is out of possession that fact is referrable not to the contract of simple mortgage but to some other transaction. It may be doubtful whether or not the burden of proving the nature of that transaction is on the mortgagor, who is out of possession but I have no doubt that the mortgagee is entitled to prove that the transaction which resulted in the change of possession was an agreement for sale and that proof of such an agreement is a good defence to a suit by the mortgagor to recover possession by redemption of the mortgage.

I therefore concur in the answer to the reference given by the learned Chief Justice.

CARR J.—I concur in the answer of the learned Chief Justice to the question referred. This answer

seems to me to follow necessarily from the decision in *Myat Tha Zan* v. *Ma Dun*. (4) The only difference between the essential facts of the two cases is that in the present case the sale or agreement for sale, was preceded by a simple mortgage, in which the subsequent vendor was the mortgagor and the subsequent vendee the mortgagee. In my opinion that makes no difference whatever. I agree with the learned Chief Justice that the simple mortgage does not account for the subsequent transfer of possession and that Lentiagne. J. was wrong in holding in *Myat Tun Aung* v. *Lu Pu* (2) that it did. I think that the learned judge in that case erred in applying the English rule in view of the great difference between an English mortgage and a simple mortgage.

The questions of the conflict between the decision in *Ma Shwe Kin* v. *Ka Hoe* (7) and *Ma Ma E.* v. *Mg Tun* (8) and of the admissibility of evidence, do not arise on the reference, and I express no opinion on them.

DUCKWORTH J.— I concur with the Judgment written by the learned Chief Justice.

To my mind, the answer to the question referred by me is that the mortgagees can in the circumstances stated, plead in equity that the invalid sale, as involving an agreement to sell, is a shield, and can prove it.

My reasons are that there has admittedly been a change of possession, which cannot be directly attributed to the registered simple mortgage. The mortgagees are, therefore, not alleged to be mere trespassers, and the onus rests, in the first instance, upon the plaintiffs, who plead the conversion of the simple mortgage into an usufructuary mortgage.

When I wrote the order of reference I was under the impression that the plaintiffs could prove this alleged usufructuary mortgage : inasmuch as all that was involved was a change of possession under the already existing mortgage. But it involved as a matter of fact, a change or variation of the original simple mortgage, and therefore evidence was not admissible to prove it under Section 92 proviso 4 (or any other proviso) of the Evidence Act, unless it was in writing, and registered. I am convinced that the opinion expressed by me, in the

(7) 3 B. L. J. 211. (8) 3 B. L. J. 214.

order of reference, on this point, was erroneons. The Full Bench case of *Maung San Min* v. *Maung Po Hlaing* (1) also supports this view.

On the other hand, the defendants were in a position to prove the agreement to sell, which did not require writing, or registration. There is a series of Rulings in this, and other Courts, which establishes this point clearly. The decisions are based on considerations of equity, part performance, prevention of fraud, and the fiduciary aspect of the vendor's position, coupled with the impropriety of permitting him to succeed against his vendee, in a suit for possession. The decisions of this Court culminate in the Full Bench case already quoted by me above, but I would particularly call attention to an unpublished decision of a Bench of this Court, consisting of the learned Chief Justice and Sir Benjamin Heald, J., in the case of *Maung Po Cho and 1* v. *Maung Paw Saing* (2).

I concur entirely in that decision.

There the facts were stated to be as follows:—

The plaintiffs alleged that under a registered deed of mortgage Maung Po Tein mortgaged to the defendants a piece of land, *with possession*, and that the plaintiffs purchased the land from Maung Po Tein by a registered conveyance. They then sued defendands for redemption.

The defendants admitted that the land originally belonged to Maung Po Tein and that it was mortgaged to them usufructuarily. They however contended that later on, Maung Po Tein made over the land to them absolutely for the amount due on the mortgage, together with rent due by him, as their tenant.

Even here, where there was no change of possession, the invalid sale, by Po Tein to the Defendants, was allowed to be proved and in order to prevent fraud, to prevail.

The conclusion arrived at confirms the view, which I took in the case of *Ma Ma E. and two* v. *Maung Tun* (3).

A decision, which assists considerably in the matter of this Reference, is that of Pratt J., in *Maung Shwe Hmôn* v. *Mauug Tha Byaw* (4).

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(1) 4. Ran. 1.
(2) 2nd Appeal No 299 of 1924.
(3) 2 Ran. 479=3. B. L. J. 214.
(4) 11. L. B. R. 462.

It is clear that whatever the transaction was which led to the mortgagees obtaining possession of the land, the possession was traceable to that transaction, and not to the registered simple mortgage. As stated, it cannot be shown that the simple mortgage was converted into an usufructuary mortgage but it can be shown that the mortgage was satisfied, and that possession changed in virtue of an agreement to sell which was duly acted upon by part performance.

Part performance is constituted not only by payment but by change of possession.

Thus I consider that, in the case under reference, the defendants can plead and prove the subsequent oral agreement to sell, which amounted to an entirely new transaction in order to set it up as a shield against redemption of the simple mortgage.

I think that the case of *Myat Tun Aung* v *Lu Pu* (5) was wrongly decided by Lentaigne J., and that the application of the principles, enunciated by him in that Judgment, would give a greater impetus than ever to fraudulent suits by speculators.

In order to render my position clear, I would refer to the case of *Ma Pyone* & 2 v. *Ma U* & 2 6).

I do not think that anything more need be said.

JUDGMENT *1st September 1926.*

MG BA J.—The appellants sought to recover possession of a piece of paddy land by redemption. The transaction started as a simple mortgage effected by a registered deed. About a year afterwards the mortgagee was put in possession of the land. There was no document evidencing such change of possession. As usual we have two divergent versions. The appellants allege conversion of a simple into usufructuary mortgage while the respondents allege outright sale. The transfer took place about 14 years before the institution of the suit.

The lower Courts have never considered the question of adverse possession. My brother Duckworth referred to a Full Bench the following question :—

"Where there is a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors

(5) 3 Ran. 243. (6) 2 B. L. J 233.

and the latter assert that this was under the original mortgage whilst the former plead that it was a fresh transaction amounting to an outright but invalid sale to them, can the mortgagees in a suit by the mortgagors for redemption of the mortgage plead and prove this invalid sale in equity and as a shield, or must the mortgage prevail and redemption be allowed ?"

The answer of the Full Bench was "that the mortgagee is entitled to plead and prove an agreement to sell in pursuance of which possession was given, and if he proves the same it is a complete answer to the mortgagor's suit for redemption."

It is therefore only necessary to find out whether the respondents have proved such an agreement to sell. After perusing the evidence I am satisfied that they have proved the same. This finding will dispose of the appeal. I wish however to add that apart from this it would appear that for want of a registered instrument proviso (4) to Section 92 of the Indian Evidence Act. would preclude the appellants from proving the usufructuary mortgage alleged by them.

In the result the appeal must be dismissed.

Thein Maung (*1*) for appellants.

SIR BENJAMIN HEALD J. AND CHARI. J.

1	Maung Pan Gaing	*Petitioners.*
2.	Nga Sein	,,
3.	Nga Tun	,,
	v.	
King Emperor	.....	*Repondent.*

Sanction—Registration Act (XVI of 1908) Section 83—Private party cannot prosecute for offence under Section 82, without permission of registering officer concerned.

A prosecution for an offence under the Registration Act coming to the knowledge of a registering officer in his official capacity cannot be commenced by a private person without the permission mentioned in Section 82 of that Act.

Maung Saing v. *King Emperor;* 1, Rangoon 299:—*overruled.*

The word "may" in Section 83 of the Registration Act should be read as equivalent to "must be."

Criminal Procedure Code (V. of 1898) Section 195 (1) Registering officer—public servant—offence under Section 182. I. P. C:—Sanction.

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* Criminal Reference No. 109 of 1996.

If a private prosecutor wants to proceed, not under the Registration Act but under the Penal Code, for an offence falling under Section 182 of the Code, the provisions of Section 195. Clause 1 (a) of the Cr. Pro. Code is a bar to such a prosecution. Under the Cr. Pro. Code, as now amended, a Court can take cognisance of such an offence only on a written complaint by the "public servant" concerned. A registering officer is a "public servant" for the purpose of Section 195 (1) (a) Cr. P. Code.

Reference.

The following reference was made by Heald J. in Cr. Rev. No. 648 B. of 1926, on the 5th July 1926:—

On the 13th of March 1924, Paw U and his wife Ma Hnin Me mortgaged a holding of paddy land measuring 11. 22, acres together with possession to one Po Hmat for Rs. 700/- with interest thereon at 3 per cent per mensem. The wording of the document shows that although the land was described as paddy land some of it had not yet been brought under paddy cultivation.

On some date after the 5th of May 1924, probably very soon after that date, Paw U and Ma Hnin Me entered into a written agreement with one Maung Gale about the same eleven acre holding and four adjoining pieces of land which were described as *dani* plantations. For the purposes of this case it does not matter whether or not the lands described as *dani* plantations represent the uncultivated parts of the land which had been mortgaged. The 11 acre holding to which this agreement refers was certainly the 11 acre holding which had been mortgaged. That agreement referred to an earlier agreement dated the 22nd of April 1924, whereby Paw U and Ma Hnin Me agreed to sell the 11 acre holding and four adjoining *dani* plantations to Mg Gale for Rs. 830/- of which Rs. 530 was to be paid at once and was to be regarded as earnest money, and the balance of Rs. 300/- was to bear interest at 3 per cent per mensem and was to be paid by the 8th of March 1925, and whereby Paw U and Ma Hnin Me agreed to transfer the land to Maung Gale's name on the price being so paid in full, and it stated that that agreement was to remain in force, and that Maung Gale was to work the land for the season 1924-25 and that if he failed to pay the balance of the price of the land as agreed he should pay a rent of 130 baskets of paddy which Paw U and Ma Hnin Me should be entitled to take out of the actual crops for that season.

It is admitted that Maung Gale paid the Rs. 530/- at that time.

On the 5th of March 1925, Paw U and Ma Hnin Me signed a document in which they acknowledged receipt of the balance of the price and declared that Mg Gale was benficial owner of the land and that they undertook to give him a registered conveyance as soon as they had redeemed the mortgage.

On the 8th of June 1925, one Pan Gaing, who held a power of attorney from Mg. Gale, presented for registration a conveyance which purported to have been executed by Paw U and Ma Hnin Me. In his application to the Registering Officer he said that Mg. Gale had bought the land for Rs. 830/-, that Paw U and Ma Hnin Me had signed a document, that Mg. Gale had paid the Rs. 830/-, in full and that Paw U and Ma Hnin Me refused to have a conveyance registered. He asked that they should be summoned and that the conveyance which he presented should be registered. The Registering Officer summoned Paw U and Ma Hnin Me, who admitted that they had agreed to sell the land and had received the price, but denied that they had signed the conveyance. Registration was therefore refused.

On the 18th of July, Paw U filed a complaint against Mg Gale's agent Pan Gaing and against the three witnesses who attested the document, charging them with an offence under Section 465, of the Indian Penal Code and with abetment of that offence, and also with an offence, under Section 82 of the Registration Act.

The Magistrate charged Pan Gaing under Section 82 (a) of the Registration Act with making a false statement to the Registering Officer by stating that the conveyance was signed by Paw U and Ma Hnin Me, and he charged two of the attesting witnesses Tun Yin and Ma Sin with abetment of that offence. He found them all guilty and sentenced them to a fine of Rs. 200/- each with 6 months' rigorous imprisonment in default. Apparently the fines have not been paid, but it does not appear that the accused have yet been sent to jail.

They appealed and the learned Additional Sessions Judge upheld the convictions and sentences.

They now come to this Court in revision.

It seems to me that this prosecution raises an important point of law, namely, whether in view of Section 83 of the Registration Act, a prosecution under

Section 82 of that Act can be instituted by a private person without the permission of the Registering Officer.

The Registering Officer under Sections 3 and 6 of the Act are the Inspector General of Registration, the Registrars and the Sub-Registrars. If there is more than one Sub-Registrar in a sub-district the registering officers for that sub-district are known as Joint Sub-Registrars, but they are presumably still Sub-Registrars for the purposes of Section 83.

That Section says that a prosecution for any offence under the Registration Act coming to the knowledge of a registering officer in his official capacity may be commenced by, or with the permission of the Inspector General, the Registrar or the Sub-Registrar in whose territories, or district, or sub-district, as the case may be, the offence has been committed. The section does not say that prosecutions may be otherwise commenced, but *expressio unius est exclusis alterius.*

There are, however, conflicting decisions of the High Courts in India on this point.

In the case of *Maung Saing* v. *King Emperor* (1) a single Judge of this Court said : "In view of the Full Bench ruling of the Calcutta High Court in *Gopi Nath* v. *Kuldip Singh* (2) it must be taken as settled law that no sanction is necessary," for a prosecution under Section 82 of the Registration Act.

All that the learned Judges say on the subject in the case cited is : "We are of opinion that no sanction is required. It has been contended that, under Section 83 of the Registration Act, it is necessary that some one of the officers who are mentioned in that section must have given previous permission to institute proceedings, but we think that it is not so. The provisions of Section 83 are not obligatory. They rather seem to be intended for the purpose of enabling the officers of the Registration Department, when they should see fit, to institute any prosecution under the Act upon their own responsibility". With all respect for the opinion of the learned Judges who were parties to that decision I am of opinion that their statement of the purpose of the section is inadequate. It certainly provides for the institution of prosecutions by

(1) 1. Rangoon 299. (2) 11. Calcutta 566.

Registration officers, but it also added a new provision for prosecution by private persons with the permission of Registration Officers, and the question is whether the latter provision excludes prosecution by private persons without such permission.

That question was considered in 1917 by a Bench of the Madras High Court in *Piranu Nadathi's* case (3) and Ayling J., said : "I am inclined to hold that permission of the Registration Officers is not a preliminary requisite for the institution of proceedings by a private person for offences under the Registration Act". Napier J., said that he agreed with his learned brother but that the question was one on which it was possible to arrive at a different conclusion as could be seen from the decisions of the Calcutta High Court. He referred to the case of *Batesar Mandal* (4), *Hussain Khan* (5), and *Jiwan* (6 in which a contrary view had been taken, and he admitted that he had had great difficulty in arriving at a conclusion.

In *Palani Goundan's* case (7) in the same Court Ayling J., followed the decision in *Piranu Nadathi's case* (3) but in that case, although Spencer J., said that he was not prepared to differ from that decision, he went on to say : "Although I recognise the fact that a different view has twice been taken by the learned Judges of the Allahabad High Court sitting singly, I am inclined to prefer the opinion of a Bench of this Court supported as it is by a full bench of the Calcutta High Court in *Gopinath.* v. *Kuldip Singh,* and by the language of Section 83 which is not prohibitory like that of Section 195 of the Code of Criminal Procedure, but permissive."

It is clear from the wording of these decisions that none of these learned Judges was satisfied that the matter was free from doubt.

In *Hussain Khan's case* (8), a learned judge of the Allahabad High Court said : "Section 83 seems neither very clear nor grammaticial. Bearing in mind, however, that the offence is the creation of the Registration Act and finds no place in the Penal Code, I think the accused is entitled to the benefit of any ambiguity in the provisions of the Act. It is certainly not an unreasonable

(3) 40. Mad. 880. (4) 10. Cal. 604. (5) 14. All. L. J. 412.
(6) 37. All. 107. (7) 62. I. C. 582. (8) 38. All. 354.

contention to be urged on his behalf that a prosecution for an offence under Section 82, should not be commenced without the permission referred to in the section. It is said that the permission only refers to permission ? (prosecution) by a registering authority. This seems hardly correct, because the different registering authorities are the very persons who are named by the section as the persons who should grant the permission. The applicant cites the case of *King Emperor* v. *Jiwan.* (6) It seems quite clear that Tudball J., was of opinion that permission was necessary before a prosecution for an offence under Section 82 could be commenced. I allow the application."

It is probable that this decision was considered and not followed by the Madras High Court in *Palani Goundan's* case (7) and doubts were certainly cast on its correctness in the case of *Musammat Gobindia* (9), but I am not satisfied that it was mistaken. The principle which was embodied in Section 195, of the Code of Criminal Procedure is that prosecution for offences which are regarded as contempts of the lawful authority of public servants, of which, it is to be noted, furnishing false information to a public servant is one, are not to be instituted without the sanction of the public servant concerned or of some public servant to whom he is subordinate. The application of that principle has recently been made more stringent by the amendment of the Code which provides that an actual complaint of a public servant is now necessary.

The provisions of Section 83 of the Registration Act as to the necessity for the permission of the registering officer concerned or of some registering officer to whom he is subordinate are so similar to those of Section 195, of the Code that I think that it is a fair persumption that the legislature intended to apply a similar principle. The Registration Act of 1866, clearly contemplated and provided for the institution of prosecutions for offences under the Act only by Registering Officers, and if that Act had not been amended, as it has been in the two succeeding Registration Acts, I see no reason to doubt that the Courts would have held on the principle of

(9) 31. I. C. 124.

expressio unius that none but a Registering Officer could institute a prosecution for an offence under the Act. In the amendment of the Act provision was made for the institution by private persons with the permission of the Registration Officer concerned or of some Registration Officer to whom he was subordinate, as well as by Registration Officers themselves, but I see no reason why the principle should not still apply so as to prevent the institution by private persons without such permission.

As, however, the matter is admittedly open to question, and there is a decision of a Judge of this Court in the contrary sense I refer the following question for the decision of a Bench or a Full Bench according as the learned Chief Justice may direct :—

"Can a prosecution for an offence under the Registration Act coming to the knowledge of a registering officer in his official capacity be commenced by a private person without the permission mentioned in Section 82 of the Act ?"

Opinion. *16th August 1926.*

CHARI J.—The question referred for decision is "Can a prosecution for an offence under the Registration Act coming to the knowledge of a Registering Officer in his official capacity be commenced by a private person without the permission mentioned in Section 83 of the Act ?"

The facts which led up to the reference are that one Pan Gaing the agent of Maung Galay, the vendee, and three persons who are supposed to have attested a sale deed, were charged with an offence under Section 465 of the Indian Penal Code, with abetment of that offence, and also with an offence under Section 82 of the Registration Act. So far as the offence under Section 465 of the Indian Penal Code is concerned, no sanction or permission is necessary and the reference is only in respect of the offence under Section 82 of the Registration Act.

The relevant Sections of the Registration Act. are Sections 81, 82 and 83. Section 81 makes the endorsing copying, translating or registering a document by a Registering officer charged with those duties in a manner

which he knows or believes to be incorrect intending thereby to cause injury as defined in the Indian Penal Code to any person, an offence punishable with imprisonment which may extend to 7 years, with fine or with both. Section 82 deals with three classes of offences classified under (*a*), (*b*), (*c*) and (*d*) of the section. The offences are made punishable in the same manner as under the previous section. Clause (*a*) deals with intentionally making false statements before officers acting under the Act, (*b*) with intentionally delivering to a registering officer a false copy or translation of a document or a false copy of a map or plan and (*c*) with false personation and presentation of a document or the making of an admission or a statement in an assumed character in any proceeding or enquiry under the Registration Act. Clause (*d*) deals with the abetment of the above offences. Section 83 runs as follows: "A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector General, the Branch Inspector General of Sind, the Registrar or the Sub-Registrar in whose territories, district or sub-district, as the case may be, the offence has been committed." The point for consideration is whether a prosecution under the Act can be commenced by a private person, that is, whether the wording of Section 83 which enacts that a prosecution may be commenced by certain officers or with their permission, is mandatory or permissive. Before dealing with the authorities on the point which are conflicting, I shall refer to the wording in the old Registration Act of 1866, the corresponding section of which was the same as the section in the later Acts with two differences. The wording in the Registration Act of 1877 is the same as the wording in the present Act. The Act of 1866 after the words "in his official capacity" contained the words "may be instituted by" instead of the words in the present Act "may be commenced by or with the permission of." The old Act, also, before the words "Sub-Registrar," contained the words "with the sanction of the Registrar to whom he is subordinate." These words have been omitted in the present Act so that the Sub-Registrar's discretion to commence proceedings is not fettered by

any limitation. It will thus be noticed that the word "may" is used in both the Acts and the words "with the permission of" did not appear in the old Act. If the word "may" in the old Act can be read as being permissive and if the old Act did not bar private prosecutions then it follows that the later Acts could not have been intended to bar private prosecutions either, and that the words "with the permission of" were inserted merely to enable the Registering officer to depute someone else to file the complaint instead of going himself to the Magistrate's Court. It is unfortunate that there are no decisions under the old Act. The rulings on this question are not uniform. In the case of *Queen Empress* v. *Batesar Mandal* (1) a Bench of the Calcutta High Court was of opinion that a prosecution for the offence of giving false evidence before a Sub-Registrar can only be commenced either by him or by any of the officers mentioned in Section 83, or with the sanction of one of them. No reasons are given in support of this opinion. In *Gopinath* v *Kuldip Singh* (2) a Full Bench of the same High Court took a different view. In this case the reasons given by the learned Judges are that the provisions of Section 83 are not obligatory and that these provisions appear to have been intended to enable the officers of the Registration Department to institute any prosecution under the Act on their own responsibility if they should think fit. I shall consider later whether the section is obligatory or not, but the statement of the object of that section, as my learned colleague points out, is unsatisfactory. If the intention of the Legislature was not to put any limitation or bar on prosecutions, there was no need for a special provision that an officer of the Registration Department may institute proceedings since it is always open to him to do so. In the Madras High Court there are two cases, the case of *re Piranu Nadathi* (3), and a later case *In' re Palani Goundan* (4) In the former Mr. Justice Ayling and Mr. Justice Napier took the view that no permission was necessary for the institution by a private person of proceedings for an offence under Section 82 of the Registration Act. Mr.

(1) 10. Cal, 604.
(2) 11. Cal. 566.
(3) 40. Mad. 880.
(4) 62. I. C. 582.

Justice Ayling was of opinion that the intention of Section 83 was merely to prevent official prosecution for offences under the Act being instituted by an officer below a certain grade. This statement of the intention of that section does not strike me as being any more satisfactory than the one given in the Calcutta Full Bench case and I fail to see what distinction there can be between an official and a non-official prosecution in respect of the former. Mr. Justice Napier distinguished the offences created by the Registration Act from the offences created by other special Acts and from a consideration of the offences created by the Registration Act drew the inference that enquiries into false statements made before a registering officer are for the benefit of a particular person who may be injured or otherwise affected by the registration of a document, and that therefore they were in a different class from such offences as contempt of the authority of public servants or offences against the Government. He admitted that there were decisions to a contrary effect and expressed his regret that the judgments in these decisions did not give a reasoning of the learned Judges, a regret in which I share. The case of *Palani Goundan* (4) gives no additional reasons. Mr. Justice Ayling was a member of the Bench in this case also. Mr. Justice Spencer was not prepared to differ from the opinion expressed in the earlier case. In the opening portion of his judgment he refers to the fact that an offence under Section 82 may also be an offence under the Indian Penal Code, and under Section 195 of the Code of Criminal Procedure, before its recent amendment, sanction would have been necessary. A consideration of this circumstance leads to a conclusion different from the one arrived at by the learned Judges of the Madras High Court. Before referring to the cases of the Allahabad High Court, which has taken a different view, I shall refer to the case of *Govind Ram* v. *Emperor* (5) referred to by my learned colleague. This case was a decision of a single Judge of the Patna High Court who had held that the truth or falsity of recital in a deed was not one of the matters into which a Registering officer was entitled to enquire and that therefore the offence did not

(5) 81. I. C, 103.

come under Section 82 of the Registration Act. Having so held, the learned Judge proceeded to dispose of another argument raised before him that the prosecution was bad in the absence of the permission of the registering officer. He cited the Allahabad and the Calcutta Full Bench cases and the Madras case of *Piranu Nadathi* (3) and expressed his agreement with the Madras and Calcutta decisions, though it was not necessary for him to decide that point. I may also refer to the case of *Indrani* v. *Rani Bari* (6) in which the learned Additional Judicial Commissioner of Nagpur followed the Calcutta and Madras rulings. He draws attention to the fact that the word used in Section 83 of the Registration Act is "may" and not "must be."

As against these authorities we have the decision of the Allahabad High Court which had taken a different view. In the case of *King Emperor* v. *Jiwan* (7) and later case of *Emperor* v. *Hussain Khan* (8) two Judges of the Allahabad High Court sitting as single Judges took the view that it was not competent for a private person to institute a prosecution for an offence under the Registration Act without the previous permission of a Registering Officer. The ground on which the Chief Justice decided the later case seems to have been that as there is ambiguity in Section 83 of the Registration Act the accused is entitled to the benefit of that ambiguity.

These are the only authorities on the point. Considering the matter on principle without reference to authority, I have come to a conclusion in agreement with that of the learned Judges of the Allahabad High Court. My reasons are the following. The use of the word "may" by itself, gives no indication of the intention of the Legislature. Where there are a number of persons by any one of whom an act can be performed the Legislature uses the word "may" simply to show that it is open to any one of such persons to perform that act. Whether the performance of the act is obligatory or optional and whether such performance is confined to the persons specified in the statute, are matters in respect of which the intention of the Legislature will have to be gathered from the other provisions and the

(6) 87. I. C, 913. (7) 37. All. 107. (8) 38. All. 354.

general scheme of the enactment. A consideration of the provisions which create the offence and the purpose for which Section 83 was enacted, leads me to the conclusion that the word "may" is used here in the sense of "must be", and that that word is used merely because more than one person is authorised to institute proceedings. Section 81 of Registration Act enacts that every registering officer or any person employed under him who being charged with the duty of endorsing, copying, translating or registering documents does any of these things incorrectly with intent to cause injury to any person, is liable to punishment. This section is intended to punish the Registering Officers or their clerks for intentional dereliction of duty. Section 83 is general in its terms and applies to the offences under both the Sections viz. 81 and 82 of the Act. If the intention was not to bar private prosecutions in respect of offences under the Registration Act, it is open to any person to drag a Registering Officer or his clerk into a Criminal Court for an incorrect registration, and he can do so in spite of the fact that the superior of the registering official has made enquiries and has satisfied himself that the incorrect registration was due to accident without any intention to cause injury. I hardly think that such a result was contemplated. Turning now to the succeeding section which creates three classes of offences the first one is intentional making of a false statement before an officer acting in execution of the Registration Act in any proceeding or inquiry under that Act and it is immaterial whether this statement was made on oath or whether it has been recorded or not. As Section 84 of the Registration Act makes all Registering Officers "public servants" within the meaning of the Indian Penal Code, such a statement may fall under Section 181 or under Section 182 of the Indian Penal Code according to circumstances. Section 181 of the Code is narrower in scope than Section 82 (a) of the Registration Act because it applies only to cases where the person making the statement is bound by an oath or affirmation to tell the truth, and the maximum punishment prescribed is three years imprisonment instead of the seven years of the Registration Act. If in such a case a private prosecutor wants to proceed not under the Registration Act but under the Penal Code for

an offence which falls under Section 181 of the Code, the provisions of Section 195 clause 1(*a*) of Criminal Procedure Code will bar such a prosecution. Under the Criminal Procedure Code as now amended a Court can take cognisance of such an offence only on a written complaint by the public servant concerned. As a Registering Officer is a "public servant" though not a "Court" for the purpose of the succeeding sub-clauses (*b*) and (*c*) the complaint must be made by him and cannot be instituted by a private person, but when the same act is also an offence under Section 82 of the Registration Act which is a special Act and provides a much heavier penalty, it is suggested that it is open to a private prosecutor to institute proceedings on his own initiative. This is, and would, be an anomaly. Clause (*b*) of Section 82 makes the intentional delivery of a false copy or translation of a document or a false copy of a map or plan, punishable. It will be noticed that these copies are delivered to the Registering Officers under the special provisions of Sections 19 and 21 of the Registration Act, the former of which provides that a true copy and a true translation should accompany a document in cases where such document is in a language which the Registering Officer does not understand and which is not the language of the district, and the latter of which provides, that a document should contain a description of property, sufficient to identify it. The offence under Section 82 clause (*e*) relates to false personation. It will be seen from the above analysis that the primary, though not the sole object of the provisions of Sections 81 and 82 of the Registration Act is to ensure proper and correct registration of documents, and prevent an abuse of the law of registration. The limitation, that, in such cases a prosecution should be commenced by the officials concerned or with their permission, is not only reasonable but necessary. It is always open to a private person to bring the facts constituting the offence to the notice of the Registering Officer in his official capacity so that he can if he thinks fit take steps to institute proceedings, and if he does not do so to appeal to the head of the department in the Province.

For the reasons above given, I have come to the conclusion that the word "may" in Section 83 of the Indian Registration Act should be read as equivalent to

"must be" and that that section bars the institution of proceedings by a private person without the permission mentioned in that section. I therefore answer the question referred in the negative.

16th August 1926.

HEALD J.—I have had the advantage of reading the judgment of my learned brother Chari, and as his view of the meaning of Section 83 (1) of the Registration Act agrees with the view which I took in the order of the reference and which I have seen no reason to alter as the result of the further argument before this Bench, it is unnecessary for me to deal with the case at length again. It seems clear that if any and every person has a right to institute a prosecution for an offence under the Act, then it was unnecessary for the Legislature to provide in the Act of 1866, that a prosecution for an offence under the Act might be instituted by the Registrar General, the Branch Registrar, the Registrar, or (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar in whose territories, district or sub-district, as the case may be, the offence has been committed. The provision that the sanction of the Registrar was necessary for the institution of a prosecution by a Sub-Registrar was clearly restrictive, and I have no doubt that the intention of the Section as a whole was to restrict the power of instituting prosecutions for offences under the Act to the Registering Officers within whose area the offence was alleged to have been committed, that restriction, in the case of the lowest class of Registering Officers, being subject to the further restriction that they could not institute prosecutions without the sanction of the Registrar to whom they were subordinate. When the Act of 1866, was amended the restriction on the power of Sub-Registrars to institute prosecutions was relaxed and a further relaxation was made by the insertion of a provision that prosecutions for offences under the Act might be instituted by persons other than Registering Officers with the permission of the Registering Officers within whose area the offence had been committed.

If any and every person had the right to institute prosecutions for offences under the Act it was obviously unneceessary to provide that Registering Officers should

have that power, or to provide that persons other than Registering Officers should have that power with the permission of a Registering Officer. If any meaning at all is to be given to these provisions, that meaning must be that the power to institute prosecutions under the Act was restricted to the persons mentioned in the Section and that meaning is incompatible with the view that any and every person has an unrestricted right to institute such prosecutions.

I therefore agree that the question referred must be answered in the negative.

Robertson for Petitioner.

Eggar (Govt. Advocate) for the Crown.

SIR BENJAMIN HEALD J.

Nga San Tin ..... *Appellant.*

v.

King Emperor ..... *Respondent.*

Criminal Procedure Code (Act V. of 1898) Section 437-498—person accused of Murder-Bail not granted where reasonable grounds for believing him guilty.

A person accused of murder should not be released on bail either by the Police or the Court before whom he is brought if there appear reasonable grounds for believing that he is guilty of the offence of which he is accused.

Order. *9th August*, 1926.

Applicant is under trial before the Sessions Court of Prome on a charge of murder. He applied to the Sessions Judge to be enlarged on bail and his application was refused. He now asks me to order his release on bail under the provisions of Section 498 of the Code of Criminal Procedure. His learned advocate says that the case against him does not go beyond mere suspicion, and that the Sessions Court ought to have released him on bail under the provisions of Section 497 (2) of the Code. He also refers me to *Mohamed Eusoof's case* (1) as laying down that because an accused person is regarded as innocent until he is proved to be guilty, bail ought ordinarily to be accepted when the security is such as to make it morally certain that the accused will not abscond. He has, however, overlooked a later passage

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Cr. Misc. Application No. 31 of 1926, re-order of Sessions Judge Prome, in Cr. Misc. Trial No. 5 of 1926.

(1) 3. Ran. 540.

in the same judgment, where it was said that "it is unusual to grant a bail where the offence charged involves the possibility of capital punishment". I have no desire to indentify myself with the learned Judge's view of the words "death or transportation for life" in Section 497 of the Code, since I consider that view mistaken, but there can be no doubt that Section 497 lays down that a person accused of murder shall not be released on bail, either by the Police or the Court before whom he is brought, if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.

I have read the learned Sessions Judge's order and I find that he has considered the grounds raised in the present application. I see no reason to believe that he exercised his discretion wrongly in refusing to enlarge the applicant on bail, and I am not satisfied that I should be justified in directing the applicant to be admitted to bail under the provisions of Section 498.

I therefore dismiss the application.

Aung Din, for applicant.

MR. JUSTICE DUCKWORTH.

R. M. K. S. Firm ..... *Appellants.*

v.

Maung Ba Gyaw ..... *Respondent.*

Master and Servant–Clerk speaking and acting as local agent–letting out land for paddy cultivation–no authority from principal–whether bound.

A servant can bind his master by an act committed in the course of his service and for his master's benefit even though no express command or privity of the master can be proved, when the master has put him in his place to do that class of acts. *Barwick* v. *English Joint Stock Bank*, L, R, 2. Exch 259 (1867); *Dina Bandhu Saha* v. *Abdul Latiff Molla* 27 C. W. N. 18 applied.

Where a Chetty's Clerk who was managing a Branch firm let out certain paddy land on behalf of his principals to the respondent and later the principals themselves let the land to another, *Held* that as the Clerk had spoken and acted as one who had authority to let and had actually done so, and was to all appearances the local manager of the Chetty firm's paddy land, he must be held to have had, for the purposes of this case, authority to let out the land and thereby to bind his master.

Civil 2nd Appeal No. 446 of 1925, against the decree of the District Court of Bassein, in C. A, No. 112 of 1925.

Judgment. 29th *April*, 1926.

This is an appeal, which lies only under Section 100 Civil Procedure Code, the two Lower Courts having come to concurrent findings.

The facts of the case, in brief, are, that the Plaintiff appellant Chettyar firm who work in Bassein, but keep a clerk, Supaya at Kangyidaung some distance away, had let out their paddy land at Kangyidaung to the respondent-defendant for some years. The annual rent amounted to 520 baskets of paddy. Then, in March 1925, the plaintiff firm suddenly let the land to one Mg. Tun Myat, at the same rental, and in April sent the defendant-respondent notice to vacate the said paddy land. As the defendant did not vacate the land the appellant Chettyar firm brought this suit for ejectment. The defendant *inter alia* pleaded that he had been accepted as tenant for the season 1925-26, and that the notice came too late, inasmuch as he had already made preparations on the land to cultivate it. Both the lower Courts found that the defendant could not be ejected, since Supaya the clerk at Kangyidaung had accepted him as the firm's tenant for 1925-1926.

Mr. Halker's chief ground of appeal on behalf of the appellant, in fact the sole grounds which he argued or pressed, are that there is no evidence that Supaya, who denies letting out the land to defendant-respondent, had any authority to let out the land, or that he had acted in such a manner in other cases.

Upon these grounds I shall not interfere with the decision of the Courts below. Supaya himself in his evidence speaks in a manner which shows clearly that he considered himself the local agent of the firm for dealing generally with the land for letting it out. Moreover, there is evidence on the record, given by the Inspector of Land Records, and Headman, which shows equally clearly that Supaya spoke and acted as the agent of the firm. Kyaw Zan Win's evidence proves that Supaya *did* let the land for 1925-26, to respondent. There is other evidence to this effect also. Legally, in such circumstances, I think that Supaya could bind his master. The case of *Barwick* v. *English Joint Stock Bank*

(1) leaves no doubt in my mind that a servant can bind his master by an act committed in course of his service, and for his master's benefit, even though no express command or privity of the master can be proved, when the master has put him in his place to do that class of acts. This decision was, with limitation, approved in the case of *Dina Bandhu Saha* v. *Abdul Latiff Molla* (2).

Then there is the evidence given by the plaintiff's own witness Maung Po Saing that when defendant spoke to plaintiff about his leasing the land to another man the plaintiff promised that he would try to recover the lease, but otherwise stated that he could not help the defendant.

I consider that there was enough evidence upon the record to indicate that the clerk Supaya was the local manager of the plaintiff firm's paddy lands, and that he had, for the purposes of this case, authority to let out the land, and thereby to bind his master. Not jonly so, but there is sufficient evidence that he *did* let out the land to the defendant respondent for 1925-26.

The appeal is, therefore, dismissed with costs.

Mr. Halker, for appellants.

Shan, for respondent.

MR. JUSTICE CARR.

M. V. Mudaliar ..... *Appellant.*

vs.

V. S. M. Pillay and others ..... *Respondents.*

Limitation Act (IX of 1908)-Suit to recover share of estate-Sale by Hindu without legal necessity—starting point of limitation—date of sale.

Where the estate of a deceased Hindu was held by the widow after the husband's death for the benefit of herself and the children who were minors and managed by her, and then sold, but not for legal necessity, *Held* that a suit by the children, was not barred, as the cause of action arose only on the execution of the conveyance and not from the father's death.

JUDGMENT. *4th May 1926.*

The case of the plaintiffs-respondents was that their father Subbia Pillay died in 1909, leaving an estate which comprised the property in suit. They were then minors and the estate was managed by their mother and the 1st

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(1) L. R. 2. Exch 259 at p. 265 (1867). (2) 27, C. W. N. 18.

Civil 2nd Appeal No. 400 of 1925, against the decree of the District Court of Amherst, in C. A. No. 29 of 1925.

defendant, their half brother in 1913, these two sold the property in suit to one Tha Zan, who afterwards sold to recover their share, which was three-quarters. Their mother herself was not entitled to any share and the share of the first defendant was one-quarter.

They succeeded in both the Courts below. This appeal is based on the grounds that the suit was barred by limitation and that the sale was for legal necessity and was therefore valid.

Taking the second ground first, both Courts have found that there was no legal necessity, there being ample other assets to discharge the debts of the estate. That is a finding of fact which is final, and this ground must fail.

On the first ground the only question is when the period of limitation began to run. If from the date of Subbia's death then the suit was barred. If from the date of the sale it was not barred. Both Courts have found that after Subbia's death the estate was held in common, for the benefit of the widow and all the children, and was managed by the widow and the first defendant because the others were minors. On that finding I have no doubt that the cause of action arose only on the date of the conveyance and that the suit was therefore not time-barred.

The appeal is therefore dismissed with costs.

Mr. Halker, for appellant.

MR. JUSTICE CARR.

U Aung Din and 2 others *vs.* Ma Ngwe I.

Civil Procedure Code (Act V of 1908) Order 33, Rule 6—Scope of enquiry under Rule 6.

In proceedings under Order 33, R. 6, questions which will ultimately be questions in the suit, should permission to institute one be granted, are not to be tried before granting such permission.

Jogendra Narayan Roy vs. *Durga Charan Guha Thakurta* 46. C. 651- followed:-

Charu Sila Dasi vs. *Haran Chandra Mukerjee*, 50 I. C. 520- dissented from.

Civil Revision No. 252 of 1925, from the order of the District Court of Yemathin. in C. M. No. 97 of 1925.

JUDGMENT. *14th May 1926.*

The respondent, Ma Ngwe I, applied to the District Court of Yamethin for permission to sue as a pauper. After taking evidence as to pauperisim under Rule 6, of Order 33, the District-Judge granted her application

The present petitioners, who are some of the respondents in Ma Ngwe I's application, apply for revision of the order granting permission.

When leading evidence as to pauperism the petitioners had led also evidence to show that the respondent had no good cause of action in the suit. The District Judge refused to consider any evidence on this point other than the statement of Ma Ngwe I herself.

The first ground of this application for revision is that this refusal was wrong. In my opinion the District Judge was clearly right Rule 6, allows only evidence as to pauperism and the whole of Order 33, seems to me to contemplate that questions which will ultimately be questions in issue in the suit, should permission to institute one be granted, are not to be tried before granting such permission.

This view was taken by a bench of the Calcatta High Court in *Jogendra Narayan Roy* v. *Durga Charan Guha Thakurta* (1). The contrary view was taken by a Bench of the Patna High Court in *Charu Sila Dasi* v. *Haran Chandra Mukherjee* (2).

I agree entirely with the decision of the Calcutta Bench which seems to me to be fully borne out by the wording of Order 33.

A second ground is that even on the statement of Ma Ngwe I herself she had no good cause of action. I am unable to find in her statement any admission which throws doubt on the genuineness of her claim.

This application is dismissed with costs, advocate's fee five gold mohurs.

Mr. Anklesaria, for Petitioners.

Mr. Ganguli, for respondent.

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(1) 46 Cal. 651. (2) 50 I. C. 520.

SIR. GUY RUTLEDGE. C. J. & MR. JUSTICE CARR.

Vellasawmy Servai & 2 others — Appellants.

vs.

L. Sevaraman Servai — Respondent.

Civil Procedure Code (Act V. of 1908) Section 110—Appellate order of High Court granting Probate—Appeal to Privy Council.

An order granting probate is in the nature of a final decree and an appeal lies to the Privy Council therefrom under Section 110, Civil Procedure Code.

***Po Kin & Ma Sein Tin* 12 B. L. T. 87 dissented from.**

JUDGMENT. *12th July 1926.*

This is an application for leave to appeal to His Majesty in Council. Admittedly, in the District Court probate of a will of 1906, was granted to the applicants and the respondent's case for probate of a will of 1924, was rejected. On appeal to this Court the decision was reversed, the appeal was allowed and probate of the will of 1924, was granted to the respondent.

It is admitted that the estate in respect of which probate was sought was considerably over the value of Rs. 10,000/-

Objection however, is taken on behalf of the respondent to the grant of leave on the authority of the case of *Po Kin* v. *Ma Sein Tin* (1) in which a Bench of the late Chief Court decided that in probate cases no appeal lay to the Privy Council, on the analogy of the *Rangoon Botatoung Company's Case* (2).

We have perused this judgment and we are quite unable to agree with it. We can see no analogy whatever between the provisions of the Probate and Administration Act and the Land Acquisition Act. We have no doubt that the judgment of this Court granting probate is a decree and a final decree and there is a long series of decisions of their Lordships of the Privy Council which show that an appeal lies to them and will be entertained by them from decisions of the High Court in probate suits.

Civil Misc Application No. 61 of 1926 against the order in C.M.A. No. 44 of 1925, High Court Rangoon.

(1) 12 B. L. T. 87.

(2) 6, L. B. R. 150.

We need only refer to I. L. R. *21. Cal. page 1* I. L. R. 22 *Cal. page* 519, 23 *Cal. page* 1 & 24. *Cal. page* 30.

In these circumstances, there will be the usual order granting leave to appeal,

Keith, for appellant.

Mr. Bhattcharya, for respondent.

SIR BENJAMIN HEALD J.

Maung Tha E. .... *Appellant.*

v.

King Emperor .... *Respondent.*

Lower Burma Land and Revenue Act—(Burma Act II of 1876) Rule 69-unauthorised use of grazing ground for purposes other than grazing—strict proof required that ground demarcated and marked with boundary posts.

In all prosecutions under Rule 69 B. of the Rules under the Lower Burma Land and Revenue Act there should be evidence not only that the grazing ground has been allotted but also that it has been finally demarcated, that is, that the boundaries have been clearly marked with permanent posts or visible marks of some kind.

The proper procedure in such cases is for the Land Records Officer to file in each case along with his complaint or report, a map showing the relevant boundaries of the grazing ground with the demarcation marks and the area alleged to be occupied by the accused within the grazing ground and for the Court to take evidence that the grazing ground has been allotted and demarcated and that the alleged trespass has been committed. The evidence of the Land Records Officer and that of the Village Headman on all these points would be important.

Order. *18th July, 1926.*

A number of persons, namely, Shwe Nge, Tha E, Tha Ywe, Mg. Pe, Po Ba and San Min have been prosecuted by a Revenue Surveyor, Sein Ngwe, for occupying part of a grazing ground for purposes other than grazing and have been convicted of an offence under Rule 69 of the Rules under the Lower Burma Land and Revenue Act and sentenced to heavy fines.

The defence in each case was that they did not know that the land which they had occupied was grazing ground.

It is essential in all prosecutions under Rule 69 that there should be evidence not only that the grazing ground has been allotted but also that it has been finally demarcated, that is that the boundaries have been clearly marked with permanent posts or visible marks of some

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Criminal Revison No. 932 B. of 1926, being review of the Order of the Township Magistrate of Thanatpin, in Criminal Regular No. 142 of 1926.

kind, so that there is no room for mistake as to the limits of the grazing ground.

In the present series of cases there is no evidence to show that the grazing ground was properly demarcated and the Sessions Judge has reported the cases to this Court with a recommendation that the convictions and sentences be set aside and new trials be ordered.

In view of the defect mentioned above, of the number of cases, and of the severity of the fines imposed, I am of opinion that this course is justifiable.

There is nothing on the record to show on what the severity of the fines, which, ranged from Rs. 50/- to Rs. 200/- was based. If it was based on the area occupied, the adoption of that basis seems to me to have been unjustifiable, since the offenders have presumably been assessed to revenue on that basis, and it would in my opinion be unfair that they should have to pay twice on the area of the land which they had occupied.

The proper procedure in such cases is for the Land Records Officer to file in each case along with his complaint or report a map showing the relevant boundaries of the grazing ground with the demarcation marks and the area alleged to be occupied by the accused within the grazing ground, and for the Court to take evidence that the grazing ground has been allotted and demarcated and that the alleged trespass has been committed. The evidence of the Land Records Officer on all these points is of course important, as would be also that of the Village Headman.

In the circumstances of these cases I set aside the convictions and sentences and order that the accused be re-tried. As none of the fines seem to have been exacted and none of the accused seem to have been sent to jail in default, no orders for refund of the fines or for release from jail seem to be necessary, but if any of the fines have been paid they will be refunded and if any of the accused have been sent to jail they will be released forthwith so far as these cases are concerned.

The bonds which the accused have executed will be cancelled.

MR. JUSTICE DUCKWORTH.

The Joint and United Hindu family of K. V of Tiruvalur, Tanjore District, by its managing member N. P. Pakirisawmy Pillay ... *Appellant.*

v.

P.L.P.K.R.M.K. Chettyar and one ... *Respondents.*

Transfer of Property Act (IV of 1882 Sections, 3, 6 [e]—Mesne profits Assignment- suit- whether for account or actionable claim.

Where land was purchased by a Chettyar firm in 1917 but no registered deed was executed, and subsequently in 1920, the same vendors with the consent of the Chettyar firm sold the property and all mesne profits from 1917, to the vendees. *Held* [1] that as the mesne profits were an actionable claim and the Chettyar firm were owners in equity of the mesne profits which accrued due before the sale to the Vendees the assignment should have been executed by them [2] but that if the claim to mesne profits involved accounts as to the value of the paddy it would be a mere right to sue and was not transferable.

JUDGMENT. *15th July, 1626.*

On the facts, Mr. Burjorjee admits that there are no merits. There are concurrent findings, and the sole point in regard to which the two Lower Courts differed was as to the value of the rents and profits, which the appellant-defendant was liable to pay to the plaintiffs P. L. P. K. R. M. K Chettyar Firm. As to this there were cross-objections filed by Mr. Doctor on behalf of P. L. P. K. R. M. K., but he had to admit, at the hearing, that he could not press them, and he has not done so.

Mr. Burjorjee proceeds simply upon law points. He claims that, in regard to the profits for 1918-19 and 1920-21, his client should not be compelled to pay them to the plaintiff firm, because (1) the claim in regard to them is merely a right to sue for an account, which is not transferable under Section 6 (e) Transfer of Property Act, and even then only transferable by the 1st defendant Firm of M. S. A. P. L. He urges that in any case Nelamegam Pillay had no power to transfer the rents and profits to the plaintiff firm, inasmuch as, even if the claim be taken to be a debt, it is an actionable claim, and as such could only be transferred by registered assignment, and then only by M. S. A. P. L.

Spl. Civil 2nd Appeal No. 564 of 1925, from the decree of the District Court of Pegu in C. A. No. 92 of 1925.

He rightly points out that both the Lower Courts have held that M. S. A. P. L. was the beneficial owner up to 1923, and that the transfer of the land to the plaintiff by Nelamegam Pillay in that year was made with the consent of M. S. A. P. L., and that K. V. was the agent of M.S.A.P.L., up to then, and not of Nelamegam Pillay.

It is quite clear that after the sale agreement of 1917, M. S. A P. L. were in quity the rightful owners of the land, even though they took no registered title, and that K. V. was their agent for collecting the rents and profits for them. Nelamegam Pillay merely remained the person, in whose name the land stood, and who was bound to give his vendees M. S. A P. L. a registered title. No doubt, in 1920, with M S. A. P L's. consent, he could make a legal transfer of the title in the plaintiffs P.L P.K.R.M.K., but it was quite another matter when he purported to transfer the rents for 1918-19, which were then due. I think that it is clear that Nelamegam Pillay, even with M. S. A. P. L's consent, could not transfer the right to those rents and profits, which had accrued, by means of his sale deed to the plaintiffs inasmuch as they were held by K. V. for M. S. A. P. L., who alone could make such a transfer. If the claim is an actionable claim, then the same persons must transfer it by a registered assignment under Section 130 of the Transfer of Property Act. They did not do this. If it is merely a right to sue for an account, then this right was not transferable by anyone.

Mr. Burjorjee has relied on the cases of *Seetama.* v. *Venkataramnayya* (1) and *Durga Chunder Roy.* v. *Koilas Chunder Roy*, (2) The case of *Sheogobind Singh* V. *Gouri Prasad* (3) has also been referred to. The claim is certainly an actionable claim as defined in Section 3 of the Transfer of Property Act, and if it involves accounts as to the value of the paddy, it comes very near a mere right to sue for such accounts.

As regards rents and profits accuring *after sale to plaintiffs* i. e., for the years 1920-21 and 1921-22, Mr. Burjorjee admits that plaintiffs are entitled to them, and I think that he is right.

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(1) 38. Mad. 308. (2) 2. C. W. N. 43. (3) 4. Patna. 43.

I allow the appeal in regard to the rents and profits for 1918-19 and 1919-20, but dismiss it as regards the rents and profits for 1920-21 and 1921-22, i. e., the decree of the District Court is modified by reducing the amount decreed in plaintiffs' favour from Rs. 1470/9/0, to Rs. 830/15/0. The plaintiffs sued to recover in all Rs. 2181/15/3, so that they have succeeded in less than one half of their claim.

Taking everything together I order that the appellant do pay the plaintiffs P. L. P K. R. M. K. their costs on Rs. 830/3/0 in all Courts, whilst the plaintiffs P. L. P. K. R. M. K. will pay appellants costs on Rs. 1351/12/0.

The cross-objections are dismissed with costs on Rs. 711/6/0, i. e., the difference between Rs. 2181/15/0, and Rs. 1470/9/0.

Burjorjee, for appellant.
Doctor, for 1st respondent.
Kya Gaing, for 2nd respondent

MR. JUSTICE MYA BU.

Co-Operative Bank of Padigon ..... *Appellants.*

v.

S. V. K. V. Raman Chettyar & one ..... *Respondents.*

Civil Procedure Code (Act V of 1908)-Order 21, Rule 6—Assignment of decree-subsequent payment of decretal amount into Court-omission of assignee to record transfer—attachment of decree—right of attaching creditor.

Where a decree-holder assigned his decree to the appellants and they omitted to record, the transfer in Court and get themselves placed on the record and in the meantime the decretal amount was deposited in Court and attached and drawn out by 1st defendant Chettyar firm in execution of a decree held by them against the assignor decree-holder *Held* in a suit by the assignee against the Chettyar firm and the assignor that the assignees had no right to execute the decree assigned to them or to the benefits arising from the execution until they had been brought on the record and taken out execution of the decree and that not having done so their suit must fail.

A decree-holder is *prima facie* entitled to execute a decree and an application for execution of the decree by him cannot be resisted by the judgment debtor on the ground that the decree has been assigned to a third party as long as the assignee has neither appeared nor applied to execute the decree,

18th August 1926

PER. MYA BU, J.—In Civil Regular No. 67 of 1922, of the Subdivisional Court of Paungde, the 2nd defendant obtained a decree against one Maung Po Hlaing for Rs. 3150. Execution of that decree was taken out in

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Civil 2nd Appeal No. 589, of 1925, from the order of the District Court of Prome in C. A. No. 100 of 1925.

Civil Execution No. 56 of 1923, of the Subdivisional Court resulting in the case being closed on the 26th of September 1924, on a compromise whereby it was agreed to accept Rs. 2700 in full satisfaction of the decretal amount and one Ma Pyu became the judgment-debtor, Maung Po Hlaing's surety for the payment of the sum in or before the month of Tabaung 1286. B. E., that is roughly March 1925. On the 12th December, 1924, the 2nd defendant transferred to the plaintiffs the decree obtained by him in Civil Regular No. 46 of 1922.

On the 15th January 1925, the 1st defendant instituted Civil Execution No. 4 of 1925, for execution of the decree which they had obtained against the 2nd defendant in Civil Regular No. 50 of 1924, of the same Court and obtained attachment of the 2nd defendant's decree against Maung Po Hlaing. On the 21st March 1925, the said Ma Pyu made payment of Rs. 2700 into Court in satisfaction of the decree against Maung Po Hlaing on the basis of the abovementioned compromise. This amount was withdrawn by the 1st defendant on the 23rd March 1925, when the execution case was closed.

The plaintiff-appellants' suit is for recovery of that sum of Rs. 2700 from the 1st defendant.

It must be borne in mind that since the taking of the assignment the plaintiff Bank took no steps whatsoever until the institution of this suit to execute the decree or to have the transfer of the decree recognised by the Court.

The Court of first instance and also the Lower Appellate Court have dismissed the suit on the grounds that a decree-holder is *prima facie* entitled to execute a decree and that an application for execution of the decree by him cannot be resisted by the judgment-debtor on the ground that the decree has been transferred to a third party so long as the transferee has neither appeared nor applied to execute the decree. I have examined the cases quoted by them and I see no reason for disagreeing with the views expressed therein.

There is nothing at all to show that a transferee of a decree obtained primarily any more than a right to take out execution of the decree. If he does take out such execution he is then entitled to the benefits that may arise from his action.

The contention put forward on behalf of the plaintiffs amounts to this, that by virtue merely of the transfer of a decree the transferee became entitled to the very sum of money mentioned therein. I fail to find anything to support this contention. The ruling in *Sada Gopa Chariar.* v. *Raghunatha Chariar.* (1) relied on by the learned counsel for the plaintiff appellants, does not go far enough to support his case and deals with quite a different question altogether.

On the other hand, I can add the weight of the decisions in *Jasoda Deye.* v. *Kirtibash Das and others* (2) *Monmotho Nath Mitter.* v. *Rakhalchandra Tewary* (3), *Silu Peda Yelligadu* v. *Sree Raja Rav Venkata Kumara Mahipathi Surya Row Bahadur* (4) *and Hari Krishnamurthi* (5) in support of the proposition that it is the decree-holder on record who is entitled to execute the decree. It then follows that the transferee of a deeree will be entiled to execute the same only when he has been brought on the record and the transferee will be entitled to the benefits arising from the execution only when he takes out execution of the decree. I entirely fail to see how the plaintiffs-appellants in this case can succeed in their claim to be entitled to the sum of Rs. 2700/- which the 1st defendant Chettyar drew out of Court.

In the result, the appeal fails and it is hereby dismissed with costs.

Thein Maung and Ohn Pe, for appellants.

Mr. Chari, for respondents.

MR. JUSTICE CARR AND MR. JUSTICE MYA BU.

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1. Maung Po Tha
2. Ma Ngwe Bon .... *Appellants.*

versus.

S. R. M. M. A. Nagappa Chettyar and one ..... *Respondents.*

Civil Procedure Code (Act V of 1908) Order 21, Rule 66,—Neglect to mention place of sale in sale proclamation—material irregularity.

By omitting to mention the place of sale in the proclamation a very material piece of information to intending purchasers is kept back. Such

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(1) 33. Mad. 62. (2) 18. Cal. 639. (3) 10. C. L. J. 396.
(4) 18. M. L. T. 494. (5) 38. M. L. J. 271.

Civil Misc Appeal No. 218 of 1925 from the order of the District Court of Magwe in Civil Misc. No. 38 of 1925.

omission is a serious flaw in publishing the sale and constitutes a material irregularity therein, in the same way as the omission to mention the hour of the sale.

JUDGMENT. *11th August 1926.*

Per Mya Bu. J.—In Civil Execution No. 37 of 1924, of the District Court of Magwe, the 1st respondent firm in execution of a decree against the appellants had certain properties belonging to the latter attached and brought to sale. At first the sale proclamation was issued on the 3rd February 1925, fixing the sale at 7 a. m. on the 8th March 1925, at Yenangyaung. This sale, however, had to be stayed. Later another proclamation of sale was issued on the 1st June 1925. In it, it was announced that the sale would be held at 7 a. m. on the 12th July 1925, but there was no mention of the place where it would be held. The sale was conducted by the Bailiff of the Court commencing at 11 a m, on the appointed day at Yenangyaung and all the items of the property sold were knocked down to the second respondent for a total sum of Rs. 16,100. It may be mentioned that one of the items was sold subject to the mortgage in favour of the first respondent decree holder) to the extent of Rs. 50,500.

On the 7th August 1925, the appellants filed the application out of which this appeal has arisen praying that the said sale might be set aside. The matter was at first laid before the District Judge himself, who on the 12th August 1925, fixed the case for enquiry and production of witnesses on the 28th September 1925. The parties cited several witnesses for the enquiry but owing to pressure of other work the District Judge was unable to hold the enquiry on the day fixed and transferred the case to the file of the Additional District Judge.

On subsequent occasions when the case came on, the learned Additional District Judge merely heard the arguments of the advocates and no witnesses were examined; but he proceeded to pass the order, now under appeal, refusing to set aside the sale.

Out of the many grounds on which the appellants sought to get the sale set aside only two have been urged before us. They relate to:—

(1) The omission of the place of the proposed sale in the proclamation of 1st June 1925; and
(2) The sale having taken place four hours after the time mentioned in the proclamation.

If any one of these two amounts to material irregularity in publishing the sale, it will follow that the lower Court erred in not taking evidence on the question of substantial injury, if any, sustained on account of such irregularity.

As regards the 2nd point we are clearly of opinion that it does not amount to material irregularity. We can conceive of many circumstances for which the auctioneer cannot be blamed which will defeat his desire for punctuality. There is no hard and fast rule that a sale must start punctually at the appointed time. Such delay as in this case cannot be regarded as unusual or extraordinary.

As regards the first point under Order 21, Rule 66, of the Code of Civil Procedure, the necessity for mentioning the place of the intended sale in the proclamation is imperative. By the omission of the place of sale in the proclamation a very material information to the intending purchasers is kept back. In our judgment such omission forms a serious flaw in publishing the sale and consititutes material irregularity therein in the same way as the omission to mention the hour of the sale in such proclamation, as held in *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal* (1).

The learned advocates for the respondents relying on the rulings in *Arunachellam* v. *Arunachellam and another* (2) and *Umadi Rajaha Rajai Damara Kumara Thimma Nayanim Bahadurvaru Raja of Kalahasti* v. *Sri Raja Velugoti Sri Rajagopala Krishnaya Chendra Bahadurvaru, K. C. I. E., Maharaja of Venkatagiri and another* (3) submitted that the appellants who allowed the sale to be completed without raising any of the objections now raised by them, should be estopped from complaining of any irregularity resulting from the defective proclamation. We have examined the cases cited by them and we are satisfied that they do not apply to the case before us. They deal with questions relating to insufficient or erroneous statement or description of the property put up for sale which the judgment debtor had the opportunity of correcting. In the present case we are concerned with an omission of a material part of a sale proclamation which, in our opinion, is quite a different thing

(1) 24, Cal. 291. (2) 12. Mad. 19. (3) 38. Mad. 387.

In the result we allow this appeal and set aside the order of the Lower Court dismissing the appellants' application. And the case is sent back to the Lower Court with the direction that it shall dispose of the appellants' application after taking such evidence as may be adduced on the question relating to substantial loss or injury sustained by the appellants.

Respondents to pay the appellants' costs in this appeal, advocates' fee three gold mohurs.

Kyaw Din, for appellants.

Banerjee and K. C. Bose, for respondents.

SIR. BENJAMIN HEALD KT. J.

Nga Tun Sein ... *Appellant.*

vs.

King Emperor ... *Respondent.*

Burma Excise Act (Burma Act V of 1917) Section 64 A—Habitual Offenders' Restriction Act not applicable.

No proceedings can be taken under Sections 3 and 7 of the Habitual Offenders' Restriction Act against persons who are being proceeded against under Section 64, A. Excise Act.

King-Emperor vs. *Nga Kyaw Hla*, 4, Ran. 123—referred to

Order. *3rd September*, 1926.

Tun Sein was sent up by the Excise Department before the Subdivisional Magistrate of Moulmein with a view of his being put on security under the provisions of Sections 64, A. of the Burma Excise Act. Instead of taking the action which he was asked to take the Magistrate purported to take action under Section 7 of the Burma Habitual Offenders' Restriction Act. It has been held by a Bench of this Court in the case of *K. E.* v. *Kyaw Hla* (1) that the cases referred to in Section 3 (1) of the Habitual Offenders' Restriction Act do not include cases in which a Magistrate may require a person to show cause why he should not be ordered to execute a bond for his good behaviour under Section 3 of the Burma

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Criminal Revision No. 1136, B. of 1926, being review of the order of the Sub-Divisional Magistrate's Court of Moulmein, in Criminal Misc. No. 214 of 1926.

(1) 4, Ran. 123.

pium Law Amendment Act. Theiprovisions of Section ɬ, A. of the Burma Excise Act are exactly similar to those Section 3 of the Burma Opium Law Amendment Act, ıd it follows that the fact that proceedings under ɛction 64, A. of the Excise Act may be taken against ıe accused does not warrant a Magistrate in taking roceedings against him under Section 3 of the Restric-on Act or in making an order under Section of that ct.

The order of restriction against Tun Sein is set aside ıd the case is remanded to the Subdivisional Magis-ate for retrial according to law.

ɔIR GUY RUTLEDGE KT.K.C, C.J. & MR. JUSTICE CARR.

N Surty ... *Appellant.*

vs

'. S. Chettyar Firm ... *Respondents.*

Civil Pro. Code (Act V of 1908) O, 45, R. 7, Extension of time for ·ving security for appeal to Privy Council.

Under the amended provisions of Order 45, Rule 7, the High ·ourt has no power to extend the six weeks period allowed by the ·ule for furnishing security from the date of certificate for appeal.

Burma Excise Act. (Burma Act V of 1917) as amended by Burma ·xcise Act (Burma Act IV of 1925.)

SECT. 64 A.—Whenever a District Magistrate, Subdivisional Magistrate or, when he is specially empowered in this behalf by the ·ocal Government, a Magistrate of the first class, receives infor-nation that any, person within the local limits of his jurisdiction ·arns his livelihood wholly or in part:—

(a) by the unlawful manufacture, transport, importation exportation, sale or purchase of excisable article in contravention of the provisions of this Act or of any rules made thereunder, or

(b) abetting such unlawful manufacture, transport, importa-tion exportation sale or purchase;

ıe may deal with such person as nearly as may be as if the imfor-nation received about him were of the description mentioned in ɔection 110 of the Code of Criminal Procedure 1898; and for the ɔurposes of any proceeding under this Section the fact that a person ɛarns his livelihood as aforesaid may be proved by evidence of general repute or otherwise.

Civil Misc. Application No. 96 of 1925, from the decree of High Court of Judicature at Rangoon, in Civil 1st Appeal No. 89 of 1925.

Ram Dhan & ors. v. *Prag Narain & ors.* 44, All, 216 @ p. 217 followed.

But if time is computed on the alternative basis of 90 days from date of the decree the High Court has a discretion to extend time fo another 60 days giving in all 150 day's from the date of decree.

Judgment. 19*th July*, 1926

Per RUTLEDGE C. J. :—In this case there is ar application by the appellant asking the Court to extenc the time for furnishing security in a case where leave tc appeal to His Majesty in Council has been granted anc there is a counter-application on the part of the respon-dent to revoke the certificate of leave as the appellan has failed to furnish security within time. The question is governed by the provisions of Order 45, Rule 7 of the Code of Civil Procedure read with Section 3 (*1*) of Act XXVI of 1920, so that Rule 7 now reads :—

"Where the certificate is granted, the applicant shall within 90 days or such further period not exceeding 6c days as the Court may upon cause shown allow from the date of the decree complained of or within six weeks from the date of the grant of the certificate whichever is the later date—"(a) furnish security in cash or in Gover-ment securities for the costs of the respondent."

For the appellant it is argued that, although the judgment appealed from is dated 6th June 1925, there was an application to review that judgment, which was admitted, and judgment upon the review was not passed until the 22nd of February 1926, that the certificate to appeal to His Majesty in Council was granted by this Court on the 10th of May 1926, but that the question of the amount and the nature of the security was not decided then but only decided on the 26th May 1926. Admitted-ly even if the date of the judgment upon the review application, namely, the 22nd February 1926, is taken as the period from which the three months is to run, this part of the Section would not avail the appellant. But it is urged that in the alternative the six weeks period should be calculated from the 26th of May and that if that is done as that period does not lapse until the 7th July, the appellant is in time to move the Court for an exten-sion.

Reliance is placed upon a series of cases beginning with Indian Law Reports 2, Calcutta, page, 272, which

was approved of by the Privy Council in Indian Law Reports 10, Calcutta page 557, which show that, for cogent reasons, the Court has power to extend the time.

We may observe, however, that all these decisions were previous to the important amendment by Act XXVI of 1920, and if the result of that Act is to limit the power of the Court to grant any extension to the three months' period and not to allow any extension of the six weeks' period, then the cases cited would have no application. This was the view taken by a Bench of the Allahabad High Court in *Ram Dhan and others* vs. *Prag Narain and others* (44, Allahabad, p. 216). The Chief Justice and Mr. Justice Banerji observe on page 217 :—

"The question before us is whether having regard to the very careful drafting of the amendment the discretion of the Court is not curtailed and limited, as regards the period from the date of decree, to an extension of 60 days, beyond which under no circumstances the Court can go. We are of opinion that is the real meaning and the intended effect of the Section. It will be seen that the period of six weeks from the grant of the certificate has not got coupled with it any discretionary period. In practice an appellant secures not much less than 150 days from the decree appealed against under this provision. Our view is that we have no power to extend the period beyond those times which are now definitely and clearly set out in the amended Order XLV, Rule 7. To decide otherwise and grant extension beyond the period of six weeks would in our view defeat the object and intention of the amendment."

The same construction seems to have been adopted by the Madras High Court and the Court of the Judicial Commissioner at Oudh, and we ourselves have no doubt that this is the correct view, applying the legal maxim *expressio unius* to the construction of the rule. But even if we had considered the amendment in the way contended for by the appellant we are not satisfied that any cogent reasons for extension appear in this case.

The appellant or the party behind him was to give security in cash or Government securities. They did not choose to give cash but wasted a lot of time in seeking for a particular kind of Government security upon

which apparently the interest or return would be better, namely, the new issue by the Government of India. When this was found unavaibable, they purchased the ordinary Government Promissory Notes and even then apparently they did not purchase sufficient, taking the face value instead of the market value of these notes, with the result that the Bailiff, subsequent to their tender, reported that their actual value was short by something like Rs. 900/-

We are accordingly of opinion that the appellant's application fails and that the respondent's application must succeed with the result that the certificate granted will be revoked. Costs, 3 gold mohurs.

N. N. Burjorjee, for appellant.

Ormiston, for respondents.

MR. JUSTICE CHARI

M. Ramanathan ... *Appellant*

vs.

King-Emperor ... *Respondent*

Hindu marriage—Sudra—Oriya male and Telegu female—whether marriage is in accordance with Hindu law and custom.

It is not in accordance with Hindu law or custom for an Oriya male to enter into a valid marriage with a Telegu Hindu woman.

There is nothing in the Hindu Shastras to prohibit a marriage between persons belonging to different subdivisions of the Sudra caste yet in all such cases the persons belonging to the different subdivisions spoke the same language and were residents of the same Province.

Upoma Kuchain and one v. *Bholaram Dhubi* (1) 15 C. 708; *Mahantawa Kom Irappa* v, *Gangawa Kom Malappa and others* (2) 33. Bom 693—distinguished.

JUDGMENT *2nd September* 1926.

The complainant R. K. Behara, an Oriya Hindu of the Sudra caste, filed a complaint against Ramanthan, the accused, charging him with enticing away his legally married wife with intent that she may have illicit intercourse with him, an offence punishable

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Criminal Appeal No. 1179 of 1926, from the order of 5th Additional Magistrate Court of Rangoon in Criminal Regular Trial No. 547 of 1925.

under Section 498 of the Indian Penal Code. The trial Magistrate found the accused guilty, and convicted and sentenced him to 3 months' rigorous imprisonment and to pay a fine of Rs 300 or in default to suffer 3 months further rigorous imprisomment.

The accused appeals to this Court and it is argued by the learned advocate on his behalf that (1) no valid marriage was possible between the complainant and Satyanarayana who is alleged to have been his wife; (2) no marriage has been proved; (3) there has been no enticement in the Indian Penal Code.

The first point to consider is whether there could be a valid marriage between an Oriya Sudra and a Telegu woman presumably also of the Sudra caste. In the earlier rulings of the Indian High Courts it was held that marriages between persons belonging to different sub-divisions of the same caste is illegal unless sanctioned by custom. A different view was taken in the later rulings, and it has been held that there is nothing in the Hindu Shastras to prohibit such a marriage. (1 *Upoma Kuchain and another* v. *Bholaram Dhubi* (1) and *Mahantawa Kom Irappa* v. *Gangawa Kom Malappa and others* (2). In all these cases however the persons belonging to the different sub-divisions spoke the same language and were residents of the same Province. In the present case the complainant is an Oriya speaking a language which is a branch of the Bengali, while the girl Satyanarayana is a Telegu speaking a Dravidian language. Whether a marriage between these two people is legal or illegal it is so unusual and unheard of that the evidence relating to the marriage has to be scrutinised with more than usual care In all my experience I have never heard of such a marriage ever having taken place.

The evidence as to the marriage is that of the complainant himself. He says that he was married according to the Hindu rites and customs, whatever that may mean. The second witness is the girl's mother. She admits that she has been living with the complainant ever since the marriage of her daughter. She has been in a sense dependent on him. Her evidence does not carry the case much further. The complainant says that a

(1) 15. Cal. 708. (2) 33. Bom. 693

man by the name of Molaram Dass was the Oriya priest who officiated at the ceremony. In this peculiar marriage a noticeable feature is that priests belonging to the Oriya caste and priests belonging to the Telegu caste are alleged to have officiated. The person who was actually called however is an entirely different man by the name of Bhola Nath Panda who did not himself officiate at the marriage, but whose brother Fakir Charan Panda is alleged to have officiated. The other two witnessses Battercharje and Misra are merely to show that such marriages are possible. The adoptive father of the girl says that he does not know of any such marriage, as the complainant alleges having taken place. He would undoubtedly have known of such a marriage, if it had taken place.

In proving an offence in which marriage is an essentical ingredient, it is necessary that the fact of the marriage must be strictly proved. In this case the probabilities are entirely against there having been any valid marriage between the parties. The complainant admits that he had two, if not three, other Telegu women as his mistresses before he took Satyanarayana. He is an Oriya Hindu and has got an Oriya wife in his own country. It is also proved that before Satyanarayana came to the complainant she passed through the hands of one Chelleya. In these circumstances when it would have been the easiest thing possible for the complainant to obtain this woman as a mistress, it is inconceivable that he would have gone out of his way to perform a ceremony of marriage and make her his legal wife with the probability and almost the certainty of her being discarded from the caste in his own country and by his own people.

In these circumstances I have no hesitation in holding that a valid and legal marriage has not taken place, and that therefore the accused could not have been convicted of the offence of enticing away a married woman. I set aside the conviction and sentence passed on the accused Ramanathan, and direct that he be acquitted and that the bail bond executed by him be cancelled. The fine, if it has been paid, will be refunded to him.

Vakharia, for applicant.

MR. JUSTICE MYA BU.

Ma Shwe Yon and Others ..... *Appellants.*

vs.

Ma Waing and one. ..... *Respondents.*

Burmese Buddhist Law—Stepmother's death after divorce—stepson no right to inhert—continuance of filial relations required to be proved.

A stepson has ordinarily no right of inheritance to his step-mother's property in the event of her death after her divorce and separation from his father.

In order to acquire such a right it must be proved that there was a continuance or revival of filial relationship on the part of the stepson.

A Buddhist couple were divorced by mutual consent in 1925. The document of divorce contained an agreement to partition the joint properties between, them and the wife took possession of certain properties in pursuance thereof, The husband died in 1917. The wife died in 1924. The stepson sued the brothers and sisters of the step-mother, they having taken possession of her estate as her heirs, *Held* that as no revival of filial relations had been proved by the stepson after the divorce he was not entitled to inherit the step mother's estate.

Maung Dwe v. *Khoo Haung Shein and ors.* 3. Ran 29—3 B. L. J. 348 (P. C.)—distinguished.

Divorce agreement for each party to enjoy certain property—possession taken in pursuance thereof—document admissible without registration.

Held also, that as the document of divorce merely mentioned the terms agreed to by the parties as to the way in which they should take their respective shares in the properties and did not of itself create a partition of the properties it was admissible in evidence without registration.

Ma Han. v. *R. A. M. L. Firm.* 4. Ran. 110 referred to.

JUDGMENT. *5th August* 1926.

The facts of the case, which must now be or have been accepted by all the contesting parties in this Court are these.

U Tha Maung a Burmese Buddhist, had 2 wives. The 1st. wife was Ma Daung, who died in 1924. The defendants are her brothers and sisters. During the subsistence of his marriage with Ma Daung, U Tha

Special Civil 2nd Appeal No 38 of 1926. from the District Court of Toungoo in C. A. No. 92 of 1925.

Maung married the 2nd. wife, Ma Waing, the 1st plaintiff, by whom he had a son, Mg Ko Gyi, the 2nd. plaintiff. After this marriage, a divorce by mutual consent was effected between U Tha Maung and Ma Daung on the 20th September 1925, as per exhibit I and since then they became separate. A year or two later U Tha Maung died. The present dispute relates to the properties of which the said Ma Daung admittedly died possessed In their amended plaint, the plaintiffs claimed that the said properties still belonged to the joint estate of U Tha Maung and Ma Daung, that therefore U Tha Maung's share therein devolved on the 1st. plaintiff as his surviving widow and sole heir and that the remainder, namely, Ma Daung's own share devolved on the 2nd. plaintiff, who was Ma Daung's stepson.

The defendants, who are the brothers and sisters of Ma Daung and who would be the rightful heirs to the whole estate if the entire estate belonged to Ma Daung, alone and if Ma Daung had died leaving no descendant, contested on the ground that inter-alia there had been a divorce and partition of property between U Tha Maung and Ma Daung.

The trial Court found that, though there was a divorce as alleged, there was no partition of property between U Tha Maung and Ma Daung, and decreed U Tha Maung's share of what was found to be the joint estate in favour of the 2nd-plaintiff.

On appeal by the defendants, the Lower Appellate Court upheld the finding of the trial Court as to divorce and partition of property but held that, in view of the divorce between U Tha Maung and Ma Daung the 2nd. plaintiff could not be regarded as Ma Daung's heir. Consequently the learned District Judge gave what was found to be Tha Maung's share to the plaintiff, the remainder being decreed in favour of the defendants.

The chief reason for the finding by both the Courts that the joint estate of U Tha Maung and Ma Daung had been partitioned was that the document, Ex. I, was admissible merely to prove the divorce but inadmissible to prove the partition. The defendants in coming to this Court on 2nd. appeal set out various grounds of appeal most of which attacked the proposition of fact as set out in the opening of this judgment and have not been

touched upon by their Counsel in his argument. Their sole real ground now in short is that the Lower Courts failed to appreciate the point of law involved in the question on the alleged partition.

The 2nd. plaintiff also has filed a cross-objection against the Lower Appellate Court's finding that he was not an heir of Ma Daung. His counsel relies on the decision of their Lordships of the Privy Council in the case of *Mg Dwe and others* vs; *Khoo Haung Shein and others* (1.) That case deals with the right of the ordinary step-children step-grand-children of a deceased person to inherit his estate to the exclusion of his collaterals, laying down that it is not necessary for the establishment of their right to inherit to prove that they maintained filial relationship with the deceased. The question arising in the present case is quite different. The 2nd. plaintiff's father and his step-mother, Ma Daung, had the marriage tie between them cut off before the death of the former, and this is too important a factor to be left out of consideration. The learned District Judge who pointed out that there was no anthority on the point, arrived at the conclusion that the divorce between U Tha Maung and Ma Daung had cut off the relationship between the 2nd. plaintiff and Ma Daung and that he therefore could not be her heir. There is no reason why I should dissent from that conclusion, which has been based on very cogent reasons. In addition I should point out that the case of *Ma Cho Gale* vs; *Ma Nan Chaw and others* (2.) is very similar to this, the only difference being that in the former the claimant step-child was the child of an inferior wife. This difference makes me reluctant to apply the ruling in that case to the one now before me, though I have very grave doubts that the learned Judges who gave that decision would have had a different one even if the claimant's mother had the status of a full or superior wife. All that I would like to add is this: Though there is no direct authority either in the reported decisions or in the Dhammathats, an analogy may safely be taken from the law relating to the status of the children of a divorced couple when they have been taken

(1) 3 Rang. 29.=3. B. L. J. 340 (P. C.)

(2) 3 Rang. 521.

away by either of the parents. From the cases of *Mi Thaik* vs; *Mi Tu* (3), *Ma Gywe and others* vs; *Ma Thi Da* (4) *Ma Sein Nyo* vs; *Ma Kywe* (5) *Ma Pon* vs; *Po Chan* (6) *and Le Maung* vs; *Ma Kwe and others* (7) it may be taken as a well established rule of Buddhist Law that a child taken away by one of its parents on divorce loses the rights of inheritence as a member of the family of the other parent unless there has been maintenance or revival of filial relationship between it and the latter. In my opinion this rule should apply with much greater force to a case like the one under consideration. There is no evidence at all that there was continuance or revival of filial relationship between 2nd. plaintiff and Ma Daung.

The counsel for the 2nd. plaintiff contends again under the authority of *Maung Dwe and others* vs; *Khoo Haung Shein and others* (1) that it was not incumbent on a step-child to prove maintenance of filial relationship in order to be entitled to inherit from a step-parent. But if it is borne in mind that upon divorce of the parents' a position very analogous to that of adoption arises in regard to the status of their children as pointed out in *Ma Paw and one* vs; *Ma Mon and others* (8) *Po Cho* vs; *Ma Nyein Myat and others* (9) *and Ma Yi* vs *Ma Gale* (10) it becomes intelligible that although a step-child may not ordinarily be called upon to prove maintenance of filial relationship, yet a child who goes away or remains behind with one of the parents on their divorce must necessarily show that in spite of severance filial relations between it and the other parent have not been broken off or have been resumed so as to be entitled to inherit in the latter's estate. In my judgment, the 2nd. plaintiff's cross-objection must be thrown out.

I now return to the appellant's case. I fail to see why the appellants who are in possession of the properties in suit, should be required to prove that they were the absolute properties of Ma Daung. The divorce took place in 1915: since then Ma Daung and U Tha Maung

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(3) S. J. (1872-92) 184. (4) 2. U. B. R., 1892-96, 194.
(5) 2. U. B. R., (1892-96) 159. (6) 2. U. B. R., 1897-01, 116.
(7) 10 L. B. R., 107. (8) 4 L. B. R., 272.
(9) 5. L, B. R., 133, (10) 6. L. B. R., 167.

became separate and Ma Daung was in possession and enjoyment of the properties till her death. On Ma Daung's death, the 1st respondent applied for Letters of Administration, concealing the fact of the said divorce, to the estate of Ma Daung on the ground that her minor son, the 2nd Defendant, was Ma Daung's step-son, and heir. She failed to get the Letters-of-Administration and she as the next friend of the 2nd respondent filed the first plaint in the suit in which, too, she put up the 2nd respondent as Ma Daung's heir entitled to Ma Daung's effects as set out in the schedule. It was only about 7 weeks later she altered the case to one in which the same properties were described as the joint estate of U Tha Maung and Ma Daung and claimed to be the heir of U Tha Maung in her own right as his widow posing the 2nd respondent as the heir of Ma Daung entitled to Ma Daung's undivided share in the same properties. It was most unlikely that the 1st respondent would sleep over her rights to have the joint estate partitioned on U Tha Maung's death, if there was any truth in the allegation that the properties did then belong to both U Tha Maung and Ma Daung. In these circumstances, it would be only fair to the appellants to presume that the properties belonged to Ma Daung and Ma Daung alone after her separation from U Tha Maung unless the contrary be shown by the respondents.

There is Ex I which supports the theory of partition between Ma Daung and U Tha Maung. I have read this document and I find that there is nothing therein which rendered this document to be compulsorily registered.

It sets out the divorce and does not itself create a partition. It merely mentions the terms agreed to by the parties relating to the way in which they should take their respective shares in the properties in the manner stated. It was treated by the parties as such. Stamp duty was not paid on it as on an instrument of partition. I can see no justification for excluding any part of that document from the evidence in the case. I am fortified in my view by the ruling in *Ma Han* vs *R. M. A. L. Firm* (11) wherein it was held that " a document which does not of itself create a partition of properties but which merely

(11) 4 Rang. 110.

recites a previous arrangement is admissible in evidence to prove that arrangement."

In the circumstances I have no hesitation in holding that the properties in suit were the separate properties of Ma Daung. That being so, 1st respondent's case fails. I allow the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff-respondent's suit with costs.

Tun Byu for appellants.

Ganguli for respondents.

SIR. BENJAMIN HEALD KT. J. & Mr. JUSTICE CHARI.

Eng Ban Hwat & Co., ... *Appellants.*

vs.

Latiff Hazi Shariff, Hajee Noor Mahomed *Respondent.*

Contract Act (IX of 1872) Section 107 - Right of re-sale under Section 107 - cannot be exercised unless property in goods has passed to buyer.

The right of re-sale may be the result of a statutory provision or of agreement between the parties.

The right of re-sale under Section 107, Contract Act can only be exercised if the property in the goods has passed to the buyer.

Baldeo Das v. *Howe*, 6. C. 64 @ p. 68—referred to.

Under a contract for the purchase of "Milcher" rice where the seller tendered a milling notice which the buyer refused to accept, and the seller notwithstanding milled the rice and offered delivery, which was refused, and then sold the rice and claimed the difference between the sale price and the contract price, *Held* that the buyer having refused to accept the milling notice or delivery of the rice, there was no appropriation, and the property in the goods had not passed to the buyer and the right of re-sale under Section 107 Contract Act did not arise, that the measure of damages was the difference between the contract price and the market price.

Judgment. *8th September*, 1926.

PER CHARI J. :—In the suit out of which this appeal arises the plaintiff sued to recover a sum of Rs. 3308/- being difference between the contract price of 2000 bags of boiled "Milcher" rice which the defendant had agreed

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Civil 1st Appeal No. 133 of 1926, aginst the decree of O. side High Court, Rangoon, in Civil Regular No. 309 of 1925.

to buy from the plaintiff and price fetched by the sale of the rice which, according to the plaintiff, was sold by public auction at the defendant's risk. The defendant denied the contract and claimed that he instructed his broker to buy 200 tons of boiled "Milcher" rice of the Prawn mark of Eng Hong Bee's mill and not the plaintiff's rice which is known in the market as "Milcher" rice of the "fish" mark.

The learned Judge of the original side held that the contract was entered into as claimed by the plaintiff and found on that point against the defendant but as regards the question of damage the learned Judge was of opinion that as there was a demand for boiled rice in the month of May during which, according to the contract, the rice ought to have been delivered to the defendant and as it was the duty of the plaintiff to minimise damages as much as possible the plaintiff ought not to have sold the rice which he had milled by public auction. He held therefore that the plaintiff was only entitled to damages on the basis of the difference between the market price in the month of May and the contract price. He held that difference to be Rs. 12/8/- per 100 baskets and gave the plaintiff, on that basis, a decree for Rs. 750/-. The defendant has not appealed but the plaintiff appeals to this Court against this decree and claims that he is entitled to the sum of Rs. 3308/- as claimed in the plaint.

The right of re-sale may be the result either of a statutory provision or of agreement between the parties. The statutory provision is contained in Section 107 o. the Indian Contract Act and it is clear from the terms of that section that it can only be exercised if the property in the goods has passed to the buyer, (*Baldeo Das* v. *Howe* I. L. R. 6, Cal, 64, at p. 68). The learned advocate for the appellant argues that in this case the property in the rice had passed to the buyer. We, however, do not think so. Neither Section 83 nor 87 of the Contract Act is applicable because before the plaintiff started milling he tendered a milling notice which the defendant refused to accept. On the 23rd of May 1925, the plaintiff's advocate sent a notice to the defendants saying that in spite of the tendering of the milling notice the defendent had not sent gunnies for the boiled rice,

and enquiring whether the defendant intended to take delivery of the rice. It would seem, therefore, that there had been no appropriation of the goods by the seller. The property in the goods not having passed, there was no lien on the goods in favour of the seller which would enable him to re-sell the rice in accordance with the provisions of Section 107 of the Contract Act. As regards the contract itself, in the bought and sold notes there are two clauses which are relevant. Clause 11 provides that if the buyer fails to appear to take delivery ex hopper the sellers have the option of cancelling the contract and claiming from the buyer the difference between the contract and market price on the day the rice was to have been milled. As the defendant repudiated the contract from the very beginning that was the obvious remedy of the plaintiff, The succeeding clause however provides that the sellers have the option of disposing of the rice by private or public sale for buyer's account should they fail "either to deposit margin as above within two days of the presentation of the bill." This clause must be read with the previous clause and in our opinion it gives a right of re-sale only when the buyer, having agreed to milling of the rice on his behalf fails after the rice had been milled to pay its price within two days of the presentation of the bill. We are of opinion that the conclusion arrived at by the learned Judge that the plaintiff is entitled only to damages calculated on the difference between the contract price and the market price is correct.

The other findings have not been challenged and was therefore dismiss this appeal under Order 41, Rule 11 of the Civil Procedure Code.

S. N. Sen, for appellants.

MR, JUSTICE DUCKWORTH.

Kauk Sike ..... *Appellant.*

vs.

Ong Hock Sein & One ..... *Respondents.*

Civil Pro. Code (Act V of 1908)-O. 21, R. 97—decree for possession of land silent as to house—executing Court no power to order dismantling of house—proper order to be passed by executing Court.

When a decree has been passed for possession of land on which a building is erected but as to which the decree is silent, the Court has to deliver possession of the land and remove any person therefrom. It is not within the province of an executing Court to direct that the building should be pulled down, that being a matter for the decree holder to consider after he has obtained possession. In such cases an order directing the occupier of the building to vacate and to dismantle within a specified time may be granted.

Radha Gobind Shaha, V. Brijendro Coomar Roy Chowdry (1873) 18. W. R. p. *527—adopted.*

JUDGMENT. *28th June, 1926.*

The facts appear to be as follows:—

The respondents obtained a decree in Civil Regular Suit No. 131 of 1924, against the appellant for possession of the same land on which the latter occupied a house, but the decree was silent as to the said house.

In execution, the respondents applied for his ejection and for possession of the land. A delivery order was issued, and possession was given to the respondents, but the appellant though duly informed of the order, refused to leave the house. Application was then made to the executing Court for action against the appellant under Section 74 and Order XXI, Rule 97 and 98 Civil Procedure Code. Eventually the execution Court ordered the appellant to dismantle the house within thirty days of the order, tailing which he would be committed to the Civil Jail for further obstruction.

On appeal by the appellant to the District Court, the learned Additional Judge of the District Court confirmed that order.

In this Court, on 2nd appeal, it is urged that it was not within the province of the executing Court to order

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Civil 2nd Appeal No. 429 of 1925, from the District Court, Pyapon, in Civil Misc. Appeal No. 100 of 1925.

the debtor to dismantle buildings on the land as to which the decree was silent, even when ordering the debtor to give up possession of the said land in terms of the decree. Reliance is placed on the case of *Radha Gobind Shaha* v. *Brijendro Coomar Roy Chowdry* (1.) It was there held that in similar circumstances, where the decree is for *Khas*, or actual, possession, the Court has power to remove any person, who refuses to vacate the land, and to deliver actual possession to the decree holder, but that it is hardly within the province of the Court, executing the decree, to direct that the building should be pulled down, that being a matter for the decree holder to consider, after he has obtained possession. At the same time the learned Judges in that case allowed the debtor two months time within which, if he pleased, he might vacate the land, and carry away the materials of his buildings.

In the present case, appellant has been steadily obstructing the respondents since June 1925, and is still apparently in possession of his house. There is no necessity therefore, to give him any further time in which he must himself vacate the premises. In the case adverted to above it does not appear that there had been such determined obstruction.

Since I can trace no other case bearing on the subject I shall accept the principles laid down in the ruling quoted, and will hold that in such cases, it is not within the province of an executing Court to order the demoletion of a building as to which the decree is silent ; to this extent I consider that the Lower Courts were wrong.

I modify the order of the Lower Court by directing that the appellant do vacate the building on the land as soon as this order is communicated to him, and that he be granted two months from this date, within which, if he so pleases, he may dismantle the building, and remove its material. I make however, no order as to costs of this appeal.

Surridge, for appellant.

U. Ze Ya, for respondents.

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(1) 18, W. R. page 527 (1873)

MR. JUSTICE CARR & MR. JUSTICE MYA BU.

Ma Ah Pu ..... *Appellant.*
vs.
U Po Lai and two ... *Respondents.*

Burmese Buddhist Law—Inheritance—out of time grandchildren—Orosa's children not entitled to claim partition on grand-father's remarriage.

Out-of-time grandchildren by the *Orosa* child are not entitled to claim partition against their grand-father on his remarriage after death of the grand-mother.

JUDGMENT. *3rd Sept. 1926.*

PER MYA BU J.—The plaintiff appellants are the grand children of the 1st defendant respondent U Po Le, being the children of U Po Le's *orasa* son Mg Po Kaing who predeceased his mother, Ma Ma. Ma Ma died in 1283. B. E, and 2 years later U Po Le married Ma Pu Shan, the 2nd defendant respondent. The 3rd defendant respondent Ma Ma Zun, is the only surviving child of U Po Le and Ma Ma.

The first question for determination is whether the plaintiff appellants are entitled to claim a share in the joint property of their grand parents on the remarriage of their grandfather, U Po Le.

In support of the plaintiff appellant's claim two distinct lines of argument have been adopted. One is that as the out-of-time grandchildren by an *Orasa* child are placed on the same plane as their uncles and aunts in matters relating to inheritance in the estate of their grandparents, and as after the death of one of the parents a younger child or younger children of a Burmese Buddhist couple can claim partition of the parental estate from the surviving parent on the latter marrying again, the grand-children by an *Orasa* child who predeceased his first deceased parent, have the same rights as their uncles or aunts in regard to the right to claim partition from the surviving grand-parent, who remarries. We find it unnecessary here to decide the

Civil 1st Appeal No. 205 of 1925, from the District Court of Henzada, in Civil Regular No. 11 of 1925.

question as to the rights of the younger children of a Burmese Buddhist couple to demand partition on the remarriage of the surviving parent after the death of the other, because we are not satisfied that the first part of this line of argument can be upheld. Out-of-time grand-children by the *Orasa* child are placed in the same position as their uncles or aunts in the division of the estate of their grand parents, whereas other out of time grand-children are allowed, in such division, only one-fourth of what their parents would have got had they survived their own parents The origin of this rule lies in the *Dhammathats* cited in sections 162, 163 and 164 of the Digest Volume I which deal with the modes of division among the children and grand children of a couple who have both died, and we can find no authority what-soever to warrant an extension of that rule or its principle to a case like the one under consideration. The last sentence in the extract from *Manu-Vannana Dhammathat* in Section 163 of the Digest Volume I, runs.—"The same rule applies whether the partition is made during the lifetime of the grand parents or after their death," and it may at first sight appear to give support to the argument in favour of an extension of the rule to the present case. But it is impossible to fix its import with any claim to accuracy, since we are unable to say that the clause "whether the partition is made during the lifetime of the grand parents" was intended to refer to any form of disposition of property other than what an aged or dying owner might do by means such as a *Thedansa* more or less in accordance with the ordinary rules of succession.

The other line of argument leads us to an examination of the texts dealing with the rights of the grand children as such as against the surviving grand parent to demand partition on the latter's remarriage. The grand children whose parents are still alive obviously have no such right. The texts relating to the point under consideration are to be found in Section 260 and 261 of the Digest Volume I each of which presents the same extracts from three *Dhammathats; Yazathat, Vinicchaya* and *Kungyalinga*. These two sections are headed respectively. "The grand-father being dead, partition between the grand mother and the grand

children on her marrying again," and "The grand-mother being dead partition between the grand father and his grand children on his marrying again."

The extract from the *Yazathat* gives as much as is three-fifths of the whole estate to the grand-children on the remarriage of the surviving grand-parent. The reason for the rule appears to lie in the desire to penalize the grand-parent for "not living unmarried as he or she ought to, on the maintenance and support of the grand-children." This reason is pregnant with practical absurdities, for we are unable, to believe that in the year 991 B. E. when this *Dhammathat* was compiled, appreciably more than at the present day, most grand-children were capable of looking after and willing to maintain, their grand-parent. Again, in granting three-fifths of the general joint estate of the grand-parents to the grand-children, the *Dhammathat* goes much farther than the largest possible extent to which the rights even of the children might for the sake of argument be stretched in partitioning the joint estate of their parents after the death of one parent and on the remarriage of the survivor, which is only half.

Inasmuch as the *Kungyalinga* merely reproduces the same rule, it requires no separate discussion here. The only other *Dhammathat* on the point is the *Vinicchaya*, according to which on the remarriage of the survivor the grand-children whose parents predeceased the deceased grand-parent receive half of the share to which their parents were entitled. It is difficult to rely on this extract of the *Dhammathat* on account of its isolated nature.

It has been argued that support is lent to the claim of the grand-children by the *Dammathats* quoted in section 256, with its cognate Section 258, and Section 257 with its cognate Section 259. These *Dhammathats* lay down the rules for partition of the grand-parents' estate on the death of one of them between the surviving grand-parent and the grand children. If these rules hold good, we would at once find that the grand-children who are the children of younger children, who predeceased their first deceased parent, are in a better position than the younger children themselves, who according to the accepted principles, have no right whatsoever in the

parental estate. In regard to these rules the *Manugye*, a *Dhammathat* of paramount authority, is conspicuously silent.

For these reasons, we are unable to hold that the rules in Section 256 to 259 lend any material support to those laid down by *Vinicchaya* in Section 260 and 261.

For the above reasons we are unable to find sufficient grounds for departing from the decision in the case of *Tun Myaing* v. *Ba Tun* (1) which is for practical purposes on all fours with the present case. In the result we dismiss the appeal with costs.

Paw Tun, for appellant.

Thein Maung, (1) for respondents.

MR. JUSTICE DUCKWORTH.

U Pan and one ..... *Appellants.*

v

Maung Po Tu and one ..... *Respondents.*

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(1) Provincial Small Cause Courts Act. (IX of 1887) Suit for compensation for deficient acreage—suit lies in S. C. Court,

A suit for compensation for loss in acreage is a suit of a Small Cause nature and no second appeal lies.

(2) Civil Pro. Code (Act. v of 1908) Section 115—Revision—lower Court misapplying a provision of law.

Where a Lower Court misapplies a provision of law which is not applicable, there is ground for revision.

(3) Sale of land—deficient acreage—resumption by Government after sale—damages against vendors.

Where a party purchased 16.81 acres and a year after the purchase Government resumed 1.44 acres on the ground that the plot fell within Government enclosed land and had been encroached upon by the former owners, *Held* that a suit for compensation lies against the vendors for the deficiency. It makes no difference that the mistake is discovered only after the conveyance has been executed and registered.

Janga Venkatareddy v *Jamal Ahmed Saheb*, 29. I. C. 394 approved.

Rutherford v *Acton Adams*. 32. I. C. 47 (P. C.) referred to.

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(1) 2. L. B. R. 292.

Civil 2nd Appeal No. 499 of 1925, at hearing changed into Civil Revision No. 155 of 1926.

JUDGMENT. *4th June 1926.*

The facts of this case, for the present purpose, may be stated as follows:—

The plaintiff appellants U Pan and Ma Nge, purchased in March 1924 from the respondents, Ma Pa Tu and Ma Kyaw, two plots of paddy land, really amounting to one holding, which is described in the conveyance which was drawn up according to the Tax receipts, as containing 16. 18 acres. The purchase price of Rs 5,000 was duly paid and the conveyance was duly executed and registered, so that the property actually passed to the appellants. The latter also took delivery and worked the land.

In or about January 1925, Government resumed a portion of the land on the western side on the ground that the plot had encroached on Government enclosed land and fined the 1st Respondent. The acreage was thus reduced to 15. 40 a reduction of 1. 44 acres.

The plaintiff appellants appear to have every intention of adhering to their purchase, which is presumably a good one, but in these proceedings they sued the respondents for compensation amounting to Rs. 3281, owing to their loss in acreage due to the Governnent resumption.

The plot, which was resumed by Governnent is alleged to have been included in Government enclosed land as far back as 1907. There is, however, no definite or satisfactory proof of this fact with the exception of a statement of a new Revenue Surveyor.

The respondents prior to the sale had been in possession of the land for 10 years and had been assessed to revenue for the full area. They therefore claimed, to have known nothing of the fact of encroachment, but it must be noted that, when they bought the land in 1914, the area was much smaller, and the encroachment must have been made by them.

The loss in acreage bears a proportion of roughly 1/12th of the whole acreage and thus, though financially it may be of importance to the vendor and vendee, it is in reality not a large portion of the whole acreage. In other words, the appellants have purchased substantially what they laid themselves out to purchase.

The respondent vendors defended the suit on the ground that they were not liable, inasmuch as the re-

sumption had taken place nearly a year after the plaintiffs, purchase and occupation of the land.

The Trial Court dismissed the suit.

The District Court, on 1st appeal, confirmed that decision, holding that the whole contract was void under Section 20 of the Contract Act and that the sole relief to which the plaintiff appellants were entitled was to file a suit for the return of the whole amount of the purchase money. Against this decision the plaintiff appellants come up to this Court on Second Appeal.

Mr. Chatterjee, for the respondents, raised a preliminary point at the hearing that there was no second appeal, inasmuch as the suit was one cognizable by a Court of Small Causes, and was not valued at over Rs. 500/-. He contended that the suit did not fall under Article 15 of the Second Schedule of the Provincial Small Cause Courts Act, but was a mere claim for compensation amounting to Rs. 428/-.

Mr. Sein Tun Aung, on the other hand, urged that the suit was one in which title to a part of the land was involved and that therefore under Article 11 of the same Schedule it was not a suit of a small cause court nature. He further claimed that Article 15 was applicable, inasmuch as it was in reality for rescision of a contract.

I think that there can be no doubt Mr. Sein Tun Aung's contentions are erroneous and that the suit was one cognizable by a Court of Small Causes, inasmuch as it was a suit for compensation for part failure of consideration owing to a mutual mistake. The Full Bench case of *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande* (1) seems to me to render it clear that a suit of the present nature is cognizable by a Court of Small Causes,

There is therefore no second appeal under Section 102 of the Civil Procedure Code.

Mr Sein Tun Aung thereupon asked that the Memorandum of appeal should be treated as an application for revision under Section 115 of the Code of Civil Procedure. Mr. Chatterjee did not seriously oppose. I am therefore treating the appeal as an application for revision.

(1) 37. Bom 675.

In my opinion, the learned additional Judge of the District Court misapplied Section 20 of the Contract Act, which is not applicable where the purchaser obtains sustantially the thing which was really the subject of the sale.

The law in these cases appears to me to be well laid down in the case of *Janga Venkatareddy* v. *Jamal Ahmed Saheb* (2) where Sadasiva Aiyer and Napier J J. of the Madras High Court held that in such cases as this, compensation can be awarded and obtained. As a matter of fact, the learned Judge applied the legal principles involved in Section 14 of the Specific Relief Act.

Their Lordships of the Privy Council in an appeal from the Court of Appeal of New Zealand in the case of *Rutherford* v. *Acton Adams* (3) laid down very similar principles.

It would seem that it makes no difference that the mistake is discovered only after the conveyance has been executed and registered.

Since the District Court and the Trial Court applied the wrong law to the case, there are clearly good grounds for interference in revision under Section 115 of the Civil Procedure Code, inasmuch as the Lower Courts acted illegally and with material irregularity in the exercise of their jurisdiction.

I allow this revisional application, set aside the decrees of the two Lower Courts and decree the plaintiff-appellants' claim for Rs. 428/- with costs on that amount in all Courts.

Sein Tun Aung for appellants.

J. C. Chatterjee for respondents.

SIR. GUY RUTLEDGE KT. K. C. C. J., SIR BENJAMIN HEALD J., AND MR. JUSTICE CHARI.

King Emperor, ... *Appellant.*

vs.

Nga Tin Gyi, ... *Respondent.*

Cr. Pro. Code (Act V of 1898) Sections 303 and 434—Sessions Trial—Verdict of Jury under Section 304 I.P.C.—Jury returning verdict under Section 303 I. P. C. after again retiring—Whether trial vitiated.

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(2) 29, I. C. 394. (3) 32, I. C. 47.

Criminal Reference No. 125 of 1926 arising out of Sessions Trial No. 14 of 1925 of the High Court, Rangoon.

Where a jury in a Sessions trial purport to return a verdict under a particular section of the Penal Code and it appears to the trial Judge that the verdict is ambiguous it is not a misdirection for the Judge to read an appropriate passage from a Law Report to explain the law.

A Jury after retiring returned a verdict of "culpable homicide not amounting to murder" under Section 304, I. P. C. They were examined by the Judge as to whether the verdict fell within the first or latter part of Section 304, and the Judge read over part of a ruling in the Law Reports relating to the distinction between murder and culpable homicide not amounting to murder. The Jury again retired and returned a verdict under Section 303 I. P. C. *Held* that until the Jury intimated under which part of Section 304 I. P. C. their verdict fell their verdict was incomplete and could not in fact be accepted and recorded as a verdict and was in fact no verdict at all, that it was the duty of the Court to question the jury and if their answers showed that they had arrived at no unanimous verdict under Section 304 I. P. C. at all to send them back for further consideration. *Held also* that there is no proposition in law forbidding a Judge to read to a jury in his charge from a Judgment and if the judge does so it does not amount to a misdirection. In practice it is not desirable to refer to and read from several law reports as it may have the effect of confusing the minds of laymen. But in explaining the dividing line between murder and culpable homicide not amounting to murder judges have frequently read in their charges a passage from some well-known judgment.

Queen Empress v. *Chunilal Vithal*—Ratanlal's Unreported Cases 982—distinguished.

REFERENCE. *6th August 1926.*

DUCKWORTH J:—In this matter, Mr. McDonnell on behalf of the accused Nga Tin Gyi, has applied to have a reference made to a Bench of three judges of this court. I think that under Section 434 Cr. P. Code read with clauses 24 25 of the Letters Patent, I have the power to make the required reference in regard to Sessions Trial No. 14 of 1926 (*K. E.* vs *Nga Tin Gyi*) under Section 303 of the I. P. Code.

The events which took place with reference to the verdict was one of such a nature that it is possible that a point of law arises.

The final verdict which was an unanimous verdict, was one of murder under Section 303 I. P. C.

On the evidence in the case I consider that this verdict was justified and inasmuch as it was unanimous and the jury were before that, clearly in the dark as to

their true opinion, I passed a death sentence which is the only possible sentence under that section.

The Jury *at first* stated that their unanimous verdict was guilty of culpable homicide not amounting to murder.

In order to determine which degree of that offence the jury intended I proceeded to ask questions which together with the jury's replies thereto, I have recorded as near as possible in the exact words uttered. I acted under Section 303 Cr. P. C.

From the answers given the jury showed that they were in great doubt as to what they did mean and finally I was asked to state to them again the portion of 11 *L, B. R. 115*, at *page 118*, which I had explained to them in the summing up. This I did. The jury then asked permission to retire once more and consider matters. I consented since their verdict veered from one under section 304 to one under section 325 I. P. C. and they did not seem to know what they meant.

It was not I who sent them back to reconsider matters and I did not give them any fresh directions as to their verdict.

After about half an hour they returned and unanimously convicted the accused under Section 303 I. P. C. I passed sentence as stated.

I have *since* noted in Sohoni's notes under Section 303, Criminal Procedure Code that it is stated that in such a case it has been held that the jury can no longer return a verdict of guilty of murder and that if they do so the judge should simply treat it as a verdict under Section 304 (1) I. P. C. (Ratanlal 282) I can find no other authority.

I therefore refer the matter as it seems to me that a point of law may arise as to the validity of the conviction under Section 303 I. P. C. and the sentence. The execution of the death sentence might be suspended pending orders

The two Burma cases though not parallel, are *Hla Gyi* v. *King Emperor* 3 L. B. R. 75 and *Thein Myin* v. *King Emperor* 9 L. B. R. 60.

OPINION. *18th August 1926.*

RUTLEDGE C. J.—This is a reference made by Mr. Justice Duckworth under Sect 434 Cr. P. Code read with

Sections 24 and 26 of the Letters Patent arising out of Session Trial No. 14 of 1926.

The accused who was a convict serving in the Rangoon Central Jail under a sentence of transportation for life was charged at the last sessions with the murder of a fellow convict under Section 303, I. P. Code.

After the judge had charged the jury, they retired and after a considerable interval returned and stated that they were unanimous and that their verdict was that the accused was guilty of culpable homicide not amounting to murder. This was a verdict under Section 304 I. P. Code but as that section embraces a more severe and a less severe portion the judge very properly questioned them as to which part their verdict came under. There then ensued the following dialogue:—

Q. Of that there are two degrees under Sect. 304 I. P. Code Do you find that he intended to cause bodily injury likely to cause death or that his act was done with the knowledge that he waslikely to cause death ?

A. No, we find that he caused injury without justification which he did not expect would cause death.

Q. Is that not inconsistent with your verdict as stated above ?

A. He did not expect the man would die. That is what we mean.

Q. Then you think he did not know that his act was likely to cause death ?

A. He did not know.

Q. Then how did you make out that his act amounted to culpable homicide not amounting to murder ? What is your verdict ? Are you not mixing up expectation with intention ?

A. We think accused caused a wound by which he did not intend to kill the deceased.

Q Quite so. Then it is not murder, but what exactly do you mean ?

A. That he intended to cause greivous hurt to the man.

Q. Then you mean that he did not even know that this heavy blow was likely to cause death ?

A. Our opinion is that the implement which he used was not one which would be likely to cause death.

As a jury we would like the Judge to read to us the Burma Ruling referred to in the summing up.

The Judge reads from *Nga Khan* v. *King-Emperor*. 1) from " In our judgment " to " nature to cause death " vhich he had read in the summing up to the jury. On his the jury retired and after a considerable interval eturned a unanimous verdict of guilty under Sect. 303, vhich the Judge accepted

For the accused it is argued that though the first question put was within the province of the Judge under Sect. 303, Cr P. Code, the verdict was clearly and irrevocably one of not guilty of murder, and that as soon as the Judge ascertained under which part of Section 304, I. P. Code their verdict fell, he should have stopped, and that his reading a passage from a Judgment in another case with entirely different facts amounted to a misdirection which entirely vitiated the trial. On the first part of his argument strong reliance is placed on the case of *Q. E.* v. *Chunilal Vithal in Ratanlal's Unreported Criminal Cases, page 982*. From the judgments both of Parsons. J. and Ranade J. they held that the Judge having accepted the verdict of the majority of a jury could not afterwards accept a second and inconsistent verdict. They distinguish the case from that of *Queen* v. *Sustiram Nundal* (2) While expressing no opinion whether in the circumstances of the case the decision was right in *Chunilal's case*, it is clearly distinguishable from the present. Until the Jury intimated under which part of Section 304, I. P. Code their verdict fell, it would not in fact be accepted and recorded. It was incomplete and if their subsequent answers to proper questions addressed to the jury show that they have arrived at no unanimous verdict under Section 304, I. P. Code at all it is the duty of the Court to send them back for further consideration.

Admittedly the first question put to the jury was perfectly proper. And it is clear that the negative answer given showed that they had not come to a verdict under Section 304, I. P. C. at all.

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(1) 11. L. B. R. 115 at 118.

(2) 21. W. R. 1.

In these circumstances the Judge was justified in putting the further questions to see if they meant, as some of their answers indicated, a verdict under Section 325, I P. Code, of voluntarily causing grievous hurt Once the jury answered "No" to the first question put to them, I am of opinian that the Court could not accept the first verdict which was nullified by that answer. If it was so nullified, as they had not arrived at a decision, it was right that they should retire and further consider their verdict. It is immaterial that their subsequent answers seem to point to something less than murder. If the imperfect verdict which they returned is shown by their first answer not to have been intended, then there was no verdict which the Court could accept and the jury were at liberty to consider afresh.

And here it is necessary to consider the further point urged for the accused viz, that in reading the passage from *Nga Khan's case* the learned Judge erred so seriously as to amount to a misdirection. There is no prohibition in law so far as I know forbidding a Judge to read to a jury in his charge from a judgment.

In practice it is not desirable to refer to and read from several law reports, as it may have the effect of confusing the minds of laymen. But in explaining the dividing line between "murder" and "culpable homicide not amounting to murder" Judges have frequently read in their charges, a passage from some well-known judgment such as Melville J's in *Govinda's case* (3) or Sir Charles Fox in *Shwe Ein's case* (4) as accurately illustrating the distinction. In so doing they are acting very properly. In reading from the decision in *Nga Khan's case* in his summing up and explaining the law the learned Judge was rightly drawing the jury's attention that they were not merely to confine their attention to the fact that only one blow was struck or to the nature and weight of the weapon. The passage "In our Judgment it would be most unsafe to suggest that in all cases where death is caused by a single blow from a hollow bamboo, the offence is not murder, i. e., that the sole criterion is the nature of the weapon used. The size and the weight of the stick, the manner in which it is used and the actual

(3) 1 B. 342. (4) 3 L.B.R. 122.

injuries caused by the blow must all be considered" was perfectly relevant and is perfectly good law.

I think that the learned Judge should have stopped there, as the next sentence applied to the facts of that case. "Here the injury was so severe and uncommon and the force used must have been so terrific that we are of opinion that the offence fell under Sect 300, thirdly, I. P. Code, i. e. that he intended to cause injury sufficient in the ordinary course of nature to cause death." But while this sentence may have been irrelevant I cannot conceive how a jury could be misled by the fact that in another case where the injury was so severe and uncommon and the force used so terrific the accused was found guilty of murder.

For these reasons I am of opinion that the learned Judge was justified in accepting the verdict of the jury of guilty under Sect. 303, I. P. Code and in treating the prior verdict as nullified by the jury's first answer to the Judge's question

Chari J.—I concur.

HEALD J :—I agree with the learned Chief Justice in his answer to the reference.

The accused, who is a convict serving a sentence of transportation for life, was charged with having murdered another convict; and Section 303 of the Indian Penal Code says that whoever, being under sentence of transportation for life, commits murder, shall be punished with death.

On a charge under that section it was open to the Jury to find that the accused was not guilty of murder but was guilty of one or other of the two forms of culpable homicide not amounting to murder which are specified in Section 304 of the Code, or of some minor offence. If they had so found the Judge would have been bound to record their verdict and to pass sentence accordingly. But the Jury did not say to which of the two kinds of culpable homicide not amounting to murder their finding of "Guilty of culpable homicide not amounting to murder" was intended to refer, and therefore their finding was incomplete and could not be recorded as a verdict and the Judge was bound to ask them such questions as might be necessary to ascertain what their verdict was. Accordingly he informed the Jury that

there are two degrees of the offence of culpable homicid not amounting to murder, and asked them whether the found that the accused intended to cause bodily injur which was likely to cause death, or that this act wa done with the knowledge that it was likely to cause death Their answer that they found that he caused injur without justification, but did not expect that that injur would cause death showed that they had not understoo the law on the subject of murder and culpable homicid amounting to murder since expectation of death is not a necessary ingredient in either offence. It may amount t murder if death is caused by an act done with the intentio of causing bodily injury which is in fact sufficient in th ordinary course of nature to cause death, even if the person who did the act had no actual expectation that death would be the result of his act, and similarly, it may be culpable homicide not amounting to murder if death is caused by doing an act with the intention of causing such bodily injury as is in fact likely to cause death, but not with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, even if the person who did the act had no expectation that death would be caused. It being thus clear that the Jury had not understood the law, and that fact having been disclosed by questions which the Judge was entitled to put to the jury the Judge was entitled to ask the Jury such further questions as were necessary to ascertain what their verdict really was. To those questions the Jury replied that they found that the accused did not expect that the man would die, that he did not know that his act was likely to cause death, that he did not intend to cause grievous hurt. These answers showed that the Jury had not directed their mind to the fact that it is not an essential ingredient of murder or culpable homicide not amounting to murder that there should be an expectation of death, or knowledge that the act was likely to cause death, or an intention to kill. Every man who kills another necessarily causes grievous hurt and in most cases intends to cause grievous hurt and the question which the Jury had to decide in this case was not whether or not the accused intended to cause grievous hurt, but whether the hurt which he intended to cause went beyond grievous hurt, that is to

say, whether the hurt which he intended to cause was merely grievous hurt or was such bodily injury as was likely to cause death or such bodily injury as was sufficient in the ordinary course of nature to cause death. To that question these answers of the Jury were no answer, and their answers showed that their finding was no verdict whether on a charge of murder or on a charge of culpable homicide not amounting to murder. But in answer to a further question by the Judge the Jury said that they found that the implement which the accused used was not one which would be likely to cause death. On that finding they would be entitled, if they were so minded, to infer that the accused did not act with the intention of causing such bodily injury as was either sufficient in the ordinary course of nature to cause death, or was likely to cause death, or with the knowledge that he was likely by his act to cause death, but before drawing any of those inferences they desired to have their memories refreshed by the reading of a passage from a decision of a Bench of the Chief Court which the Judge had read to them in his charge. The learned advocate who appears for the accused suggests that the reading of the official reports of other cases to the Jury by the Judge amounts to misdirection, but I agree with the learned Chief Justice that in this case such reading did not amount to misdirection. The Jury were evidently in doubt as to what inference they should draw from the weapon used. That was matter which was in their own discretion but they were entitled to ask the Judge for guidance or, as they did, for a repitition of the guidance which he had given to them in his charge. The effect of the passage which the learned Judge read was that the criterion of intention should be not merely the weapon used, but its size and weight, the manner in which it was used, and the actual injuries caused, and that in a case where the injury caused was severe and uncommon and the force used was terrific an intention to cause injury sufficient in the ordinary course of nature to cause death might be presumed. After the reading of that passage the Jury asked for permission to retire for further consideration, and as their first finding was not a finding which could be recorded as a verdict and as the answers to the questions which the Judge was bound to put showed

that it was based on a mistaken view of the law and was therefore a mistaken finding, I am of opinion that the judge was right in giving them that permission; and was also right in accepting the verdict which they subsequently gave. As that verdict was clear and unambiguous, the judge had no power to ask any further questions and therefore that verdict was final, and as it was unanimous the judge was bound to accept it and pass sentence accordingly, just as he would have been bound to accept the first finding, if it had been a finding which could have been recorded as a verdict. In view of the fact that it was not such a finding and that as a result of questions which the judge was bound to put it was found to be no verdict either on a charge of murder or on a charge of culpable homicide not amounting to murder, both Judge and Jury were, in my opinion, entitled to regard it as no verdict and the Jury were entitled to deliver their verdict after such further consideration as they needed.

For these reasons I agree with the learned Chief Justice that there was no misdirection and that the verdict of guilty of murder under Section 303 of the Indian Penal Code was a verdict which the Judge was bound to accept.

Mc Donnell for accused.

Govt. Advocate (*Mr. Eggar*) for the Crown.

SIR BENJAMIN HEALD, KT. & MR. JUSTICE CHARI J.

Ma E Mya ..... *Appellant.*

vs.

The Japan Cotton Co. & 3 others *Respondents.*

Buddhist Law—Husband and wife—joint property in name of husband—mortgage by husband—suit without impleading wife—wife bound by decree.

Where a Buddhist husband and wife carried on a cotton ginning business and part of the joint property was in the name of the husband only and he mortgaged it and a suit was filed by the mortgagee and the property brought to sale without impleading the wife *Held* that the husband was not only the managing partner but also the benamidar of the wife in respect of any interest she may

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Civil 1st Appeal No. 164 of 1926 from the District Court of Meiktila in Civil Suit No. 1 of 1925.

have had in the mortgage property, and that she was bound by the decree passed against the husband.

Ma Nyun v. *Texeira*. 10 L. B. R. 36—distinguished

JUDGMENT. *8th September* 1926.

PER HEALD J.—In suit No. 3 of 1923 of the District Court of Meiktila the Japan Cotton Trading Company Limited, sued Mg. Thu Daw and his son Mg. Myint, who were described in the plaint as "Carrying on cotton ginning business at Mahlaing under the name and style of The Mar Kamanta Cotton and Oil Mill Company" on a mortgage bond which was executed by Thu Daw and Mg. Myint as carrying on business as cotton ginners under the name and style of The Mar Kamanta Cotton and Oil Mill Company and by which they mortgaged the mill site together with the mill and all its appurtenances, and also two blocks of paddy lands, measuring 66. 89 acres and 5 82 acres in Kwins Nos. 250 and 278 respectively. All these properties stood in the sole name of Thu Daw. Thu Daw and Mg. Myint set up what the Court characterised as a false defence that the claim had been compromised and the Court gave the plaintiffs the usual preliminary decree for sale of the mortgaged property. There was an appeal to this Court which was summarily dismissed in August 1924.

In suit No. 1 of 1924 of the same court E. D. Sassoon & Co. Ltd. sued Thu Daw and his wife Ma E Mya and their sons Mg Myint and Mg Tin on a mortgage of the same mill and its site and appurtenances and other property and in a written statement which Thu Daw filed on behalf of all the defendants the mortgaged properties were described as belonging to Thu Daw. In that suit also a preliminary mortgage decree was given.

Soon after the appeal in the first suit was dismissed and while the second suit was pending Ma E Mya who as has been said was the wife of Thu Daw and mother of Mg Myint, filed the present suit against the plaintiffs in both the former suits for a declaration that she was owner of a half share in all the properties which had been mortgaged to the "Japan Cotton Company" that is to the Japan Cotton Trading Co. Ltd., and that her share was "not liable to mortgage attachment and sale."

The District Court on the strength of certain rulings of the Chief Court dismissed her suit.

She appeals and her learned Advocate contends that the learned Judge in the Lower Court overlooked the decision of the Full Bench of the Chief Court in the case of *Ma Nyun* vs. *Texeira* (1) and that she was entitled at any rate to a decree declaring that the mortgage decree in the suit to which she was not a party could not bind her interest in the mortgaged property.

In her evidence Ma E Mya swore that she and her husband had traded together in cotton and that all the properties in respect of which she claimed except the site of the mill which she said was the undivided ancestral property of her husband had been acquired by means of that joint business. She said that she and her husband were partners in the business and that her husband was in sole charge of the business and managed it himself. All the properties in respect of which she claims stood in the sole name of the husband so that he was not only managing partner in respect of the business, but was also *benamidar* for his wife in respect of any interest she may have had in the property.

The case is clearly distinguishable from *Ma Nyun's* case and in the circumstances of this case we have no hesitation in finding that in respect of any interest which she may have had in the property the decree against her husband bound her.

We therefore dismiss the appeal with costs on Rs. 40000/- the amount at which the appellant valued her suit in the District Court.

Dhar for appellant.

Paget for respondents.

MR. JUSTICE CHARI.

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1. Nga Yok Oh
2. Nga Aung Doe } ... *Appellants.*

vs.

King Emperor ... *Respondent*

Charged under Section 9, c. 14, 9 (c) Salt Act.

(1.) 10 L. B. R. 36.

Criminal Revision No. 868, B, of 1926, being review of the Order of District Magistrate Tavoy in Criminal Appeals No. 115 and 116 of 1926.

Salt Act (Burma Act II of 1917) Section 9, c. 14.—Rules 41 and 42 – removal of salt without license,

By implication Rules 41 and 42 passed under the Salt Act render the removal of salt without a license illegal.

Order. *12th August* 1926.

In this case the accused were convicted under Sections 9 (c) and 14 and Section 9 (c) of the Salt Act and sentenced to pay fines. Their appeal was dismissed by the Sessions Judge and they have come to this Court in revision. On the facts, I feel no doubt that the findings of the Trial Magistrate, confirmed by the Sessions Judge are correct. There is no doubt that Aung Doe did bring 4000 viss of salt and that he had a pass for only 2000 viss. Mg Myat Nu's story that the extra salt was bought by him is absurd.

The only points of law argued are firstly that there is nothing in the Act or the rules which make the "removal" of salt illegal. Rules 41 and 42 do by implication make the removal of salt without a pass illegal. It is also argued that the prosecution has not discharged the burden that lay on it of proving that the removal is illegal. The prosecution clearly have discharged the burden by showing that Aung Doe brought 4,000 viss of salt with a pass for 2,000 viss. The burden is then shifted to the defence to give a satisfactory explanation of the unauthorised removal of the surplus salt. This the defence has failed to discharge.

I see no reason to interfere with the conviction and sentence and I accordingly dismiss this application.

M Donnell—for appellant.

SIR. GUY RUTLEDGE KT. KC, C. J. AND
MR. JUSTICE CARR.

K. C. Bose ..... *Applicant.*

vs.

Govt Advocate (Mr. Eggar). *Respondent.*

In the matter of filing Powers of Attorney under the Civil Procedure Code (2nd amendment) Act No. 22 of 1926.

Civil Reference No 11 of 1926.

Civil Pro. Code (Act V of 1908) Order III Rules 1 and 4 as amended by Act XXII of 1926. Advocates acting required to file powers.

Advocates are required to file a power in the High Court at Rangoon in all cases where they desire to "act" for clients and not merely "plead".

To "act" for a client in Court is to take on his behalf in Court or in the Office of the Court the necessary steps that must be taken in the course of the litigation in order that his case may be properly paid before the Court.

Filing Memo of appeal and Cross-objections is "acting" within the meaning of the High Court Rules.

Order. *28th June* 1926.

Per RUTLEDGE C. J:—The Deputy Registrar Appellate side considered that Advocates were required. under the newly amended Order III, Rule 4 (1) of the Civil Procedure Code, to file Powers of Attorney when they file Memoranda of appeal or cross objections. Certain Advocates questioned this opinion and I directed that the matter be brought before the 1st Bench for decision.

Mr. Bose on behalf of these Advocates contends that the signing and filing of Memoranda of appeal does not come within the meaning of "act" in sub-rule (1) and is covered by sub-rule (5). He refers to the English practice whereby Counsel sign the grounds of appeal as well as the Statement of Claim, Defence, and Reply. We may observe however that though signed by Counsel, these documents are never filed by counsel but by Solicitors who "act" in England. As observed by the Full Bench in I. L. R. 9. *Allahabad at p. 620* the practice that prevails and regulates the professional status and proceedings of Counsel in England is altogether beside the question that we have to determine.

To "act" has been explained on more than one occasion by the Indian Courts. In *Fuzzle Ali's case* 19. W. R. Cr. Rulings. p. 9. Phear J. says "I think that the word "Act" there (i. e. in Act XX ot 1865, S. 5) means the doing something as the agent of the principal party, which shall be recognised or taken notice of by the Court as the act of that principal; such for instance as filing a document". In *Kali Kumar Roy's* Case I. L. R. 6. Cal at p 590 White J. says "To act for a client in Court is to take on his behalf in the Court or *in the Offices of the Court* the necessary steps that must

be taken in the course of the litigation in order that his case may be properly laid before the Court". These cases arose in connection with persons alleged to be practising as muktears, but this in no way detracts from their value in considering what is the meaning of "acting" for a client in legal proceedings.

The legislation in question is the result of the Bar Committee's Report. At p. 15 of the Report there are the following remarks. "We therefore propose that all practitioners shall be required to file vakalatnama, when they act, but that when they merely appear and plead they shall be allowed the option of filing a memorandum of appearance, signed by them, giving the names of the parties in the case, the name of the party for whom they appear, and the name of the person who authorised them to appear. We would not, however, apply this rule, but would maintain the existing practice in the case of an Advocate who under the rules in force can only appear on the Original Sides of the Calcutta, Bombay and Madras High Courts on the instructions of a Attorney".

By Section 2 (15) of the Civil Procedure Code "pleader" includes Advocate. We are therefore of opinion that an Advocate "acts" when he files a Memorandum of Appeal or cross objections or any other document in a case other than a Memorandoum of Appearance under Rule 4 (5) and that in all such cases a Power of Attorney is necessary.

K. C. Bose—for Petitioner.

Eggar—for the Crown.

SIR. BENJAMIN HEALD KT. J.

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1. Mani Karki
2. Ramlal Limu } ..... *Appellants.*

vs.

King Emperor. ..... *Respondent.*

Against conviction under Section 323/326 I. P, C.

Criminal Revision No. 845. B. of 1226 being review of the order of the Head Quarters Magistrate, Insein in Criminal Regular 25 of 1926.

Private defence—Drunken persons causing disturbance at night—breaking open door of shop—resisting arrest and assaulting watchmen—exercise of right of private defence by cutting with Kukri.

Though drunken men are entitled to the protection of the law yet if they break the law and attack either the person or the property of people any member of the public is entitled to exercise the right of private defence provided he does no more harm than the necessities of private defence require.

Where two watchmen in carrying out the orders of the ten-house gaung to arrest certain persons finding them violent and resisting arrest cut one of them with a *Kukri* and assaulted the other *Held* that they had not exceeded the right of private defence, that the watchmen were bound by law to assist the ten-house gaung and if they found the persons resisting arrest or attempting to escape they were entitled to use all means necessary to effect the arrest short of killing them.

JUDGMENT. *28th July 1926.*

The two applicants are Gurkha night watchmen employed by the Kamayut Defence Committee to keep order in the town at night. They are both retired Military Policemen of excellent character. They have been convicted of causing hurt to one Nga Sein and sentenced to a fine of Rs. 25 and to one year's rigorous imprisonment under Sections 323 and 326 of the Indian Penal Code respectively.

The facts of the case are that Nga Sein, who is a youth of 19, and his employee, Nga Ka who is 18, had been drinking and created a disturbance at the shop of one Nanu because he refused to supply them with more drink. Their story is that Nanu pushed them out of his shop, as of course he had a perfect right to do, since they were drunk and disorderly, that while they were talking to Nanu, which means of course while they were abusing him, another Indian, Tikai Singh, came up and struck Nga Sein with a stick, that then the two Gurkha watchmen came and one struck Nga Sein with a stick and the other cut him with a *Kukri.*

There can be no doubt that Nga Sein did get beaten and cut, but it seems clear that he was asking for trouble and that his story of what happened is not the whole truth. It is quite certain that the two Burmans were very drunk and very disorderly. * * * Maung Kyaw who is Sub-Inspector of Railway Police says that Nanu came and complained to him that Nga Sein had assaulted his man and smashed things at his shop. Then Nga

Sein and another Burman came to his house and asked where Nanu was. Nga Sein was armed with a clasp knife and a bottle and the other Burman with a plate and a piece of plank. Nga Sein fell off a foot bridge into the ditch and the other Burman with him took a bamboo from the bridge and they went off. About ten minutes later he heard a Police whistle blown and cries of "thief." He went outand saw Nga Sein being taken away under arrest. He is quite sure that Nga Sein was drunk as he could neither walk nor talk properly and after his fall into the ditch he was covered with mud and water. Mr. Subnis, the senior clerk in the office of the Government Examiner of Railway Accounts, who lives at Kamayut and is the Secretary of the Kamayut Defence Committee says that at about 10 o'clock that night the two Gurkha night watchmen came and reported to him that two or three drunken Burmans were molesting people on the road. He told them to go and report to Mr. Lazarus, the ten house gaung. Mr. Lazarus the Ten House Gaung of West Kamayut, says that the two Gurkhas came and told him that they were sent by Mr. Subnis to report that two Burmans were creating a disturbance and to ask him to go and see for himself. He went with them and found two Burmans at Nanu's shop. One of the Burmans was breaking the door of the shop. He turned his lamp on them and one of them ran away. He went and got hold of the other man, who was covered with mud and wet through. He told the man that he would take him to the Headman's house for being drunk and breaking Nanu's door but Nga Sein refused to go. He then told the two Gurkhas to arrest Nga Sein and take him to the Headman's house. They arrested him and soon afterwards one of the Gurkhas reported to him that Nga Sein had tried to assault him. He took Nga Sein under arrest to the Headman who told him to take him to the Police Station. Then a number of Burmans, men and women, came and took Nga Sein away saying they wanted to take him to the Hospital.

All this evidence given by respectable witnesses shows the story told by Nga Sein and Nga Ka was false. It proves that they were drunk and were creating a serious disturbance and that when the Ten House Gaung

who is a Police Officer attempted to arrest Nga Sein he resisted arrest. It is true that even drunken men are entitled to the protection of the law but if they break the law and attack either the person or the property of the people any member of the public is entitled to exercise the right of private defence provided that he does no more harm than the necessitieas of private defence require. In this case the two Gurkhas were bound by law to assist the Ten House Gaung in arresting Nga Sein and in preventing his escape and if Nga Sein resisted arrest or attempted to escape were entitled to use all means necessary to effect the arrest, short of course of killing him. Nga Sein was armed and was violent and in the circumstances of the case I am not prepared to hold that the applicant Ramlal Limbu exceeded his rights in giving him a cut on the hip with his *Kukri* and if the other applicant Mani Karki struck Nga Sein as he is alleged to have done he certainly did not exceed his rights.

I set aside the conviction and sentence in the case of each of the accused and I acquit them.

The applicant Ramlal Limbu will be released forthwith so far as this case is concerned and the fine which has been paid by Mani Karki will be refunded.

I note that the Sessions Judge dealt with the appeal very perfunctorily.

MR. JUSTICE MAUNG BA.

Suleman Hassan Dadan and others ..... *Appellants.*

v. .....

Sheik Chand and others ..... *Respondents.*

Mahomedan Law-Wakf—portion of holding dedicated—no delivery of possession—wakf invalid.

Where a portion of a holding was dedicated as *wakf* to a mosque for the purpose of establishing a School but had not been partitioned. *Held* that as the *Wakif* had not divested himself of the *wakf* property or delivered possession to the donee the *wakf* was invalid.

Mahammad Yunus v. *Mahammad Ishaq Khan*, 43. All. 487 referred to

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Civil 2nd Appeal No. 583 of 1925. from the District Court of Bassein, in Civil Appeal No. 83 of 1925.

JUDGMENT. *2nd November* 1926.

The appellants sought to recover possession of a bit of land 120 feet by 19 feet, out a larger holding, alleging that about 14 years prior to their suit that bit of land was dedicated to the mosque for the purpose of establishing a school by one Sheik Medina, a Sunni Mahomedan, since deceased. The District Court found that there was such a dedication, but accepting the conclusion of the first Court that delivery of possession had not been proved, held the waqf to be invalid. In support of that view it quoted certain rulings. That view appears to be supported not only by those rulings but also by a later one in *Mahammad Yunus* v *Mahammad Ishaq Khan* (1) where it was held that according to the Hanaf School, it is essential to the validity of a wakf that the wakif should actually divest himself of the property to be made wakf. The concurrent finding that there had been no delivery of possession seems to be justified. On the admission of the principal plaintiff it would appear that no attempt was ever made to have that bit of land partitioned off and that it still remained part of the larger holding which always stood in the name of Sheik Medina.

For the above reasons this appeal must fail and is accordingly dismissed with costs.

A. B. Banerji—for appellant.

On Pe,—for respondent.

MR. JUSTICE MAUNG BA.

Ma Ngwe Yun & 7 others ..... *Appellants.*

vs.

Ma Pu & 4 others ..... *Respondents.*

Limitation Act (IX of 1908) Section 5—mistake in counting date and in adding number of days not excused

Where an advocate made a mistake in calculating the time for appeal from the date on which the Judge signed the decree instead of from the decree itself and thereafter in adding up the days which resulted in a delay of 10 days *Held* that the delay was not excusable under Section 5, Limitation Act.

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(1) 43. All. 487.

Civil 2nd Appeal No. 360 of 1926, from the District Court of Magwe, in Civil Appeal No. 10 of 1926.

JUDGMENT. *7th December 1926,*

This 2nd appeal from a decree of the District Court of Magwe was filed 10 days late. Extension under Section 5 of the Limitation Act is applied for the reason advanced for the delay in the affidavit of Mr Rahman's clerk was that Mr. Rahman had made two mistakes in calculating the period of limitation.

The first mistake was the taking of 18th March 1926, the date on which the Judge signed the decree, as the starting point instead of 13th March 1926, which was the date of the decree. The second mistake was that in adding up the days he added wrongly. The application for copies being made after the 18th of March delay of 5 days in signing the decree world make no difference.

A *bona fide* mistake on the part of a pleader may be sufficient cause within the meaning of Section 5. But as held by a bench of this Court in *J. N. Surty* v. *T. S Chettyar Firm* (1), no mistake is *bona fide* unless made in spite of due care and attention. In the present case there is nothing to show that such care and attention has been given.

Application for extension is refused and dismissed with costs.

Rahman for appellants

Kya Gaing for respondents

MR. JUSTICE OTTER.

Nga Pan E ..... *Appellant.*

v.

King-Emperor ..... *Respondent.*

Against order under Section 7, H. O. R. Act.

Burma Gambling Act (Burma Act. 17 of 1899) Section 17—.H. O. R. A.—Section 7.

No restriction order under Section 7, H. O. R. A. can be passed against a person who gains his livelihood by unlawful gaming and has been brought within the provisions of Section 17. Burma Gambling Act. The correct procedure is to call upon him to show cause why he should not execute a bond.

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(1) 4. Rang. 265=5 B. L. J. 15,

Criminal Revision No. 1240, B. of 1926 from the District Magistrate's Court of Prome, in Criminal Revision No. 279 of 1926.

King-Emperor v. *Kyaw Hla* 4. Ran. 123—applied.

Judgment. *12th November*, 1926.

The applicant was convicted by the Township Magistrate of Hmawza of the offence of earning his livelihood by unlawful gaming. The evidence that he did so was given by one witness, and the learned Magistrate expressed himself as satisfied that he so earned his livelihood, and he ordered that he should be restricted to the village of Kyaukphu for a period of two years. He took this course as he was under the impression that Section 7 of the Habitual Offenders Restriction Act was applicable to the case.

Mr. Maung Ni, on behalf of the applicant, has argued that the Magistrate had no power to make the order he did.

By Section 17 of the Burma Gambling Act, 1899, it is provided that whenever a Magistrate "receives information that any person ..... earns his livelihood ..... by unlawful gaming, *he may deal with such person as nearly as may be as if the information received about him were of the description mentioned in Section 110 of the Code of Criminal Procedure 1898.*"

Section 110 of the Code of Criminal Procedure provides that when a Magistrate etc receives information that a person has brought himself within the provisions of that Section he may, in manner provided, require such person to show cause why he should not enter into a bond.

By Section 3 (1) of the Habitual Offenders Restriction Act it is provided that where a Magistrate may, *under the provisions of Section 110 of the Code of Criminal Procedure*, require a person to show cause why he should not be ordered to execute a bond, he may, "in lieu or in addition to so doing, require such person to show cause why an order of restriction should not be made against him."

It is said that Section 3 (1) of the Habitual Offender's Restriction Act does not apply to a case arising under Section 17 of the Burma Gambling Act, 1899. It seems to me that this must be so for the order directed to the person to show cause appears to me to be made under Section 17 of the Burma Gambling Act 1899, and not under Section 110 of the Code of Criminal Proce-

dure. Therefore, Section 3 (1) of the Habitual Offenders Restriction Act does not apply to such a case. In any event I must so hold for the matter has arisen in a prosecution under the Burma Opium Law Amendment Act, Section 3 of which, is practically identical with Section 17 of the Burma Gambling Act 1899. In the case of *King Emperor* v. *Kyaw Hla* (1) a Bench of this Court held that Section 3 (1) of the Habitual Offenders Restriction Act does not apply to cases arising under Section 3 of the Burma Opium Law Amendment Act, and that persons prosecuted under that Section may not be dealt with under the Restriction Act.

I set aside the Order of the learned Magistrate as altered by the District Magistrate of Prome and direct that an order according to law should be passed by the District Magistrate Prome, or some other competent Magistrate, within his jurisdiction.

Mg. Ni and Ba So—for the applicant.

MR. JUSTICE OTTER.

Nga Ngwe Kyi ... *Applicant.*

vs.

King Emperor ... *Respondents.*

Against conviction under Section 12. Gambling Act.

Burma Gambling Act (Burma Act 17 of 1899) Section 12,—using house as common gaming house.

A common gaming house is a house where instruments of gaming are kept for the profit of the owner of the house. Some evidence of habitual keeping or using would be required in such a case.

Where the Police raided a house and found the game of *Tachatmauk Phe* going on and one of the persons engaged in the game (not the applicant) received a commission on the game *Held* that no offence under Section 12 (a) of the Burma Gambling Act had been made out against the applicant and even if the evidence had been that the owner of the house received the commission which resulted from the use of the pack of cards it was doubtful it he could have been convicted.

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(1) 4. Ran. 123.

Criminal Revision No 1264 B. of 1926, from the District Magistrate's Court of Sandoway, in Criminal Appeal No. 26 of 1926.

JUDGMENT. *12th November* 1926.

In this case the applicant was convicted under Section 12 of the Burma Gambling Act of 1899 of the offence of using his house as a common gaming house, Nine other persons were charged under Section 11 of the same Act with playing in a common gaming house or being present for the purpose of gaming in such a house. Of these nine persons, seven were convicted, and the prosecution against the remaining two having been withdrawn they were called on behalf of the Crown. These two men had been engaged by the police to visit the house in question for the purpose of of obtaining evidence of some offence under the Gambling Act. and the case for the prosecution rested mainly upon their evidence.

If was proved that a party consisting of the Sub-Inspector of Police, the two men I have mentioned and three other persons went to the house of the applicant. The two men who were acting on behalf of the police entered the house and were there for some time. Their evidence as to what they saw does not agree upon all points but it was in evidence that the applicant was present (though one of them said he was not,) while a game of "Tachatmauk Phe," a card game was going on. One of these two men also said that one of the other accused persons, (not the applicant) received a commission on the game. Eventually the Sub-Inspector of Police together with the other three persons entered the house and the applicant was found there to-gether with the two persons sent on behalf of the Police and others who were present at the game. Cards were found in the room and there is no doubt that small sums of money were staked upon the game.

There is no evidence whatever that any instruments of gaming were kept or used for the profit of the persons owning the house, on the contrary the evidence was that another person received the commission. If seems to be quite clear that the game of *ti* or other game of a like nature was not being played. Therefore it is a little difficult to understand how the applicant could have been convicted of keeping his house as a common gaming house for the definition of a common gaming

house is a house where instruments of gaming are kept for the profit of the owner of that house.

I doubt very much whether, even if the evidence had been that the owner of the house received the commission which resulted from the use of the pack of cards, he could even so have been convicted of opening keeping or using his house within the meaning of Section 12 (a) of the Burma Gambling Act. It is unnecessary to decide this point but in my view some evidence of habitual keeping or using would be required in such a case.

If seems to me at least a matter for consideration whether the other seven persons who were convicted under section 11 of the Act would not be well advised to appeal by way of revision and against their convictions.

I set aside the conviction and sentence in this case The fine must be returned.

Myint Thein for applicant

MR. JUSTICE CHARI.

U Sayainda ..... *Appellant.*

v.

U Tha Mngala ..... *Respondent.*

Transfer of Property Act (IV of 1882) Section 123. Gift—Donee without registered deed—taking from similar donee—whether valed.

The rule that a donee obtains a valid gift by possession though the gift has not been made by a registered deed is distinguishable from the case of a donee who takes from such donee without a registered deed.

Ma Shin v. *Mg Hman & 3 others.* 1. Ran. 651; *M. P. L. M. P. Chetty* v. *Ma Ngwe Sein:* 1. Ran. 665—Dist.

Judgment. *25th November 1026.*

This is an applicaton for a review of my Judgment passed in Civil 2nd Appeal No. 430 of 1625. The principal ground an which the review is applied for is that I did not take into consideration the rulings in the cases of *Ma Shin* v. *Maung Hman* & 3 (1) and *M P. L. M.*

Civil Misc. Application No 74 of 1926 review of Judgment in C. 2. A. No. 430 of 1925 of High Court at Rangoon.

(1) 1. Rangoon. 651.

M. P. L. M. P. Chetty v. *Ma Ngwe Sin* (2). These two rulings show that, where a donee of property is in *bona fide* possession of it, though the gift had not been perfected by a registered instrument in accordance with law, the donor or his representative cannot oust the donee, who has been in undisturbed possession of the property for a long period, though such period falls short of 12 years. But the present case is, in my opinion, distinguishable from those two cases, because the defendant is not a donee from the alleged donor direct, but is a donee from adonee; neither of these gifts had been perfected by a registered instrument. Moreover there is no clear evidence whatever that the defendant had been in undisturbed possession for a long time. He was the presiding monk of the *Kyaungdaik* and the plaintiff was his disciple; and they were all living together in the monastery. This fact cannot be held to be a clear implication of an absolute and exclusive possession by the defendant.

For these reasons I dismiss the application for review of my Judgment with costs.

E Maung (2) for petitioner

Ko Ko, for respondent

MR. JUSTICE BROWN

San Kauk ..... *Appellant.*

v.

Maung Po Kyan ..... *Respondent.*

Pleadings—suit for partnership share as partner—decree for value of share as assignee—different cause of action.

Where the plaintiff filed his suit for a partnership share on the basis of being a partner and it appeared from the evidence that he was an assignee of a share of one of the partners but a decree was given by the lower appellate Court for the value of that share.

Held that the lower Appellate Court was wrong in giving a decree on a cause of action not pleaded in the plaint, as entirely

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(2) 1, Rangoon, 665.

Special Civil 2nd Appeal No. 73 of 1926, from the District Court of Thaton, in C. A. No. 140 of 1925.

different questions arose in a suit for a partnership share from those in a suit as assignee of a partner's share.

Judgment. *14th December* 1926.

On the 7th October 1924 the Appellant San Kauk entered into a partnership for selling gold leaves with three others Po Lin, Twe Ya and Maung Pe The business of the partnership came to an end, and attempts were made to settle accounts between the partners. The respondents Po Kyan claim that after the original formation of the partnership he became one of the partners. He further claimed that the accounts of the partnership were definitely settled, and it was decided that he was entitled to a sum of a little over Rs. 1000 as his share From this he deducted a sum due from him to the Appellant and he claimed the balance of Rs 904-12-6 against the Appellant. He alleged that all the funds of the partnership were with the Appellant and that he was therefore entitled to recover the amount from him

Both the lower Courts have found that the plaintiff has failed to prove that he was ever a member of the partnership. The Trial Court on this finding dismissed the suit. The lower Appellate Court held that although the plaintiff was not himself a partner, he had nevertheless become the assignee of the share of one Po Lin and that he was entitled to recover the value of that share, and gave him a decree.

The present appeal has been filed against this decree. According to the partnership deed there were originally six shares in the partnership, each share valued at Rs. 333-4-0 of these shares Po Lin held three and the other three partners one each. Since the partnership was formed the value of each share has risen to Rs. 745/-. How this has happened is not explained, but the fact does not appear to be disputed. The share which the respondent Po Kyan claims to have in the partnership is one of the three shares which originally belonged to Po Lin. The plaintiff himself speaks of giving Rs. 745/- to the Appellant as treasurer when he joined the partnership. But it does not appear that he really claims that he added any fresh capital to the partnership. His witness Po Lin says that it was one of his shares that the plaintiff took over, and if the money was paid to San Kauk. then it was apparently paid on behalf of

Po Lin. Po Kyan admits that when he obtained this share he entered into a written agreement with Po Lin. He has not produced this agreement. And has not given a satisfactory explanation as to why he has not done so. Three of the four original partnership deny that the plaintiff ever became a partner in the business, and the finding of the lower Courts that he was never a partner may safely he accepted as correct. In these circumstances it does not seem to me that he is entitled to succeed in the present suit In the plaint he quite clearly claims that he was himself a partner, and that at a settlement of account it was found that his share as partner came to Rs. 904/-. His cause of action was founded on the alleged partnership, and on his failing to prove the partnership he could not succeed. It is a fundamental principle of the law of pleadings that a plaintiff in a suit can only succeed on the cause of action set forth in the plaint or on a cause of action consistent with his pleadings Po Kyan has been found not to be a partner, but the assignee of one share in the partnership. That is a very different state of affairs from what is set forth in his plaint, and the difference is far from being a merely technical one. If he were himself a partner he would be able to claim against the partnership on his own account. His claim now is in the first instance against Po Lin only, and he clearly cannot claim from the partnership anything that is not due to Po Lin by the partnership. It is clear that the Appellant has all along been objecting to settling with the plaintiff until Po Lin's accounts have been settled. He says in his evidence that Po Lin has drawn from him about Rs. 2000/- in different instalments. He did not definitely plead that this sum would have to be settled before he could meet the claim of the plaintiff. But it was quite unnecessary for him to make any such plea, as the claim in the plaint was that the money was due to the plaintiff personally, and not to him through Po Lin. It is true that it was held in the case of *Juggut Chunder Dutt* v. *Rada Nath Dhur* (1) that an assignee of a share in a partnership could sue on the dissolution of the partnership for such a distributive share as belonged to his partner, but that

(1) 10. Cal. 669.

is not what the plaintiff has done in the present case, and it is impossible to say that had he done so he would have been successful. Entirely different questions of fact would have to be considered on such a claim from those which arose on the pleadings in the present suit.

The plaintiff having failed to establish the cause of action set forth in his plaint was in my opinion not entitled to a decree in the present suit.

I set aside the decree of the District Court, and restore that of the trial Court dismissing the plaintiff's suit. The plaintiff respondent will pay the costs of the defendant-appellant throughout.

F. C. Brown, for Appellant
Maung Ni, for Respondent

MR. JUSTICE BROWN.

Ma Kin Kywe, heir and legal representative of Daw Shwe Nyein, by her agent Maung Ba Maung .... *Appellant.*

Versus.

Maung Tun Myat .... *Respondent.*

Mesne Profits—measure of damages.

The rental value of land is the only really fair criterion of the measure of mesne profits.

Where the land is subject to floods a fair allowance from the rental value should be made on that account.

Judgment. *15th December* 1926.

One Ma Shwe Nyein, deceased, brought a suit against the respondent, Maung Myat Tun, for possession of certain land and recovery of mesne profits for a year. She was successful in the trial Court and in the first appellate Court, and was given possession of the land. Myat Tun appealed to this Court and was eventually successful. The decree passed by this Court was to the effect that Ma Shwe Nyein was the mortgagee of the land in question, and that, if Myat Tun did not pay her the mortgage amount, she would be entitled to have the land sold. Myat Tun then applied to be put in possession of the land again and for payment of the mesne profits for

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Special Civil 2nd Appeal No. 40 of 1926, from the District Court of Insein in C. A. 68 of 1925.

the two years during which Ma Shwe Nyein had been in possession. He was awarded as mesne profits the sum of Rs. 875-12-0 by the trial Court, but this sum was reduced on appeal by the District Court to Rs. 583-13-4.

Before this case for restitution began, the original plaintiff, Ma Shwe Nyein, died, and in the present litigation her estate has been represented by Ma Kin Kywe as her legal representative.

On the facts, the District Court agreed with the trial Court. but the learned judge reduced the amount payable on the ground that Ma Kin Kywe was not the sole heir of Ma Shwe Nyein's estate. This finding appears to be based on a misconception of the position.

The original decree-holder in this case was Ma Shwe Nyein, and the order for restitution was against the estate of Ma Shwe Nyein. Ma Kin Kywe has been added to the suit merely as the legal representative of the estate, and, so far as this litigation is concerned, she represents the estate. It is not for the Court dealing with the present matter to decide who are the heirs of Ma Shwe Nyein, and any order passed in the present suit can be enforced only against Ma Kin Kywe as the legal representative of the estate.

It seems to me clear that the reasons which led the District Court to reduce the amount payable were insufficient. Ma Kin Kywe has nevertheless appealed against the finding of the District Court and asks that the amount may be reduced still further.

A cross-objection has been filed by Maung Tun Myat. One of the points taken on behalf of Ma Kin Kywe now is that the respondent Tun Myat, is not entitled to any mesne profits by way of restitution at all. The contention is that, as Daw Shwe Nyein was entitled to a mortgage-decree against the respondent, she was entitled until the mortgage was redeemed to possession of the property. I think, however, that this point was clearly disposed of in the orders passed in the original suit by this Court. It was there held that Daw Shwe Nyein was not entitled to any interest on the mortgage since the date on which an offer to redeem the mortgage had been made to her. It was subsequent to this date that she obtained possession of the land, and the result of the finding of this Court, is that she was entitled neither

to interest nor to the usufruct of the land for the two years for which she was in possession. This point, as a matter of fact, was not raised in either of the lower Courts, where it was apparently admitted that the only question for decision was the amount of mesne profits payable.

As regards the amount, the respondent, Myat Tun, claimed that he was entitled to the whole outturn of the land, less actual expenses of working. I entirely agree with the lower Courts that this is a wrong basis of calculation. If Ma Shwe Nyein had worked the land herself, it is clear that all that she received during the year would not fairly have been applicable to the mesne profits, as it would have included remuneration for the part taken by her in working the land. The rental value of the land is the only really fair criterion of the measure of mesne profits. As to this, both the lower Courts have found that a fair rate would be 300 baskets of paddy a year. There is evidence on this point in favour of the appellant, and, in ordinary years, I am not prepared to say that this amount would be excessive. But the appellant says that during the two years in question there were heavy floods, with the result that the income derived by her from the land was very small. That there were floods in the years in question is borne out not only by the witnesses for the appellant, but also by Maung Myat Tun's own witnesses If Maung Po Tin is speaking the truth, then only Rs. 250 has been paid as rent for the two years. It is suggested that the respondent might have obtained more with due diligence, and that the failure if there really was a failure, to obtain more was due to her not advancing the necessary money to the tenants. There is very little material to help us to come to a decision on this point; but, in view of the evidence as to the floods, and in view of the fact that Ma Shwe Nyein herself, when claiming mesne profits for the same land only valued the mesne profits at 250, baskets of paddy a year, I think the allowance of 300 baskets of paddy in the present case is somewhat high 250 baskets of paddy a year at Rs. 180, per 100 baskets would work out for the two years at Rs. 900. The revenue for the two years would be close on Rs. 220, which would reduce the amount to Rs. 700. Allowing for the floods, which

appear to have taken place during the year, some reduction might, I think be made from the 250 baskets of paddy, and I do not think that the sum of Rs. 583-13-4 allowed by the District Court is an unfair estimate of the compensation which the appellant should pay the respondent.

I note that in the cross-objection only Rs. 2 has been paid as Court fees, and it is objected that this is wrong, and that payment should be made *ad valorem.* In the cross-objection, however, it is not stated how much Maung Tun Myat claims, and it is impossible, therefore, to say what the *ad valorem* fee would be. As I am not allowing the cross-objection, I do not think it necessary to pursue this point further and ask the respondent what he does claim.

The order for payment must be altered into an order for payment against Ma Kin Kywe as legal representative of Ma Shwe Nyein, deceased. With this exception, I dismiss both the appeal and the cross-objection. I pass no orders as to costs in this Court.

Villa, for appellants.

Po Han, for respondent.

SIR GUY RUTLEDGE, C. J. AND MR JUSTICE BROWN.

S. M. Hashim ..... *Appellant.*

v.

J. A. Martin ..... *Respondent.*

Civil Pro. Code (Act V of 1908) Sections 42 and 47—mortgage decree—sale of properly pending appeal—modification of decree in appeal—sale null and void.

Where the lower Court refused to stay execution of a mortgage decree pending an appeal and the appellate Court's judgment modified the decree, the property being sold in the meantime.

Held that the effect the judgment of the appellate Court was to obliterate and stand in the place of both the preliminary and final decrees of the trial Court and to provide a further period of 6 months for redemption and that the sale was null and void.

Syed Jawad Hussain. v. *Gendan Singh.* 54 I. A. 197 applied.

Civil 1st Appeal No. 212 of 1926, from the District Court of Hanthawaddy, in Civil Execution No. 9 of 1926.

Judgment. *8th December* 1926.

PER RUTLEDGE C. J.:—This is an appeal from the order of the District Court of Hanthawaddy refusing to stay the sale of certain property at Syriam belonging to the appellant.

Respondent obtained a preliminary mortgage decree against the appellant and one of his sons in Civil Regular No. 632 of 1925. His son, who is a minor, appealed against that decree in Civil 1st Appeal No. 136 of 1925. Application was made to the Appellate Court for a stay of execution The application was dismissed with the result that after the usual six months period a final decree was passed and at the instance of the respondent the decree was transferred to the District Court of Hanthawaddy for execution by the sale of the mortgaged properties. The sale did not in fact take place until judgment was passed by the Court on the 8th June 1926. The appeal was allowed and the decree was modified in certain material respects. The effect of this judgment was that both the preliminary decree and final decree passed on the original side were obliterated by the decree of the appellate Court, which in fact took the place of the preliminary decree and gave a further period of six months for redemption. Application was made to the District Court in these circumstances to stay the execution proceedings and on the 30th July 1926, the learned judge passed an order granting an interim stay of sale with notice to the respondent On this the respondent's advocate appeared and raised the objection that the District Court had no power to grant the stay which could only be done by the High Court. The learned judge took this view, rejected the appellant's application for stay and the property was duly sold.

For the respondent reliance is placed upon the cases decided under section 42 of the Civil Procedure Code which lay down that a Court executing a transferred decree has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree. This is quite true, but this does not help the respondent. In our opinion it was the duty of the Court, when the facts were brought to its notice showing that the decree in

respect of which execution was stayed was no longer in existence, to have ascertained whether in fact that was so and refused to allow the sale to proceed until it was satisfied that the decree was still in existence.

Another ground on which the respondent relies is that the appellant has not chosen the right remedy, which was proceedings to set aside the sale. We do not think that this objection is well-grounded, as we have already said in our opinion after the appellate judgment of the 28th June, the Original side decree became cancelled. In this view we are fortified by the recent decision of their Lordships of the Privy Council in *Sayed Jawad Hussain* v. *Gendan Singh* (1) in which Lord Dunedin quotes with approval part of the decision of Mr. Justice Tudball :—"When the Munsif passed the decree, it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed it is that decree and only that which can be made final in the cause between the parties."

In these circumstances, we must allow the appeal and set aside the order refusing to stay the sale, and as a result we declare the sale null and void. We allow two gold mohurs costs.

Oehme,—for appellant.

Keith,—for respondent.

MR. JUSTICE MAUNG BA.

Anamalai Chettyar ..... *Appllicant*,

vs.

Maung Saing and one ..... *Respondents.*

Negotiable Instruments Act (XVI of 1881.) Onus of proof—Endorsee suing—plea by maker of payment.

In a suit by an indorsee of a Promissory note the defendant pleaded that he had paid in full to the original payee. *Pointed out* that the maker should have taken care to get the Pro-note back.

—Civil Revision No. 377 of 1925, from the District Court of Magwe, in C. A. No. 34 of 1925.

(1) 54, Indian Appeals 197.

By allowing it to remain with the original payee the maker assisted him to perpetrate a fraud. His proper course was to sue the original payee.

The decree of the District Court was set aside.

Judgment. *15th December* 1926.

The plaintiff sued to recover the amount due on the promissory note in suit as an indorsee. The defence was that the amount due on the promissory note had been paid in full to the original payee. The learned Additional District Judge accepted the defence and dismissed the claim. He evidently forgot that he was dealing with a negotiable instrument and that he should be guided by the principles laid down in the Negotiable Instruments Act.

The promissory note has no endorsement of any payment to account and there is nothing to show that the indorsee was aware of any of the alleged payments to the indorser. He is a holder in due course and is entitled to recover according to the apparent tenor of the instrument If the instrument had been discharged as alleged the maker should have taken care to get it back. By allowing it to remain with the original payee he assisted him to perpetrate the fraud. His remedy would be to sue the original payee to refund the amount which he had to pay over again.

The decree of the District Court is set aside and that of the Township Court restored with costs.

K. C. Bose,—for applicant.

Maung Lat,—for respondents.

MR. JUSTICE MAUNG BA.

Ram Sewak Koeri Mosadi Koeri ... *Appllicant.*

vs.

Rai Bahadur Harihar Prasad Singh & one ..... *Respondent.*

Civil Pro. Code (V. of 1908) O. 26, R. 4—refusal to issue Commission—judicial discretion—Court not to prejudge bona fide applications.

Civil Revision Nos. 458 & 459 of 1925, from the Subdivisional Court of Pyu, in Civil Regular Suit No 58 of 1925.

Under Order 26, Rule 4, C. P. C. a Court has a discretion to grant or refuse a Commission but the discretion must be exercised judicially and the reasons given for refusal must be adequate. A Court is not justified in refusing to issue a Commission when the evidence is material to the case and the application has been made without delay. To say in such a case that the application is not *bona fide* is to prejudge the defence by saying that the Court doubted it.

Judgment. *15th December* 1926.

These applications are to revise the order of the Subdivisional Judge of Pyu refusing applications by the defendants for the issue of a commission for the examination of the plaintiff and five other witnesses by the Munsif of Arrar in Bihar.

The suits are a few among a good number connected with the Zeyawadi Grant land. They are suits for recovery of rents from tenants and the rates are in dispute. The tenants allege that the plaintiff agreed to a certain rate. According to the affidavit filed by one Sarju Koeri those witnesses are to depose to those rates. If that be the case there can be no doubt that their evidence is material in the suits. The applications were made without any delay. If the plaintiff stays away in India it is not unreasonable on the part of the defendants to ask for a commission to examine him. The learned Judge has remarked that similar issues have been framed in many other suits and a decision in the present suit will govern the rest. But he rejected the applications for commission on the ground that in his opinion they were not *bona fide*, but were made simply to gain time. He based that opinion upon (1) that the issue of commission would delay the disposal of the suits (2) that the defendents did not set up such a defence in previous suits; and (3) that the applications are supported by the affidavit of one man, Sarju who is a well known witness in most of the Zeyawadi cases.

In my opinion he was not justified in prejudging the defence by saying that he doubted it. He admitted that the evidence would be material if the defence were true. As pointed out above the applications were not unreasonable and were made without any delay.

Under Order 26, Rule 4 Code of Civil Procedure a Court has a discretion to grant or refuse a commission but the discretion must be exercised judicially. The

reasons given by the Judge for his refusal do not appear to be adequate.

For the respondent it has been urged that the applications must have been supported by the affidavit of the party or of the witness. This argument is untenable. Order 26, Rule 2, does not say that. It only says that the application of a party or of a witness is to be supported by affidavit or otherwise. Here the applications were signed by the defendents' pleader and were supported by the affidavit of Sarju.

I set aside the order rejecting the applications and direct that commission be issued as requested. The applicants are entitled to their costs in this Court and in the Court below (3 gold mohurs).

Ganguli,—for applicant.

Syed Janab Ali,—for respondent.

MR. JUSTICE OTTER.

Ma Shwe Hlaing ..... *Appellants.*

vs.

Maung Shwe Wa & others ..... *Respondents.*

Specific Relief Act (I of 1877) Section 55—Mandatory injunction—Riparian owner—interrupting flow of water by erecting bund on other's land:—

One riparian owner is entitled to enjoy the natural flow of water through or by his land. If that right is interfered with by an owner of land either above or below his property he has a remedy in respect of such interference, if such interference is caused by any obstruction placed upon the land of such owner.

It makes no difference if the obstruction is placed by the party, causing it not upon his own land but upon some one elses' land.

Judgment 20th *December* 1926.

This is an appeal against the decision of the District Judge of Sandoway reversing an order made by the Township Judge of Gwa.

The plaintffs are husband and wife, and they own certain plots of land, Nos. 36 and 33, and 30 and 32, respectively apparently abutting upon a tidal waterway.

Special Civil 2nd Appeal No. 55 of 1926, from the District Court of Sandoway, in C. A. No. 43 of 1925.

The claim is for a mandatory injunction against the defendant who is the owner of three plots of land near this waterway to compel him to remove the bund said to have been built by him at a point some short distance from plot 30 belonging to the 2nd plaintiff.

The first question for me to decide is whether the plaintiffs have a right of action against the defendant at all. There is no doubt that one riparian owner is entitled to enjoy the natural flow of water through or by his land. If that right is interfered with by an owner of land either above or below his property he has a remedy in respect of such interference if caused by any obstruction placed upon the land of such owner. It is sufficient to refer to the case of *Mg. Bya Lone* v. *Mg. Kyi Nyo and others* (1). In the present case, the evidence is that that bund was placad not upon the defendant's land at all but was erected across the channel at a point in respect of which there is no evidence as to the owner of the land. I must ask myself, therefore, if there is any distinction between the principles to be applied in the present case and those enunciated by the Privy Council in the case I have just referred to, It has long been well settled that an owner of land adjacent to water runing in a defined natural channel has, in law, a right to have a continuance of the accustomed flow of water both as regards quantity and quality. The well-known case of *John Young and Company* v. *The Bankier Distillery Company* (2) is an authority for this proposition, and it does not seem to have been limited to a case where the act complained of was done upon the land of the defendant. In the present case the defendant apparently put up a bund on someone else's land, and he has, so it is alleged an behalf of the plaintiffs, interfered with the flow of water down the channel and so caused damage by flood. I can see no difference in principle between the two cases though the matter is not entirely free from difficulty. I think, therefore, that an action does lie in the circumstances of the present case.

The second question that I must decide is whether the plaintffs have adopted the appropriate remedy. I see that Section 55 of the Specific Relief Act empowers a

(1) 3, Ran. 424. (P.C.) (2) 1893, A. C. 691.

Court to grant a mandatory injunction to prevent the breach of an obligation where it is necessary to compel the performance of acts which the Court is thinking of enforcing. It seems to me that the only method by which a remedy can be enforced by the Court is by compelling the defendant to remove his bund provided, of course, I am satisfied upon the evidence that such an order is justified. Mr. Lambert has argued that it is for the plaintiffs to make out a case here and has said that evidence upon the record is insufficiant to justify the granting of an injunction. He has suggested that this case should be sent back in order that more light may be thrown on the matters in dispute. He says in effect that the whole of the circumstances of the case are such that the exact position with regard to the property in question is so doubtful that further evidence ought to be taken. I agree with him that it is difficult to appreciate the exact position of the plots of land in question and also as to the character of the waterway. I think, however, that there is sufficient material upon the record to enable me to come to a decision. Furthermore, I very much doubt whether any useful purpose would be served by my taking the course suggested by Mr. Lambert. In considering the matter I have been assisted by a sketch plan made and agreed to by the learned advocates appearing on both sides, and I attach it to this record.

In his preliminary statement the 1st plaintiff after describing his holding and the erection of the bund in question said that owing to the bunding of the *Chaung* fresh water would remain within the bund and that consequently their *dhani* plantations would get spoilt. He went on to say that "after making up the bund the salt water does not reach into (meaning the defen dant's) land". He added also that the *chaung* is a salt water *chaung*. From this evidence and from the other statements in the case I think it is open to me to come to the conclusion that the salt water flowed from the direction of the bottom left-hand side of the plan and passed the various plots marked in red and blue respectively. Further it is also clear, I think, that there is a flow of fresh water from the right-hand bottom of the plan round and out by the left hand.

The defendant in his preliminary statement admitted making the bund at the place marked "A," which corresponds with the sketch before me, and he said that he did so to prevent salt water coming in. He further said that plantiffs' land would not be spoilt and that he had made three waterways in the bund so that fresh water could flow through them. His reason for making the bund, he says, was in order to improve his paddy crop by keeping the salt water from it.

The headman Maung Law gave evidence on his behalf and said that some time in August of last year he visited the property and that he saw two waterways, (presumably in the bund), the width of each being about 1 cubit. He also said that the *dhani* plantations belonging to the plaintiffs were flooded, as all the water inside the bund could not flow. He went on to say that the *chaung* was flooded with salt water and some of the *dhani* plants were dead. His evidence was substantially corroborated by three other witnesses called on behalf of the plaintiffs, and their evidence, though somewhat vague, seems to me to be sufficient to support the suggestion that owing to the erection of the bund the water became dammed up and caused damage to the plaintiffs' *dhani* plantation.

For the defence three witnesses were called and it was said that two waterways were made in the bund, and it was suggested that there was a proper flow of water through the bund. One witness said that the tide came in and went down after the bund was constructed and he even went so far as to say that when the tide went down there was no water in the *dhani* plantation. As Mr. Lambert has rightly pointed out, the state of things in this locality must differ materially according to the season of the year, In the rains no doubt a greater flood would be likely than in the hot or cold weather. It may be that in the latter periods the waterways (or the holes) in the bund would be sufficient to take the water away. In the rains, on the contrary, it may well be that these waterways would be insufficent.

That is the effect of the evidence called for the plaintiffs. In this connection Mr, Lambert has rightly relied upon certain statements appearing in the judgment in the case reported in I. L. R. 3. Rangoon, page 494,

and there is no douht that the case of a bund with waterways through it must differ from the case of a bund with no such outlets. If a bund be constructed with waterways through it so that the usual and natural flow of the water be not interfered with no doubt no right of action would accrue to anybody. In the present case, however in spite of the fact that I am satisfied that certain holes in the bund were made, there is sufficient evidence, I think at least, so far as the rains are concerned, that the natural flow of water had caused flooding and damage by reason of the erection of the bund. Further it seems to me that, even though the flow might not be interrupted during the remaining seasons of the year, the fact that in the rains floods would be caused is sufficient to support the claim of the plaintiffs. The only question, therefore, is whether I am satisfied on the evidence that a sufficient case has been made out for the granting of the injunction claimed. The matter is by no means free from doubt. But, after a careful consideration of the evidence, that interference has been caused. Mr. Lambert has said that in order to support a claim for a mandatory injunction the evidence must show serious damage, I am inclined to think that the plaintiffs have satisfied me on this point. The three witnesses, the 2nd, third and 4th, called on behalf of the plaintiffs, said that damage had been caused and the *dhani* plants had died. Mr Lambert says that it was by no means clear that the evidence shows that the *dhani* plants had died as the result of the flood. I cannot agree on the evidence as recorded that it leaves any doubt in my mind that the witnesses were saying that the plants had died as a result of the flood. In all the circumstances I think that this appeal must be dismissed with costs and that the decision of the learned District Judge will therefore stay.

There will be stay of execution till the end of the week in January next year.

Lambert,—for appellant.

Halker,—for respondent.

MR JUSTICE BROWN.

Ma Lon Ma ..... *Appellant.*

vs.

S, R, M. M. R. M. Firm ..... *Respondent.*

Evidence—Account books—not necessary to produce person who wrote the accounts—Payments of interest on account—all entries not produced.

Where several payments of interest were admitted to have been made and the plaintiff only produced evidence of the last payment to save limitation;

Held that although the plaintiff admitted receipt of other sums it was not necessary for him to set forth every single date on which interest was paid.

Held also that where the actual clerk who made the original entry as to the loan had not been called as a witness to speak to the entries or the books another person who was clerk when some of the subsequent entries as to interest were made was qualified to give evedence that the account books were kept in the regular course of business.

Held also that although the comments of the trial judge on the demeanour of witnesses should not be lightly disregarded by a Court of appeal, yet where an appeal lies on facts as well as law and the trial Court has given its judgment on discrepancies in the evidence it is the duty of the appellate Court to consider the questions of fact that were raised before it and to test discrepancies which it was in a position to do as well as the trial Court.

Judgment 22nd *December* 1926.

The sole point for determination in this appeal is whether the appellant Ma Lon Ma did not execute the promissory note in suit. The Trial Court held that the plaintiffs had not proved that she did execute it. The District Court took the contrary view.

Stress has been laid on the fact that the judge before whom the witnesses were examined did not believe the plaintiff's story. It is of course an accepted principle that the opinion of the judge who has examined the witnesses on a question of fact is entitled to great weight, and should not be lightly disregarded by a Court of appeal. But it is quite clear that an appeal did lie in this case to the District Court on questions of fact as well as of law, and it was the duty of the District

Special Civil 2nd Appeal No. 635 of 1625 from District Court of Bassein in C. A. No. 204 of 1925.

Court to consider the questions of fact that were raised before it. And a perusal of the judgment of the Trial Court suggests that the opinion of the Trial Judge was formed not so much on the demeanour of the witnesses examined as on certain supposed discrepancies in the plaintiff's case which are capable of check as well by the Appellate Court as by the Trial Court.

The only witness who gives direct evidence as to the execution of the promissory note is Ramaswamy Chettiar. His evidence was rejected by the trial judge because of his different statements as to the manner of execution by Ma Lon Ma. In examination in chief he states "Ma Lon Ma cross marked", and in cross-examination" Ma Lon Ma held the pen and her son wrote down her name, Maung Thit cross marked after Ma Lon Ma touched the pen." I am in entire agreement with the learned judge of the District Court in his view as to this supposed discrepancy on which much reliance has been placed by the Trial Judge. In his first statement on the point the witness merely explained that Ma Lon Ma executed the document by means of a cross mark and not by signing herself as the other two signatories did. When cross-examined later on he explained that the actual cross-mark was not made by Ma Lon Ma herself. The two statements were made on the same day within a short time of each other, and I do not consider that there was any real inconsistency here at all.

I am also in agreement with the District Court on the matter of the account books. The Trial Judge found the extracts from the account books unsatisfactory for three reasons, firstly that the dates given in the extracts from the ledger differ from the dates given in the extracts from the day book, secondly, that they account for Rs. 320/- interest only whereas the plaint admits that Rs. 820/- interest has been paid and thirdly that the plaint only mentions one date of payment of interest.

As to the first of these three points the District Judge has pointed out that the Trial Court was mistaken.

The second point does not appear to me to have anything in it, the extracts as to payments of interest being from the 30th March 1924 only. The promissory note is dated January 1922. Twenty rupees a month for the 25 months between these two dates would amount to

Rs. 500/- which added to the Rs. 320/- shewn in the accounts exactly corresponds with the sum shewn in the plaint as paid towards interest. Since April 1924 the amount shewn as paid monthly is Rs. 20/-. I am therefore unable to see any reason for discrediting the story of the plaintiff here. The 3rd point is that only one payment of interest is mentioned in the plaint. The paragraph in the plaint referred to reads as follows—"Limitation is saved by receipt of interest on 29-11-24, and other dates" That is one of the dates on which the account books shew interest to have been paid, and the plaint and the account books therefore entirely agree. There was no necessity for the plaintiff to set forth in the plaint every single date on which interest was paid.

I agree with the District Court that there was no substance in any of the reasons given by the Trial Court for not accepting the story of the plaintiffs. It is contended now that the account books have not been shewn to have been kept in the ordinary course of business. Muthraman, present clerk or agent of the plaintiff's firm, says in his evidence, "The transaction was kept in account books kept in the regular course of business. I have now filed extracts and certified translations of day book as well as of ledger." He then goes on to enumerate the Exhibits. This is direct evidence by the person best qualified to know that the books produced were books of account kept in the oridinary course of business. The actual clerk who made the original entry as to the loan has not been called as a witness. But Muthuraman was apparently clerk to the firm when some of he subsequent entries as to payment of interest were made. Muthuraman was not questioned on this point as to how the books of account were kept. And the correctness of his statement as to the books having been kept in the ordinary course of business does not appear to have been challenged seriously in the trial Court.

It is true that there is only one eye witness to the execution of the promissory note. But this eye witness would appear to be an independent person, and his evidence is strongly corroborated by the entries in the account books. The reasons given by the trial Court for rejecting the evidence for the plaintiffs seem to me to be entirely insufficient. In the circumstance I am not

satisfied that sufficient ground has been shewn for interfering with the orders passed by the District Court.

I dismiss this appeal with costs.

L. C. Khoo for Maung Kun, for Appellant

Maung Ba Thein (1), for Respondent

MR. JUSTICE DOYLE.

P. C. Das ..... *Appellant.*

v.

J. R. Rangasawmy & Co, ... *Respondent.*

Negotiable Instruments Act (XXVI of 1 881) *onus of proof*

So long as consideration has been given for a Promissory note the onus is entirely on the person executing the same to establish fraud (which must be pleaded) or some circumstance which will excuse him from paying the whole amount, or the Court may employ the Usurious Loans Act.

Where a defendant pleaded that he had only received part consideration for a Pro note and had paid interest and the Court accepted the former plea only and gave no reasons for believing one part of the evidence and not the other.

Held, that the Judge had not applied his mind sufficiently to the case. The decree was set aside and a decree for the full amount of the Pro note was passed.

Judgment *22nd December* 1926.

The applicant sued for the recovery of Rs. 231-8-0, principal and interest, due on a promissory note.

The respondents admitted having executed the promissory note but pleaded that only Rs. 100/- had been received as consideration at the time of execution and pleaded in addition that interest had been paid up to date.

The learned Judge of the Small Cause Court found that only Rs. 100/- had been paid but disbelieved the allegation that interest had been paid. He therefore gave a decree for Rs. 155-12-0, with costs thereon dismissing the rest of the claim with costs. He has given no reasons whatsoever for not decreeing the full amount. So long as consideration was given for the promissory

(1) Civil Revision No. 278 of 1926 from the Small Cause Court of Rangoon, in C. Reg. No. 5081 of 1926.

note, the onus was entirely on the person executing the note to establish traud, which he has not pleaded, or some circumstance which would excuse him from paying the whole amount. The learned Judge has not employed the Usurious Loans Act in this connection.

I must hold that the learned Judge of the Small Cause Court did not apply his mind sufficiently to the present case. He has incidentally given no reasons for believing one part of the defence and disbelieving the other and appears to have acted it this case on surmise.

I set aside the Judgment and decree of the Small Cause Court and give Judgment and decree for Rs. 231-8-0 with costs.

Mr. Doctor, for Applicant.

SUPPLEMENT

TO

The Burma Law Journal.

THE LAW REPORTS ACT 1875.

A point has arisen as to the scope of the Law Reports Act 1875 and its bearing upon reports of judgments published by independent journals.

The case of King Emperor vs. Mg. San Nyein 4 B. L. J. 187 came up before Rutledge, C.J. Carr and Chari J. J. on a reference by the latter. The point referred was whether a Complainant was bound to pay process fees in a non-cognisable warrant case. Doyle, J. held in the case above cited that he was not. The Full Bench ruling in effect is that payment of such process fees is obligatory but that the Court might exempt the Complainant from paying them under a rule under the Process Fees Act.

The occasion brought up the question of the reports published in this journal and incidentally in all non-subsidised journals and attention was drawn to the above Act. No views were expressed in the judgment as to when and under what circumstances reports or rulings other than those in the I. L. R. series are to be received, and it is due to this that we think it necessary to advert to the matter.

The law and usage before the passing of the Law Reports Act 1875 was that which has prevailed in England for centuries. That rule is stated in Halsbury as follows.

"A Barrister has the right of authenti"cating by his name the report of a case "decided in any of the superior Courts. "As soon as a report is published or "any case with the name of a Barrister "annexed to it, the report is accredited "and may be cited as an authority before "any tribunal".

This rule was extended and acted upon in India and for that purpose the same authority was conceded to vakils of High Courts.

A reading of the preamble of the Law Reports Act will show what its object and purpose was. It was sought to reduce the multiplicity of Government reports and the expense of printing them. It did not purport to interfere with the printing of judgments by independent journals. By Section 3, no Court ma

bound to receive or treat as authority binding on it any report of the High Courts other than a report published under the authority of the Government. It, however, left untouched the discretion of the Courts to receive any other judgment and treat it as authority. The Act did not invest the reports of the I. L. R. with super-authority over any other kind of report. This is clear from Section 4 which reads:—

"Nothing herein contained shall be "construed to give to any judicial deci- "sion any further or other authority "than it would have had if this Act had "not been passed."

The Privy Council have accepted rulings reported in the independent journals and so have Judges of the High Court at Rangoon, and all other High Courts. As to whether a judgment is to be treated as authority depends upon its soundness in principle quite irrespective of whether it is printed in the I. L. R. or an unsubsidised publication. The difference is simply this : If printed in the I. L. R. the Courts are bound to receive them, if not they are not bound but still may do so—a discretion which is in most cases exercised.

In the case of *Mahomed Ali Hossein vs Nager Ali & ors.* (28. C. 292) *Maclean C. J.* (sitting with Banerjee & Brett J. J.) referring to Section 3 of the Law Reports Act stated that "it does not prevent the Court, from looking at an unreported judgment of other judges of "the same courts. *This has always bee* "*done and can and ought to be done.* "*Judgment is none the less an authority be* "*cause it has not been reported*" (The italics are ours-Ed.)".

In a recent case (93 I. C. 850) it wa held that though judgments not officiall reported need not be blindly followe yet good reason must be found for nc following them.

That the above observations of Mac lean C. J. are strongly supported b general law and practice is furthe shown by Section 84 of the India Evidence Act. Under that Section th Court has to presume the genuineness of every book purporting to contai reports of decisions of the Courts c "such Country" (meaning a foreig country). If a report published out c British India, where its genuineness can not be tested, has to be received a genuine how much more is it lexpedien that local reports should be similarl treated? Again, in ascertaining the law of any country (meaning a foreig country) the relevancy of a publishe report has under section 38 to b accepted. We have, then, provision for accepting both the genuineness an the relevancy of reports when th question of ascertaining the Law of an country is in issue. Are the Hig Courts throughout India going to say:- "We shall receive the published report of any foreign country and treat it a genuine and relevant for the purpose i

hand but if a question arises nearer home relating to local laws we will neither accept such reports nor regard them"? It must be remembered that the Law Reports Act which has produced this inconsistency was passed more than half a century ago—long before democratic institutions in India were established, the time has come for the Act to be repealed as obsolete and unpractical for none of the High Courts regard it seriously in practice. It is high time, as our learned contemporary the *Laws of India* points out, for its place to be taken by a *Law Reporting Act* (or indeed by no Act at all. Even if every private journal were suppressed—to take an extreme view—the I, L. R. could not possibly report all the reportable judgments of the High Courts, and on this ground alone, let alone any other, the independent reports have long justified their usefulness.

We have noticed a strange inconsistency amongst certain members of the Bar, who, when fortified in a view by a judgment reported in an independent journal are ready enough to ask the Court to consider it, but if the opposite party happens to make use of a judgment against their particular view, resort to the pedantic objection as to the lack of "authority" regarding such report. It is easy enough in such cases to quote the number of the suit or appeal to which reference is given in the report, but we would remind the learned profession that from time immemorial it has always been the practice—and an honest practice—to give credit to the journal or paper whence a piece of information has been derived, and such a course must save the Court a great deal of unnecessary trouble.

ARBITRATION OUTSIDE THE PRESIDENCY TOWNS.

A legal correspondent sends the following queries:—

(1) Does an award in an arbitration held without the intervention of the Court, which the Court has refused to file under para 21 of the 2nd schedule C. P. C. 1908, bar a suit for the properties dealt with therein, having regard to the last 37 words of section 21 Specific Relief Act 1877.?

(2) Can such an award be pleaded under Order 23 Rule 3 as a compromise to a suit for the properties dealt with therein,?

Answer—The second schedule provides for the filing of agreements or awards by either of the parties thereto. Once the agreement or award is filed it becomes subject to those provisions, (Vide section 89 C. P. C.) and no other provisions apply, and by para 21 the Court is required to pass a decree in terms of the Award.

There is, however, no provision declaring the procedure in the case of awards that are rejected.

It is clear from section 21 Specific elief Act that no contract to refer to bitration can be specifically enforced nd even if a suit is filed claiming relief respect of any subject which a person as contracted to refer, the suit will be arred by reason of such a contract.

The reference to "contract" in this ection can only mean a valid contract hich is capable of being enforced. If uch a contract for some reason is in-alid and incapable of being filed, as, for nstance, where it has failed to pass the ests provided by the 2nd Schedule . P. C. for an enforceable contract, hen there is no contract at all. The section obviously refers to enforceable' contracts and the only way of having them enforced is in manner provided by the second schedule.

All these observations apply to awards (Vide Section 30 Specfic Relief Act)

The answer to our correspondent's queries would seem to us to be as follows:—

(1) An award rejected by the Court does not bar a suit—not being an award nforceable at law,

e

(2) An award rejected by the Court cannot be set up as a Compromise If it is, a party may in his replication plead *res judicata* by way of demurrer.

ACT NO. XXV OF 1926.

Received the assent of the Governor General on the 25th March 1926.

Whereas it is expedient further to amend the Indian Divorce Act, for the purpose hereinafter appearing; It is hereby anacted as follows:—

1. This Act may be called the Indian Divorce (Amendment) Act, 1926.

2. For the second, third and fourth paragraphs of section 2 of the Indian Divorce Act the following shall be substituted namely:—

"Nothing hereinafter contained shall authorise a Court to grant any relief under this Act except where the petitioner professes the Christian religion,

or to make decrees of dissolution o marriage except where the parties to th marriage are domiciled in India at th time when the petition is presented,

or to make decrees of nullity of mar riage except where the marriage ha been solemnized in India and the peti tioner is resident in India at the time c presenting the petition,

or to grant any relief under this Ac other then a decree of dissolution c marriage or of nullity of marriage, excep where the petitioner resides in India : the time of presenting the petition."

SUPPLEMENT.

BOOK REVIEWS.

ODERN BURMESE BUDDHIST LAW, 1925, by S. C. Lahiri, M.A., B.L., Advocate, High Court of Rangoon. (Graduate Friends & Co., 3-A. Barr St., Rangoon.)

Mr. Lahiri has rendered considerable rvice to the profession by bringing out e present work on the Modern Buddhist aw. The statements of the law are set rth in concise notes and are exceedingly ell written. There is a tendency amongst xt-writers to spin out legal matter to an traordinary length and to cause the ader to wade through a mass of unnecesry pabulum. It is refreshing to find Mr. ahiri has not given way to this temptation. very page is readable and the principles e so well put that the exact law on a int can be ascertained without labour or fficulty. We think the book will be of nsiderable use to the profession to whom e have no hesitation in commending it.

NELL'S PRINCIPLES OF EQUITY, 19th Edition, 1925. (Messrs. Sweet & Maxwell. Messrs. R. Cambray & Co.)

The whole of the 1925 Special Indian dition of this notable work has been quired by Messrs. Cambray & Co. and is w on sale. The present Edition embodies e considerable changes which have been ade by the Law of Property Act, 1925, he Trustees Act, 1925, The Administran of Estates Act, 1925 and other Acts of 925 passed by the Imperial Parliament. ll these Acts come into force on the 1st nuary, 1926, and in view of the changes e Editors have devoted a separate chapr to equitable estates, priorities and signments and have skilfully incorporated the text the changes effected by the new atutes. As a concise work embodying prinples we do not think Snell's has an equal d the text has been preserved as far as possible. We congratulate Messrs. Sweet & Maxwell, the Publishers, on the splendid way in which the book has been printed and bound replete with comprehensive reference and indices and Messrs. Cambray on their enterprise in securing this important Edition.

THE LAW OF EASEMENTS AND LICENSES, by B. B. Katiar, B.A., B.SC., LL.B. (Messrs. Butterworth & Co.)

We welcome this work as a long-felt need in the profession. It is a very full commentary on the Easements Act, 1882, and in addition the author has provided an Appendix on the "Special Characteristics of Important Easements". The earlier works on Easements, though valuable storehouses of legal learning, appear to us to have paid more attention to the English Law, but this is the first commentary of its kind which specialises in the Indian Law. Though most of the principles of the Indian Law of Easements is derived from the English Law (which are all practically embodied in the Act) a notable exception may be found in dealing with *profits a prendre*. The Indian Act includes them under the definition of Easements and removes the artificial distinctions of the English Law. The author has also rather fully dealt with the question of Licenses. We have noticed in judgments of the Courts how little the Law of Licenses is made use of. We consider this branch of the law is one of the most important in India and in this country, where people mostly resort to oral agreements relating to the use of land. In the absence of registered deeds the Courts are prone to regard them as inchoate or inadmissible contracts. We notice the profession are also much to blame for this state of things. The chapter on Licenses will well repay close perusal. The work should be in every library. The style of the book is all that can be desired, and exhaustive indices are provided making reference easy.

THE PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), by P. Ramanatha Aiyar, B.A., B.L. (The Madras Law Journal Office, Madras.)

This is a very complete work on the Act. We think the author has justly paid great attention to Section 25. This will appeal to practitioners practising in both the Small Cause Courts as well as the High Courts. The book is priced at the modest sum of Rs. 4 and consists of 238 pages, Royal Octavo, and is a very good value for the money.

THE LAW OF INTEREST IN BRITISH INDIA, Second Edition, by P. Ramanatha Aiyar, B.A., B.L. (The Madras Law Journal Office, Madras.)

This work is a complete commentary on the Usurious Loans Act (X of 1918) and contains exhaustive commentaries on the Interest Act (XXXIII of 1839), The Usury Laws Repeal Act (XXVIII of 1859), and the English Money-lenders Act, 1900, as well. The whole of the case-law to date has been embodied in this Edition and the book should be very helpful to all practitioners. There is a complete Index and Table of Cases.

PRINCIPAL LEGISLATION IN 1925.

ACT III OF 1925.

This Act repeals the Workman's Breach of Contract Act, 1859, The Indian Penal Code, Sections 490 and 492, The Workman's Breach of Contract (Amendment) Act, 1920 and portions of the first Schedule of the Devolution Act, 1920. It comes into force on 1st April, 1926.

ACT VIII OF 1925.

This Act gives effect to certain articles of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. Sections 292 and 293 of the Indian Penal Code are replaced by new sections. Section 98 (1) of the Criminal Procedure Code is also amended.

ACT XV OF 1925.

Amends Article 47 in Schedule I of th Stamp Act, 1899, by providing for stamp o insurance by way of indemnity agains accidents to workmen.

ACT XVII OF 1925.

This Act amends Sections 46 and 47 c the Prisons Act, 1894.

ACT XX OF 1925.

A new proviso is added to Section 6(clause (*i*), Civil Procedure Code, by provic ing that where the decree-holder is Society registered under the Co-operativ Societies Act, 1912 and the judgment-debtc is a member of the Society, clauses (*i*) an (*ii*) are to be construed as if the wor "twenty" were substituted for the wor "forty" and the word "forty" for the wor "eighty" wherever it occurs.

ACT XXI OF 1925.

Amendments are made in Sections 2 an 10 of the Religious Endowments Act, 186; defining the term "Civil Court".

ACT XXIII OF 1925.

By this Act members of legislative bodie are exempted from serving as jurors or a: sessors and also from arrest and detentic in the civil prison. A new Section 135-/ is added to the Civil Procedure Code a to arrest and detention under civil proce: of such members during the continuance (any meeting of the Chamber or Counc Section 320-A, Criminal Procedure Cod has also a new clause (AA.) added to including members of the same bodies.

ACT XXVI OF 1925

Amends the law with respect to carriag of goods by sea and incorporates certa Articles agreed to at the Brussels Confe ence of Maritime Law of 1922.

ACT XXVII OF 1925.

Further amends the Opium Act, 1857.

ACT XXIX OF 1925

Amends Sections 375 and 376 of the Indian Penal Code raising the age of consent from 12 to 14 and makes corresponding amendments in Schedule II of the Criminal Procedure Code.

ACT XXX OF 1925

Amends Articles 4 and 5 of Schedule to the Limitation Act, 1908.

ACT XXXVII OF 1925.

This is a repealing and amending Act. Special note should be taken of the repeals of the Burma Laws Act, 1898.

ACT XXXVIII OF 1925.

Section 130 (1) of the Transfer of Property Act, 1882, is amended to the following extent :—After the words "authorised agent" the words and figures "notwithstanding anything contained in Section 123" to be inserted.

ACT XXXIX OF 1925.

This is the new Indian Succession Act 1925, which consolidates the Indian Succession Act of 1865, The Probate and Administration Act, 1881 and certain other enactments. The case-noted Editions of the new Act are already out.